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DECISIONS
RELATING TO
THE PUBLIC LANDS.

BOYD v. HOPPS.

Decided January 4, 1919.

ISOLATED TRACT—ACT OF MARCH 28, 1912.

Where an application is filed by one duly qualified under the provisions of the act of March 28, 1912, for the sale of a tract of land "mountainous or too rough for cultivation," jurisdiction is thereby conferred upon the Commissioner of the General Land Office in the exercise of discretion to order into market and sell at public auction such tract; and the intervening loss of qualification of the applicant does not affect the jurisdiction thus acquired.

VOGELSANG, First Assistant Secretary:

This is a controversy in which both parties have appealed from the decision of the Commissioner of the General Land Office, of May 17, 1918. Said decision denied application of Nathan E. Boyd to reinstate his canceled desert-land entry, 04874, for NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, T. 23 S., R. 3 E., N. M. P. M., in the Las Cruces, New Mexico, land district, made November 4, 1910, and canceled by the Commissioner, after due notice, on January 4, 1916, for failure to submit third year or final proofs; but dismissed the protest of Daniel V. Hopps, filed May 19, 1916, against the sale of SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, T. 23 S., R. 3 E.; SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ (lot 7), Sec. 6; NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ (lot 1), Sec. 7, T. 23 S., R. 4 E., and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, T. 23 S., R. 3 E., pursuant to the Commissioner's order of April 19, 1916, under the act of March 28, 1912 (37 Stat., 77), amendatory of section 2455, Revised Statutes, which order was based on Boyd's application for sale, filed October 28, 1912, alleging his ownership of said desert-land entry of said NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said Sec. 12 (which adjoins the first three above mentioned of said subdivisions sold) and his ownership of his homestead entry of lands adjoining said desert-land entry on the south and adjoining the last above mentioned of said sold subdivisions on the east.

Boyd's said desert-land entry having been canceled, as above stated, he was allowed, by the Commissioner's decision, June 13, 1917, to

apply for its reinstatement. He having made application accordingly, the Commissioner, in the decision now under appeal, holds that the showing made is insufficient on sundry grounds, chiefly because the injunction against Boyd of which he complains, issued in litigation with a neighbor, to prevent his bringing water from the nearby tract for irrigation of his desert-land entry, antedated the initiation of that entry, and did not either deter him from its initiation nor prevent his making the first and second year improvements, nor interfere with a practicable though somewhat expensive plan of procuring water, to which he had adverted but did not carry it out as a basis of final proof; also, because he made no response to the notice that he was in default, although nearly a year elapsed before formal cancellation. With these views of the insufficiency of the showing the Department, after full examination, is not inclined to differ; and that part of the Commissioner's decision which denies Boyd's application for reinstatement of his desert-land entry is accordingly affirmed.

The protest of Hopps against the sale rested on his homestead application embracing the desert-land entry and said three adjoining forties, filed after the order for sale on Boyd's application. Hopps's homestead application was rejected as to said three forties, because the notation in the district office of the order for their sale had segregated them from entry; and his appeal to the Commissioner (still pending) from that rejection was accompanied by his protest against the order for sale—which was held notwithstanding, July 19, 1916, Boyd purchasing all four forties at the statutory minimum price, which he paid, a cash certificate being withheld, however, because of the protest.

This protest raised the question whether the Commissioner, having acquired jurisdiction to order the sale upon filing of the application, still retained the jurisdiction when the sale was ordered, the adjoining desert-land entry having meanwhile been canceled.

The pertinent clause of said act of 1912, *supra*, reads as follows:

Provided, That any legal subdivisions of the public lands * * * the greater part of which is mountainous or too rough for cultivation, may, in the discretion of the Commissioner, be ordered into the market and sold pursuant to this act upon the application of any person who owns lands or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this act. * * *

Said act was amendatory (by adding to it the quoted proviso and by some minor changes) of section 2455, R. S., which in its original form provided simply for sales from the public domain of "isolated or disconnected tracts"—without requiring application for such action. Under the original form of said section, however, an application had been required as a basis for such action, by regulations sup-

plementary to the statute. For the sale of isolated or disconnected tracts such an application is still required only by regulations, but the amended form of the section itself requires such an application as preliminary to an order of sale of tracts "mountainous or too rough for cultivation," which application must come from the owner of adjoining land or of a valid entry thereof.

There is nothing in the amendatory statute, however, which expressly or by implication requires that said qualifying ownership by the applicant shall still exist when the order for the sale is made by the Commissioner, or when such order is carried into effect by the sale itself.

Nor does anything in the nature of the case require this. The statute gives no preferential right of purchase to the applicant. He must stand at the sale on terms of equal competition with others, and if he has lost his ownership of the adjoining tract by cancellation before the time of sale arrives, that does not disqualify him from bidding or give any advantage to his transferee or to a succeeding entryman of the adjoining tract. Such a sale, if made to another bidder, could not be held void or voidable because the applicant's entry, valid at the time of application, had prior to the sale been canceled, or had been transferred by him. No more should a sale to the applicant himself be held void or irregular.

The question involved is new, but upon the grounds stated the Department is of the opinion that the Commissioner's jurisdiction to order a sale, once conferred by the filing of an application by a then qualified applicant, continues until he orders a sale and until the actual sale thereunder, regardless of the intervening loss of qualification of the applicant.

The Commissioner's decision dismissing the protest of Hopps against the sale is affirmed, and patent will issue to Boyd for the tracts sold, in the absence of other objection.

FANCHER v. HEIRS OF McGRATH.

Decided January 4, 1919.

PRACTICE—CONTEST—SERVICE.

While the present Rules of Practice, approved December 9, 1910, make no provision for service of notice on a person of unsound mind, yet Rule 9 of Practice adopted December 23, 1896, does so provide and, as it has never been revoked, service in accordance with its provisions will be deemed sufficient.

VOGELSANG, *First Assistant Secretary*:

Lloyd L. Fancher has appealed from a decision of the Commissioner of the General Land Office dated July 11, 1918, dismissing his contest, initiated December 11, 1916, against the homestead entry of

Frederick P. McGrath, made May 10, 1911, at the Los Angeles, California, land office, for lots 1, 2, and 4, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 32, T. 1 N., R. 19 W., S. B. M.

It appears that said entryman died in January, 1913, leaving four children as his heirs at law: John J., Frederick E., Nellie, and Ethel. The latter was an inmate of a State hospital for the insane, at Patton, California.

Contestant charged that the heirs had failed to reside upon or cultivate the land. Notice of contest was personally served on Nellie McGrath, now Meyers, who on December 18, 1916, filed answer, whereupon the local officers issued notice for a hearing on January 30, 1917. It developed at the hearing that Mrs. Meyers had no authority to appear for the other heirs, and that a registered letter containing the notice of contest, addressed to the insane heir in care of the superintendent of the hospital where she was confined, was receipted for by the superintendent of the hospital on December 14, 1916. The local officers, by decision of March 15, 1917, recommended cancellation of the entry. Mrs. Meyers appealed, and the Commissioner of the General Land Office, by decision of September 12, 1917, held that only one of the heirs had been served with notice, and remanded the case for further proceedings. New notice of contest issued September 19, 1917, and was personally served on Mrs. Meyers. The local offices authorized service of notice on the other heirs by publication. The notice was published and posted as required by the Rules of Practice, and mailed by registered letters to the heirs other than Mrs. Meyers, who filed an answer "on her own behalf and not for anyone else." The local officers forwarded the papers to the General Land Office without action, and later Mrs. Meyers filed a motion to dismiss the contest because notice was not served in accordance with the Rules of Practice. By decision of April 8, 1918, the Commissioner of the General Land Office held that the service of notice on all the heirs except Ethel McGrath was sufficient, and because of that alleged defect the case was again remanded, that service of notice on the contest on said insane heir might be made. The contestant took no action when notified that the case had been remanded, and the decision appealed from followed.

The present Rules of Practice do not prescribe any method for service of notice on persons of unsound mind. Rule 9 of the Rules of Practice in force prior to the revision of December 9, 1910 (39 L. D., 395), provided that service of notice on a person of unsound mind may be made by delivering a copy of the notice to the statutory guardian or committee of such person, if there be one; if there be none, then by delivering a copy of the notice to the person having the person of unsound mind in charge. Said rule was adopted December 23, 1896 (23 L. D., 592), and has never been revoked.

It is apparent that the Commissioner of the General Land Office disregarded the fact that the State official having the insane heir in charge receipted for notice of contest on December 14, 1916. It is true that prior to the hearing of January 30, 1917, no proof of such service was filed, but Mrs. Meyers, one of the heirs, had filed an answer, and contestant was justified in presuming that the answer was made on behalf of all the heirs. It was not until Mrs. Meyers was called to the stand that it was known that she was not authorized to appear for the heirs generally. Thereupon the attorney for contestant was sworn and testified as to the service of notice on the insane heir, and produced the evidence of such service.

Mrs. Meyers having made answer and appeared at the hearing of January 30, 1917, it was not necessary to again serve her with notice of the contest; nor was she entitled to make further answer on her own behalf. It follows that the answer filed by her on October 22, 1917, must be dismissed.

The insane heir having been regularly served with notice of the contest issued on December 11, 1916, and no answer having been filed on her behalf, the case was thereupon closed as to her. Proceeding in accordance with the remanding order of September 12, 1917, the heirs other than Mrs. Meyers and Ethel McGrath were duly served with notice, but failed to make answer. This leaves only the first answer filed by Mrs. Meyers, and the testimony submitted thereunder.

It was clearly established at the hearing on January 30, 1917, that entryman had not earned title to the land, and that his heirs had in no way complied with any of the requirements of the homestead law since his death. It follows that the entry must be canceled. The decision appealed from is accordingly reversed.

NEMNICH v. COLYAR.

Decided January 4, 1919.

APPLICATION TO CONTEST—CORROBORATING AFFIDAVIT.

The provision of Rule 3 of Practice that the statements in the application to contest must be corroborated by the affidavit of at least one witness having personal knowledge of the facts is jurisdictional, and objection to the absence of such corroborating affidavit may be interposed at any time prior to joining issue.

VOGELSANG, *First Assistant Secretary:*

On August 12, 1909, Albert M. Colyar made homestead entry at the Bellefourche, South Dakota, land office, for SE. ¼, Sec. 6, T. 10 N., R. 2 E., B. H. M. He submitted final five-year proof on October

20, 1915, and final certificate issued two days later, followed by patent No. 511611 on February 3, 1916.

Pursuant to application filed March 27, 1915, said Colyar on October 29, 1915, was allowed to make an additional entry under section 3 of the enlarged homestead act for S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lot 5 of said Sec. 6 (157.35 acres).

An application to contest the additional entry was filed by Louis Nemnich on January 24, 1918, in which it was charged that—

entryman never cultivated his original homestead from date thereof, except the first year after said filing original entry he broke about one acre and planted thereon three rows of potatoes, never resided thereon more than one year in all, and not then as a good faith homemaker, and never earned said original patent but acquired the same fraudulently; never cultivated either the original or additional homestead since date of additional homestead entry, or at all, except said three rows of potatoes many years prior to said additional entry; never resided on either additional or original homestead since date thereof; said land has been wholly abandoned since date of entry.

The affidavit was corroborated by Carl Bentz. Service of notice by publication was authorized by the local officers, and before the service was complete said Bentz, on February 23, 1918, filed an affidavit in which he alleged that he corroborated the contest affidavit without knowing what he was signing, he being a German and "hardly able to understand any English"; that he was handed the paper to sign and knew nothing as to its contents except that it had to do with Colyar's land; that on being asked regarding the original entry affiant replied that "Colyar had lived on it and that he, Bentz, worked for Colyar," and at that time affiant stated that he knew nothing concerning the additional and did not know even where it was; that he had never stated that Colyar had obtained the patent for his original entry through fraud or that he had acted otherwise than in good faith, nor had he intended to state that there had been no cultivation of the original entry, for the reason that the land had been cultivated. The affidavit concluded with a "demand" that he be allowed to withdraw his name as a witness, for the reason that he knew nothing concerning the additional entry and that the statements as to the original are either partly or wholly untrue, and that he had mistakenly and without intent to do so been wrong in signing the contest affidavit, having merely reposed confidence in the person who made the request. On February 27, 1918, the local officers rejected the contest affidavit and notified the parties of their action. Service of notice by publication was thereafter completed, and on March 21, 1918, the attorney for contestant filed motion for default, which motion was denied, and contestant appealed. By decision of August 26, 1918, the Commissioner of the General Land Office held that, as at the time the contest affidavit was filed it was sufficient to justify its acceptance, it should not have been dismissed

without first giving the contestant a right to be heard, and reinstated the contest, allowing entryman thirty days from notice within which to serve and file answer. Entryman has appealed.

Rule of Practice 3, as amended September 23, 1913 (44 L. D., 365), provides:

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

Prior to said amendment it was held that the requirement of the Rules of Practice that the affidavit of the contestant must be corroborated by one or more witnesses was to assure the Government of the good faith of the contestant (*Gotthelf v. Swinson*, 5 L. D., 657), and not that jurisdiction may be vested in the local officers—that being obtained only by service of notice. (*Irwin v. Hayden*, 27 L. D., 555.) But the present requirement of corroboration by one having personal knowledge of the facts, and that the facts must be stated in the corroborating affidavit, is jurisdictional, and objection to the absence of the required corroborating affidavit can be interposed at any time prior to joining issue. (*Preskey v. Swanson*, 46 L. D., 215; *Bolton v. Inman*, 46 L. D., 234.) The amendment was adopted to prevent the allowance of unjustifiable attacks against entries, thus relieving the Land Department of the consideration of speculative and unwarranted contests and entrymen from the trouble and expense attendant on the defense thereof.

When Bentz formally advised the local officers that he had signed the corroborating affidavit under a misconception of the statements made therein, and that the allegations therein set forth were not true, they could do no less in the then state of the record, than to dismiss the contest. They were without authority to allow him to proceed. To notify the contestant of their proposed action and to allow him to be heard would have been an idle proceeding, as without amendment of the application to contest by the substitution of a proper corroborating affidavit there was no proper foundation for the proceeding, and such amendment could not have been allowed except in the absence of an intervening application to contest (*Shugren et al. v. Dillman*, 19 L. D., 453), and the amendment would have required proceedings *de novo*.

The amendment of Rule 3 deprived the local officers of the discretion which was formerly vested in them regarding the acceptance of contest affidavits, and the doctrine announced in a long line of cases from *Houston v. Coyle* (2 L. D., 58) to *Bridges v. Bridges* (27 L. D., 654) is no longer controlling.

For the reasons aforesaid, the decision appealed from is reversed and the contest dismissed.

JOHNSON v. OGDEN (ON REHEARING).

Decided January 17, 1919.

ENLARGED HOMESTEAD—SECTION 6, ACT JUNE 17, 1910—DESIGNATION.

In the matter of designation of land under the provisions of section 6 of the act of June 17, 1910, it is the practice as well as the duty of the Department to investigate and determine the character thereof; and in the absence of convincing evidence that certain statements in a letter from the applicant were known to be false or were intended to induce favorable designation, it can not be assumed that it was intended or expected that the Department would not follow its practice and perform its duty under the statute.

VOGELSANG, First Assistant Secretary:

A motion for rehearing of the Department's decision rendered March 8, 1918 [not reported], has been entertained, in this case, and oral argument has been heard in support of the motion. The argument has failed to convince the Department that the joint letter of Clyde Hanson and James E. Ogden to the Director of the Geological Survey, dated November 10, 1913, is a sufficient basis to sustain the charge of fraud on the part of Ogden upon the Government. Certain statements in that letter are clearly shown to have been misleading and false, but there is no convincing evidence that they were known to be false or were intended to influence or induce a favorable designation under section 6 of the act of June 17, 1910 (36 Stat., 531). It was the practice as well as the duty of the Department to investigate and determine the character of the land, and in the absence of a positive showing of intentional misrepresentation on Ogden's part, it can not be assumed that he intended or expected that the Department would not follow its practice and perform its duty under the statute.

The departmental decision, of March 12, 1918, characterized the designation as *res adjudicata*. The provision in paragraph 2 of the regulations of July 18, 1910, issued in aid of the administration of this act (39 L. D., 96), that "the fact that lands have been designated as subject to entry is not conclusive as to the character of such lands," has been pointed out as providing the contrary; but that statement of the regulations is immediately qualified by the provision that a designation under the act shall not be disturbed as against one who has acted in good faith under such designation. In other words, the designation is final in this case, in default of a convincing showing of fraud on Ogden's part.

The efforts to secure title prior to the application for second entry cannot now be considered. The questions arising thereon were considered and determined by the General Land Office; and, after designation, the entry was allowed.

The motion for a rehearing is denied.

FRANK L. BAILEY AND MABLE M. KAEGI.

Decided January 22, 1919.

INTERMARRIAGE OF HOMESTEADERS—ELECTION AS TO RESIDENCE—FILING OF DECLARATION.

The right of election under the provisions of the act of April 6, 1914, is one which accrues at the date of marriage by operation of law and is not dependent on the filing of a formal declaration that it has been made, that being a requirement of regulation and not of statute; and election to reside upon the land embraced in the husband's entry having in fact been made, failure to file such a declaration prior to his offer of final proof and receipt of final certificate does not warrant the rejection of the declaration.

DEPARTMENTAL REGULATIONS MODIFIED.

Paragraph 6 of the regulations of June 6, 1914, 43 L. D., 272, under the act of April 6, 1914, is modified by striking therefrom the words, "or to the filing of the election."

VOGELSANG, First Assistant Secretary:

On November 11, 1916, Frank L. Bailey was married to Mable M. Kaegi after his homestead entry, Glasgow 032051, for SW. $\frac{1}{4}$, Sec. 23 and NW. $\frac{1}{4}$, Sec. 26, T. 37 N., R. 41 E., M. M., had been allowed on December 7, 1915, under his application filed January 11, 1915; and after her like entry, Glasgow 035755, for lots 2, 3 and 4 and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 1, same township, had been allowed on September 7, 1915, under her application filed August 19th of that year.

These parties had each resided on the lands embraced in their entries for more than one year prior to the date of their marriage, and since that time they have lived together on the husband's claim and cultivated the lands embraced in both his and his wife's entry.

Bailey did not, however, file his election to maintain their joint home on the land covered by his entry under the act of April 6, 1914 (38 Stat., 312), until April 3, 1917, or more than three months after he had made final proof and received final certificate under his entry, on December 29, 1916.

By its decision of April 16, 1918, the General Land Office rejected the election, and the case is now before this Department on Mrs. Bailey's appeal from that action.

The act of April 6, 1914, *supra*, provides:

That the marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry: Provided, That the provisions hereof shall apply to existing entries.

The decision appealed from was based on the finding that "Bailey had fulfilled the requirements of the law and applied for patent prior to his marriage and prior to the filing of the election."

While the decision was correct in holding that the election was filed subsequent to the making of final proof, it was erroneous in further holding that Bailey had fully complied with the law before his marriage. He began his residence on the land covered by his entry on December 10, 1913, prior to the date of the entry, and was married November 11, 1916, or two years and eleven months after the date of his settlement. He had not therefore fully met the requirements of the law that residence must be maintained for three years before the entryman is entitled to make final proof.

The right of election is one which accrues at the date of a marriage, by operation of law, and is not dependent on the filing of a formal declaration that it has been made. *Harper v. Gifford* (45 L. D., 108). While the statute provides that the husband shall be the one who shall make the election as to where he and his wife shall reside, it does not in terms require him to file a formal election in writing with the local office or elsewhere. That requirement was made for the first time in the regulations issued under that law (43 L. D., 272). But even these regulations do not specify the time within which the election shall be filed, further than may be implied from the statement made in paragraph 6 thereof, which says:

However, the act has no application to cases where the requirements of the law have been fulfilled as to one entry prior to the marriage or to the filing of the election.

In *Harper v. Gifford*, *supra*, the wife left her land at the date of her marriage and thereafter resided with her husband on the land covered by his entry, as was the fact in the present case, and the husband's formal election was not filed until more than fourteen months after the marriage. Notwithstanding this fact, it was held in that case that a contest initiated before the filing of the election could not be maintained on the charge that the wife had abandoned her residence on the land covered by her entry.

If Bailey had filed his election prior to the time he completed his required residence, there could be no question but what his wife would thereafter have been excused from further residence on her land, notwithstanding the fact that her husband completed his compliance with the requirements of the law within a very short time after their marriage, because the regulations mentioned declare that—

If proof is made on the entry selected as the home before title to the other is earned, residence may nevertheless be continued on the perfected entry and credited to the other.

These considerations lead to the conclusion that the election in this case should be recognized, and that the words, "or to the filing of the election," in paragraph 6 of the governing regulations, hereinbefore quoted, should be stricken therefrom. They impose a restriction which is not required by the law. While good administration is subserved by the prompt filing of an election in such cases, a failure in that behalf should no more be determinative of rights under this statute than would be a failure to file an application for leave of absence, where the facts warrant the granting of such leave, under the act of March 2, 1889 (25 Stat., 854).

While the action taken by the Commissioner in this case was warranted by the regulations, it is, for the reasons stated, directed that the election be accepted and allowed.

FRANK O. HORTON.

Decided January 22, 1919.

SECOND HOMESTEAD ENTRY—ACT OF SEPTEMBER 5, 1914.

The provisions of the act of September 5, 1914, requiring a showing as to "the prior entry or entries" does not contemplate that one who had been duly allowed to make a second homestead entry under the act of February 8, 1908, subsequently canceled, should be required thereafter to make a further showing as to the loss of the original entry in support of an application to make a third homestead entry under the former act.

VOGELSANG, First Assistant Secretary:

This is an appeal involving the question whether Frank O. Horton is entitled to make a second homestead entry under the act of September 5, 1914 (38 Stat., 712).

It appears that said Horton on November 9, 1907, made homestead entry at the Buffalo, Wyoming, land office for 160 acres in Sec. 34, T. 55 N., R. 79 W., 6th P. M., which entry he relinquished on July 27, 1908, on which date he was allowed by the Buffalo officers to make a second entry under the act of February 8, 1908 (35 Stat., 6), for 160 acres in Sec. 10, T. 54 N., R. 79 W., 6th P. M. The latter entry was relinquished March 24, 1911.

On January 15, 1917, Horton applied to make entry under the stock raising homestead act (39 Stat. 862), for SE. $\frac{1}{4}$, Sec. 21, SW. $\frac{1}{4}$, Sec. 22, NW. $\frac{1}{4}$, Sec. 27, and NE. $\frac{1}{4}$, Sec. 28, T. 52 N., R. 80 W., 6th P. M., filing therewith a petition for the designation of the land and a showing as to his right to make a second entry under the act of September 5, 1914, *supra*.

By decision of May 1, 1918, the Commissioner of the General Land Office rejected the application because Horton had made no showing

as to the reasons for relinquishing his first entry, and because the showing as to the circumstances under which the second entry was relinquished failed to meet the requirements of the law. Horton has appealed.

The act of September 5, 1914, *supra*, provides that an applicant to make a second homestead entry must show 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.

In his original showing Horton alleged that he had abandoned the second entry—

for the reason that I had changed my business, so that I could not live on the land. At that time I established a summer resort at the base of the Big Horn Mountains and it became necessary for me to devote my entire time to the new occupation.

In an affidavit filed with the appeal Horton sets forth that the second entry was relinquished for the reasons stated in his former affidavit—

but that, although the reasons given were true, they were not the only reasons then existing; that, soon after making his said homestead entry and establishing residence thereon, affiant's health became impaired by reason of the alkali water on the land, and it became necessary for him to leave on that account. For some time after making the entry, and before relinquishing the same, affiant had attempted to find another business whereby he could leave that vicinity, and get into a region where the water was better; that the only water available for domestic use was surface alkali water which he and his family were compelled to drink for lack of better; that the water was so strongly impregnated with alkali, especially in the summer months, that no one could drink it without serious detriment to health, and, for that reason, affiant became very anxious to get away from that locality. Affiant says that while he did change his occupation, and engaged in the summer resort business elsewhere, the change was induced largely by the intolerable conditions at the homestead, which made it imperative for him to leave and go to a place where the water supply was better. Affiant further says that he was largely induced to go into the summer resort business because of the excellent quality of water there available. While it was probably within affiant's power to have stayed on the homestead, and to that extent it was within his control not to have lost the same, nevertheless the water conditions which made the change primarily necessary were not within his control, and the change was without fault on his part for that reason.

With the appeal was also filed a statement under oath as to his reasons for relinquishing his first entry, but it is unnecessary to consider such showing. The act above quoted did not, by requiring a showing as to "prior entry or entries," contemplate that one who had been allowed to make a second entry, on a sworn statement of facts submitted with his application therefor, should thereafter, in applying to make a third entry, again make an explanation as to

the loss of the first entry. The second entry having been regularly allowed and afterwards canceled, all questions relating to the first entry are closed and need not be made the subject of further inquiry. In the case on appeal the only question to be determined is whether the reasons for relinquishing the second entry were such as to warrant the allowance of the pending application.

The additional showing convinces the Department that the applicant is entitled to the benefits of the act of 1914. Accordingly the decision appealed from is reversed and the application will be allowed if the land applied for is designated as stock-raising land and no preference right thereto is asserted under section 8 of the stock-raising act.

KETTER v. RUCKDASCHEL.

Decided January 22, 1919.

HOMESTEAD ENTRY—HOUR OF SETTLEMENT—RES ADJUDICATA.

Final adjudication of a case involving the time settlement was initiated, renders that question *res adjudicata* between the parties thereto, and the unsuccessful applicant is estopped from having the matter relitigated by alleging an earlier hour of settlement than that originally asserted.

HOMESTEAD ENTRY—SUBSEQUENT SETTLEMENT—RESIDENCE.

The rule that a settler must establish residence upon the land claimed within a reasonable time after initiating settlement and maintain such residence as against a rival settler, has no application in case of a homestead entry based on an application filed prior to the hour of settlement asserted by the conflicting claimant.

VOGELSSANG, *First Assistant Secretary:*

The Commissioner of the General Land Office on July 19, 1918, held for cancellation the homestead entry of Charles Ruckdaschel, No. 034021, allowed November 2, 1915, for the E. $\frac{1}{2}$, Sec. 5, T. 34 N., R. 43 E., M. M., in the Glasgow, Montana, land district, and sustained the homestead application of John P. Ketter, No. 035082, filed July 17, 1915, for the same tract. No appeal having been filed within time, Ruckdaschel's entry was canceled, September 20, 1918. By the Department's order of November 1, 1918, a petition for the exercise of supervisory authority filed by Ruckdaschel was granted and it was directed that the case be treated as upon appeal from the Commissioner's decision of July 19, 1918. Said petition, now treated as an appeal, has been served, and a reply thereto filed by Ketter.

The township plat of T. 34 N., R. 43 E., was filed in the local land office May 17, 1915. The land at that time was subject to a preference right of selection for sixty days by the State of Montana, under the act of August 18, 1894 (28 Stat., 372, 394); but this tract was not so selected.

On June 7, 1915, at 9:50 a. m., Ruckdaschel filed his application to make second homestead entry under the act of September 5, 1914 (38 Stat., 712), alleging settlement the previous day. This application was suspended by the local officers to await the exercise or the expiration of the State's preference right, and also for failure to furnish the affidavit required by the regulations of September 27, 1914 (43 L. D., 408). The required affidavit was filed July 23, 1915.

On July 17, 1915, Ketter filed his homestead application for the same tract, alleging settlement June 7, 1915, at 10 a. m. This application was rejected by the local officers July 23, 1915, for conflict with Ruckdaschel's application, which was filed prior to the time of Ketter's settlement as he then alleged it. On August 20, 1915, Ketter appealed to the Commissioner, contending that the land was not subject to application during the period of the State's preference right of entry, and requesting that a hearing be ordered. Notwithstanding the pendency of Ketter's appeal, the Commissioner, October 30, 1915, ordered the allowance of Ruckdaschel's application, which was thereupon allowed by the local officers, November 2, 1915. On January 21, 1916, the Commissioner affirmed the local officers' action in rejecting Ketter's application; and this decision was affirmed, on further appeal, by the Department, May 12, 1916.

In the meantime Ketter filed, February 23, 1916, his application to contest Ruckdaschel's entry, upon the alleged ground that he (Ketter) had made settlement prior to the filing of Ruckdaschel's application, asserting that he went upon said land about eight o'clock a. m. and established actual residence upon it at 9.30 a. m. of June 7, 1915, and had since maintained residence thereon, and that at that time there was no one living upon or claiming the tract—and seeking to explain the statement in his former affidavit of said settlement that it took place at ten o'clock a. m., as having been made—

for the reason that he did not know that there was any person claiming said land, and gave that hour without thought that it made any difference as to what time of the day settlement was made, but that in fact his settlement was made and residence established not later than 9:30 o'clock in the forenoon of said 7th day of June, 1915.

This application to contest abated and was dismissed, April 5, 1916, for failure of timely service of notice thereof, under Rule 8 of Practice. Ketter then filed, April 20, 1916, a new application to contest, alleging the same grounds. After denial of a motion to dismiss this new application, Ruckdaschel answered it, and a hearing was had thereon by the local officers. They held, upon the testimony, that—

The initial act of settlement by Ruckdaschel was prior in time to that of Ketter, and the settlement of Ketter was prior in time to the presentation of the homestead application of Ruckdaschel. It necessarily follows that

the rights of the parties must be adjudicated upon their settlement rights. While Ruckdaschel was the prior settler * * * during the months of June and July, 1915, he made only two short visits to the land, unaccompanied as it would appear by his family, and did not establish residence thereon to the exclusion of a home elsewhere until in April, 1916. * * *

We accordingly find that Ruckdaschel did not establish and maintain his residence on said land, to the exclusion of a home elsewhere, within a reasonable time after settlement, and accordingly recommend that his entry be held for cancellation. * * *

On appeal, the Commissioner affirmed this decision, July 19, 1918; and the granting of Ruckdaschel's petition for exercise of the supervisory authority of the Department, filed after his time for appeal had expired, stands, as above stated, as an appeal to the Department from the Commissioner's decision.

The question of priority of settlement was directly involved in the rejection of Ketter's homestead application, affirmed by the Commissioner and the Department; that rejection resting on the ground that the earlier homestead application of Ruckdaschel had been filed prior to Ketter's settlement as then alleged. That question is therefore *res adjudicata* between them, and can not be relitigated in this contest proceeding, even though Ketter now has alleged the making of his settlement at an earlier hour than before. Were such a shifting of the hour, for obvious reasons, to be permitted, nothing would remain of the salutary doctrine that a matter once brought into controversy and judicially decided estops the defeated party from thereafter asserting anything to the contrary.

Ruckdaschel's allowed entry of November 2, 1915, was followed within six months by his removing his family to the land and making it henceforth his exclusive home. His improvements and cultivation have been of substantial amount and value—admittedly involving larger expenditure than those of Ketter, and larger than the law insists upon. Entire good faith on Ruckdaschel's part is shown. All the requirements of the homestead law being thus met, it is not perceived upon what ground this contest was sustained. The decisions below apparently rest on the false premise that Ketter, as he now alleges and undertakes to show, initiated his settlement a few minutes before, instead of a few minutes after, Ruckdaschel filed his homestead application—which in any case related back to his settlement of the previous day, the bona fides whereof is unassailable upon this record and which was followed by the establishment of residence within a reasonable time, to wit, within six months of the allowance of the entry. The rule that a settler must establish residence upon his claim within a reasonable time *from the date of his initial act of settlement* and maintain such residence as against a rival settler has no application here, where, during the whole time,

from Ruckdaschel's application to its allowance, Ketter was asserting a settlement subsequent to that application.

The decision of the Commissioner is reversed, and the contest of Ruckdaschel's homestead entry is dismissed.

KETTER v. RUCKDASCHEL.

Motion for rehearing of departmental decision of January 22, 1919, 47 L. D., 13, denied by First Assistant Secretary Vogelsang, March 18, 1919.

E. M. PALMER (ON PETITION).

Decided January 22, 1919.

CONFIRMATION—MINERAL ENTRY—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

An entry under the mining laws is not one made "under the homestead, timber-culture, desert-land, or preemption laws," and does not therefore come within the purview of the proviso to section 7 of the act of March 3, 1891, and action upon such entries is in nowise affected thereby.

VOGELSANG, First Assistant Secretary:

Counsel for E. M. Palmer in the above matter has filed a petition asking the Department to exercise its supervisory power and authority with a view to the reopening of this case, the immediate reinstatement of the canceled entry and the passing thereof to patent.

The petition is grounded on two assignments as follows:

Error in not finding and holding that as no charge was brought against this mineral entry for more than two years after the issuance of final certificate, the same stood confirmed under the proviso to section 7 of the act of March 3, 1891, and, accordingly, patent must issue thereon.

And as a further ground your petitioner refers to the leading decision of the United States Supreme Court rendered last June in the case of *United States v. Svan Hoglund*, wherein upon an almost identical state of facts the entry was held confirmed, and patent directed to issue.

In December, 1901, entry (now 03068), was made of the Palmer placer embracing 120 acres in Secs. 27 and 34, T. 10 S., R. 68., 6th P. M., Denver, Colorado, land district. In January, 1907, an adverse report was submitted by a forestry officer, the land being then included with the Pikes Peak National Forest. As the result of proceedings had, adverse decisions were rendered in all tribunals of the Land Department, final decision being that of E. M. Palmer (38 L. D., 294). The entry was canceled December 4, 1909, and has ever since remained canceled.

The confirmatory provisions of the act of March 3, 1891 (26 Stat., 1095), have no application to this canceled mineral entry. An entry

under the mining laws is not one made "under the homestead, timber-culture, desert-land, or pre-emption laws." While it was formerly held that a timber and stone entry was a "preemption" and subject to confirmation (Instructions of June 3, 1904, 33 L. D., 10), it was later held both by this Department and by the courts, that such an entry was not within the statute. See case of James A. Cobb *et al.* (37 L. D., 181), and Menasha Wooden Ware Company, Assignee of William Gribble (37 L. D., 564; 33 D. C. Ap., 211). The proviso does not apply to entries under the coal land laws. Charles Stough *et al.* (41 L. D., 616), and Opinion (39 L. D., 327, 332). The act does not extend to an entry made pursuant to soldiers' additional right. Thomas A. Cummings (39 L. D., 93). Under the reasoning set forth in the several authorities above cited, it becomes clear that a mineral entry is not within the scope of the statute. The Palmer entry was, therefore, not subject to the operation of the proviso to section 7 of the act of March 3, 1891, *supra*, and was not confirmed.

The case of Lane *v.* Svan Høglund referred to by counsel, which was decided by the Supreme Court of the United States on May 21, 1917 (244 U. S., 174), involved Høglund's homestead entry which had been intercepted by the forest withdrawal. For the reasons above indicated that decision of the Supreme Court applying confirmation to the homestead entry, is neither controlling nor persuasive in the case at bar.

The petition is denied.

STATE OF LOUISIANA *v.* BELTON (ON REHEARING).

Decided January 22, 1919.

ENTRY—PRIOR CLAIM—COLOR OF TITLE.

One who makes homestead entry for a tract of land which is in the possession of another claiming from a different source fully disclosed by the records of the parish is constructively notified by such possession and records of the adverse claim; and land so held under color of title is not subject to entry, citing *Krueger v. United States* (246 U. S., 69).

VOGELSANG, *First Assistant Secretary*:

William E. Belton has filed a motion for rehearing in the matter of his homestead entry, made June 26, 1916, for N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, T. 18 N., R. 8 E., La. M., Louisiana, wherein the Department, by decision of December 5, 1918 [not reported], reversed a decision of the Commissioner of the General Land Office, dated April 13, 1918, and directed the cancellation of the entry for conflict with the prior selection of the tract by the State of Louisiana as swamp and overflowed.

The motion contends that the Department erred in considering the testimony relative to the title of Linton W. Stubbs, and that the only question involved was the character of the land.

Said Stubbs appeared at the date set for the hearing, and introduced his own testimony and that of three witnesses, without objection. The hearing was then continued, by agreement, to allow Belton to take the depositions of three witnesses, which constituted his entire defense. Belton did not testify. His objection to the consideration of Stubbs's evidence comes too late.

While the patent from the State did not issue to Linton W. Stubbs's grantor, Frank P. Stubbs, until July 10, 1913, it was established at the hearing that the State had issued to said grantor a certificate of sale on November 24, 1860. One of Belton's witnesses testified that Mose Stevenson, father-in-law of Belton and also of one of Belton's witnesses, was in the employ of Stubbs "for a good long while," and it is this testimony and that of another witness to which reference was made by the Department as warranting the inference that Belton knew when he made entry that the land had been deeded by the State to said Stubbs. But whether he did so know or not, Belton was charged with notice of Stubbs's title, herein found to be a valid one, the records of the parish having shown since 1881 that the land had been transferred to him and that State, county and levee taxes had been paid thereon. See *Krueger v. United States* (246 U. S., 69).

The preponderance of the testimony was to the effect that at the date of the hearing all but about 25 acres of the land was low and wet—of the character contemplated by the granting act, and a witness who had been familiar with the land since 1859 testified that there had been no change in its character since that year.

The motion for rehearing is denied.

GRAY TRUST COMPANY (ON REHEARING).

Decided February 3, 1919.

MINERAL LAND—DEPOSIT OF LIMESTONE.

The existence of a limestone deposit which is or may be used in construction or surfacing of roads, or as an ingredient in the manufacture of Portland cement, is not sufficient to subject it to mineral location when found in a region containing immense quantities of similar deposits more favorably situated, and not otherwise possessing attributes which would bring it within the category of mineral deposits made subject to location under the mining laws.

Vogelsang, *First Assistant Secretary*:

This is an entertained motion for rehearing filed by the Gray Trust Company in the matter of the protest of the Government against

three asserted placer mining locations denominated the Emigration Rock and Emigration Rock Nos. 2 and 3 embracing the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE, $\frac{1}{4}$ and W. $\frac{1}{2}$, Sec. 22, T. 1 N., R. 2 E., Salt Lake City land district, Utah, wherein the Department by decision of June 1, 1917 [not reported], affirmed the decision of the Commissioner of the General Land Office of February 19, 1917, holding the alleged locations to be null and void because not supported by sufficient discovery and also for want of good faith on the part of the mineral claimants.

The claims in question purport to have been located in 1909 and 1910, and are within the limits of the Wasatch National forest. They are also included within an area reserved "subject to all legal rights heretofore acquired under any law of the United States" from all forms of location, entry or appropriation, "whether under the mineral or nonmineral land laws of the United States," by the act of September 19, 1914 (38 Stat., 714).

February 14, 1911, the Gray Trust Company claiming as transferee of the original locators filed application for patent to the area in question, but withdrew the same February 6, 1912. The application was by the Commissioner's decision of April 9, 1912, formally rejected, but in the same decision the local officers were directed to proceed against the claims on the charges:

1. That no discovery of mineral has been made.
2. That \$500 has not been expended in improvements and development.
3. That these claims were not located in good faith for mining purposes, but for the value of the lands as a summer resort and a site for cottages and camping purposes.

Hearing was had, after due notice, on said charges commencing December 9, 1912, with the result above stated. At the hearing the claimant sought to show that the land in question was chiefly valuable on account of deposits of limestone, sandstone, fire clay and aluminum disclosed thereon. From a careful reexamination of the record the Department is not convinced that the land contains fire clay in workable quantities, if indeed the small deposit referred to as such can be properly termed fire clay, or that metallic aluminum can be profitably extracted from any substance shown to exist upon the land.

The motion challenges the correctness of the decision of the Department in so far as it concerns a deposit of sandstone situated in the northwest corner of the area asserted by witnesses for claimant to be commercially valuable as a building stone and to be of the same character and quality as the deposits situated on a tract adjoining the area here in question on the west which had been quarried and disposed of in Salt Lake City, from which the land is about 10 miles distant. In connection with the motion, however, the claimant filed

two newspaper clippings wherein it is stated that one LeGrande Young, president and owner of all the outstanding stock of a railroad company, owning a railroad constructed for the purpose of transporting to Salt Lake City building stone from the quarry on said adjacent tract, in which quarry, it appears, Young was largely interested, had after nine years of unsuccessful operation of the road, sought permission of the utilities commission to dismantle the track and equipment and discontinue operation of the road for the reason, it would seem, that the demand there for red and white sandstone of the quarries had fallen off as a result of the growth of the cement industry, just when the line was completed. This showing very strongly tends to sustain the conclusion heretofore reached by the Department that the sandstone deposits in part relied upon by the claimant as a basis for one of the locations in question render the land of little, if any, value, on account thereof.

As to the limestone deposits, the existence of which upon portions of the ground is testified to by claimant's witnesses, it is sufficient to say that they have not been demonstrated to be of such quality as to give them any substantial value over and above other limestone deposits of that region which are there shown to exist in immense quantities and more favorably situated with relation to transportation facilities, or otherwise to bring them within the category of mineral deposits subject to location under the mining laws.

There are filed with the motion a number of certificates of analysis of samples of more or less argillaceous limestone alleged to have been taken from the land, which it is declared form an excellent substance for use in the manufacture of Portland cement. It is also stated that disintegrated portions of the same deposits which it is alleged occur in immense quantities on the land, make a very serviceable road surfacing material which has been and is now being used by the authorities of Salt Lake County for that purpose with highly beneficial results.

The Department is not persuaded, however, that as a Portland cement ingredient the deposits referred to are of such an exceptional nature as to warrant the adjudication as mineral of land upon which they may be shown to exist. Nor does the mere fact that a deposit is or may be used in the construction or surfacing of roads render land upon which it occurs mineral land within the meaning of the mining laws.

For the reasons stated no ground is shown to disturb the decision of the Department complained of. It is accordingly adhered to and the motion for rehearing denied.

INSTRUCTIONS.

February 3, 1919.

POTASH WITHDRAWAL—ACT OF JULY 17, 1914—RESTRICTED PATENT.

Public lands in and adjacent to Searles Lake, California, withdrawn or classified as valuable for potash, and not embraced in an existing lease under the act of October 2, 1917, may be patented upon proper application, with the reservation of the deposits to the United States under the provisions of the act of July 17, 1914.

VOGELSANG, *First Assistant Secretary*:

I am in receipt of your [Commissioner of the General Land Office] letter of January 28, 1919 ("FS-D" MAM), requesting instructions as to nine soldiers' additional homestead applications filed on September 30, 1918, by Francis Marion Smith, at Independence, California, under the act of July 17, 1914 (38 Stat., 509), as follows:

- 05629, lots 1, 2, 3, 4, 7 and 8, Sec. 6, T. 26 S., R. 43 E. M. D. M.;
- 05630, lot 4, Sec. 5, T. 26 S., R. 43 E.;
- 05631, SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 6, T. 26 S., R. 43 E.;
- 05632, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 6, T. 26 S., R. 43 E.;
- 05633, SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 5, T. 26 S., R. 43 E.;
- 05634, lot 11, Sec. 31, T. 25 S., R. 43 E.;
- 05635, lot 12, Sec. 31, T. 25 S., R. 43 E.;
- 05636, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 31, T. 25 S., R. 43 E.;
- 05637, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 31, T. 25 S., R. 43 E.

The above described lands are embraced in Executive order of February 21, 1913, Potash Reserve No. 2, California No. 1, which directed that they be "withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting nonmetalliferous mineral deposits."

It appears that the Director of the Geological Survey has reported that all of the lands in 05629, except lot 1 and those in 05632, 05634 and 05635, have been found to be nonmineral in character and that steps will shortly be taken to restore them to entry. The present applications are stated to be for the interest of the West End Consolidated Mining Company, which has been awarded a lease under the act of October 2, 1917 (40 Stat., 297), Independence 05474, for land in Sec. 13, T. 25 S., R. 43 E., and Secs. 18, 19 and 30, T. 25 S., R. 44 E., M. D. M., the company desiring the present tracts for the purpose of constructing such plants as are necessary to conduct successfully its operations under the lease. You request to be advised as to whether the applications may be patented, all else being regular, with the reservation provided for in the act of July 17, 1914, *supra*.

Section 1 of the act of July 17, 1914, permits of the entry of lands withdrawn or classified as potash, or valuable for such a deposit, "with a view of obtaining or passing title with a reservation to the

United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same." Section 2 provides that the—

* * * patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages. * * *

Under section 1 of the act of October 2, 1917, *supra*, these lands are not subject to the prospecting permit provided for therein. Section 2 of that act provides:

That the *potash deposits* in the public lands in and adjacent to Searles Lake in what would be if surveyed townships twenty-four, twenty-five, twenty-six, and twenty-seven south of ranges forty-two, forty-three, and forty-four, east, Mount Diablo meridian, California, may be operated by the United States or may be leased by the Secretary of the Interior under the terms and provisions of this Act. * * *

Section 3 of the act authorizes the Secretary of the Interior to grant the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land, not exceeding forty acres, for camp sites, refining works, etc. Section 6 contains the following proviso:

That said Secretary, in his discretion, in making any lease under this Act may reserve to the United States the right to dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein. * * *

Section 9 of the act provides:

That the provisions of this Act shall also apply to all deposits of potassium salts in the lands of the United States *which may have been or may be disposed of* under laws reserving to the United States the potassium deposits with the right to prospect for, drill, mine, and remove the same, subject to such conditions as to the use and occupancy of the surface as *are or may hereafter be provided by law.*

Under section 12, the deposits referred to in the act of October 2, 1917, are subject to disposition only in the form and manner provided for in that act.

It should be noted that the proviso to section 2 applies solely to the deposits of potash in the designated townships. No provision of law has as yet been enacted whereby the United States itself may operate such deposits, and the present tracts are not embraced in any lease.

Under section 2 of the act of July 17, 1914, the underlying deposits in these tracts, if patented, would be subject to disposition by the United States upon furnishing the security for damages to the surface, etc., as provided therein. No reason is here apparent why similar patent may not be issued for the surface of such of these tracts as are classified to be mineral in character. In fact, such action is in harmony with section 9 of the act of October 2, 1917.

The present case is to be distinguished from *State of California et al.* (44 L. D. 127), which related to a naval reserve in the State of California, and which held that an application to secure title therein, with a reservation of the oil deposits to the United States, should be rejected. There, prior to the act of July 17, 1914, *supra*, the Government, in addition to withdrawing the land for the purpose of classification and prospective legislation, as in the present order, had appropriated and dedicated it to naval purposes, being Naval Petroleum Reserve No. 1, which directed that the lands be "held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by act of Congress." In other words, there was an absolute reservation both of the land and the underlying deposits for the use of the Navy, but no such reservation is here present.

You are accordingly advised, in the absence of other objections, that the applications for such of the tracts remaining withdrawn or classified as valuable for potash, may be patented, with the reservation of the deposits to the United States under the act of July 17, 1914, *supra*.

STOCK-RAISING HOMESTEADS—CIRCULAR 523, AMENDED.

INSTRUCTIONS.

[Circular No. 635.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 8, 1919.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Attention is directed to the second sub-paragraph of paragraph 13 (b) of circular No. 523 (45 L. D., 625-634), directing that, in case of

conflict between two or more applications entitled to preference under section 8 of the act of December 29, 1916 (39 Stat., 862), the papers be forwarded to this office for consideration.

It is now directed that, before forwarding the papers in accordance with the above cited instructions, you notify the various applicants for the conflicting preference rights, that they will be allowed thirty days from receipt of notice within which to agree among themselves upon the division of the conflicting tracts by subdivisions, and that if they fail to come to an agreement the records will be forwarded to the General Land Office where a division will be made. If the parties agree to a division you will allow the applications, in the absence of other objection, in accordance with their agreement.

The notices should be sent by ordinary mail but you will note on your records the date mailed and wait until 35 days elapse before forwarding the cases to this office unless an agreement is filed. Your report should indicate when the notices were issued.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

**SALE OF KIOWA, COMANCHE, APACHE, AND WICHITA LANDS—
REVOKED.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 11, 1919.

REGISTER AND RECEIVER,
GUTHRIE, OKLAHOMA.

Departmental instructions of January thirty-one nineteen hundred fourteen (43 L. D., 87), are hereby revoked as to future sales.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

GOLDEN CENTER OF GRASS VALLEY MINING COMPANY.

Decided February 15, 1919.

MINING CLAIM—TOWNSITE PATENT—PRACTICE.

A mineral claimant of land included in a townsite patent is entitled, upon applying for a mineral patent, to a hearing as to the character of the land, where he makes *prima facie* showing that, at the date of the townsite entry, such land was known to be mineral or was held under valid mineral location.

DECISION DISTINGUISHED.

Case of *Dower v. Richards* (151 U. S., 658), cited and distinguished.

VOGELSANG, First Assistant Secretary:

This is an appeal from the decision of the Commissioner of the General Land Office, October 22, 1918, rejecting the application of the Golden Center of Grass Valley Mining Company for a mineral patent for the Roche Rock lode claim, survey No. 5116, situated in the SE. $\frac{1}{4}$ of Sec. 27, T. 16 N., R. 8 E., M. D. M., in the Sacramento, California, land district, and denying the accompanying petition of said company for a hearing to determine (1) whether or not any part of the land embraced within said claim as surveyed for patent was known on June 18, 1869 (the date of the townsite entry below mentioned), to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them, (2) whether or not at said date any part of said land was held as a mining claim, which possession was recognized by local authority, and (3) whether any part of said land was at said date a valid mining claim or possession held under existing law.

On March 17, 1868, the incorporated Town of Grass Valley made declaratory statement, under the act of March 2, 1867 (14 Stat., 541), for sundry lands as a townsite, including said Sec. 27; on June 18, 1869, said town made entry of certain of said lands, including a part of said Sec. 27 embracing the mineral claim now involved; and on October 4, 1869, a hearing was had before the register and receiver, under instructions from the General Land Office, as to the character of the lands embraced in the townsite application.

Said hearing was not initiated by the mineral claimants of any lands embraced in the townsite application, but was directed in pursuance of what appears to have been at that time the practice of the General Land Office in case of application for a townsite. The mining claimants, as well as sundry preemptioners, were served with citations, and some of them appeared at the hearing; but no one appeared in behalf of the owners of what was known as the "Dromedary mine," embracing the area of the present mineral application. Witnesses testified, however, relative to the comparative value of

that ground for mining or townsite purposes. There was no application pending for a patent for the Dromedary mine.

The local officers' report of the hearing to the Commissioner, on file in the record relating to the townsite, states:

No effort has been made to disprove the mineral off these lands; each and every 40 acre tract is covered by mineral affidavits of miners charging the land as mineral. The supplemental act of Congress, approved June 8th, 1868, seems to provide that town lots may be proven upon mineral land.

Said act of March 2, 1867, *supra*, permits and regulates the entry for a townsite of public lands occupied as a townsite and therefore not subject to entry under the agricultural preemption laws; its final proviso being, "that no title shall be acquired under the provisions of this act, to any mine of gold, silver, cinnebar, or copper."

The supplementary or amendatory act of June 8, 1868 (15 Stat., 67), simply reenacts the permission granted by the original act of March 2, 1867, *supra*, with the addition of sundry provisos, among them this, "that no title under said act of March 2, 1867, shall be acquired to any valid mining claim or possession held under the existing laws of Congress." These provisos quoted from said two acts are consolidated and reenacted in the Revised Statutes as section 2392.

There appears, therefore, to have been no foundation for the construction given to said act of 1868, by the local officers in their report of the hearing to the Commissioner.

Notwithstanding, the Commissioner, by letter "G" of July 3, 1871, to the local officers, held the lands—specifically, said SE. $\frac{1}{4}$ of said Sec. 27—to be more valuable for agricultural and townsite purposes than for the mineral contained therein. And subsequently a townsite patent issued for certain of said lands, including the area of the present mineral application.

On the strength of the finding of comparative value for townsite or for mining purposes embodied in said Commissioner's letter of 1871, the Commissioner, in the decision under appeal, affirming the local officers' action, has denied the hearing sought and dismissed the mineral application, which is based on title derived under a relocation in 1879, the possessory right of the owners of the Dromedary mine having become forfeited for nonperformance of the required assessment work for 1878.

But the decision of 1871 was clearly not binding as to the ground embraced in a mine of gold or "a valid mining claim or possession held under existing laws," in view of the restrictive provisos quoted from the acts of 1867 and 1868, *supra*. Nor was the townsite patent issued in pursuance of that decision operative to convey title to such ground, if any such was embraced in its description. Such lands are

reserved by the terms of the townsite law, even if the reservation was not expressed in the patent.

In *Lalande v. Townsite of Saltese* (32 L. D., 211), a protest of mineral claimants against a townsite entry was dismissed because needless for their protection; the decision holding (syllabus):

A patent issued under the general townsite laws * * * is inoperative to convey the title to any lands known to be valuable for minerals at the date of the townsite entry, or to any valid mining claim or possession held under the mining laws at the date of such entry.

In the body of said decision it is stated:

The protestants have instituted no proceedings in the Land Department looking to the acquisition of the paramount title to the lands embraced in their alleged mining claims. In the absence of such proceedings, the Land Department should not undertake to determine their rights as to said lands. The proper time to make such determination * * * will be when application for patent to the same, or any of them, shall be filed under the mining laws.

To the same effect are several other decisions of this Department: *Hulings v. Ward Townsite* (29 L. D., 21); *Telluride Additional Townsite* (33 id., 542); *Nome and Sinook Co. et al. v. Townsite of Nome* (34 id., 102); *On Review* (id., 276). All these cases arose under the act of March 3, 1891 (26 Stat., 1095), which incorporates the same limitations set forth in the provisos above quoted, and also a proviso that—

No entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein claimant.

The case of *Dower v. Richards* (151 U. S., 658) is not contrary to the principle of the departmental decisions cited, the decision of the United States Supreme Court adverse to the mineral claimant in that case resting solely upon a finding of fact by the trial court that the mineral claim had been worked out and abandoned prior to the date of the townsite patent.

The appellant makes a strong prima facie showing, by the affidavits, filed with its petition for a hearing, of six individuals cognizant of the local conditions in 1869, that its case falls within the protection of the provisos quoted and also within that of the act of March 3, 1865 (13 Stat., 529, 530), reenacted as section 2386 R. S., and declaring that—

Where mineral veins are possessed, which possession is recognized by local authority, * * * the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof. * * *

The decision of the Commissioner is reversed and he is directed to order the hearing sought by the mineral applicant. In view of the advanced ages of those cognizant of local conditions in 1869, it is further directed that the hearing be ordered without delay.

WILLIAM B. NEHL*Decided February 15, 1919.***STOCK-RAISING HOMESTEAD—ENTRY IN LIEU OF RELINQUISHED ENTRY.**

One who relinquishes an entry, made under the provisions of the homestead laws, embracing an area of less than 640 acres of land of the character described in the stock-raising homestead act of December 29, 1916, in order to avail himself of the privilege conferred by section 6 thereof to make an entry for the full area of 640 acres in lieu of the former entry, must support such application with corroborated showing fully meeting the requirements of the act and regulations thereunder, but he is not required to comply also with the terms of the second homestead entry act of September 5, 1914.

VOGELSANG, First Assistant Secretary:

April 16, 1917, William B. Nehl filed application 034379 to make second homestead entry under the act of February 20, 1917 (39 Stat., 926), for the N. $\frac{1}{2}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$, and lots 1 and 2, Sec. 17, T. 20 N., R. 21 E., B. H. M., containing 591.55 acres, in the Lemmon, South Dakota, land district.

On that day he also filed a relinquishment of homestead entry 032384, made under section 7 of the enlarged homestead act for 160 acres.

On July 23, 1918, the Commissioner of the General Land Office decided that said entryman was not qualified to make said entry 034379 for the amount of land applied for, because, having relinquished his entry 032384, his right to another entry in place thereof is governed by the provisions of the act of September 5, 1914 (38 Stat., 712), which required the applicant to show, among other things, that his former entry was lost, forfeited or abandoned because of reasons beyond his control, and the Commissioner held that the facts shown did not warrant the allowance of a second entry under said act, from which decision appeal was taken to the Department.

The entryman contends that he did not relinquish entry 032384 to bring his subsequent entry within the terms of said act, but that on the contrary he was endeavoring to comply with the terms of section 6 of the act of December 29, 1916 (39 Stat., 862), interpreted in paragraph 10a of Circular 523 (45 L. D., 625, 629). Said section reads as follows:

That any person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, who has entered or acquired under the homestead laws, prior to the passage of this act, lands of the character described in this act, the area of which is less than six hundred and forty acres, and who is unable to exercise the right of additional entry herein conferred because no lands subject to entry under this act adjoin the tract so entered or acquired or lie within the twenty-mile limit provided for in this act, may, upon submitting proof that he resides upon and has not sold the land so entered or acquired and against which land there are no encum-

brances, relinquish or reconvey to the United States the land so occupied, entered, or acquired, and in lieu thereof, within the same land-office district, may enter and acquire title to six hundred and forty acres of the land subject to entry under this act, but must show compliance with all the provisions of this act respecting the new entry and with all the provisions of existing homestead laws except as modified herein.

The entryman urges that the land relinquished was stock-raising land of the character described in said act, but that he was unable to exercise the right of additional entry because no lands subject to entry under said act adjoined the tract already entered, or were within twenty miles of said tract; that he resided upon said land, and had not sold it nor the improvements thereon; that there was no encumbrance against said land, and that therefore he relinquished said land to the government in order that he might acquire title to the land described in entry 034379, now pending. Said lands applied for were designated as stock-raising lands by order dated May 10, 1918, and the other facts alleged by the entryman, and necessary to comply with the terms of said law, appear to be established, except that the land relinquished had not been designated as stock-raising land.

But the law does not require that the land relinquished shall have been actually designated as stock-raising land at the time application for other lands is made. It merely states that the land relinquished shall be of that character. And if in fact the land relinquished is stock-raising in character, even though not designated, the fact that the applicant had made and relinquished such a homestead entry as in this case will not deprive him of the right of taking stock-raising land, if he complies with the rest of the terms of said act. And he is not required to comply also with the terms of the act of September 5, 1914, referred to by the Commissioner.

This entryman regularly filed an application to have the land applied for and the land relinquished designated as stock-raising land, and should the designation be made, his application should be accepted for the amount of land applied for.

The decision is reversed and the case remanded for action consistent herewith.

STEPHEN BACON.

Decided February 19, 1919.

ENLARGED HOMESTEAD IN IDAHO—ACTS OF JUNE 17, 1910, AND SEPTEMBER 5, 1916.

While originally the enlarged homestead act of February 19, 1909, did not apply to lands in the State of Idaho, its provisions were extended thereto by the act of June 17, 1910; and the amendment of July 3, 1916, adding section 7 to the original act, was likewise extended by act of September 5, 1916.

VOGELSANG, *First Assistant Secretary:*

February 2, 1900, Stephen Bacon made homestead entry for the SW. $\frac{1}{4}$, Sec. 17, T. 49 N., R. 4 W., 160 acres, Coeur d'Alene, Idaho, land district, the same being Indian lands opened to entry under the act of March 3, 1891 (26 Stat., 989, 1031). Commutation proof was submitted thereon and certificate issued June 16, 1903, which was followed by patent September 9, 1904.

December 3, 1917, Bacon filed additional homestead application 015545 for the NE. $\frac{1}{4}$, Sec. 30, T. 39 N., R. 69 W., containing 160 acres, Douglas, Wyoming, land district, under section 7 of the enlarged homestead act of February 19, 1909 (35 Stat., 639), as amended by the act of July 3, 1916 (39 Stat., 344).

On the same day he filed his application 015546 under the stock-raising homestead act of December 29, 1916 (39 Stat., 862), for the N. $\frac{1}{2}$, Sec. 29, T. 39 N., R. 69 W., containing 320 acres. These applications were accompanied by petitions for the designation of all the described lands under said respective acts.

Both of said applications were rejected by the local officers; that under the enlarged homestead act upon the ground that said act did not apply to lands in the State of Idaho, and that under the stock-raising act for the reason that the application under the enlarged homestead act had been disallowed.

May 4, 1918, the Commissioner of the General Land Office in his decision upon appeal said that the local officers erred in holding that the enlarged homestead act did not apply to lands in the State of Idaho, as such homesteads in that State were provided for by the act of June 17, 1910 (36 Stat., 531), and that the act of July 3, 1916 (39 Stat., 344), amended the original enlarged homestead act by adding section 7 thereto, which was by the act of September 5, 1916 (39 Stat., 724) extended to the State of Idaho; that accordingly there was no reason why Bacon could not make such additional entry in Wyoming under said section 7 of the enlarged homestead act as amended, provided that the designation requirements as to both the tracts embraced in his original entry and those in his additional application were complied with.

Regarding the stock-raising application, it was held that as that act does not authorize an additional entry outside of a radius of twenty miles from the original entry, said application could not be entertained for the land applied for in the State of Wyoming. Accordingly the application under the stock-raising act was rejected.

The application under section 7 of the enlarged homestead act as amended was returned for suspension pending designation of the land applied for together with that in Idaho covered by his original entry.

The decision appealed from was modified accordingly and attention was called to the fact that the designation petition did not cover the land situated in Wyoming, but merely that included in the Idaho entry, the same apparently being an oversight in the preparation of the petition. The local officers were directed to notify applicant to execute and file a supplemental petition correctly describing all of the lands of which the designation is sought under said enlarged homestead act.

The applicant has appealed to the Department from that part of said decision rejecting the application under the stock-raising act, and it is urged in support thereof that the land in Wyoming embraced in the application for additional entry under the enlarged homestead act "should be construed as a part of the original homestead entry," and that the same being within twenty miles of the land applied for under the stock-raising act, the entry of the latter should be allowed.

Regarding the application made under the stock-raising act, the case appears to come under the rule announced in the Makela case, wherein Departmental decision was rendered December 27, 1918 (46 L. D., 509). In that case Makela had in 1897 made homestead entry for 160 acres of land in South Dakota, upon which final certificate was issued in 1903, and patent followed. The land having been designated under the act of February 19, 1909 (36 Stat., 639), he, on October 18, 1916, made an additional entry under section 7 of said act. January 25, 1917, he filed application to make an entry under the stock-raising act of December 29, 1916, which was rejected for the reason that the land applied for was not within twenty miles of the tract embraced in his original entry.

The Department in its decision in that case said:

If it is kept in mind that the first entry under the stock-raising act is not an additional entry under that law, no matter how many prior entries under other homestead laws have been made, the provisions as to making additional entries will be more readily understood. In the opinion of the Department it was not the intention of Congress to limit the making of original entries under the act to land within twenty miles of former *perfected* entries under other laws. But it does limit the making of entries to land within twenty miles of the land embraced in former *unperfected* homestead entries under this or other laws and to *perfected* entries under this law.

It is therefore not necessary that the land embraced in the application in this case, under the stock-raising act, should be within twenty miles of the land in the State of Idaho covered by the former *perfected* entry, as held in the decision appealed from.

Accordingly, following the decision in the Makela case, the decision of the Commissioner herein is reversed, and the case is remanded for further consideration and action in the light of that decision.

EBNER GOLD MINING COMPANY v. T. C. HALLUM ET AL.

Decided February 19, 1919.

MINING CLAIM—NOTICE OF MILL SITE APPLICATION.

Notice of an application for mill site under section 2337, Revised Statutes, located for mining and milling purposes in connection with a lode mining claim is accorded the same force and effect as that given to a notice of the application for the vein or lode claim.

MINING CLAIM—MILL SITE—ADVERSE PROCEEDINGS.

In order to protect his rights, one claiming a mill site under section 2337, Revised Statutes, is authorized and required under sections 2325 and 2326 to institute adverse proceedings against a conflicting application for mill site patent under said section 2337, and such proceedings properly instituted constitute a bar to further action by the Department until the adverse suit shall have been decided.

DEPARTMENTAL DECISION DISTINGUISHED.

Helena, Etc., Co. v. Dailey, 36 L. D., 144, distinguished.

VOGELSANG, *First Assistant Secretary:*

The Ebner Gold Mining Company has appealed from the decision of the Commissioner of the General Land Office of July 9, 1917, directing the rejection and dismissal of its adverse claim 03597 against the mineral application 03484 of T. C. Hallum *et al.*, for the Arimildia and other lode mining claims and the Hile Nos. 2 and 3 mill sites, survey No. 1048 A and B, situate in the Juneau, Alaska, land district.

The company also appealed from so much of the Commissioner's decision as rejected its adverse claim 01760 against the soldiers' additional application 01651, of Richard F. Lewis, for certain land situate in the same district, but has filed a motion to dismiss its appeal from that action and said motion is granted.

The application of Hallum *et al.* was filed December 18, 1916, and contemporaneous publication and posting of notice thereof was had for the statutory period ending February 26, 1917. The adverse claim against said application was filed April 27, 1917, and alleged that the Hile Nos. 2 and 3 mill sites included in the application conflict with two mill site claims known as the Taku and Grand Review, located and owned by the company:

That at the time of the location of said Taku and Grand Review mill sites by the adverse claimant herein it owned and was developing and opening up a number of valuable lode mining claims in close proximity to said mill sites and at an elevation up the mountain side from said mill sites to make the said mill sites very valuable to be used in connection with the development and opening up of the large ore bodies embraced within the lode mining claims and property then owned and being developed by said protestant and adverse claimant; that all of said lode mining claims are contiguous to each other and form one continuous group of claims and are known as the Ebner Mine; that said Ebner

Mine as well as said Taku and Grand Review mill sites are contiguous to each other and are situated along Gold Creek a short distance from the City of Juneau, Alaska; that at the time of the location of said Taku and Grand Review mill sites the Ebner Gold Mining Company, adverse claimant herein had after an expenditure of several hundred thousand dollars opened up tremendous ore bodies carrying gold and had a main tunnel cross cutting the formation and vein system 8 x 8 feet in the clear and 3,600 feet, and had 8,000 feet of development work done upon said property in addition to the construction of five stamp sampling and milling plant and air compressor, and had appropriated and used the waters of Gold Creek by constructing 4,000 feet of flume and about 450 feet of pipeline to convey said water to said Ebner Mine for the purpose of developing and opening up the ore bodies therein contained.

That the adverse claimant located said Taku and Grand Review mill sites for the purpose of using the same in connection with the treatment and reduction of the ore bodies to be mined from said mining property.

The individual lode claims comprising the group referred to in the adverse claim as the Ebner Mine and for use in connection with which the said Taku and Grand Review mill sites are alleged to have been located are not named in the instrument, but it otherwise appears from the record in the case that the group consists of 11 claims, 8 of which appear to have been patented.

It is urged by appellant that the adverse claim is allowable under the provisions of section 10 of the act of May 14, 1898 (30 Stat., 409, 414). It is sufficient to say, however, in answer to this contention, that the adverse claim was not filed within the period prescribed by said act and for that reason would in no event be entitled to consideration under the act.

The instrument, however, was filed within the period prescribed by the act of June 7, 1910 (36 Stat., 459), which declares that in the District of Alaska adverse claims authorized and provided for in sections 2325 and 2326, Revised Statutes, may be filed at any time during the period of publication or within 8 months thereafter. It further appears that suit has been instituted in support of the adverse claim and is now pending. The case therefore presents for departmental determination the question as to whether one claiming a mill site under section 2337, Revised Statutes, is required or authorized under sections 2325 and 2326, Revised Statutes, to institute adverse proceedings against an application for patent to said ground under the same section in order to protect his rights.

Said section 2337 provides that—

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes. * * *

By section 2325 it was provided that upon the filing of an application for patent to a lode mining claim notice thereof shall be published and posted for a period of 60 days and that—

If no adverse claim shall be filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, * * * and that no adverse claim exists.

Section 2326 provides that—

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.

The foregoing provisions were without change carried into the Revised Statutes from sections 15, 6 and 7, respectively, of the general mining act of May 10, 1872 (17 Stat., 91).

In providing that a mill site claim may, subject to the same requirements as to preliminary notice as are applicable to veins or lodes, be embraced and included in an application for patent for the vein or lode with which the mill site is used or occupied for mining or milling purposes, Congress clearly intended that notice of the application for the mill site should be accorded the same force and effect as would be given a notice of the application for the vein or lode. The effect of such notice of application for the vein or lode is, in the absence of adverse claim filed within the prescribed period, to give rise to the assumption under the provisions of section 2325 that no adverse claim exists and that the applicant is entitled to a patent, and by section 2326 it is provided that notice of the application for patent for a vein or lode shall be accepted as basis for patent to a successful adverse claimant complying with the requirements of the section, to all or such portion of the vein or lode applied for as a successful litigant shall appear from the decision of the court to rightly possess.

Considering these provisions together, which, as before stated, were all contained in the general mining law of 1872, the Department is of opinion that they not only permit but require prosecution of adverse proceedings by one claiming a mill site in conflict with another mill site embraced in an application for patent. While the precise question has not heretofore, so far as the Department can find, been passed upon by either the courts or the Department, it is to be noted that the courts, both Federal and State, have recognized mill sites as proper subjects for adverse proceedings and have entertained adverse suits respecting them. *Durgan v. Redding* (103 Fed., 914); *Shafer v. Constans* (3 Mont., 369); *Cleary v. Skiffich* (65 Pac., 59). It is true that in *Helena etc., Company v. Dailey* (36 L. D., 144), the Department held that said sections 2325 and 2326 do not require adverse proceedings in court by a mill site claimant in order to protect his rights as against an application for patent to a lode claim in conflict with the mill site, but that by protest proceedings in the Land Department the mill site claimant can litigate all matters relating to the ownership and validity of his claim. In that case, however, the fundamental question was as to the character of the land in dispute and the departmental ruling was based upon the ground that said section contemplated judicial proceedings to determine only the right of possession as between claimants under the mining laws and not to decide controversies respecting the character of public land. In the case at bar, however, both parties are claiming the land to be of the same character and subject to disposition under the same provisions of the law, the only question involved being as to which of the parties is entitled to possession under their respective locations.

It is accordingly held that the adverse claim of appellant is properly filed and that the same constitutes a bar to further proceedings by the Department until the adverse suit instituted thereon shall have been determined.

The decision appealed from is accordingly reversed.

ELDON A. McMAHAN.

Decided February 19, 1919.

HOMESTEAD APPLICATION—APPEAL FROM REJECTION—CHANGE OF INSTRUCTIONS.

Where a homestead application is filed for a tract classified as timber land, accompanied by a petition for reclassification, which application is rejected because of failure to tender one-fifth of the purchase price, and applicant appeals therefrom, subsequent instructions directing the rejection of all applications for lands so classified will prevent the applicant from securing the suspension of such application by thereafter depositing the required payment of purchase money.

VOGELSANG, First Assistant Secretary:

Eldon A. McMahan has appealed from a decision of the Commissioner of the General Land Office, dated October 4, 1918, rejecting his application to make homestead entry under section 2 of the act of April 28, 1904 (33 Stat., 527), for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 10; SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, T. 34 N., R. 30 E., W. M., within the Waterville, Washington, land district, as additional to homestead entry for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 10, said township and range, the lands being within the former Colville Indian Reservation.

June 14, 1917, McMahan applied to make additional entry for said land. The tracts are classified as timber land. The same date the local officers mailed notice of rejection to the applicant, assigning as reason therefor that the land was classified as timber land and not subject to entry; that the applicant did not tender one-fifth of the purchase price of the land, and that the application was not in proper form.

June 27, 1917, applicant filed an application on the proper form to make additional entry of the said land together with an application for reclassification thereof. In rejecting the second application the local officers assigned as reason therefor, that applicant did not tender one-fifth of the purchase price of the land with his application. Applicant appealed to the Commissioner and, on July 6, 1918, the Commissioner affirmed such rejection. August 21, 1918, the local officers advised the Commissioner that applicant had on that date deposited one-fifth of the appraised price of the land for which official receipt had been issued. October 4, 1918, the Commissioner advised the local officers that at the time the application was filed, under the practice then in force, the application should have been received and suspended had the required payment of purchase money been tendered, but that the present practice, however, requires the rejection of applications for lands on the reservation classified as timber. He further stated that such practice follows instructions given the local officers by telegram dated July 13, 1917, in which they were directed to reject such applications and ordered that the rejection stand. The case is before the Department on appeal by applicant from the last mentioned decision.

The record has been examined and no valid reason appears for disturbing the action taken by the Commissioner. Applicant gained no rights by the filing of his application of June 27, and he was given notice upon rejection of his application of June 14 that it was necessary to deposit one-fifth of the purchase money with his application. Notwithstanding such knowledge, he failed to deposit such amount with his application of June 27, but attempted to gain a preference right by filing a petition for reclassification. Had he

deposited a requisite amount, under the practice at that time, his application would have been received and suspended pending field investigation. Having no rights in the premises, he can not complain of the subsequent change of practice requiring the rejection of applications for lands on the reservation classified as timber of which the local officers were notified on July 13, 1917.

The decision appealed from is affirmed.

SMITH v. EDGMON.

Decided February 19, 1919.

CONTEST AFFIDAVIT—AMENDMENT—RELINQUISHMENT OF ENTRY.

Where a contestant appeals from a decision holding that the charges contained in his affidavit are insufficient, he does not by so doing forfeit the right to thereafter file an amended affidavit of contest, and where a relinquishment of the entry under attack is filed after the affidavit has been so amended, it will be conclusively presumed to have been induced by the contest.

VOGELSANG, First Assistant Secretary.

George W. Edgmon has appealed from the decision of the Commissioner of the General Land Office dated April 4, 1918, allowing the application of Laura E. Smith to contest his homestead entry for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 28. NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 29, T. 2 S., R. 2 E., H. M., within the Eureka, California, land district, and granting her a preference right, in view of the relinquishment filed by Edgmon during the pendency of the contest, to make application to enter the land within thirty days from notice.

The entry was made June 7, 1910, and on August 28, 1916, Laura E. Smith filed contest against same, charging that entryman had abandoned the land and had not cultivated the same as required by law. Contestee filed a motion to dismiss the contest on account of the insufficiency of the charges, and the local officers transmitted the record to the Commissioner with a request for instructions. January 3, 1917, the Commissioner held the charges insufficient and allowed contestant thirty days from notice in which to file a properly corroborated, amended affidavit, or to appeal. Contestant appealed and on June 8, 1917, the decision of the Commissioner was affirmed by the Department. By Commissioner's letter "H" of August 7, 1917, the case was closed, leaving the entry intact.

It appears that on July 12, 1917, after receipt of departmental decision, the contestant filed a properly amended affidavit of contest, the charges contained in which, if established, were sufficient to cancel the entry. This application was accepted and notice issued, which was served August 6, 1917. September 1, 1917, a relinquish-

ment of the entry was filed, accompanied by Edgmon's timber and stone application for the land, whereupon the local officers rejected the amended contest, holding that the right to file an amended contest affidavit had been forfeited by taking an appeal to the Department from the Commissioner's decision of January 3, 1917.

The record has been examined and no valid reason appears for disturbing the action taken by the Commissioner. As held by him, the appeal aforesaid can not be considered as a waiver of contestant's right to amend. The only question involved in said appeal was the sufficiency of the original affidavit, and the right to amend same was not lost or forfeited by taking an appeal. Whether the second affidavit be considered as an amendment of the original or as a new contest, the relinquishment in the face thereof must be considered to be conclusively presumed to have been induced by the contest. Hence the preference right of contestant attached immediately upon the filing of the relinquishment and contestant would have thirty days from notice within which to exercise her preference right. It further appears from the record that contestant was notified by the local officers on April 13, 1918, of the Commissioner's decision of April 4, 1918, and that on May 13, 1918, she filed timber and stone application for the land. The timber and stone application of contestee, being in conflict therewith, will be rejected.

The decision appealed from is affirmed.

STAR GOLD MINING CO.

Decided February 19, 1919.

MINING LOCATION—ADVERSE SUIT—LOSS OF DISCOVERY.

Where as the result of a judgment in an adverse suit that part of the applicant's location containing the original discovery is lost, it is essential that there be shown a discovery made upon that portion of the claim remaining intact prior to date of filing application for mineral patent.

MINERAL CLAIM—FURTHER DISCOVERY—PRESUMED EXTENSION OF VEIN.

In connection with a *bona fide* lode location there arises a presumption of fact that the located vein extends throughout the length of the claim, and if the original discovery be lost, a further timely discovery upon retained ground, although more than 300 feet distant from a side line, evidences the mineral character of the land and is sufficient to support the claim.

VOGELSANG, First Assistant Secretary:

The Star Gold Mining Company which, on July 14, 1913, filed its mineral application 08991 for the Asbestos and five other lode mining claims, survey No. 757, situate in Sec. 13 and 14, T. 39 S., R. 1, W., W. M., Roseburg, Oregon, land district, has appealed from the

decision of the Commissioner of the General Land Office, dated July 30, 1918, wherein the application was finally rejected as to said Asbestos claim substantially because of failure to show a discovery of the vein or lode upon projected lode line within the retained area of the location after a loss of the ground (about 6 acres of the western end of the claim), containing the original discovery, by reason of a judgment in an adverse suit. The company was also allowed thirty days from notice within which to make payment of the proper purchase price of the five other claims and furnish a statement of fees and charges or to appeal, in default of which it was stated that "the application will be rejected without further notice."

As a matter of strict practice the appeal as to the Asbestos claim is late, the Commissioner, on May 2, 1918, having called for a showing and none having been submitted after due notice, the application as to said claim was rejected as above stated. As the case is *ex parte* and the record is before this Department, the appeal will be considered on its merits.

In the adverse suit of R. W. Dunlap *v.* the Star Gold Mining Co., on May 27, 1914, a judgment, which became final, was rendered awarding to the plaintiff the area in conflict between his Columbine lode claim and the company's Asbestos location. A certified copy of that judgment was furnished the Surveyor General in order that proper amendments might be made to the plat and field notes of the survey. The Surveyor General, on December 1, 1917, reported that the Asbestos discovery was within the conflicting area lost from that claim and stated that this would automatically cancel the Asbestos application. The company, on December 20, 1917, was notified by the Commissioner that, unless a discovery on the portion of the Asbestos claim not in conflict was made prior to application, rejection of the application as to that claim would be necessary. The president of the company filed his affidavit, which contains the following allegations:

* * * that other discoveries were made on said Asbestos claim before the date of application Patent or for survey and the same are as follows: Cut No. 2, which is N. 67° 38' E. 627 feet from Corner No. 4 of said Asbestos claim and Shaft No. 3 which is N. 73° 57' E. 556 feet from Corner No. 4 of said Asbestos claim and the Star Gold Mining Co. hereby claims said cut No. 2 as the discovery of the Asbestos claim as now constituted after cutting off the land covered by the conflict.

The Commissioner, on May 2, 1918, found that the points of discovery described were about 84 feet and 160 feet, respectively, south of the lode line shown on the plat and that, unless such discoveries were on the dip, the north side line would have to be drawn in to within 300 feet of the discovery in order to comply with the statute, in which event the claim would be rendered noncontiguous to the re-

mainder of the group and would have to be rejected. The applicant was required to show that the discoveries were on the vein or that another discovery had been made upon the vein prior to application. No further showing was made, and the rejection of the claim followed.

Counsel for the company insists that the Asbestos claim was located and developed in good faith as a part of the group; that the second discovery described is about 80 feet from the center of the claim "and in a blanket formation such as this would be near enough to cover the discovery technicality", and that the rule should be and is that any discovery within the intact portion of the claim is sufficient even if not midway between its side lines.

The Supreme Court has announced that a valid subsisting location has the effect of a grant and operates as a bar to a second location and that, if title to a discovery fails, so must the location which rests upon it, the loss of the discovery being a loss of the location. *Belk v. Meagher* (104 U. S., 279) and *Gwillim v. Donnellan* (115 U. S., 45). In the last cited case the court stated that all the labor was done at the discovery shaft and that there was no claim of a second discovery at any other place than where that shaft was sunk. In *Swanson v. Sears* (224 U. S., 180, 181), it was stated that "a location and discovery on land withdrawn *quoad hoc* from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right."

In *Waskey v. Hammer* (223 U. S., 85, 91) the Supreme Court, speaking through Mr. Justice Van Devanter, said:

* * * A discovery without the limits of the claim, no matter what its proximity, does not suffice. In giving effect to this restriction, this court said, in *Gwillim v. Donnellan*, 115 U. S., 45, that the loss of that part of a location which embraces the place of the only discovery therein is "a loss of the location." Possibly what was said went beyond the necessities of that case, critically considered, but it illustrates what naturally would be taken to be the effect of the statute; and as that view of it has been accepted and acted upon for twenty-five years by the Land Department and by the courts in the mining regions, it should not be disturbed now. * * *

As no adverse right had intervened at the time of Whittren's subsequent discovery of mineral within the limits of the readjusted location, it must be conceded that that location became effective as of that time, just as if he had then marked those limits anew. * * *

The Supreme Court of Utah, in the case of *Silver City Etc. Co. v. Lowry et al.* (57 Pac., 11, 14), said:

* * * Chief Justice Waite indicates, from the language used in the opinion in the case of *Gwillim v. Donnellan*, supra, that, if it had appeared that a second discovery had been made at any place on the defeated claim, other than the original discovery which was within the patented ground, the right to the portion of the claim outside of the patent would not have been lost. The Land De-

partment having established the rule thus indicated, we are of the opinion that under the facts disclosed by the evidence and findings, the case at bar is clearly within the rule thus established, and no decision holding a contrary view having been brought to our notice, it should be followed in this case.

In the case of *Tonopah and Salt Lake Mining Co. v. Tonopah Mining Co. of Nevada* (125 Fed., 408, 414), District Judge Hawley held that the location was good as to the retained ground because the evidence showed that rock in place containing mineral was discovered in different places within the limits of the location and that there were several ledges all of which were discovered prior to the location of the conflicting adverse claim. In *Bingham Amalgamated Copper Co. v. Ute Copper Co.* (181 Fed., 748), it was held (syllabus):

The fact that a mining claim which has gone to final entry without adverse claim includes the original discovery on which a prior claim was based does not necessarily defeat the right of the prior locator to the remainder of his claim, provided other veins have been discovered on such portion, and it appears that there was no actual intent to abandon the claim.

The decisions of the Land Department have been along essentially similar lines. The Department, in the case of *Gustavus Hagland* (1 L. D., 593, 594, 595), use the following language:

* * * I am of the opinion that the development and possession of the lode so far as it runs upon public land was not interfered with in any manner by the waiver of a portion, even though the original discovery shaft was included in the portion disposed of.

The continued possession and working of such outside portion under the original ownership and location ought not to be held as forfeited while the good faith of the owner toward the United States is not impaired; * * *

* * * * *

If the existence of the lode be shown beyond the lines of the conflicting survey, and application be made for patent, it would seem to work a complete abrogation of a property and statutory right to deny a patent thereon because of a sale or surrender of some other portion of the lode originally embraced in the discovery and location.

In the case of *James Mitchell et al.* (2 L. D., 752, 753), it was said:

The evidence on file shows, however, that a vein or lode was discovered within the ground claimed *prior to application* for patent.

No adverse rights to said ground appear to have been asserted. When the discovery of the vein or lode within the ground claimed was made there was of record a sufficient notice to all the world of the claim of said Mitchell and Hampton to the ground applied for. In the absence of any showing to the contrary it is assumed that the boundaries of their claim were then plainly marked upon the surface thereof.

Under these circumstances it would, in my opinion, have been wholly unnecessary, after said discovery, to have again marked the boundaries and again filed notice of location of the ground applied for. The question of their right to a patent for the ground claimed is between these parties and the United States alone.

With reference to the Cayuga Lode (5 L. D., 703), it was held (syllabus):

The exclusion of that portion of the claim which contains the discovery shaft, renders it incumbent upon the applicant to show the existence of mineral within the remainder of the claim, prior to the allowance of entry therefor.

In the case of the Antediluvian Lode and Mill Site (8 L. D., 602), it was held (syllabus):

Patent will not issue on an application wherein the land upon which are situated the discovery shaft, and improvements, is expressly excepted therefrom, and the proof fails to show the discovery or existence of mineral on the claim as entered, or the requisite expenditure for the benefit thereof.

In departmental decision involving the Lone Dane Lode (10 L. D., 53, 54), the conclusion is as follows:

The Department has held that patent will not issue on an application wherein the land upon which are situated the discovered shaft and improvements, is expressly excepted therefrom and the proofs fail to show the discovery of mineral on the claim as entered, or the requisite expenditure for the benefit thereof. Antediluvian Lode and Mill Site (8 L. D., 602). See also Independence Lode (9 L. D., 571).

The record showing the land upon which all the improvements claimed for the Lone Dane entry to have been expressly excluded from the claimant's application for patent and there being no satisfactory proof of the discovery or existing of mineral on the claim as entered the case at bar comes squarely within the rule laid down in the case cited.

The mining regulations (44 L. D., 247, 286) set forth that the object of the statutory provision regarding discovery is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists, and it is prescribed that the claimant should determine, if possible, the general course of the vein in either direction from the point of discovery by which direction he will be governed in marking the boundaries of his claim on the surface. Paragraph 133 states that, in the absence of other proof, the discovery point will be held to be the center of the vein on the surface, and that the course and length of the vein should be marked upon the plat.

★ The statute, Sec. 2320, R. S., contemplates that a claimant will locate not exceeding 1,500 feet along the discovery vein or lode. It is to his interest to so locate. In connection with a mining location there arises a presumption, essentially one of fact, that the located vein extends throughout the length of the claim. The claimant is not only entitled to the discovered vein but to all other veins, lodes, and ledges apexing within the free ground included in the surface location. Sec. 2322, R. S. Even where it may be demonstrated that the discovery vein deviates materially from a central course through the claim, the location as originally staked and marked in good faith

will stand. In *Harper v. Hill* (113 Pac., 162) it was held by the Supreme Court of California that one who locates a mining claim in good faith is protected in his possession of the surface marked out, although subsequent developments may show that his location of the apex of the vein was erroneous. There the court declined to treat any part of such a claim as excess requiring the drawing in of the side line.

So, in the case at bar, the Department believes that the Asbestos location as made, marked, surveyed and applied for, exclusive of its conflict with the Columbine claim, should be respected and permitted to stand. Had Dunlap failed to adverse, the application for the Asbestos location in its entirety would have been good beyond question. The adverse consequences following from the loss of that conflict with the original discovery therein should not be pressed to an extreme. A discovery upon claimed ground, although more than 300 feet distant from a side line, evidences the mineral character of the land. The Department is not disposed, under the facts and circumstances here disclosed, to hold that the Asbestos location, as the same is now asserted and applied for, is defective or excessive.

It is therefore concluded that, if the improvements are sufficient and in the absence of any other objections, the application for the Asbestos claim should be reinstated. The decision of the Commissioner rejecting the company's application for patent as to said location, upon the grounds therein set forth, is reversed and the applicant company will be granted a reasonable time within which to complete its proofs and make payment in accordance with the law and regulations.

CHARLES S. THOMAS.

Decided February 19, 1919.

COAL LAND APPLICATION—PURCHASE PRICE.

While an applicant under section 2347, Revised Statutes, is not compelled to pay the purchase price at the time of filing his coal land application, yet where such payment is so deferred under the authority of the regulations of July 17, 1917, and an increase in valuation occurs subsequent to application, but prior to actual tender and payment of the purchase money, the higher price will prevail.

Vogelsang, *First Assistant Secretary*:

September 10, 1917, Charles S. Thomas filed coal land application 021271, Cheyenne, Wyoming, for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 32, T. 21 N., R. 80 W., 6th P. M. This tract had been appraised, on June 1, 1907, at \$20 per acre. It was reappraised, on September 14, 1917, at \$158 per acre. By his decision of March 30, 1918, the Commissioner required the applicant to pay the latter price, from which decision he has appealed to the Department.

In the appeal it is asserted that at the time of the application Thomas offered to pay the register the purchase price under the appraisal of June 1, 1907, but that the register informed him that he need not pay at that time but that payment should be made later and that these statements would more fully appear in communications from the register in the present record. A report by the register, dated January 26, 1918, is as follows:

At the time of application he asked if he should then pay the purchase price (\$20 per acre) and was informed that it was not necessary to pay until the application had been completed and the money was called for.

The regulations of July 7, 1917 (46 L. D., 131, 142), in effect at the time this application was filed, provide, in the third paragraph to section 18:

Applicants to purchase under section 2347 of the Revised Statutes may at their option pay for the land at the time of filing their applications to purchase, or at any time thereafter, up to 15 days from and after receipt of notice from the register and receiver, as hereinbefore provided. The price to be paid will be that existent at date of actual payment of the purchase money by the applicants to the register and receiver, and a subsequent increase in the price will not affect their right to complete the applications, if proceedings be diligently prosecuted to final proof and entry. Where payments are not made at time of filing applications to purchase, but are deferred to a later date, and an increase in valuation has occurred subsequent to application to purchase, but before the actual tender and payment of the purchase money, the applicants will in all such cases be required to pay the new or higher price.

While the applicant was not compelled to pay the purchase price at the time of filing the application, if he nevertheless chose to defer payment it was with the liability of paying a higher price should a reappraisal in the meantime be made, as set forth in the above regulation.

No error being found in the Commissioner's decision, it is hereby affirmed.

HEIRS OF DANIEL MAHONEY.

Decided February 24, 1919.

THREE-YEAR HOMESTEAD—PROOF BY WIDOW OR HEIRS—HABITABLE HOUSE.

While section 2291, Revised Statutes, as amended by the act of June 6, 1912, relieves the widow or heirs of a deceased homestead entryman from the necessity of maintaining residence upon the land embraced in the entry, it does require that it be shown when final proof is offered that "she or they have a habitable house upon the land."

VOGELSANG, *First Assistant Secretary:*

The heirs of Daniel Mahoney have appealed from a decision of the Commissioner of the General Land Office dated January 7, 1919, rejecting the final proof submitted June 15, 1918, on said Mahoney's homestead entry, made August 28, 1914, for S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$,

and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 32, T. 17 N., R. 4 W., M. M., Helena, Montana, land district.

It appears that entryman died December 29, 1914, without having established residence on the land. The decision appealed from held the proof unsatisfactory because it did not appear that any of the land was cultivated during 1917.

Affidavits filed with the appeal clear up the uncertainty which was caused by the final-proof testimony as to when cultivation was performed. It is now made to appear that 10 acres were planted during the fall of 1915, for harvesting in 1916; in the fall of 1916, 20 acres additional were planted, the 20 acres being harvested in 1917. No crop was planted in the spring of 1918, because the heirs were unable to find anybody who would do the work. It is alleged that even if a crop had been planted then it would have been a failure, as the crops on neighboring lands were so damaged because of the drought that the farmers were not reimbursed by the returns for the labor and seed. However, the required area was cultivated during the second and third years from date of entry, and the final proof having been submitted almost two and one-half months prior to the expiration of the fourth year, it must be held that the cultivation required by law has been performed.

However, the proof fails to show that there is a habitable house upon the land, as required by section 2291, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat., 123). While the act cited excuses the widow or heirs of a homesteader from maintaining residence, it requires that it be shown when final proof is submitted that there is a habitable house upon the land. The final proof must, therefore, stand rejected, the decision appealed from being modified to agree herewith.

THOMAS W. McCLOSKEY (ON REHEARING).

Decided February 24, 1919.

HOMESTEAD ENTRY—FOREST WITHDRAWAL—ACT OF MARCH 3, 1911.

Where because of the ownership of more than 160 acres of land one is disqualified at date of settlement and also at date the tract involved is embraced in a forest withdrawal, but is duly qualified at time of allowance of the homestead entry based on such settlement and no fraud in connection therewith being disclosed, said entry thus "invalid solely because of the erroneous allowance" comes within the provisions of section 1 of the act of March 3, 1911, and is validated thereby.

VOGELSANG, First Assistant Secretary:

The Solicitor for the Department of Agriculture has filed a motion for rehearing in the matter of the proceedings on an adverse report of a Forest Service officer against the homestead entry of Thomas W. McCloskey, made October 11, 1909, for W. $\frac{1}{2}$ SW. $\frac{1}{4}$.

SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, T. 24 S., R. 9 W., W. M., Roseburg, Oregon, land district, wherein the Department, by decision of January 13, 1919 [not reported], reversed a decision of the Commissioner of the General Land Office dated September 13, 1918, and held that the entry was erroneously allowed but that it was validated by the act of March 3, 1911 (36 Stat., 1084).

It is contended in the motion that the departmental decision is diametrically opposed to and inconsistent with the decisions in the cases of Robert L. Morris (44 L. D., 439) and David W. Hennessey (Kalispell 0553), unreported.

The case of Morris involved an application to make entry; hence the act of 1911 was not applicable thereto.

The entry of David W. Hennessey was made August 22, 1905, for a tract within an area which was withdrawn January 9, 1904, for forestry purposes. Hennessey alleged settlement in December, 1903. Thereafter a protest against the entry was filed by a forest officer, and a hearing had, and upon the record made up the local officers found that Hennessey had not established such settlement claim prior to withdrawal as excepted the tract from the operation of the withdrawal, and that the alleged acts of settlement in December, 1903, were not upon the tract entered. Further, that those acts had not been followed up by such showing as evidenced maintenance of a home in good faith, and that, as a consequence, the allowance of his homestead entry in 1905 was improper in view of the order of withdrawal. This Department, on appeal, reached the same conclusion, and the entry was accordingly canceled. Thereafter, Hennessey filed a petition for the exercise of supervisory authority and reinstatement of his entry under said act of 1911. This petition was denied by decision of March 29, 1911, it being held:

The said remedial act can not be invoked to validate an illegal entry which was permitted to be made only because of the untrue or fraudulent statements made by the applicant for the purpose of procuring allowance of his entry.

Four charges were preferred against the entry here involved: (1) That in October, 1906, at the date of the alleged settlement, and on March 2, 1907, the date of the forest withdrawal, McCloskey was the owner of more than 160 acres of land; (2) that he had not established and maintained residence on the land; (3) that he had made only a pretense at cultivating the land, and (4) that he did not enter the land for the purpose of securing a home, but for the purpose of securing the valuable timber thereon. The decision appealed from dismissed the proceedings except as to the first charge, from which action the Solicitor for the Department of Agriculture did not appeal. As to the first charge, claimant admitted that on the date of settlement and until long after the forest withdrawal he was the owner of 160 acres acquired by him under the timber and stone law,

and also of several lots in the towns of Myrtle Point and Bandon, at least two of which comprised one acre each. Upon these facts the decision below held that claimant was not a qualified settler on March 2, 1907, and that therefore he had no rights which he could assert in the face of the withdrawal of that date.

The case of Hennessey differed materially from the case at bar. In that case the entryman's claim of settlement was held to be fraudulent; whereas the evidence in the case under consideration shows that claimant throughout acted in good faith, and that before making settlement he was advised by an United States commissioner that town lots were not considered in determining qualifications as to ownership of land. When he applied to make entry he was not the proprietor of more than 160 acres of land, having divested himself of the ownership of 160 acres. Hence his application to make entry did not contain any untrue statements. The corroborated affidavit filed with his application, wherein he set forth the extent of his presence on the land, was in no sense fraudulent, but the local officers failed to require him to make a showing as to his qualifications as to the ownership of land at the date of his settlement and at the date of the withdrawal. This led to the erroneous allowance of the application. Had the local officers fulfilled their duties, the facts would doubtless have been developed, and the application would have been rejected, but the entry having been allowed, and it having since been established that the claimant was not guilty of any fraud, the said act of 1911 is clearly applicable. The showing made by him prior to the allowance of his application did not allege that he was a qualified settler at the date of the withdrawal, and in the absence of any allegation as to such a material fact it must be held that there was no showing of settlement prior to withdrawal, and that, entryman being qualified at the date of his application, the entry, in the language of the statute, was "invalid solely because of the erroneous allowance" thereof "after the withdrawal of (the) lands for national forest purposes."

The motion is denied.

CHARLES R. REED.

Decided February 24, 1919.

RESIDENCE—LEAVE OF ABSENCE—ACT OF DECEMBER 20, 1917.

The leave of absence granted to any homestead settler or entryman under the provisions of the act of December 20, 1917, for the purpose of performing farm labor during the pendency of the existing war is not dependent upon the remoteness of the place of employment from the claim; it is sufficient that the absence be in good faith for the purpose contemplated by the statute, and that due compliance be made with the regulations thereunder.

VOGELSANG, *First Assistant Secretary*:

Charles R. Reed has appealed from a decision of the Commissioner of the General Land Office of August 20, 1918, denying his application under the act of December 20, 1917 (40 Stat., 430), for a leave of absence from his land embraced in his application of December 17, 1917, and allowed January 2, 1918, for lots 2 and 3, Sec. 2, T. 38 N., R. 37 W., and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 35, T. 39 N., R. 37 E., W. M., to perform farm work upon the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 3, T. 38 N., R. 37 E., for the reason that the two tracts of land described are not sufficiently far apart to require the homesteader to reside away from his entry.

The provisions of the act, *supra*, are as follows:

That during the pendency of the existing war any homestead settler or entryman shall be entitled to a leave of absence from his land for the purpose of performing farm labor, and such absence, while actually engaged in farm labor, shall, upon compliance with the terms of this Act, be counted as constructive residence: *Provided*, That each settler or entryman within fifteen days after leaving his claim for the purpose herein provided shall file notice thereof in the United States Land Office, and at the expiration of the calendar year file in said land office of the district wherein his claim is situated a written statement, under oath and corroborated by two witnesses, giving the date or dates when he left his claim, date or dates of return thereto, and where and for whom he was engaged in farm labor during such period or periods of absence: *Provided further*, That nothing herein shall excuse any homestead settler or entryman from making improvements or performing the cultivation required by applicable law upon his claim or entry: *Provided further*, That the provisions of this Act shall apply only to homestead settlers and entrymen who may have filed their application prior to the passage of this Act. The Secretary of the Interior is authorized to provide rules and regulations for carrying this Act into effect.

The act nowhere requires or specifies that the leave of absence shall be limited to cases where the farm labor is performed at a point remote from the claim. No limit or distance is named or implied. If the absence be in good faith for the purpose named in the statute and the conditions laid down in the law and regulations are complied with, the entryman is entitled to the leave without regard to distance from his homestead to the place of labor.

The decision is reversed and the record returned for appropriate action.

WILKERSON v. SOUTHERN PACIFIC R. R. CO. (ON REHEARING).

Decided February 27, 1919.

PATENT—EFFECT OF ISSUANCE—ATTEMPT TO RECONVEY.

Where title has passed from the Government by the issue of patent for a tract of public land, after which in a court of competent jurisdiction it is adjudged that another is entitled thereto, and upon failure of patentee to so

convey a master in chancery deed is issued as decreed, the patentee is without authority thereafter to reconvey said land to the United States, and an attempt to do so does not revest title in the Government.

REPAYMENT—ACT OF JUNE 16, 1880—JUDICIAL DECREE.

While under the provisions of the act of June 16, 1880, a relinquishment of all claims under the entry is required as a basis for repayment, it is not contemplated, in a case where chancery deed issued pursuant to a decree of court, that the patentee should thereafter surrender his patent upon which such deed is based or attempt a reconveyance to the United States, in order to avail himself of the benefit of said statute.

VOGELSANG, *First Assistant Secretary*:

The Department has considered motion for rehearing filed by Parris M. Wilkerson *in re* its decision of September 20, 1918 [not reported], which affirmed the action of the Commissioner of the General Land Office under date of April 29, 1918, holding for cancellation his homestead entry for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 15, T. 21 S., R. 26 E., M. D. M., Visalia, California.

The land is within the primary limits of the main line grant to the Southern Pacific Railroad Company by the act of July 27, 1866 (14 Stat., 292, 299), as adjusted to the map of constructed road filed October 3, 1872, and is also within the primary limits of said grant as based upon the map of general route filed January 3, 1867.

It appears that the land was embraced in a homestead entry made May 5, 1863, by one Henry which was canceled September 25, 1869; that on May 24, 1872, one Duncan filed preemption declaratory statement for the land, this claim being subsequently abandoned; that on contest proceedings brought by one Theodore Spuhler against the railroad company, it was held by the Commissioner, December 3, 1879, the action being affirmed by the Department, that the land was excepted from the operation of the grant to the company by reason of the homestead entry of Henry pending at the date of the filing of the map of general route January 3, 1867, and that on December 27, 1879, Spuhler was allowed to make homestead entry for the lands which he commuted to cash December 19, 1881, and patent issued to him August 3, 1882.

The Commissioner, on January 10, 1884, rejected an application of the railroad company to list the land on the ground that it conflicted with the patented entry of Spuhler. The company subsequently instituted proceedings against Spuhler in the United States Circuit Court for the 9th District of California, and by decree entered April 24, 1885, the court held that the railroad company was entitled to the land under its grant and decreed that Spuhler execute a deed to the company and upon his failure to do so, that the master in chancery deed the land to the company. In accordance with the decree,

the master in chancery conveyed the land to the company November 3, 1885, which in turn transferred the same to Keeley Brothers.

It appears that Spuhler subsequently filed application for repayment of the purchase money paid on his entry and in so doing he surrendered his patent and attempted to reconvey the land to the United States. He also set out in connection with his repayment application the fact that by decree of the court he had been deprived of his title to the land. Thereupon the Commissioner on August 25, 1891, canceled Spuhler's entry, also his patent and the record thereof.

June 29, 1915, Parris M. Wilkerson was allowed to make second homestead entry for the land and in view of the facts above set forth, the Commissioner on March 21, 1916, directed the local officers to notify Wilkerson that he would be allowed thirty days in which to show cause why his entry should not be canceled for conflict with the superior right of the railroad company and its transferee under the decree of the United States Circuit Court and deed of the master in chancery issued in pursuance of such decree, and the entry of Theodore Spuhler and the patent and record thereof reinstated. Upon consideration of the showing made by Wilkerson in answer to the rule to show cause, the Commissioner in said decision of April 29, 1918, held that the entry of Spuhler and his patent and the record thereof, were erroneously canceled; that "Spuhler could not after the date of said chancery deed reconvey said land to the United States, as he had nothing to convey and his attempt to do so did not revest title in the United States." The Commissioner, accordingly, held the homestead entry of Wilkerson for cancellation with a view to the reinstatement of Spuhler's entry and patent. This decision was affirmed by the Department in its said decision of September 20, 1918, now up for rehearing and wherein it was held:

Spuhler's attempt to reconvey the tract to the United States, after a court of competent jurisdiction had decreed that he was holding the title in trust for the railroad company, was ineffectual. The title passed from the Government when the patent was issued on August 3, 1882, and thereafter the jurisdiction of a court of equity was properly invoked to ascertain if the patentee did not hold in trust for the railroad company and its assigns. (*Johnson v. Towsley*, 80 U. S., 72.)

The various contentions of Wilkerson in this matter, among them that the United States Circuit Court for the 9th District of California was without jurisdiction in the premises, are in direct opposition to the trust theory doctrine approved by the Supreme Court in the case of *Johnson v. Towsley*, *supra*, and which has become well settled by numerous other decisions, both prior and subsequent to that case. The principle upon which the decision under rehearing is based, and that upon which the court proceeded, is that a court of equity may be invoked to ascertain and determine if a patentee does

not hold in trust for other parties. It has frequently been decided by the Supreme Court that upon the issuance of patent all control and jurisdiction over the land patented and over the proceedings by which such patent is obtained, passed beyond the Land Department. The syllabus in the case of *Johnson v. Towsley*, contains the following statement:

8. The decisions of this court on this subject establish:

I. That the judiciary will not interfere by mandamus, injunction, or otherwise with the officers of the Land Department in the exercise of their duties, while the matter remains in their hands for decision.

II. That their decision on the facts which must be the foundation of their action, unaffected by fraud or mistake, is conclusive in the courts.

III. But that after the title has passed from the government to individuals, and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

9. In deciding this question, if it appears that the party claiming the equity has established his right to the land to the satisfaction of the Land Department in the true construction of the acts of Congress, but that, by an erroneous construction, the patent has been issued to another, the court will correct the mistake. *Minnesota v. Bachelder* (1 Wallace, 109), *Silver v. Ladd* (7 id. 219).

It was also urged by Wilkerson that Spuhler lost all right or title to the land in question by his reconveyance to the United States. The Department has already determined that Spuhler's attempt to reconvey the land to the United States was ineffectual inasmuch as the deed of the master in chancery, under the decree of the court, was based on Spuhler's patent. But it may be further stated in this connection that Spuhler's attempted reconveyance and surrender of his patent was obviously done only in compliance with the statute relating to repayment and as part of his application for repayment. The statute (act of June 16, 1880, 21 Stat. 287), makes repayment conditional upon the surrender of the duplicate receipt, the execution of a proper relinquishment of all claims to the land and the cancellation of the entry. What was done by Spuhler was mistaken and treated as an independent and voluntary act, and in view of the court proceedings and decree, the cancellation of his entry and patent was not only clearly erroneous but unnecessary. It was held in the case of *John C. Hollister* (26 L. D., 328; id., 28 L. D., 133), syllabi:

The purpose of the act of June 16, 1880, in requiring the relinquishment of all claim under the entry, and the cancellation thereof, prior to the allowance of repayment is to prevent any assertion of right under such entry after repayment; and such purpose is fully satisfied where the applicant, who has received patent for the land, in obedience to a judicial decree executes a deed for the land to another, who by such decree is adjudged to be entitled to receive the government title.

Where a patent issues on an entry erroneously allowed, and the patentee, under a suit to quiet title is adjudged to hold the title in trust for another

and required to convey the land to the successful party in such proceeding, and so does, and thereafter applies for repayment, the Land Department is without jurisdiction to cancel of record the entry so allowed, but may properly regard it as no longer a subsisting entry of the applicant requiring cancellation.

Upon careful consideration of the matters presented by the motion for rehearing in connection with the entire record and copy of the judgment roll in the case of Southern Pacific Railroad Company v. Theodore Spuhler, recently sent to the Department by Wilkerson, no good reason appears for disturbing the action heretofore taken in this case and the same will therefore be adhered to, said motion being hereby denied.

KIOWA, COMANCHE, APACHE AND WICHITA LANDS—PAYMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 11, 1919.

REGISTER AND RECEIVER,
GUTHRIE, OKLAHOMA:

Reference is made to sales of lands within the former Kiowa, Comanche, Apache and Wichita Indian Reservations, Oklahoma, made in December, 1913, in conformity with departmental instructions of November 3, 1913 (42 L. D., 604), which required the payment of one-fourth of the amount bid at the time of sale, the balance to be paid in four equal annual installments, with interest at the rate of four per centum per annum. It follows that the deferred payments, with interest, became due in December of the years 1914 to 1917 inclusive.

Departmental instructions of April 24, 1915, granted an extension of time for payment of one year to those purchasers who had not then paid the second installment, both the second and third installments to become due at the end of the third year. It does not appear that any further extension of time for payment has been granted.

The records show that there are 71 cases in which the purchasers have made only one payment which became due in 1913; that there are 12 cases in which they have paid two installments; 6 cases in which they have paid three installments; 52 cases in which they have paid four installments; and 300 cases in which the payments have been completed.

In order to finally close out the remaining cases they will be divided into two classes and disposed of as follows:

Class 1 will include all entries on which all installments except the last, due in 1917, have been paid. Advise each person having such entry that he will be allowed until 1919 anniversary of the date of entry within which to pay the last installment together with interest thereon at the rate of 4 per centum per annum.

Class 2 will include all entries not falling in class one on which full payment has not been made. Serve notice on each person having such entry that the unpaid installments, except the last, due in 1917, must be paid together with interest thereon at the rate of 4 per centum per annum within sixty days from receipt of notice and that in the event of his failure to make such payment within the time allowed, you will report his entry to this office for cancellation. Specify in the notice that if payment is made as required, payment of the last installment, due in 1917, may be deferred until the 1919 anniversary of the date of entry.

In the event of an entryman's failure to make payment of the 1917 installment with interest within the time specified, you will then allow him thirty days from receipt of notice within which to make such payment, and advise him that in the event of his failure to do so, you will report his entry to this office for cancellation.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

COOS BAY WAGON ROAD LANDS—ACT OF FEBRUARY 26, 1919.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 21, 1919.

CHIEF OF FIELD DIVISION,
PORTLAND, OREGON:

The act of Congress (Public No. 280), approved February 26, 1919, in Section 1, authorizes a compromise of pending litigation between the United States and the Southern Oregon Company, upon the execution and delivery to the United States by said company of a deed satisfactory to the Attorney General of the United States, conveying all the right, title, and interest held by said company in and to the lands situated in the counties of Coos and Douglas, in the State of Oregon, and embraced within the limits of the former grant made by the United States to the State of Oregon to aid in

the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said State, and provides that said lands shall thereupon again become part of the public domain; and further, that the execution and delivery of the said deed of reconveyance within thirty days after the approval of said act shall constitute the acceptance of said act by the Southern Oregon Company.

By letter of March 11, 1919, from the Attorney General, the Department received a deed of reconveyance executed February 27, 1919, and delivered by the Southern Oregon Company on March 10, 1919, reconveying said lands to the United States, and declared satisfactory by the Attorney General, which was inclosed to you by letter of March 18, 1919, directing you to have the same duly made of record in the counties of Coos and Douglas. From this it will be seen that by the terms of this act and the action taken thereunder by said company, the lands so reconveyed are now a part of the public domain.

TAXES.

By section 2 of this act it is provided:

That the taxes accrued, unpaid, and delinquent on the said lands on the date of the delivery of the deed provided for in section 1 shall be paid by the Treasurer of the United States upon order of the Secretary of the Interior, as soon as may be after this act becomes effective.

It is incumbent upon the Department to proceed as promptly as may be in the ascertainment and payment of the taxes accrued, unpaid, and delinquent on said lands March 10, 1919, the date of the delivery of the deed provided for in section 1 of said act. By this it is meant that in the computation of the taxes to be paid, the interest, penalties, and costs lawfully incident to delinquencies are to be included therein, up to and including the date aforesaid.

The Department is advised that the tax claims of the two counties have been prepared in detail, covering, it is understood, the taxes in said counties since 1908, and that copies thereof will be submitted to this office and your field division at an early date. On the receipt of these claims you will at once proceed to their adjustment, by examination of the original tax rolls and records of said counties, after a careful check of the lands reconveyed to the United States. The statutory provisions of the State in the matter of interest, penalties, and costs due in the case of delinquent taxes, should be given especial attention.

On the conclusion of your examination make a report in detail to this office, as to the claims of each county, with appropriate recommendations, submitting therewith a statement of the claims of said counties, with certificate of the proper official as to the verity of said claims.

CLASSIFICATION.

By section 3 of this act it is provided:

That the lands shall be classified and disposed of in the manner provided by the act of June 9, 1916 (39 Stat., 218), for the classification and disposition of the Oregon and California Railroad grant lands.

Turning to the act last above cited for directions that will control in the matter of the classification of these lands, it is found that section 2 of that act authorizes the Secretary of the Interior, after due examination in the field, to classify said lands by the smallest legal subdivisions into three classes, as follows:

Class 1. Powersite lands, which shall include only such lands as are chiefly valuable for water powersites, which lands shall be subject to withdrawal and such use and disposition as has been or may be provided by law for other public land of like character.

Class 2. Timber lands, which shall include lands bearing a growth of timber not less than 300,000 feet, board measure, on each forty-acre subdivision.

Class 3. Agricultural lands, which shall include all lands not falling within either of the two other classes.

The classification of lands valuable for powersite will be under the supervision of the Geological Survey, but the classification of the lands falling into classes 2 and 3 will be under your direction. No specific directions are requisite as to the manner of cruising and classifying the lands now in question, or the submission of reports thereon, for the reason that your practical knowledge of this matter, in connection with the classification of the Oregon and California lands makes it unnecessary.

PREFERENCE RIGHTS.

It will be observed that section 3 of this act directs the disposition of these lands in the manner provided by the act of June 9, 1916, and that section 5 of the latter act provides for the disposal of agricultural lands, directing that nonmineral lands of class 3 shall be subject to entry under the general provisions of the homestead laws, excluding the rights of commutation, but awarding a preference right of entry to "any person duly qualified to enter such lands who has resided thereon, to the same extent and in the same manner as is required under the homestead laws, since the first day of December, 1913, and who has improved the land and devoted some portion thereof to agricultural use, and who shall have maintained his residence to the date of such application." In addition to these methods

of disposition found in the act of 1916, it is further provided in section 3 of the present act that:

Such persons who, being citizens of the United States, have continuously leased from the Southern Oregon Company for a period of not less than 10 years, or who, under lease from said company, have cultivated and placed valuable improvements upon any of said lands classified as agricultural, not exceeding 160 acres to each person, shall be allowed a preference right of six months in which to purchase such lands from the United States by paying therefor the sum of \$2.50 per acre, and reimbursing the United States for the taxes paid on such land: Provided further, that where any of such leased lands have been resided upon to the same extent and in the same manner as is required under the homestead laws since the first day of December, 1913, by any person duly qualified to enter such lands, claiming adversely to such lessee, and who has improved the land and devoted some portion thereof to agricultural use, and who shall have maintained his residence to the date of his application, the claim of such settler and resident shall be superior to that of the lessee, and he shall be allowed the preference right of entry afforded actual settlers by section 5 of the act of June 9, 1916, aforesaid.

In the classification of these lands we will therefore have to provide for the protection of three classes of preferred rights: (1) Lessees who have continuously leased from the Southern Oregon Company lands for a period of not less than 10 years; (2) lessees from said company who have cultivated and placed valuable improvements upon any of said lands; and (3) those whose claims depend upon residence and cultivation in accordance with the homestead law since December 1, 1913. You will, accordingly, in the examination in the field of these lands, pay especial attention to the claims of people who may be found thereon, indicating the location of all of their improvements on the proper subdivisions, with a full description thereof, together with a brief statement as to the alleged duration and character of the claim asserted to the land; and to the same end you will call upon the Southern Oregon Company for a statement of all outstanding leases.

The period of six months accorded to lessees by this section, within which to perfect their claims, will begin to run from the date fixed for the opening of these lands after the classification thereof as herein directed.

The interest of the public in the early restoration of these lands requires all diligence in the matter of their classification, consistent with accurate results.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

CHIPPEWA INDIAN LANDS—SALE OF ISOLATED TRACTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 26, 1919.

REGISTERS AND RECEIVERS,

CASS LAKE, CROOKSTON AND DULUTH, MINNESOTA:

Your attention is directed to the act of Congress approved February 4, 1919 (Public No. 252), entitled "An Act For the sale of isolated tracts of the public domain in Minnesota." Said act reads as follows:

That the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States as amended by the Act of March twenty-eighth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, page seventy-seven), relating to the sale of isolated tracts of the public domain, be, and the same are hereby, extended and made applicable to ceded Chippewa Indian lands in the State of Minnesota: *Provided*, That the provisions of this act shall not apply to lands which are not subject to homestead entry: *Provided further*, That purchasers of land under this Act must pay for the lands not less than the price fixed in the law opening the lands to homestead entry.

The Chippewa lands subject to sale under said act are only those which have been opened to homestead entry. Any application for the sale under said act of Chippewa lands not listed as lands subject to homestead entry in some Chippewa agricultural schedule should be rejected.

Applications to purchase these lands as isolated tracts and sales thereof as such tracts will be governed by the general regulations governing the offering at public sale of public lands under said section 2455 as amended by the said act of March 28, 1912. See instructions of January 11, 1915 (43 L. D., 485—Circular No. 371). However, purchasers of land subject to sale under said act must pay for the lands not less than the price fixed in the law opening the lands to homestead entry.

In referring applications for the sale of any tract under the isolated-tract law to the chief of field service, this office, for report as to the value of the land and any objection he may wish to interpose to the sale, you will accompany the application with a statement showing the date when and the price at which the land was opened to entry.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

STATE OF UTAH v. OLSON.¹

Decided February 27, 1919.

CONTEST—STATE SCHOOL GRANT—PREFERENCE RIGHT.

One who successfully contests the *prima facie* claim of the State to a tract in a school section, upon the ground of the known coal character of the land at the date of the school land grant, gains thereby no preference right to make coal entry for the tract involved.

SCHOOL LAND—VALUABLE IMPROVEMENTS—SELECTION BY STATE UNDER ACT OF APRIL 30, 1912.

A company which, under claim of right and in privity with the title asserted by the State, in good faith takes possession of and makes valuable improvements upon a portion of a school section thereafter lost to the State because of adjudication that it was known coal land at the date of the school grant, may be protected by according to the State opportunity to select the land, exclusive of the coal deposits, under the act of April 30, 1912, for the benefit of the company.

VOGELSANG, *First Assistant Secretary*:

In this case both the State of Utah and William Francis Olson, the coal applicant, have appealed from the decision of the Commissioner of the General Land Office, dated August 8, 1918, in which it was adjudged that the tract involved, namely, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 16, T. 13 S., R. 9 E., S. L. M., Salt Lake City, Utah, land district, was known coal land at and prior to the date of the admission of the State into the Union, and that the land should be equitably divided by a segregation survey so as to permit the State to retain that part containing improvements and to allow the coal applicant to perfect entry for the residue.

The township mentioned was surveyed in 1890 and the survey was approved and accepted in 1891. The subdivision here involved was not returned as coal land, such return being confined by the surveyor to the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, of said Sec. 16. The tract was included in the coal-land withdrawal made in 1906, and in 1907 it was classified as coal land and valued at \$75 per acre. On February 18, 1911, this tract was reappraised and valued as coal land at \$45 per acre.

On December 8, 1913, Olson filed his coal-land application 012075, pursuant to section 2347, Revised Statutes, for said NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 16. Pursuant to this application notice was issued, posted and published and during the notice period the State filed its protest and application for a hearing, in which it was averred, in substance, that the title to said section 16 had passed to and become vested in the State absolutely and without reservation under its school-land grant; that the land was not at the time of survey, or at the date of the

¹ See decision on motion for rehearing, page 65.

admission of the State, known mineral or coal land; and that in a former proceeding involving the coal filing of one Henderson, which covered the tract, the Commissioner had adjudged that title was in the State. The applicant filed a denial of the allegations and further alleged that certain individuals, or a company in which they were interested, acting through the State, were seeking the land in connection with coal mining operations that were then being carried on in the vicinity and that an attempt was being made through the offices of the State to illegally secure title. A hearing was ordered and had, at which the coal applicant assumed the burden in attacking the claim of the State. The testimony adduced was voluminous and many exhibits were introduced. The local officers, on October 20, 1914, held that the tract was known coal land long prior to the admission of the State, and concluded that the protest should be dismissed and that the coal claim of Olson should be sustained. The State appealed.

Action on the case was suspended for sometime to await the decision of the Supreme Court of the United States in the case of *United States v. Sweet* (245 U. S., 563), in which it was decided on January 28, 1918, that the Utah school grant did not include mineral (coal) lands. That decision disposed of one of the State's main contentions in this case.

The Commissioner heard counsel for the parties orally and thereupon suggested that a compromise be entered into between the coal land applicant and the Spring Canyon Coal Company, which claimed the tract under the State and had placed improvements thereon. The parties were unable to reach any adjustment and the record was taken up for disposition. Upon a review of the evidence the Commissioner found and held that the testimony was such as to justify the conclusion that the land was at and prior to the admission of the State known to be valuable for coal. In view of the fact that the coal beds were confined to about five acres in the northeast corner of the 40-acre tract, and the further fact that the company's valuable improvements were located upon the western portion of the land, the Commissioner concluded that an equitable division was proper and that a segregation survey should be made setting apart the area containing the improvements made by the company from the remainder of the tract, and that in order to give the coal applicant the best possible tipple and loading facilities the survey should be so made as to exclude from the company's portion its boiler house, and that thereupon Olson be allowed to make entry for the residue of the subdivision.

In support of his appeal Olson contends that he has a vested right in and to the entire tract, of which he can not be deprived, he having lawfully entered and paid for it, and that the Commissioner's order

for a segregation survey is not based upon the statute, and is contrary both to the law and the regulations.

The Department is unable to perceive wherein the coal claimant has acquired any vested interest in the land or has yet a right to a patent therefor. So far as can be ascertained, either from the papers in the case or from the records of the General Land Office, there is nothing to show that Olson has paid or tendered the coal-land purchase price, or even the \$10 filing fee required in connection with a coal-land application. No entry certificate has been issued or is outstanding. At any rate the sale of the land could not be consummated and coal entry properly be allowed until the pending controversy is finally decided adversely to the State. Passing over the question as to whether the use and occupancy of the western portion of the tract by the Spring Canyon Coal Company, in connection with its mining operations, rendered the area nonvacant coal land within the purview of the statute, it is clear that rights under Olson's coal application can not arise or attach until the *prima facie* claim of the State has been eliminated by a final decision in the Land Department.

In the case of Charles L. Ostenfeldt (41 L. D., 265), a portion of school section 16 in the township immediately to the west of this land was involved. The question there presented and determined was as to when the claimant's application attached to the land, so as to determine the coal price as between the Government and the applicant. That decision concluded as follows:

However, it appears from the records of this Department that the survey of said section 16 approved by the surveyor-general June 30, 1896, did not specifically return the lands here involved as coal lands, nor does it appear from the evidence before the Department that any claim thereto under the coal-land laws was at that date asserted by claimant or others. Presumptively, therefore, the title to said land passed to the State of Utah, and this presumption could be overcome only by the submission of a satisfactory showing to the contrary. Until such showing had been submitted and a finding made upon the question involved, no application or entry could be allowed of record for the land (32 L. D., 39 and 117). An application to contest the claim or right of the State might be entertained and the application to purchase of Ostenfeldt was so treated, resulting, after answer and denial by the State, in a trial and the final holding by the Commissioner, June 6, 1911, that the lands did not pass to the State of Utah at date of approval of survey or at all, because of their known coal character. From and after this adjudication the lands became subject to application and entry under the coal-land laws but at the price then fixed under the regulations of the Department. No rights were obtained by Ostenfeldt when he tendered his application to purchase, December 13, 1909, he occupying merely the status of a would-be contestant, without the privilege, sometimes extended by statute, of a preference right of entry in event of success. Even in those instances the successful contestant is only accorded a right to enter subject to the conditions existing at the time the right becomes available. After the records had been cleared of the claim of the State he, if the first qualified applicant, might enter the land if subject to disposition, but at the price, and

subject to the conditions, then fixed. His entry may be allowed to stand only upon the payment of the price fixed and applicable June 6, 1911, and the decision of the Commissioner is accordingly affirmed.

In the case at bar, where the valuable improvements upon the land and the occupancy of the company gave notice of an asserted prior claim, with equal, if not stronger, reason may it be said that Olson gained no statutory right or claim to the land by reason of his application and the proceedings growing therefrom. Whatever recognition may be accorded to his efforts and expenditures, which adduced evidence to defeat the claim of the State, it is obvious that no specific statutory preference right or legal right to make coal entry has yet accrued to the applicant. His contention that a vested right exists and that he has become entitled to a patent for the land, is without substantial merit.

In view of the conclusion hereinafter reached it becomes unnecessary to discuss or pass upon the matter of the segregation survey authorized by the Commissioner. The Department finds it possible to make a satisfactory disposition of this case without resorting to a segregation survey.

In support of the appeal on behalf of the State, it is urged that the Commissioner erred in holding that the land involved was valuable for coal, or was known to be valuable therefor at the date of the admission of the State, and in sustaining the coal applicant's claim. It is argued that in the event the contrary is held the Department should, in the interest of equity and common justice, protect the company's valuable improvements placed upon the land, under a claim of right and in good faith, and to that end should permit the State to select the surface of the tract pursuant to the act of April 30, 1912 (37 Stat., 105).

The evidence has been reviewed. The concurring conclusions below, to the effect that the tract was known coal land prior to the admission of the State in 1896 are well founded. A bold sandstone escarpment, constituting the floor of a coal bed in that region, crossed the tract. An actual outcrop of the coal bed, resting upon this floor upon the land, was known and observed in the year 1887. At that time one Hansen asserted a coal claim on the land immediately to the east and possibly on a part of this tract, the area at that time being unsurveyed. Just beyond the east line of the 40, exposed in the face of the vertical cliff, there plainly appeared an outcropping bed of coal. Slightly over the north line of the tract the coal bed lying upon the sandstone floor was disclosed and observed. The rock formation was obviously regular and undisturbed, with a slight dip to the northeast. The region was known to contain coal beds and to the northwest and west of the land coal mines had been opened and worked long prior to the admission of the State.

The coal deposits upon the tract are found in approximately only 5 acres in the northeast corner. The State insists that because of the small area, the outcrop condition and the indications of burning, the coal in the 40 is of little or no value and insufficient in extent to impress the tract with a coal character. The main coal bed rests upon the sandstone floor and other higher beds are present upon the tract. The evidence with respect to weathering, and possible burning, fails to establish that coal is not present, available and valuable. Considering the record, the Department is convinced that the finding as to the known coal character of the tract prior to the admission of the State is justified.

The following language, used by the Supreme Court in the case of *Diamond Coal Company v. United States* (233 U. S., 236, 239, 248-249), is apposite:

To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. * * *

* * * The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common observation, and were such as would appeal to practical men and be relied upon by them in making investments for coal mining. * * *

There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; * * *

See also the case of *Milner v. United States* (228 Fed., 431), in which coal lands to the east of this tract and in the same general coal field, which had been selected by the State, were involved.

The evidence shows that the Spring Canyon Coal Company prior to the filing of Olson's application had erected valuable improvements upon the western portion of this tract, after having applied to the State to purchase the same. The company's tipple, boiler house and part of its railroad switches, an aerial tram, three stone cottages and other improvements, were constructed upon the land,

and at the time of the hearing were valued at approximately \$90,000. The company's possession and use of the tract was under claim of right and in privity with the title asserted by the State. The State of Utah has consistently urged and maintained that because not specifically excluded, mineral lands passed to the State under the land grants made in the enabling act. As to the school-land grant this contention was sustained September 27, 1915, by the Circuit Court of Appeals in *Sweet v. United States* (228 Fed., 421), and that decision was not reversed by the United States Supreme Court until January 28, 1918. The legal view entertained on behalf of the State, with respect to mineral lands, can not therefore be said to have been so clearly in error as to imply or impute bad faith to the State or the company claiming under it. Counsel on behalf of the State, in his brief, asserts that the land has been deeded to the company with a reservation of the coal. However this may be, the legal title still remains in the Federal Government and the tract is subject to the administrative jurisdiction of the disposing agency of the United States.

In the case of the Eldorado Wood and Flume Company (28 L. D., 37, 40), where rejected State selections and Indian allotments were involved, this Department said:

* * * It is true that these applications were made for lands not covered by an entry at the time, but the occupation, enclosure and improvements of the corporation and its lessee were then open and well known. In the technical sense of the word, the tract may not have been lawfully appropriated at the time of the allotment applications, but it was in a sense actually appropriated by the occupation, enclosure and exclusive possession of the portions enclosed, which covered the main body of the land in question. The rights of the Indian applicants should be protected as fully as those of other claimants to the public lands, but they can not be permitted to seize upon the fruits of the labor and expenditures of others, made under an honest belief that their tenure would ripen into a perfect title; to permit this to be done in a case like this is represented to be, would shock the moral sense and do violence to the spirit and intent of the public land laws. *Williams v. United States*, 138 U. S., 514.

In the case of *Fritchman v. Zimmerman* (33 L. D., 377, 380), the Department said:

The departments and the courts have repeatedly held that lands thus occupied and improved are not subject to entry, but that the government will retain the title thereto until a party who has placed extensive improvements thereon, under claim of right, shall be enabled to obtain the title from the government. *Williams v. United States* (138 U. S., 514).

In *Burtis v. State of Kansas* (34 L. D., 304, 306), the following is found:

The books define as color of title that which in appearance is title but which in reality is not title. It is true that a title was not acquired by prescription as against the United States by reason of the possession gained under the deed

issued by the State for this land, but it is nevertheless believed that Smith, and those claiming under and through him, occupied this land under a color of title. Their good faith in the premises is in nowise questioned and the Department fully agrees with the decision of your office and the local officers protecting such long continuous possession as against one seeking to appropriate the lands as against such prior occupants.

It is the opinion of this Department that the State should be permitted to make its title good, and to that end it should be afforded a reasonable time within which to make formal selection of the land, upon a proper and sufficient base. Should the State fail to make selection as allowed, the present occupant through purchase from the State should be afforded a reasonable time in which to protect his occupancy by himself making entry under the land laws, and upon completion of selection by the State, or entry by Williams, the application by Burtis will stand rejected.

The principle involved in these cases, or one essentially akin, has been invoked or applied in connection with many other cases under varying conditions. See *Jones v. Arthur* (28 L. D., 235); *Butler v. State of California* (29 L. D., 610); *Anderson v. Roray* (33 L. D., 339); *J. M. Longnecker* (30 L. D., 611); *Lyle v. Patterson* (228 U. S., 211); *Denee v. Ankeny* (246 U. S., 208).

Equitable claims arising in connection with public lands are cognizable before the Land Department. The protection, if any, that might be afforded to the company by the laws of Utah, with respect to improvements, will not prevent this Department from exercising its judgment and power herein. Under the circumstances disclosed in this case the Department deems that in equity and all good conscience the company's improvements should be respected. Neither the ground on which they stand nor essential control over them should be handed to a stranger, or some third party. Having been known coal land the State's title under the school grant never attached to this tract; but there appears to be no impediment to the State making a selection of the tract for the benefit of the company, with a reservation of the coal therein to the United States pursuant to the act of April 30, 1912 (37 Stat., 105). That act provides specifically that withdrawn or classified coal lands, otherwise unreserved, shall "be subject to selection by the several States within whose limits the lands are situate, under grants made by Congress," with a reservation of the coal deposits in accordance with the act of June 22, 1910 (36 Stat., 583).

A reasonable time will accordingly be afforded to enable the State to make such selection of this tract. After such State selection has been filed and entered of record in the local land office, Olson, if he so desires, may prosecute application proceedings for the coal deposits reserved to the United States. This disposition will enable the company to retain possession and control of its valuable mining improvements and will also secure to Olson, if he wishes it, the

title to the coal beds, together with the right to mine and remove the coal contained in the land.

The decision of the Commissioner, with regard to the known coal character of this tract at and prior to the date of the admission of the State into the Union, is affirmed; the holding in that decision with respect to a segregation survey is set aside and vacated, and further action in this case will be governed by the views hereinabove set forth.

STATE OF UTAH v. OLSON (ON REHEARING).

Decided April 26, 1919.

VOGELSANG, First Assistant Secretary:

William Francis Olson has filed a motion for rehearing as to the Department's decision of February 27, 1919 [47 L. D., 58], which permitted the State of Utah to file a selection under the act of April 30, 1912 (37 Stat. 105), for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 16, T. 13 S., R. 9 E., S. L. M., Salt Lake City, Utah, land district, and allowed him to purchase the underlying coal deposits if he so desired.

Olson filed his application to purchase the tract under the coal land laws (Salt Lake City 012075) December 8, 1913. The State of Utah filed a protest claiming that the tract had inured to it under its school land grant. After the submission of testimony, the register and receiver by their decision of October 20, 1914, held that it had been shown that the tract was coal in character and so known at the time of survey, and therefore did not pass to the State. This finding of fact was affirmed by the Commissioner and the Department.

In its decision of February 27, 1919, the Department said:

The Department is unable to perceive wherein the coal claimant has acquired any vested interest in the land or has yet a right to a patent therefor. So far as can be ascertained, either from the papers in the case or from the records of the General Land Office, there is nothing to show that Olson has paid or tendered the coal land purchase price, or even the \$10 filing fee required in connection with a coal-land application. No entry certificate has been issued or is outstanding.

The motion for rehearing sets forth that the above statement is incorrect alleging that:

* * * on January 19, 1914, the coal claimant paid to the Receiver of the United States Land Office, Salt Lake City, the sum of Eighteen Hundred Dollars as the purchase price of said land fixed by the Department, and received therefor Receiver's receipt No. 1235497 certifying to said payment, which money was, on said date, put into the Treasury of the United States as earned by said Land Office; no filing fee at that time being required by the Department. * * *

A further search of the records of the General Land Office discloses that the above statement as to the payment of the purchase price is correct. As to the filing fee the motion is in error since the payment of such a fee is required by the regulations of May 4, 1912 (General Land Office Circular 105, Sec. 122, Page 29). In its prior decision the Department further stated:

At any rate the sale of the land could not be consummated and coal entry properly be allowed until the pending controversy is finally decided adversely to the State. Passing over the question as to whether the use and occupancy of the western portion of the tract by the Spring Canyon Coal Company, in connection with its mining operations, rendered the area nonvacant coal land within the purview of the statute, it is clear that rights under Olson's coal application can not arise or attach until the *prima facie* claim of the State has been eliminated by a final decision in the Land Department.

In support of the above statement the case of Charles L. Ostensfeldt (41 L. D. 265) was cited, and no reason is found to change the view there expressed.

Further, in accordance with the cases cited in the decision of February 27, 1919, the Department had the right and was under the duty of protecting the equity arising from the prior possession of the Spring Canyon Coal Company which claimed title as purchaser under the State and from the extensive improvements made by it before the filing of Olson's application.

No reason is found for disturbing the Department's prior decision, and the motion for rehearing is accordingly denied.

CHARLES BAHM.

Decided March 1, 1919.

STOCK-RAISING HOMESTEAD—DESIGNATION—CULTIVABLE AREA.

In the administration of the stock-raising homestead law it is recognized that small areas of high grade land may be embraced within a tract "chiefly valuable for grazing and raising forage crops"; such tracts may be designated and entry allowed thereunder, however, where not to exceed one-eighth of the area embraced in the stock-raising homestead is cultivatable land.

VOGELSANG, *First Assistant Secretary:*

Patent No. 484628 issued July 28, 1915, to Charles Bahm under the enlarged homestead act for NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, T. 136 N., R. 104 W., 5th P. M., Dickinson, North Dakota, land district, and on July 25, 1917, said Bahm applied to enter, as additional thereto, under the stock-raising homestead act, the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, said Sec. 26. The 160 acres last described were designated as stock-

raising land, effective February 11, 1918, but under date of February 18, 1918, the Director of the Geological Survey advised the Commissioner of the General Land Office that an examination of the lands patented to Bahm makes it appear that they are not stock-raising lands, in that they are adapted to dry farming and more valuable therefor than for grazing and raising forage crops. Whereupon, the Commissioner of the General Land Office, by decision of March 19, 1918, rejected the application to make additional entry, and applicant has filed an informal appeal.

The lands patented to Bahm as well as the tract applied for were examined by an agent of the Geological Survey on August 25, 1917. This examination disclosed the fact that 165 acres in a compact body are cultivable lands; that 108 of these 165 acres were under cultivation at the time of the examination, and that a good crop of grain was growing thereon. The soils were reported as clay loams or gumbo, with a small rocky area in one 40, and the native vegetation as consisting of a good stand of grama grass, wheat grass, bunch grass, and stipa.

Section 2 of the stock-raising homestead act defines stock-raising lands as those which are "chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that 640 acres are reasonably required for the support of a family." In the instructions of January 27, 1917 (45 L. D. 625), under said act, it was stated:

The classification will be made, as far as practicable, to exclude lands that are not chiefly valuable for grazing and raising forage crops, either because too valuable for such use or too poor for such use. Lands which are capable of producing valuable crops of grain or other food cereal or fruit are not subject to designation, being, if otherwise subject to entry, disposable under the 160-acre or 320-acre homestead law, according to their character.

Considering the precipitation, the length of the growing season, and the soils in the western part of North Dakota, together with the known results which have been achieved by farmers in that locality, the Department is of opinion that the cultivable lands—that is, the plow lands of favorable soil types, are grain lands, which are not "chiefly valuable for grazing and raising forage crops," nor are they "of such character that 640 acres are reasonably required for the support of a family." Such cultivable lands are essentially dry-farm lands of the 320-acre type, and can not properly be designated for entry under the stock-raising homestead law.

As the rejection of all applications containing minor amounts of these higher grade lands would not constitute a practicable and equitable administration of the stock-raising homestead law, a reasonable

principle to govern the permissible amount of better grade lands that may be included must be determined upon. In a well-administered stock-raising homestead of 640 acres, in the region here under consideration, it appears that as much as 80 acres, or one-eighth of the total area, may be needed for the production of winter feed for the stock that could be maintained on the homestead during the grazing season. It is reasonable, therefore, to allow 80 acres of cultivable lands for feed production in a stock-raising homestead even though such lands could be used for grain production under dry-farming methods. The allowance of such an area of better grade lands is in substantial conformity with the established practice that permits designation of a legal subdivision as nonirrigable under the enlarged-homestead and stock-raising homestead acts if less than one-eighth of its area can be thoroughly irrigated and reclaimed.

The lands applied for by Bahm would enlarge his holdings to 480 acres, of which 165 are cultivable and 315 noncultivable. As the proportion of cultivable lands is greatly in excess of one-eighth of the entire area, the tract patented to the applicant can not be designated as stock-raising lands. The decision appealed from is accordingly affirmed.

RYTHER v. WILDBERGER.

Decided March 12, 1919.

PRACTICE—APPLICATION TO CONTEST—CORROBORATING AFFIDAVIT—APPEARANCE.

Where claimant incorporates in his answer an objection to the sufficiency of the contest affidavit because not corroborated by at least one witness having personal knowledge of the facts, as required by Rule 3 of Practice as amended September 23, 1915, and thereafter appears and renews the objection at the hearing, he is entitled to a ruling thereon even though he joins issue by denial of the charges.

VOGELANG, *First Assistant Secretary*:

This is an appeal on behalf of Henry W. Wildberger from a decision of the Commissioner of the General Land Office dated November 6, 1918, holding for cancellation, on the contest of James C. Ryther, his homestead entry, made October 20, 1916, for lots 1, 2, 3, and 4, Sec. 18, lot 1 and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 19, T. 5 N., R. 12 E., B. H. M., Rapid City, South Dakota, land district.

The contestant charged, in his affidavit filed October 12, 1917, that—

entryman has never established residence on the above described land; that although he started a house he has never put the rough on the same. That said absence is not due to any military or naval duty of any kind in any place in connection with the present war.

The affidavit was corroborated by Clayton B. Ryther, who alleged that—

He is acquainted with the tract described in the above affidavit, and knows from personal knowledge and observation that the statements therein made are true. That said entryman has never established residence on the above-described land, that although he at one time started a house on the above-described land he has never put the roof on said house. That absence is not due to military duties of any kind in any place connected with the present war.

In this answer entryman alleged that—

He established residence on the above-described land in July, 1917, following my settlement upon the land of erecting a house thereon; that in September, 1917, a cyclone or wind storm partially destroyed said house, which I have since repaired, and the house is now in a habitable condition and furnished; that he denies the first allegation of the complaint; admits that he is not employed at present in the Army or Navy service, but affiant alleges the fact to be that he is under draft; alleges the fact to be that both the contestant and his corroborating witness reside in Rapid City, and have so resided in Rapid City at all times since the date of entry, and knows nothing of the facts alleged, and that both the contestant and his brother, the corroborating witness, are incompetent to allege or corroborate the affidavit of contest, and defendant, by reason thereof, objects thereto. That as to the second allegation affiant is unable to plead, as the same is unintelligible; denies the allegation of the corroborating witness that he never placed a roof upon said structure.

When the parties appeared before the local officers on December 7, 1917, the day set for the hearing, before any testimony was submitted defendant again objected to the sufficiency of the contest affidavit, reference being made to that part of his answer wherein he alleged that neither the contestant nor his corroborating witness could have personal knowledge of the facts alleged. The contestant thereupon took the stand and was followed by his brother, the witness who corroborated the contest affidavit. After the latter had admitted that he had not been on the land in 1917 except on October 15, and had no knowledge then when the house was first constructed, defendant renewed his objection to the contest affidavit and moved that the proceedings be dismissed, alleging as a further reason that the notary public before whom the affidavit was executed had not affixed his seal. The contestant stated that the notary public would affix his seal before the hearing was concluded. The motion to dismiss was overruled by the local officers, who by decision of March 6, 1918, recommended that the entry be canceled. The decision below was affirmed by the Commissioner of the General Land Office on November 6, 1918, and defendant has appealed.

While the affidavit appeared sufficient on which to order a hearing, defendant's motion to dismiss, interposed after the corroborating witness had acknowledged that he did not have personal knowledge of

the matters alleged, should have been granted, the objection to the affidavit having been set forth in defendant's answer. The Department has held that after issue has been joined, any objection thereafter to the sufficiency of the affidavit comes too late. But in the case under consideration it can not be held that defendant waived his objection, his denial being coupled with the statement that the corroborating witness was not in position to have personal knowledge of whether residence had or had not been established. The question having been thus raised, it was necessary that both the contestant and his corroborating witness take the stand and, if possible, refute the charge of disqualification. It developed that defendant's objection was well founded, and the local officers should have dismissed the contest.

Rule of Practice 3 as amended September 23, 1915 (44 L. D., 365), referring to applications to contest, provides:

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

As stated in *Preskey v. Swanson* (46 L. D., 215, 217):

Prior to the amendment of September 23, 1915, Rule 3 simply provided: "The statements in the application must be corroborated by the affidavit of at least one witness." This resulted in many affidavits being corroborated on information and belief, and made it possible to impose on the Land Department the consideration of speculative and unwarranted contests. Experience demonstrated the necessity for the amendment of the rule, and defendants are entitled to a strict compliance therewith before being placed under the necessity of defending a contest.

In *Nemnich v. Colyar*, decided January 4, 1919 (47 L. D., 5), the Department held (syllabus):

The provision of Rule 3 of Practice that the statements in the application to contest must be corroborated by the affidavit of at least one witness having personal knowledge of the facts is jurisdictional, and objection to the absence of such corroborating affidavit may be interposed at any time prior to joining issue.

It was not intended by the decision last cited to lay down the rule that an objection to the sufficiency of a contest affidavit, raising the question of jurisdiction, can not be considered if a defendant also joins issue by the denial of the charges. If the objection be incorporated in the answer, it entitles the defendant to a ruling thereon, and if it be held that the objection is well founded the dismissal of the contest is demanded.

As the affidavit in question was not corroborated by a witness having personal knowledge of the facts in relation to the contested entry, jurisdiction to consider the charges was not obtained, and the decision appealed from must be, and is hereby, reversed.

GRANT L. SHUMWAY.

Decided March 12, 1919.

PUBLIC LAND—BED OF MEANDERED LAKE.

The Land Department has no jurisdiction over the bed of a meandered lake, or authority to grant a potash lease therefor; and under the law of Nebraska it appears that if navigable, title thereto is in the State, but if nonnavigable, that title is in the riparian owners.

VOGELSANG, First Assistant Secretary:

This is an appeal by Grant L. Shumway from the decision of the Commissioner of the General Land Office of July 17, 1918, holding for rejection his application 010033 for a permit to prospect for potash under the act of October 2, 1917 (40 Stat., 297), on certain lands described as "included in the boundaries of a lake known as 'Pelican Lake' and the muds thereunder," embracing what, if surveyed, would be portions of Secs. 5 and 6, T. 29 N., R. 28 W., Sec. 31, T. 30 N., R. 28 W., Sec. 1, T. 29 N., R. 29 W., and Secs. 35 and 36, T. 30 N., R. 29 W., Valentine, Nebraska, land district, the area being given as 762.77 acres.

The said Pelican Lake, which is a meandered body of water, appears, from the plat on file with the record, to be about three and a half miles long with an extreme width of about one-half mile. The application embraces the entire area included within the boundaries of the lake.

The application was rejected by the local officers for the stated reason that the area lies within the limits of a meandered lake, the title to which is in the riparian owners, and the Commissioner finds that all of the lands surrounding and abutting upon the lake, except those in said Sec. 36, have been patented. The records of the General Land Office show that the survey of the township embracing said Sec. 36 was approved in 1875 and that no disposition of any portion of said section to private individuals has been made by the Department. The entire section, therefore, must be assumed to have passed to the State under its school-land grant. It thus appears that title to the entire area surrounding the lake has passed out of the United States.

In the case of *Lee Wilson and Company v. United States* (245 U. S., 24, 29), the Supreme Court as a legal proposition, which it declared to be indisputable because conclusively settled by previous decisions, stated that:

Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several States. *Hardin v. Jordan*, 140 U. S., 371; *Kean v. Calumet Canal Co.*, 190 U. S., 452, 459; *Hardin v. Shedd*, 190 U. S. 508, 519.

The Supreme Court of Nebraska has repeatedly declared that the common law rule, with respect to rights of private riparian proprietors, except as altered or modified by statute, has been a part of the laws of the State of Nebraska ever since the organization of the State government. *Slattery v. Harley et al.* (79 NW., 151); *Meng v. Coffey et al.* (93 NW., 713); *Crawford Co. v Hathaway et al.* (Id. 781); *Kinkead v. Turgeon et al.* (109 NW., 744). So far as it relates to the title to beds of streams or other bodies of water in the State of Nebraska, the common law is still in force in that State. *Kinkead v. Turgeon et al., supra.*

If the lake here in question is navigable the title to the soil underlying the waters thereof is in the State of Nebraska. *Barney v. Keokuk* (94 U. S., 324); *Hardin v. Jordan* (140 U. S., 371); *Illinois Central Railroad Company v. Illinois* (146 U. S., 387); *Shively v. Bowlby* (152 U. S., 1); *Morris v. United States* (174 U. S. 196). If, on the other hand, the lake is nonnavigable, the title to the soil would under the common law rule be in the riparian owners. *Hardin v. Jordan, supra.* In that case the court said:

* * * When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water. Besides, a lake or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equidistant from the land on either side. * * *

In neither event, therefore, would the area described in the application be public land of the United States subject to permit or appropriation under the act of October 2, 1917, *supra.* The application must therefore be held to have been properly rejected, and the decision appealed from is affirmed.

JULIUS A. STROEHLE.

Decided March 12, 1919.

SURVEY—PUBLIC LAND.

Where, in a survey of public land, a body of water or lake is found to exist and is meandered, and the abutting lands disposed of, the Land Department has no jurisdiction over the submerged land or lake bed, or authority to grant potash lease therefor.

SURVEY—TITLE TO BED OF MEANDERED LAKE.

So far as relates to the beds of meandered lakes or other bodies of water, it appears that the common law is still in force in the State of North Dakota, and that thereunder, if navigable, title to the soil is in the State, but if nonnavigable, that title is in the riparian owners.

VOGELSANG, *First Assistant Secretary*:

Julius A. Stroehle, who, on September 12, 1918, filed his application 019982, pursuant to the act of October 2, 1917 (40 Stat., 297), for a potash lease for 2,560 acres, described as being "the unsurveyed lake bed of Horsehead Lake," situate in Ts. 141 and 142 N., R. 72 W., 5th P. M., in Kidder County, Bismarck, North Dakota, land district, has appealed from the decision of the Commissioner of the General Land Office, dated October 28, 1918, rejecting the application.

The Commissioner states that the lake mentioned is shown in the official township plats to be meandered, and that the records of his office indicate that the abutting lands have been disposed of by the United States. It follows, as held by the Commissioner, that the Land Department has no jurisdiction over said lake bed, or authority to grant a potash lease therefor.

In the appeal it is asserted that the owners of land adjoining the lake claim that they have no title to said lake and that it is Government land, and it is further stated that the county records do not show the lands for taxation.

In the case of *Whitaker v. McBride* (197 U. S., 510, 512), the Supreme Court of the United States made the following statement:

A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.

In the case of *Lee Wilson and Company v. United States* (245 U. S., 24, 29), the court stated as a legal proposition, which was indisputable because conclusively settled by previous decisions, the following:

Where in a survey of the public domain a body of water or lake is found to exit and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several States. *Hardin v. Jordan*, 140 U. S., 371; *Kean v. Calumet Canal Co.*, 190 U. S., 452, 459; *Hardin v. Shedd*, 190 U. S., 508, 519.

The local law of North Dakota was determined by the Supreme Court of that State in the case of *Brignall v. Hannah et al.* (157 N. W., 1042), decided May 1, 1916, with respect to a nonnavigable lake. The court held as follows (syllabi):

As a general rule, the meander lines run along the margin of nonnavigable lakes or ponds are not intended as boundary lines, but are run for the purpose of determining the quantity of land for which the purchaser must pay.

Whether the patentee of the United States to land bounded on a nonnavigable lake belonging to the United States takes title to the adjoining submerged land is determined by the law of the State where the land lies.

The rights of riparian owners with respect to nonnavigable lakes and ponds in North Dakota rest upon and are controlled by the rules of the common law.

Under the common law the owners of land abutting upon a meandered, non-navigable lake own the lake bed in severalty, their respective title extending to the center of the lake.

A similar determination was early reached in the State of South Dakota in the case of *Olson v. Huntamer et al.* (61 N. W., 479; 66 N. W., 313).

With respect to a navigable lake a different principle obtains. Section 4809 of the Revised Codes of North Dakota of 1905 reads as follows:

Except when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low water mark, and all navigable rivers shall remain and be deemed public highways.

The ownership of the bed of a navigable lake therefore appears to rest in the State and not in the riparian proprietor.

From the foregoing, it follows that the area sought by the applicant is not public land of the United States, subject to appropriation.

The decision of the Commissioner rejecting the application is correct and is hereby affirmed.

BRIDGES v. THE CANYON SIDING MINING CO.

Decided March 15, 1919.

MINING CLAIM—NOTICE OF IMPROVEMENTS.

The failure of an applicant for patent to a mining claim to comply with local laws or regulations as to the posting of a notice relating to improvements, while possibly subjecting a claim to relocation before entry, presents no valid basis for the cancellation of an entry in the absence of an adverse claim legally asserted.

MINING CLAIM—PROTEST.

The alleged absence, during the period of publication of notice of application for mineral patent of an official survey monument marking a single corner of a mining claim or claims included in an application, affords no valid basis of protest against the application if there was enough upon the ground covered by the application, when considered in the light of the published notice, to have put the protestant upon inquiry as to the area included in the application.

MINING CLAIM—PROTEST.

In cases where the notice of application is regular and sufficient the Land Department will not inquire into a charge made by one who fails to adverse, that fraudulent representations have been made to him by an applicant for mineral patent, as to the area claimed by such applicant.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by G. T. Bridges from the decision of the Commissioner of the General Land Office of March 26, 1918, requiring him to show cause why his protest against Salt Lake City mineral entry 018398 of the Canyon Siding Mining Company should not be dismissed.

The entry was allowed January 9, 1917, upon an application filed by said company for patent to the Loop Nos. 1, 2, 3, and 6 lode mining claims, survey No. 6385, notice of which application was published and posted for the statutory period, commencing November 3, 1916, during which period no adverse claim was filed.

The said Loop Nos. 2, 3, and 6 claims were, as shown by the certificates of location thereof, located, respectively, January 2 and 5, and March 16, 1909. The protest of Bridges, which was filed February 13, 1918, charges, in substance and effect, that the said three claims conflicted at the time of their location with the Iron Mask lode mining claim, and now conflict with the Night Cap claim, which is a relocation of the identical ground previously covered in the Iron Mask; that said Iron Mask claim was located September 17, 1907, by the protestant and one C. C. Parker; that the protestant and his co-owner did, or caused to be done, the annual assessment work on said claim for the year 1908, and for each and every year thereafter up to and including the year 1913; that by reason of the failure of the owners of said claim to perform the annual assessment work thereon for the year 1914, the ground included therein reverted to and became a part of the public land of the United States January 1, 1915, on which date one Jesse Salisbury made relocation of the ground under the name of the Night Cap, and on January 2, 1915, conveyed to the protestant an undivided one-half interest in the claim; that the said owners of the Night Cap claim performed the annual assessment work thereon for the year 1916, and in 1917 filed notice, claiming the benefit of the act of Congress exempting mining claims from the performance of annual assessment work; that at the time of the location of the Loop Nos. 2, 3, and 6 claims, no portion of the areas included therein and in conflict with the Iron Mask was a part of the public lands of the United States; that in 1909, and about the time of the location of said Loop Nos. 2, 3, and 6 claims, the protestant had a conversation with one Pulver and one Chase, who claimed to be agents and officers of the applicant company, and at that time exhibited to Pulver a recorded notice of the Iron Mask, and went upon the ground with said Chase and pointed out to him the exterior boundaries of said claim; that at no time has Chase or Pulver, or their successors in interest, or the applicant, maintained a notice or stakes on said Iron Mask claim or posted any notice on the ground or in the vicinity thereof, to the effect that work was being performed elsewhere for the benefit of such ground, as required by section 1499 of the Compiled Laws of Utah, 1907; that at the time the official survey of the claims applied for was being made the protestant notified Pulver, who was the active agent of the applicant company, not to place any stakes upon the protestant's said ground, include, or interfere with the same, and was then assured by Pulver that he did

not want said ground, made no claim to it, and would see that it was excluded from the patent survey; that in September, October, November, and December, 1916, when protestant and his co-owner of the Night Cap were performing the assessment work on that claim, no patent stakes were, after careful search therefor, found upon said ground, nor was there any evidence of any kind upon the ground that any part thereof was included in the survey; that during the period of publication the protestant was upon "said ground" on several occasions and made diligent and careful search for patent stakes and copy of the notice and plat, but found none; that it was not until several months after the expiration of the period of publication that protestant found what purported to be a patent stake near the center of the said ground and that that stake was not there during the period of publication; that because of the matters alleged, the applicant company induced the protestant to believe, and he did believe, that said company claimed no part of said ground, and that it was not included "within the exterior lines of its patent survey;" that said acts and matters were intended to enable the applicant to clandestinely and surreptitiously gain possession of protestant's ground and his extensive improvements and development work thereon, and that such purpose did not become apparent to protestant until after the expiration of the period for the filing of an adverse claim; that on account of the wilful, premeditated, and fraudulent conduct of the officers and agents of the applicant company, the protestant did not file an adverse claim during the period of publication. He therefore prays that patent on the entry be withheld and that a hearing be ordered to afford him an opportunity to "establish and secure his equities and rights in a legal and proper manner."

Accompanying the protest and made a part thereof is a plat purporting to show the conflict between the Loop Nos. 2, 3, and 6 claims and the Iron Mask. From this it appears that the west side line of the Loop No. 3, constituting also the east side line of the Loop No. 6, and the west side line of the Loop No. 2, which claim adjoins the Loop No. 3 on the north, form a continuous straight line 3,000 feet in length, and extends through the Iron Mask, approximately in the position of its longitudinal axis; that this line is intersected at a point a few feet to the south of the center of the Iron Mask by a straight line 1,200 feet in length, extending in an easterly-westerly direction, and forming the common end line of the Loop Nos. 2 and 3, and the north end line of the Loop No. 6. The point of intersection is the common corner Nos. 4, 2, and 2, respectively of the Loop Nos. 2, 3, and 6.

Upon considering the protest, the Commissioner, by the decision appealed from held—

(1) That the possessory rights of two mineral claimants to the same mineral land is a matter which is committed exclusively to the courts and has no proper place in a protest before the Land Department, and hence that that feature of the protest must be disregarded.

(2) That it may be that the protestant intended to intimate as a ground of protest that the plat and notice of the application for patent were not properly posted on the ground applied for during the period of newspaper publication, but that the affidavit in that respect is not sufficiently clear to warrant consideration.

(3) That the only remaining allegation necessary to be considered is the one to the effect that one or more corners of the Loop Nos. 2, 3, and 6 claims were not properly monumented on the ground during the publication period, and that because thereof and of a promise made by an agent of the company that no claim would be asserted by it to the ground embraced in the Night Cap claim, and that the ground would be excluded from the patent survey, the protestant was led to believe that the application for patent embraced no portion of the ground covered by the Night Cap, and that on account of this belief, the protestant failed to file an adverse claim within the period allowed by law; that the protest did not allege that there were not sufficient corners in place to enable the Loop Nos. 2, 3, and 6 claims to be identified with reasonable accuracy on the ground, nor was it alleged that the descriptions in the published notice were insufficient to put protestant on notice as to the exact or approximate area covered by the Loop Nos. 2, 3, and 6 claims; that as a matter of fact, it affirmatively appears from the protest that the protestant knew of the conflict between the said claims and the Night Cap; that there is in the field notes of the official survey of said claims a report by the mineral surveyor, to the effect that the official survey of the four claims of the group is identical with the locations, the corners of which were found in place; that the published notice of the application furnished such a description of the claims applied for as should have enabled a person exercising due diligence to determine with reasonable accuracy the situation of said claims upon the ground, even though a monument to mark the corner common to Loop Nos. 2, 3, and 6 was missing. In view thereof, and of the fact that the published notice of the application recited no exclusion, the Commissioner held that had the protestant exercised due caution and diligence he would have been aware of the fact that a portion of the area covered by the Night Cap was included in the application, and that therefore there is no reason apparent for ordering a hearing on the protest. He accordingly directed that the protestant be notified that he would be allowed thirty days within which to show cause why the protest should not be dismissed.

The protestant apparently acquiesces in so much of the Commissioner's decision as holds that the validity of the claims applied for, in so far as they embrace portions of the former Iron Mask, can not be successfully attacked before the Department.

The appeal, however, challenges the correctness of the Commissioner's decision on the ground that it refuses the protestant an opportunity to prove at a hearing the allegations—

(1) That neither the applicant nor his predecessors in interest ever maintained a location notice or stakes on the protestant's ground.

(2) That they nor any of them ever performed any work upon or posted a notice on the protestant's ground as required by the laws of the State of Utah.

(3) That during the period of publication the applicant company never maintained a patent survey stake or monument on protestant's ground, although it was shown that the corner common to the Loop Nos. 2, 3, and 6 falls within the exterior boundaries of the protestant's ground.

(4) That the applicant, through its officers and agents, has been guilty of such fraudulent practices and representations, both in positive statements and omissions, as to wholly invalidate the proceedings.

The alleged failure of the applicant company to maintain a location stake within the limits of the ground claimed by the protestant at the corner common to the Loop Nos. 2, 3, and 6 would not have constituted a valid objection, even if urged as a basis of an adverse suit; *Warnock v. DeWitt*, Utah (40 Pac., 205); *Walsh v. Erwin* (115 Fed., 531), and there is no law requiring a location notice on any of said claims to have been maintained within the conflict area. As to the alleged failure of the applicant or its predecessors in interest to perform any work within the conflict area, it is sufficient to say that it is wholly immaterial upon what part of a claim or group of claims patent expenditures are made so long as the work performed tends to the development of the claim or claims to which it is applied; nor does the fact, if it be a fact, that the applicant and its predecessors failed to comply with the provisions of section 1499 of the Compiled Laws of Utah, 1907, in the matter of posting notice relating to improvements, affect its right to a patent, as the failure of a mineral claimant to comply with local laws and regulations which, while possibly subjecting a claim to relocation before entry, nevertheless furnishes no ground for the cancellation of an entry in the absence of an adverse claim legally asserted. *Hughes et al. v. Ochsner et al.* (27 L. D., 396).

The Department concurs in the Commissioner's holding that so far as anything to the contrary is alleged, there was during the publication period enough on the ground, when viewed in the light of the published notice, of which the protestant seems to have been cognizant at the time, to have put him on inquiry as to the area included in the application and survey, even if, as alleged in the protest, there was then no monument marking the corner common to the Loop Nos. 2,

3, and 6 claims. The published notice recites that the area is described in the field notes and plat on file in the local office as commencing at corner No. 1 of the Loop No. 3 claim, whence the corner of sections 3, 4, 9, and 10, T. 10 S., R. 2 W., S. L. B. & M., bears south $10^{\circ} 12'$ east 1,298 feet; thence north $81^{\circ} 45'$ west 600 feet to corner No. 4 of Loop No. 6 claim; thence north $3^{\circ} 21'$ west 1,500 feet to corner No. 3 of said claim; thence south $81^{\circ} 45'$ east 600 feet to corner No. 2 of said claim, identical with corners Nos. 4 and 2 of Loop No. 2 and Loop No. 3, respectively (the alleged missing corner); thence north $3^{\circ} 21'$ west 1,500 feet to corner No. 3 of Loop No. 2 claim; thence south $81^{\circ} 45'$ east 1,200 feet to corner No. 3 of Loop No. 1 claim; thence south $3^{\circ} 21'$ east 1,500 feet to corner No. 4 of said claim; thence north $81^{\circ} 45'$ west 600 feet to corner No. 1 of said claim, identical with corners Nos. 1 and 3 of Loop No. 2 and Loop No. 3 claims, respectively; thence south $3^{\circ} 21'$ east 1,500 feet to corner No. 4 of Loop No. 3 claim; thence north $81^{\circ} 45'$ west 600 feet to corner No. 1 of said claim, the place of beginning. This description identifies the position of the alleged missing monument at the corner common to Loop Nos. 2, 3, and 6 claims at a point on a straight line between and 1,500 feet from common corner Nos. 1 and 1 of the Loop Nos. 3, and 6, respectively, and corner No. 3 of the Loop No. 2; and on a straight line between and 600 feet from the monument reported as marking the corner common to Loop Nos. 1, 2, and 3 claims and the monument reported as marking corner No. 3 of the Loop No. 6 claim.

The remaining question presented by the appeal, namely, that relating to fraud alleged to have been perpetrated upon the protestant by the applicant, is a matter with respect to which the Land Department can afford no relief, even if the matters charged could be clearly proven. By section 2325, Revised Statutes, it is provided that—

If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

In *Golden Reward Min. Co. v. Buxton Min. Co.* (79 Fed., 868), after setting forth the above-quoted provisions of section 2325, the court said, at page 873:

Section 2326 provides for a stay of proceedings in the land office upon the filing therein, within the 60 days, of an adverse claim, and also provides that the party filing the adverse claim shall, within 30 days thereafter, commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

These provisions provide a method whereby all parties having adverse claims to mineral lands, for which a patent is asked, may have their day in court. If a party fails to file his adverse claim in the land office in the time provided by law, or if, having so filed it, he fails to commence proceedings in accordance with section 2326, he waives his adverse claim. With reference to the proceedings in the land office, the publication of the proper notice for the prescribed period is due process of law. The proceeding is judicial in its character, and in the nature of a proceeding in rem. If there is no adverse claim, a decision of the land office awarding the patent to the claimant is a judgment by default, as conclusive as to the matter adjudicated as a judgment upon contested issues. The expression "it shall be assumed" must be construed to mean "conclusively assumed," as any other construction would defeat the object of the statute. In using the word "conclusively," I do not mean to say that the statute has closed the doors of a court of equity to adverse claimants in every case; but I think it may safely be asserted that the failure to adverse, as provided by the sections referred to, deprives the adverse claimant of all remedies except those which a court of equity might allow to be urged against a judgment at law. *Wight v. Dubois*, 21 Fed., 694; *Kannaugh v. Mining Co.* (Colo. Sup.) 27 Pac., 245; *Hamilton v. Mining Co.*, 33 Fed., 562; *Four Hundred & Twenty Min. Co. v. Bullion Min. Co.*, 3 Sawy, 634, Fed. Cas. No. 4,989; *Dahl v. Raunheim*, 132 U. S., 260, 10 Sup. Ct., 74; *U. S. v. Throckmorton*, 98 U. S., 65; *Vance v. Burbank*, 101 U. S., 519.

In *Gowdy et al. v. Kismet Gold Mining Co.* (22 L. D., 624), which is a case similar to the one at bar, the Department at page 625 said:

It is not charged by the protestants that they did not have notice of the application for patent. All they claim is that some of the claimants of the Kismet assured some of them "that they were not claiming and would not claim any portion of the ground in conflict," and relying upon this verbal promise they did not protect their interests by adverse proceedings. If it be granted that such assurances were made, this would not excuse the protestants from taking the course prescribed by statute for their own protection.

In the absence of any showing to the contrary, when publication and posting have been made, the Department must assume that all adverse claimants had notice thereof, and if they fail to protect their interests, the Department can not relieve them, when there has been a substantial compliance with the law as to the notices.

These decisions clearly support the view above expressed.

From a careful consideration of the entire record, the Department sees no reason to disturb the decision of the Commissioner, and it is accordingly affirmed.

THOMAS H. GOODWIN AND MAGGIE KANE.

Decided March 15, 1919.

SOLDIERS' DECLARATORY STATEMENT—ACTS AMENDING SECTION 2289, REVISED STATUTES.

While the privilege accorded soldiers and sailors by section 2309, Revised Statutes, authorizing the initiating of a homestead claim by agent, originally had reference to the ordinary homestead entry under section

2289, yet as the varied subsequent legislation, enlarging or restricting the area of land that may be entered, is amendatory of the latter section, that privilege is thus extended to entries initiated under the later acts.

STOCK-RAISING HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT—PETITION FOR DESIGNATION.

The petition for designation of land under the stock-raising homestead act of December 29, 1916, may be executed and filed by agent accompanied by the soldiers' declaratory statement, but formal application to make entry must be filed by the claimant within the six months period specified in section 2309, Revised Statutes.

VOGELSANG, First Assistant Secretary:

This case is before the Department on appeal by Thomas H. Goodwin from decision of the General Land Office, dated November 5, 1918, holding for cancellation his homestead entry and rejecting his application for additional entry, to the extent of one subdivision of each, because of conflict with the homestead entry of Maggie Kane.

April 23, 1917, Goodwin, by agent, filed in the local land office at Sundance, Wyoming, soldiers' declaratory statement for 640 acres and also petition for designation of same as subject to entry under the stock-raising act of December 29, 1916 (39 Stat., 862).

The local officers, on August 27, 1917, rejected the filing as to the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 30, T. 50 N., R. 74 W., 6th P. M., because of conflict with a prior State selection, and rejected it as to the other tracts because the petitioner for designation was not executed by the soldier applicant in person, but by his agent instead.

September 15, 1917, Goodwin, the soldier, filed application under the enlarged homestead act for 320 acres of the land first applied for and also filed application for additional entry of the remaining portion of the land first filed upon, including one other tract and excluding the tract embraced in the State selection. Also, on that date, he filed petition for designation of the said lands under the stock-raising act. The local officers allowed entry for 320 acres under the enlarged act and suspended the application for additional under the stock-raising act, and transmitted the petition for designation to the General Land Office.

In the meantime, and on April 26, 1917, Maggie Kane applied to make additional homestead entry for 160 acres under section 7 of the enlarged homestead act, as added by the act of July 3, 1916 (39 Stat., 344). Her original entry for 160 acres, upon which patent had issued, was in the State of Montana and situated more than twenty miles from the land applied for. The local officers suspended her application at the time it was filed, awaiting information, whether the land in the original entry had been designated, and upon receiving advice from the Miles City, Montana, land office that it had been so designated, her application for additional

entry for the S $\frac{1}{2}$ N $\frac{1}{2}$, Sec. 29 of the above mentioned township, was allowed under date of October 19, 1917. This was manifestly error, caused by oversight, as it conflicted with the prior entry of Goodwin as to the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 29, and with his suspended application for additional for the SE $\frac{1}{4}$ NW $\frac{1}{4}$, said section. It appears that no appeal was filed by Goodwin or his agent from the original action of the local officers rejecting the soldier's declaratory statement, and it was held in the decision of the Commissioner that Kane had the superior right to the tracts in conflict and, therefore, the entry of Goodwin was held for cancellation as to the SW $\frac{1}{4}$ NW $\frac{1}{4}$, said Sec. 29, and his application for additional entry was held for rejection as to the SE $\frac{1}{4}$ NW $\frac{1}{4}$, said section, because of the said conflict. It was further held that other tracts would also have to be eliminated from Goodwin's entry and application because of lack of contiguity with the portions which would remain after removal of the conflict.

It is stated in the appeal that Goodwin has commenced contest against Kane's entry for failure to establish residence thereon. If this contest should prevail, conflict would thus be removed and the entry and application of Goodwin could be allowed to stand pending consideration of his petition for designation. But even independently of the contest, which is not now here for consideration, the Department is unwilling to hold, under the circumstances of the case, that the prior rights of Goodwin as to the tracts in dispute were waived or foreclosed by failure of the formal act of appeal from what is considered an erroneous action on the part of the local office in rejecting his original filing on the ground that the agent and not the principal executed the petition for designation.

It is true that neither the said stock-raising act nor the instructions issued thereunder by the Department for its administration contain any reference to initiation of such claims by agent, but other provisions of law *in pari materia* must be construed in connection therewith and applied so far as applicable and consistent. Section 2309, Revised Statutes, authorizes initiation of a homestead claim as well by agent as in person in behalf of any soldier, sailor or marine qualified as specified in section 2304, Revised Statutes, as amended by the act of March 1, 1901 (31 Stat., 847), by filing a declaratory statement, and the principal is allowed six months from the date of the filing within which to file application for entry. This legislation was of course with reference to ordinary homestead entry under the provisions of section 2289, Revised Statutes, which has since been amended in various particulars, enlarging or restricting the area originally allowed and modifying the requirements for earning of title, and changing the administrative procedure in some instances. Thus, there is the reclamation act, whereby the area enterable may be

greatly restricted in the discretion of the Secretary; the enlarged homestead act, whereby 320 acres of land of a specified character, in a number of States, may be taken in an entry; the so-called Kinkaid Act, allowing entry of 640 acres in certain portions of Nebraska; the forest homestead act, permitting entry in forest reserves; the stock-raising act, permitting entry of 640 acres of the character specified therein. All of these acts have been regarded as merely variations from and modifications of the basic homestead act of May 20, 1862 (12 Stat., 392), which was carried into the Revised Statutes. The privilege accorded soldiers and sailors by section 2309, Revised Statutes, has been extended and applied to these different forms of homestead entry, or some of them, and so far as consistent should be applied to applications under the stock-raising act. No good reason is perceived for requiring the petition for designation of lands under this act to be executed by the soldier in person, and neither is it deemed requisite in case of such person to accompany the petition for designation by a formal application to enter, where the declaratory statement and the petition are filed through an agent. It is sufficient if the application be filed within the six months' period specified in section 2309, Revised Statutes.

It is, therefore, held error was made in rejecting the declaratory statement and the petition for designation in this case for the reason stated. But even so, the rejection was adjudged as final and the case closed upon failure of appeal from that action. Some consideration must be given to this feature of the case. It will be noted that, within the appeal period, the soldier, in person, filed his application and petition, although in a little different form, and it is alleged that before doing so he inquired of the local office whether there was any objection to such filing. His assertion that he received a favorable reply is attested by the fact that his application for entry was allowed and his petition entertained. Had he been informed of the intervening application of Kane, the soldier would still have had time for formal appeal from the original adverse action, but upon allowance of his application no appeal seemed necessary. Under the circumstances shown, it would be altogether unjust to hold that whatever rights inured to the soldier under the original filing by his agent were lost by failure to appeal from the adverse action thereon.

This leads further to consideration of the nature of his rights under the original filing. It must be remembered that said filing was for 640 acres with a view to entry under the stock-raising act, whereas his existing entry is for 320 acres under the enlarged homestead act, a different form of entry, made in connection with petition for designation of the whole area under the stock-raising act. The land had been designated as subject to entry under the enlarged act but not under the stock-raising act. Before Goodwin applied

under the enlarged act, Kane had filed her application under that act. Therefore, as to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 29, embraced in Goodwin's entry Kane had the prior right to consideration under that act, whereas Goodwin had the first filing and claim thereto under the stock-raising act, and if that tract should be designated under the latter act Goodwin should prevail as to that tract, and likewise as to the SE. $\frac{1}{4}$ and NW. $\frac{1}{4}$, said section, embraced in his application for additional entry. In other words, if this land shall be designated as of the character subject to entry under the stock-raising act Goodwin should prevail, but if not, then Kane should be allowed to retain her entry under the enlarged-homestead act in the absence of other objection. It will, therefore, be necessary to consider the petition of Goodwin for designation, after which appropriate further action will be taken in accord with the views herein expressed.

The decision appealed from is modified accordingly.

JULIAN F. CUMBERLAND.

Decided March 20, 1919.

DESERT-LAND ENTRIES IN CHUCKAWALLA VALLEY—STATUTORY PERIOD.

In determining the statutory lifetime of desert-land entries embracing lands in the Chuckawalla Valley in the State of California, it is necessary to note the extensions granted by the acts of June 7, 1912, March 4, 1913 and April 11, 1916; and the further fact that such period does not run during any suspension effected by the withdrawal of land for the purpose of resurvey.

VOGELSANG, First Assistant Secretary:

This case is before the Department on appeal from decision of the Commissioner of the General Land Office dated November 16, 1918, rejecting the application of Julian F. Cumberland for the privilege of perfecting his desert-land entry under the last two paragraphs of section 5 of the act of March 4, 1915 (38 Stat., 1138-1161).

The entry was made October 17, 1910, for the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, T. 6 S., R. 21 E., S. B. M., containing 320 acres, now within the El Centro, California, land district.

June 19, 1911, first yearly proof was submitted, showing expenditure of \$320 in clearing sagebrush from a portion of the land, and on June 7, 1912, like proof was made for the second year.

November 21, 1917, proof was submitted showing further expenditure of \$320 in clearing other portions of the land, and also in that connection it was represented that there was no prospect that if

further time were granted, the entryman would be able to reclaim the land by irrigation, and therefore he asked to be allowed to perfect his entry in the manner required of homestead entrymen as provided by the said act of March 4, 1915.

It appears that this land is within the area affected by the remedial acts of June 7, 1912 (37 Stat., 130), March 4, 1913 (37 Stat., 1008), and April 11, 1916 (39 Stat., 49-50), whereby the running of the statutory period of desert-land entries in certain described townships was suspended and the lifetime of the entries thus extended. The act last mentioned provided that no desert-land entry theretofore made in good faith for lands in certain townships, including the one here in question, should be canceled prior to May 1, 1919, because of failure on the part of the entryman to make any annual or final proof falling due upon any such entry prior to said date, and further provided:

If the said entrymen are unable to procure water to irrigate the said lands above described through no fault of theirs, after using due diligence, or the legal questions as to their right to divert or impound water for the irrigation of said lands are still pending and undetermined by said May first, nineteen hundred and nineteen, the Secretary of the Interior is hereby authorized to grant a further extension for an additional period of not exceeding two years.

In the instructions of May 13, 1916 (45 L. D., 86-87), with reference to these extension acts, the Department said:

The rule to be observed in determining when annual and final proofs become due in connection with desert-land entries embracing lands described in the acts of June 7, 1912, and March 4, 1913, is to exclude the period from the date of the act or acts applicable thereto, until May 1, 1915, and to extend the statutory period accordingly.

A similar rule should be observed with reference to the act of April 11, 1916, by excluding the period from April 11, 1916, to May 1, 1919, and extending the statutory period accordingly.

It will therefore be observed that only about two and a half years of the normal lifetime (four years) of this entry has run, and further provision is made that suspension may be granted for an additional period of two years in the discretion of the Secretary.

It is also noted that the land was on June 29, 1916, withdrawn for the purposes of resurvey, and the statutory period does not run during such suspension. And even after the exhaustion of these protective features, there is still further authority for extending the statutory period under the said act of March 4, 1915, where there is a reasonable prospect for irrigation.

It appears therefore that there is no immediate necessity for definite and final adjudication respecting the irrigability of the lands in question. The entry is sufficiently protected under present conditions, and patent could not in any event be issued while the land is withdrawn for resurvey.

There are perhaps eight hundred such entries in this project, embracing approximately 250,000 acres similarly situated. The lands lie adjacent to and near the Colorado River, and the plan was to obtain water from the river for irrigation of this area, but the question of infringement of the rights of Mexico in these waters has been a feature, among other obstacles, in retarding the development of the plan. While the company originally contemplating development of this project appears to have disorganized, it may be that other measures will be provided for carrying water to these lands.

The last two paragraphs of section 5 of the said act of March 4, 1915, were intended to be applied as a last resort for the protection of desert-land entries, and where it has been demonstrated to a fair degree of certainty that the lands can not be irrigated at reasonable cost from any known source of water supply. In this case the Department is of opinion that the time has not yet arrived when it can be determined that these lands are nonirrigable. In the meantime, protection will be afforded under the provisions of law above mentioned.

The decision appealed from is accordingly affirmed.

MERRITT A. GREEN (ON REHEARING).

Decided March 20, 1919.

SOLDIERS' ADDITIONAL—RETURN OF PAPERS.

The inadvertent issuance of a duplicate certificate of a soldiers' additional homestead right, through mistake and without authority of law, does not bind the Government; and when returned will be held under the uniform rule of the Department to retain in its possession such papers when adjudged invalid.

SOLDIERS' ADDITIONAL—RETURN OF PAPERS.

The tribunal vested with authority to determine whether or not rights are conveyed by an instrument has the power to control such instrument if declared invalid; and when so adjudged it should be canceled and deposited among the records of the tribunal that has passed upon its legality.

VOGELSANG, *First Assistant Secretary*:

November 21, 1877, a certificate was issued by the Commissioner of the General Land Office certifying that Ira O. Russell was entitled to an additional homestead entry for not to exceed 80 acres, as authorized by section 2306 of the Revised Statutes. December 11, 1877, said certificate was located on 73.95 acres. The location of the right was not properly noted on the records of the General Land Office, and May 16, 1908, a new certificate was issued to the widow of said soldier on a showing made by her to the effect that the original certificate had not been used, could not be found, and was thought to have been lost.

She assigned said duplicate certificate to Merritt A. Green, who tendered it with an application for land in Alaska. His application was rejected for the reason that the tract, together with other land held by him, presented an excess of water frontage on streams held to be navigable, and also because the right of entry was found to have been exhausted.

A request was thereupon made for the return of said certificate, which request was refused by the Commissioner July 10, 1918. An appeal from said action was then taken to the Secretary of the Interior, who also refused to return said certificate by decision rendered October 24, 1918 [not reported]. The matter is now pending upon motion for rehearing.

The certificate that purported to recertify the Russell right was void. But one tract of 80 acres could be taken on said soldier's right, according to law, and the original certificate evidencing that right had been located and used, and was not lost or destroyed, and the officers who issued the duplicate certificate did so inadvertently through mistake. But this mistake, however unfortunate, could not bind the Government to honor said certificate because there was no law authorizing the issuance thereof, and the original certificate stood as evidence of the right. Mrs. Russell and Mr. Green were charged with notice that, as the original certificate had been actually used and was not lost or destroyed, the duplicate certificate could have no force or effect, and no right to land could be acquired thereby. The decision of the Commissioner rejecting said application was therefore correct.

The original certificate was located on but a fraction of the land, but the remaining portion cannot be located by the invalid erroneously issued duplicate certificate. It thus appears that the paper, purporting to be a recertification of the Russell right, conveys no rights whatever against the Government. It was issued in the nature of a duplicate order for land, but when it was presented it could not be honored, because the original certificate had already practically exhausted the right. It has accomplished the purpose of its creation so far as it can, and has been voluntarily returned to the possession of its maker, and the Government has a property right in it. It purports to confer a right against the Government, but in fact does not. To reissue it might be construed as a recognition of its validity.

Then too the tribunal vested with authority to determine whether or not rights are conveyed by an instrument always has the power to control the disposition of the instrument itself, if declared to be invalid. And when it is held that there are no rights conveyed by a paper according to its natural purport and legal effect, if valid, its further transfer should be prohibited and it should be canceled

and deposited among the records of the tribunal that has passed upon its legality.

An earnest plea has been made that the Government should prevent a loss to Mr. Green by permitting him to use the alleged certificate. It is the policy of the Department of the Interior to do justice, but it cannot change nor violate the law, and the law is clear, the paper is invalid. And it cannot be honored nor reissued.

It has been the uniform custom of the Department to retain in its possession invalid papers that might be mistakenly assumed to confer rights against the Government. For an instrument purporting to convey rights, which in fact does not, can be used for no legitimate purpose, and the Government has the right, and it is its duty to protect itself against any wrongful claim by reason thereof.

The rehearing must therefore be denied.

MURPHY v. BRIGHT.¹

Decided March 20, 1919.

DESERT-LAND ENTRY—QUALIFICATION AS TO CITIZENSHIP.

The fact that a party has an unperfected homestead entry in Canada, does not of itself render illegal and void his declaration of intention to become a citizen of the United States; and by the filing of such declaration his wife is in that respect duly qualified to make an entry under the desert-land law if in fact a *bona fide* resident of the State in which the land is located.

VOGELANG, *First Assistant Secretary*:

April 1, 1913, Louisa Bright filed desert-land declaration 019387 for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 23, T. 35 N., R. 7 E., M. P. M., 160 acres, Havre, Montana, land district, and May 9, 1913, said declaration was allowed. Three annual proofs were submitted showing the expenditure of more than \$3 per acre in fencing, clearing and first breaking of the land, and with such proof was filed a copy of her husband's declaration to become a citizen of the United States, executed before the clerk of the District Court of Hill County, Montana, January 29, 1913.

June 17, 1916, John W. Murphy filed contest against said entry alleging, in substance, failure to expend the sum of \$3 per acre in improvements required by the desert-land law; that the statements in the entrywoman's annual proofs were false; that said entry is illegal because at the time of filing same entrywoman's husband was holding an unperfected homestead entry in Canada upon which he did not submit proof until more than a year after entrywoman filed

¹ See decision on motion for rehearing, page 90.

her declaration; that for this reason entrywoman was not qualified to make the declaration or entry; that at the time of filing such declaration entrywoman was not a *bona fide* resident of the State of Montana but her home was in Canada upon the unperfected homestead of her husband; that her husband's declaration to become a citizen of the United States being illegal and void determines her status as to citizenship; and further, that entrywoman has no water supply to irrigate the land and has made no *bona fide* attempt to obtain such water supply or effect reclamation of the land; and that she well knew when filing her declaration that no water could be obtained from the source stated by her.

No answer was filed and the entry was, August 30, 1916, canceled by the Commissioner's letter "H," of that date, and September 5, 1916, notice of preference right was issued to contestant. September 11, 1916, the entrywoman applied for reinstatement of her entry and by the Commissioner's letter "H," of December 29, 1916, the cancellation of said entry was revoked, the entry reinstated and hearing directed upon the contest of Murphy. Answer was filed denying the charges made and upon due proceedings therefor hearing had before the local officers in March, 1917, both parties appearing with counsel and witnesses and submitting testimony.

January 29, 1918, the local officers joined in decision that Louisa Bright was not qualified to make entry at the time she filed her declaration and thereupon recommended that the entry be canceled.

November, 1, 1918, the Commissioner of the General Land Office, considering the case upon appeal, reversed the action of the local officers and dismissed the contest of Murphy, and from this decision appeal has been taken to the Department. The facts shown by the record are clearly and sufficiently set forth in the Commissioner's decision, so that no restatement thereof is deemed necessary. All the charges made, except that entrywoman was not qualified to make the entry, are matters of conflict of testimony. The local officers did not pass upon such questions. The Commissioner, however, considered such questions exhaustively and found that none of such charges is sustained by a preponderance of the evidence, and in this conclusion the Department concurs.

As to the further charge, however, that the declaration of Thomas Bright, husband of the entrywoman to become a citizen of the United States, is illegal and void for the reason that he had at the time the declaration in question was filed an unperfected homestead entry in Canada, the facts are undisputed, but the Department concurs in the decision of the Commissioner that:

The fact that Thomas Bright had such entry in Canada did not of itself render his said declaration illegal. It is true a person can not be a *bona fide* resi-

dent of two countries at one and the same time, and that he remains a citizen of one country until he duly acquires citizenship in another country, but the homestead law allows one to make an entry who has filed his declaration to become a citizen of the United States, and the husband in this case having complied with the law in that respect, his said declaration was not illegal and void.

In the opinion of this office, Louisa Bright was a qualified entrywoman at the time she made the entry in question.

The facts disclosed in the case entitle the entrywoman, as found by the Commissioner, to relief under the act of March 4, 1915 (38 Stat., 1161).

The decision appealed from is affirmed.

MURPHY v. BRIGHT (ON REHEARING)

Decided June 16, 1919.

CITIZENSHIP—DECLARATION OF INTENTION.

The prior ownership of a homestead entry in Canada does not render illegal and void a declaration of intention to become a citizen of the United States; nor does the return of declarant to the Dominion for the purpose of correcting an error in the description of the land embraced in such entry invalidate his declaration theretofore duly executed and filed.

VOGELSANG, First Assistant Secretary:

In the above-entitled case John W. Murphy has filed a motion for rehearing of departmental decision of March 20, 1919 [47 L. D., 88], wherein his contest against the desert-land entry of Louisa Bright, made May 9, 1913, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 23, T. 35 N., R. 7 E., M. M., 160 acres, Havre, Montana, land district, was dismissed, affirming the decision of the Commissioner of the General Land Office.

The errors assigned raise no new questions either of law or fact. The testimony submitted at the hearing has again been carefully examined, and the Department is of the opinion that the charge that entrywoman has not expended the requisite amount in permanent improvements, is not sustained by the proof. On the contrary, the clear preponderance of the testimony shows that the required expenditures were made in good faith. It is urged that the failure of entrywoman to obtain a sufficient water supply for irrigation purposes shows bad faith; that she made but slight effort to comply with the law in that respect, for which reason her entry should be canceled. The report of a special agent of the General Land Office shows it to be impossible for entrywoman to provide storage facilities in any effort to reclaim the land, and he expressed the opinion that she was entitled to relief under the provisions of the act of

March 4, 1915 (38 Stat., 1161). The reasons why she failed to obtain a satisfactory water right, and her efforts to do so, clearly appear in the proof and in her application for relief under said act. The Department is of opinion that she has done all in her power to obtain a sufficient amount of water for irrigation purposes, and having found it impossible to do so, she is clearly entitled to the relief prayed for.

The main insistence, however, seems to be upon the question of citizenship, it appearing that on October 2, 1916, Thomas Bright, husband of entrywoman, was deported to Canada by the immigration authorities of the United States upon the ground that after filing his declaration of intention to become a citizen of this country he returned to Canada and proved upon a preemption claim. It is charged that Bright's declaration of intention was made upon false representations and being illegal and void, his wife could take no other status than that of her alien husband.

This charge was carefully considered by the Commissioner and his findings were concurred in by the Department. Upon further consideration of all the facts the Department is not disposed to change its holding. Bright makes affidavit, in which he is corroborated by the Canadian land authorities, that his entry there was delayed upon the submission of final proof because of an error in the description of the land, which made it necessary to submit new proof. It was pending this delay, when he supposed his Dominion entry was allowed, that he filed the declaration of intention to become a citizen of the United States. The Department is of opinion that his return to Canada for the purpose of correcting an error in the description of the land there involved would not invalidate his declaration of intention already made in the United States. It is not believed that the ownership of a homestead in the Dominion of Canada would render illegal and void a declaration of intention to become a citizen of this country. It is true a person can not be a citizen of two countries at one and the same time, but the declaration of intention does not make one a citizen of the United States. It is merely a declaration stating that the person making it intends in good faith to become a citizen at some future time as provided by the naturalization law, and the alien so declaring his intention is not a citizen until a court of record passes upon his application and clothes him with citizenship.

The facts do not justify the allowance of the motion in this case, and it is accordingly denied.

STATE OF FLORIDA.¹

Decided March 20, 1919.

SWAMP LAND GRANT—CHARACTER OF LAND.

The claim of a State to land under its swamp land grant is incomplete and inchoate, and does not become perfect, as of the date of the act, until patent is issued conveying the fee simple title; and until so patented the Land Department has jurisdiction to investigate and determine both the swamp and overflowed condition of the land as well as its mineral character.

VOGELSANG, *First Assistant Secretary*:

The State of Florida has appealed from the decision of the Commissioner of the General Land Office, dated October 1, 1918, holding for rejection its application, 015790, filed January 31, 1918, to select as swamp and overflowed land pursuant to the act of September 28, 1850 (9 Stat., 519), the W $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 10, T. 2 N., R. 1 W., T. M., Gainesville, Florida, land district, and declining to accept the State's application so amended as to be subject to the provisions and limitations of the act of July 17, 1914 (38 Stat., 509), which provides for agricultural entry of lands withdrawn for phosphate.

By Executive order of February 3, 1913, the tract described was included within Phosphate Reserve No. 16, pursuant to the provisions of the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497). Because of the withdrawal and of departmental instructions of May 25, 1918 (46 L. D., 389), to the effect that mineral lands were not included within the scope of the swamp-land grant, the Commissioner, on July 11, 1918, allowed the State sixty days to file a showing that the tract was not mineral and to apply for a hearing, or to appeal. September 3, 1918, the State filed its consent to an amendment of its application so as to permit the issuance of a limited patent with a reservation of the phosphate deposits under said act of July 17, 1914, *supra*. In the decision complained of it was held that the last mentioned act did not extend or apply to grants of specific sections in place or to grants of lands of a specified class or character, such as swamp lands, from which minerals are excluded. The amended application was held for rejection, and the State was again afforded an opportunity to apply for a hearing, or to appeal.

In support of the present appeal, it is contended, in substance, that the swamp-land act constitutes a grant *in praesenti*; that title to swamp land accrued to and became vested in the State at the date of the grant; that the withdrawal of 1913 and the surface act of 1914 can in no way impair or defeat the State's title and right to a pat-

¹ See decision on motion for rehearing, page 93.

ent, and that even if mineral lands are deemed to be excluded from the grant, it must appear that they were known mineral lands at the date of the grant.

The argument and printed brief submitted have been carefully examined. Nothing is presented which persuades the Department that the conclusions set forth in its instructions of May 25, 1918, *supra*, are in error. The title of the State at the outset is an inchoate one. The State's claim is imperfect, both at law and in equity. Title does not become perfect, as of the date of the swamp-land act, until a patent is issued conveying the land in fee simple. Until patented the Land Department has jurisdiction to investigate and determine both the swamp and overflowed condition of the land and its mineral character. If found to be mineral, the land does not fall within the scope of the grant and can not be patented.

The phosphate reserve, above mentioned, was created nearly five years prior to the presentation of the State's application. The withdrawal was noted upon the records of the Land Department and the State was charged with knowledge thereof. The Commissioner treated the phosphate withdrawal as impressing the land with a *prima facie* mineral character. There is nothing in the present record denying that such is its character. The State has submitted no showing indicating that the tract is in fact nonmineral. It has not applied for a hearing to test the character of the land.

Having fully considered the case as presented, the Department finds no reason to disturb the decision rendered by the Commissioner, and the same is hereby affirmed.

STATE OF FLORIDA (ON REHEARING).

Decided May 14, 1919.

SWAMP LAND GRANT—CHARACTER OF LAND.

Lands covered by an apparently permanent body of water at the date of the swamp land grant to the State are not of the character contemplated thereby, even though subsequently, by a recession of the waters, land of a swampy character should come into existence.

VOGELANG, First Assistant Secretary:

This is a motion for rehearing by the State of Florida in the matter of its swamp land selection under the act of September 28, 1850 (9 Stat., 519), No. 015790, filed January 31, 1918, at Gainesville, Florida, for the $W\frac{1}{2}$ $SW\frac{1}{4}$, Sec. 10, T. 2 N., R. 1 W., T. M., which was ordered rejected by the Department in its decision of March 20, 1919 [47 L. D., 92].

The above tract was embraced by Executive order of February 3, 1913, within Phosphate Reserve No. 16, pursuant to the provisions

of the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497). In view thereof and of the instructions of May 25, 1918 (46 L. D., 389), to the effect that mineral lands are not within the scope of the swamp land grant, the Commissioner, upon July 11, 1918, allowed the State sixty days to file a showing that the tract was not mineral and to apply for a hearing or to appeal. In reply thereto, the State filed an election to take the limited patent provided for in the act of July 17, 1914 (38 Stat., 509), which act, however, the Commissioner, in his decision of October 1, 1918, held did not apply to the grants of land as swamp from which minerals are excluded. In the appeal to the Department, counsel for the State conceded the correctness of that ruling of the Commissioner but contended that the swamp land grant was a grant *in praesenti*, and that the present tract being not known to be mineral in character at the date of the grant, passed to the State, which was entitled to a patent without reservation. The Department, in its decision of March 20, 1919, held that the title of the State is inchoate until the issuance of the patent, and that, if the land be found to be mineral at any time prior to patent, it does not pass to the State.

In support of its selection, the State filed the affidavits of three witnesses, executed January 19, 1918, who had known this tract for fifty, forty-eight, and fifteen years, respectively, to the effect that:

* * * the greater part of said land is swamp or over-flowed land; that not less than seventy-four (74) acres of said land is swamp or over-flowed land; that all that part of said land which is swamp or over-flowed land is unfit for cultivation by reason of its continuously over-flowed, wet, marshy or sobby condition, and that crops cannot be raised thereon; that such has been the character of said land since my first knowledge of same, and that, in my opinion, such was the character thereof on the 28th day of September, A. D. 1850, the day of the passage of the grant; * * *

The survey embracing said W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, was made in 1852. Upon the plat thereof, approved November 29, 1853, it is shown that the greater part of this tract was embraced in a body of water known as Orchard Pond, and it would appear that cultivated fields extended to the margin of the pond. The surveyor returned the land bordering the pond as, "1st and 2d Rolling Red Land" and "1st Rate Rolling field." The records of the General Land Office disclose that the tract was previously embraced in homestead entry 011172, made October 16, 1912, by Thomas Clayton, which was canceled April 17, 1918. In a report as to this homestead entry, a field officer, upon May 10, 1918, stated that about 6 acres are timbered, agricultural land which can be cultivated without irrigation or drainage, and that about 74 acres lie under the water in Orchard Pond, which is an excellent fishing place and which he recommended should be placed in a public water

reserve so that it would be at the disposal of the general public as a pleasure park.

Lands covered by an apparently permanent body of water at the time of the swamp grant are not of the character contemplated by it (*Morrow et al. v. State of Oregon et al.*, 17 L. D., 571; *State of Oregon v. Willey*, 21 L. D., 397; *State of Oregon*, 23 L. D., 178; *State of Illinois*, 26 L. D., 605). This is true although subsequently, by a recession of the waters, land of a swampy character should come into existence. *State of California* (1 L. D., 320). Under the above facts, the tract here under consideration would not pass to the State under its swamp land grant, even if it were nonmineral in character.

Further, as to the other features of the case, the Department finds no reason for changing its views as expressed in its decision of March 20, 1919.

The motion for rehearing is accordingly denied.

PROLONGED ABSENCES FROM HOMESTEADS ON ACCOUNT OF CLIMATIC CONDITIONS—ACT OF FEBRUARY 25, 1919.

INSTRUCTIONS.

[Circular No. 636.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 25, 1919.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

Under the homestead law, as it has heretofore stood, a homesteader is entitled to a leave of absence in one or two continuous periods not exceeding in the aggregate five months in each year after establishing residence, being required to file notice at the beginning and end of each period. It is provided that in the case of commutation 14 months' actual residence must be shown, no credit being allowed for the periods of these allowable absences.

By the act of February 25, 1919 (40 Stat., 1153), the following clause is inserted in the law:

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

2. An entryman desiring to avail himself of the privilege accorded by this act must, within one year after the allowance of his entry, file in the local land office an application (preferably on the approved form) consisting of his affidavit, corroborated by two witnesses, setting forth the climatic conditions which would render it a hardship to reside upon the land for as much as seven months in each year, and stating whether he wishes the requirement in his case to be fixed at six months' residence in four successive years or at five months' residence in five successive years. The affidavit of claimant and the witnesses may be executed before any officer authorized to administer oaths and using an official seal. If the showing is satisfactory, you will promptly forward the application to this office with notation of your allowance thereof, by special letter. If it is not satisfactory, you will reject the application, subject to the usual right of appeal, and all appeals will be promptly forwarded by special letters.

If the application requests a reduction to five months' residence in each year, you may, if proper, grant partial relief; that is, fix the residence period at six months in each year, your decision being subject to review by this office on appeal from your decision, of which the party will be notified with all promptness.

3. Where a homesteader has secured a reduction of the residence requirements to six months in each year, he may, at or before the termination of the second year of his entry, file application for further reduction; that is, to five months in each of five years.

4. To entitle a homesteader to the benefits of this act, he must show that the climatic conditions in the vicinity of the land entered are ordinarily—not in exceptional years—such as would render it a hardship for him to reside there for a greater part of each year than for five or for six months, as the case may be.

5. Under this provision of the law there is no authority to allow two absence periods, but the five months' residence or the six months' residence, as the case may be, must be in one continuous period.

6. Proof on an entry must be made within five years after its allowance, notwithstanding the fact that relief may have been granted under this act; but the homesteader need not wait until the termination of his fifth residence year before submitting proof, provided he has had the last required period of residence.

7. An entry which is otherwise subject to commutation may be commuted, notwithstanding the granting of relief to the homesteader under this provision of law; but the periods of actual residence on the claim must aggregate at least 14 months and cultivation of not less than one-sixteenth of the area must be shown, unless a reduction has been granted in the requirements in that regard.

8. Credit on account of a period of military service will be allowed as on other entries, but at least one year's compliance with the homestead laws must be shown in every case.

CLAY TALLMAN,
Commissioner.

Approved,
ALEXANDER T. VOGELSANG,
First Assistant Secretary.

[Form approved by the Secretary of the Interior March 25, 1919.]

DEPARTMENT OF THE INTERIOR.

United States Land Office _____ No. _____

APPLICATION FOR CHANGE IN RESIDENCE REQUIREMENTS.

To the Register and Receiver:

I, _____ of _____, holder of Homestead Entry _____ made _____, for _____

hereby apply under the act of Congress of February 25, 1919 (40 Stat., 1153), for permission to show on final proof, residence upon my claim for _____ months during each of _____ successive years in lieu of showing the residence ordinarily required by section 2291 of the Revised Statutes.

In support of this request I make the following statement as to the climatic conditions in the vicinity where by entry is situated, as the result of which it would impose a hardship, to require residence on said land for as much as seven months in each year:

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by _____);

(Give full name and post-office address.)

that I verily believe affiant to be the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in _____, _____, within the _____ (Town.) _____ (County and State.)

_____ Land District, this _____ day of _____, 19__.

(Official designation of officer.)

CORROBORATING AFFIDAVITS.

We, _____, of _____,
(Give full Christian name.) (Give full post-office address.)
_____ years of age, and by occupation _____ and

_____, of _____,
(Give full Christian name.) (Give full post-office address.)
_____ years of age, and by occupation _____, do
solemnly swear that we are well acquainted with the land entered, and have

known the climatic conditions existing where said land is situated, for _____
years and _____ years, respectively; that we have read the statements made
in said application; and that we know said statements to be true.

(Sign here, with full Christian name.)

(Sign here, with full Christian name.)

I hereby certify that the foregoing affidavit was read to or by affiants in my
presence before affiants affixed signatures thereto; that affiants are to me
personally known (or have been satisfactorily identified before me by
_____), and I believe them to be the identical persons
hereinbefore described, and that said affidavit was duly subscribed and sworn to
before me, at my office in _____, _____ County, State
(Town.)
of _____, within the _____ land district,
this _____ day of _____, 19____

(Official designation of officer.)

NOTE.—Every person swearing falsely to the above affidavit will be punished
as provided by law for such offense. See section 125, United States Criminal
Code.

UNITED STATES LAND OFFICE AT _____,

_____, 19____

This application is granted and the entryman is given the privilege of showing
on final proof residence upon his claim for a period of _____ months in
each of _____ successive years.

(Register.)

(Receiver.)

SEC. 125, UNITED STATES CRIMINAL CODE.

Whoever, having taken an oath before a competent tribunal, officer, or person
in any case in which a law of the United States authorizes an oath to be admin-
istered that he will testify, declare, depose, or certify truly, or that any written
testimony, declaration, deposition, or certificate by him subscribed is true, shall
willfully and contrary to such oath, state or subscribe any material matter
which he does not believe to be true, is guilty of perjury, and shall be fined not
more than \$2,000 and imprisoned not more than five years.

JAMES H. HARTE.

Decided March 26, 1919.

FOREST LIEU SELECTION—ENTRY ERRONEOUSLY CANCELED.

The cancellation of a homestead entry, based upon proceedings initiated more than two years after the issuance of final certificate thereon, is without authority of law, and a forest lieu selection rejected because of such erroneous cancellation of the base land, remains legally pending and comes within the provisions of the act of March 3, 1905.

VOGELSANG, First Assistant Secretary:

James H. Harte has appealed to the Department from the decision of the Commissioner of the General Land Office of November 16, 1918, denying to him the right of reselection in lieu of lots 3 and 4, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 34, T. 1 S., R. 5 E., B. H. M.

The adverse action of the Commissioner is based upon a holding that said lieu selection No. 4355 was legally rejected for the reason that the entry of the land offered in exchange was canceled because of the fault of the parties making the same, and the selection was not pending when the law, upon which the right of selection is sought to be based, was enacted March 3, 1905 (33 Stat., 1264).

In disposing of the case the Commissioner states the facts as follows:

September 21, 1900, Eudora J. Burleigh made homestead entry 5961 for lots 3, 4, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 34, T. 1 S., R. 5 E., B. H. M. Final certificate No. 2470 was issued November 9, 1900. By deed dated November 9, 1900, recorded November 10, 1900, Eudora J. Burleigh reconveyed to the United States under the act of June 4, 1897, the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 34, T. 1 S., R. 5 E., B. H. M., the land so relinquished being embraced in the above homestead entry. July 22, 1901, Eudora J. Burleigh, by James H. Harte, her attorney in fact, selected in lieu thereof the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 26, T. 42 N., R. 1 E., B. M. October 20, 1903, the entry was suspended on report made by a special agent and the entrywoman was served with notice under circular of August 18, 1889. No action having been taken, the entry was canceled and the case closed March 30, 1904. April 6, 1904, the lieu selection was rejected as a result of the cancellation of the homestead entry.

It appears from the above statement of facts that the cancellation of the homestead entry was based upon proceedings initiated more than two years after the issuance of final certificate thereon. It follows that such cancellation was without authority of law and the lieu selection was not legally canceled and therefore remained legally pending and comes within the provisions of the act of March 3, 1905, *supra*. See case of Daniels *v.* Wagner (237 U. S., 547).

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

WHALEN v. HANSON.

Decided March 26, 1919.

PRACTICE—PROOF OF SERVICE OF NOTICE OF CONTEST.

The provision of Rule 8 of Practice as to filing proof of publication of notice of contest is mandatory and has all the force and effect of law, and in order to thus make proper service it is incumbent upon contestant to show strict compliance therewith.

VOGELSANG, *First Assistant Secretary:*

Theron G. Whalen has appealed from a decision of the Commissioner of the General Land Office, dated November 27, 1918, reinstating the canceled homestead entry of Theodore Hanson for the S $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$, and E $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 32, T. 23 N., R. 22 E., W. M., within the Waterville, Washington, land district.

The entry was made February 12, 1917, and on April 16, 1918, Whalen filed contest against same charging failure to establish residence upon the land and abandonment thereof, with the usual non-military averments. Service was made by publication, the date of the first publication being May 16, 1918, and of the last being June 6, 1918. Proof thereof was not filed until June 28, 1918.

June 28, 1918, the local officers transmitted the record to the Commissioner reporting entryman's default and recommending cancellation of the entry. By Commissioner's letter "H" of July 23, 1918, the entry was canceled and directions given to notify the contestant.

Under date of July 30, 1918, the local officers advised the Commissioner of the receipt of information from the entryman to the effect that he was in the military service, being stationed at Camp Lewis, Washington.

November 27, 1918, upon further examination of the record, the Commissioner held that by reason of the mandatory provisions of Rule 8 of Practice, the contest abated by reason of contestant's failure to make proof of publication within twenty days after the fourth and final publication of the notice and revoked his letter of July 23, reinstated the entry, according contestant an opportunity to commence anew or to appeal.

The record has been examined and the appeal presents no valid reason for disturbing the action taken by the Commissioner. Rule 8 of Practice is mandatory and has all the force and effect of law. In order for contestant to make proper service by publication it was incumbent upon him to show strict compliance with said rule, which he has failed to do.

The decision appealed from is affirmed.

CONDRAV v. CHRISTENSEN.

Decided March 27, 1919.

PRACTICE—DEPOSITIONS.

Depositions regularly taken under the provisions of the Rules of Practice become a part of the record of the case upon their receipt by the local officers, subject to any legal objection which must be made at the hearing; if not so made it can not be successfully urged on appeal.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by William O. Condray from a decision of the Commissioner of the General Land Office dated November 1, 1918, dismissing his contest against the homestead entry of John F. Christensen, made June 16, 1915, for E. $\frac{1}{2}$, Sec. 25, T. 33 N., R. 68 W., 6th P. M., Douglas, Wyoming, land district.

The contest affidavit was filed June 9, 1917, and charged that entryman had neither established residence upon the land nor cultivated any portion of it. The affidavit was not corroborated in the manner required by Rule of Practice 3, as amended September 23, 1915 (44 L. D., 365), but entryman joined issue, and notice of hearing before the local officers on August 28, 1917, was issued. On July 26, 1917, there was filed on behalf of entryman a motion to issue a commission to a United States commissioner at Lusk, Wyoming, to take the depositions of ten named persons. With the motion was filed a stipulation and agreement signed by the attorneys for the respective parties that the depositions might be taken on August 9, 1917, upon oral interrogatories. The commission issued, and the depositions were taken at the time and place agreed upon, after the attorneys had signed a stipulation waiving the signatures of the witnesses. The record does not show that the depositions were formerly introduced at the hearing, nor does it appear that the local officers considered them. Their decision, signed by the receiver alone, reads as follows (omitting the caption):

Having heard the testimony given in the above-entitled case, and after a perusal thereof, we find for the contestant, holding that the allegations of contest have been sustained. We therefore recommend the cancellation of the entry.

The Commissioner considered the depositions referred to, and held that the contestant had not sustained the charges. Further, that under the circumstances connected with the taking of the depositions, no formal offer of them at the hearing was necessary.

The contestant contends that the Commissioner erred in considering the depositions, inasmuch as they were not offered in evidence. With this contention the Department is unable to agree. The Rules of Practice (20 to 27) provide for the taking and return of deposi-

tions, but make no requirement that they be formally introduced in evidence. It must therefore be held that when depositions are regularly taken they become, upon their receipt at the local office, a part of the record of the case, subject to any legal objection, and such objection must be made at the hearing. An objection raised for the first time on appeal comes too late. *Stowell v. Clyatt* (10 L. D. 339).

The decision appealed from correctly stated the facts as shown by a preponderance of the testimony. It is accordingly affirmed.

O. E. FARNHAM.

Decided March 29, 1919.

RECLAMATION CHARGES—STATE SCHOOL LANDS.

State school lands sold in 1917 and 1918 do not fall within the language of the proviso to article 4 of the supplemental contract entered into by the Secretary of the Interior with the Belle Fourche Valley Water Users Association on January 24, 1911, as they are neither public lands entered nor private lands contracted prior thereto; and the purchasers from the State are accordingly bound by the construction charge in effect at the time water right application is filed.

HALLOWELL, Assistant to the Secretary:

This is an appeal by O. E. Farnham as attorney for the purchasers of and applicants for water rights to certain school lands sold by the State of South Dakota July 31, 1917, and April 1, 1918, within the Belle Fourche Project from a decision of the Director of the Reclamation Service dated February 5, 1919, holding that the construction charge against these lands is \$40 per irrigable acre and not \$30 as claimed by the appellants.

The various transactions involved in the question presented may be summarized as follows:

By section 58 of the act of March 3, 1905 (Session Laws 1905, 201-214) reenacted in section 59 of the act of March 7, 1907 (Session Laws 1907, 373-388), the State of South Dakota provided that:

No lands belonging to the state, within the areas to be irrigated from works constructed or controlled by the United States, or its duly authorized agencies, shall hereafter be sold, except in conformity with the classification of farm units by the United States, and the title of such land shall not pass from the state until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof duly issued. After the withdrawal of lands by the United States for any irrigation project, no application for purchase of state lands within the limits of such withdrawals shall be accepted, except upon the conditions prescribed in this section.

On October 25, 1905, the Secretary of the Interior entered into a contract with the Belle Fourche Valley Water Users Association whereby the United States agreed under certain conditions to construct and operate a system of irrigation works for the benefit of the shareholders of that association. Article 4 of that agreement provided:

That the payments for the water rights to be issued to the shareholders of said Association, under the provisions of said act of Congress, shall be divided into not less than ten equal annual payments, the first whereof shall be payable at the time of the completion of said proposed works or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the Association. The cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

A supplemental agreement was entered into January 24, 1911, which recites that:

It will probably become necessary to establish a building charge greater than \$30 per acre, which was the charge fixed in the public notices issued by the Secretary of the Interior concerning the Belle Fourche Project.

Article 4 of the original agreement was amended, it being provided in part:

The cost of said proposed irrigation works shall be apportioned equitably per acre by the Secretary of the Interior among those acquiring such rights: *Provided*, That the total payments of building charges for water rights on lands filed upon on or before *January 24, '11*, or held in private ownership and signed under contract with said association on or before *Jan. 24, 1911*, or held under trust deed by said association under contract executed on or before *Jan. 24, 1911*, shall not exceed the sum of \$30 per acre.

The public notice of May 2, 1912, classified the lands into four classes, A, B, C, and D. Class A includes all public lands entered on or before January 24, 1911, and all such lands in private ownership held under trust deed or signed under contract with the Belle Fourche Valley Water Users Association on or before said date and were subject to a construction charge of \$30 per acre. In case of failure to file water right application within two years or other default, the land became subject to the building charge, etc. imposed upon lands in class C. Class B included the same lands as are within class A, it being provided, however, that the building charge is \$35 per acre to be paid in a certain graduated scale of payments. Class C includes all public lands vacant on and after January 24, 1911, and all lands in private ownership which on that date were not held under trust deed or were not signed under contract with the Belle Fourche Valley Water Users Association and are subject to a construction charge of \$40 per acre. Class D is described in paragraph 10 of the notice as follows:

Class D includes all lands in this unit now or hereafter owned by the State of South Dakota, and they shall be subject to the charges, limitations, terms

and conditions as for lands of Class A, if water-right application be made within two years of the date hereof. All lands in Class D for which water-right application shall not have been made within the said period of two years, shall become subject to the charges, conditions and limitations imposed upon lands in Class C.

May 27, 1916, the Director of the Reclamation Service reported:

A number of the owners of lands which had been made subject to trust deed, of which copy is enclosed, failed to make water right application and the Water Users Association was called upon to sell said lands at public sale in accordance with the terms of the trust deed.

In reply the Water Users Association claimed that there was some doubt as to the right of the Department to increase the charge for such lands to \$40 per acre in view of the provisions of article 4 of the contract of January 24, 1911, hereinbefore quoted.

As the lands subject to trust deed are to be sold at public auction by the Water Users Association, it is clear that if there should be doubt as to the validity of any feature of the proceedings it would be difficult to secure purchasers. For this reason it was deemed advisable to suggest to the Water Users Association that if lands of this class were made subject to water right application at a charge of \$30 per acre for a reasonable period, that the Water Users Association would thereafter be in position to make a sale that would not be doubtful on this point.

In response the Water Users Association passed a resolution to the effect that if the public notices were modified in regard to trust deed lands so as to reestablish the charge of \$30 per acre for a period of at least 6 months, the Association would thereafter promptly proceed under the terms of said trust deeds and dispose of such lands or require the disposal thereof to qualified persons who shall make water right applications in conformity with the reclamation law. This offers a means by which the owners of land subject to trust deed who have failed to file water right application may be compelled to file them within a short time and in default of which the lands could be sold to persons who would do so.

It is understood that nearly 1700 acres of trust deed lands are involved.

In consequence of this report the public notice of July 16, 1916, was issued, which provides in part:

1. Certain lands within the limits of the Belle Fourche Project, South Dakota, now subject both to public notice and to trust deeds executed on or before January 24, 1911, have not been included in water right applications duly filed.

2. Under public notices heretofore issued an increase in building charge from \$30 per irrigable acre to \$40 per irrigable acre, was made effective as to these lands in case of failure to make water right application within a specified period.

3. In order to afford the owners of these lands an opportunity to file water right application in accordance with the conditions contemplated by paragraph 4 of the contract between the Secretary of the Interior and the Belle Fourche Valley Water Users' Association dated January 24, 1911, notice is hereby given that water right applications will be received from the owners of such lands subject to the provisions of public notices and orders heretofore issued at a charge for building the irrigation works of \$30 per irrigable acre.

4. In case water right applications for such lands are not duly made within one year from the date hereof, the Secretary of the Interior will call upon the

Belle Fourche Valley Water Users' Association to execute the provisions of the trust deed in regard to the disposition of said lands at public sale to qualified persons who shall be required to file water right application.

At the time of the sale of July 31, 1917, the project manager announced that the land would be subject to the \$40 rate plus accrued operation and maintenance charges and the penalties provided by section 9 of the act of August 13, 1914 (38 Stat., 686), and at the sale of April 1, 1918, that the construction charge would be \$30 per acre plus the charges above specified. In the case of Benjamin Newkirk (46 L. D. 400), decided May 31, 1918, the Department held that they were not subject to the penalties under section 9 of the act of August 13, 1914, since such State lands under that section occupied the status of neither private nor entered lands but were rather in the same category as unentered public lands of the United States. It was also there held that they were not subject to accrued operation and maintenance charges by virtue of the provisions of paragraph 11 (B) of the public notice of May 2, 1912.

The main contentions presented in the present appeal are summarized in its fourth paragraph:

While the State school lands are not expressly mentioned in the Supplemental Agreement of January 24, 1911, between the Association and the Department, yet it is the understanding of the undersigned that the Department has classified them as private lands and subject to the terms and conditions of the Reclamation law and has referred to them as coming under section 2 of the Reclamation Extension Act. This conclusion no doubt was arrived at because of the fact that the State of South Dakota by enactment in 1905 and 1907 subjected these lands to the terms and conditions of the Reclamation Law and impliedly, if not expressly, placed them in class (a) above, as the pledge of the State with its 5,000 acres had considerable to do with the subsequent building of the project. This enactment constituted not only a contract with the Department of the Interior but also with the Water Users' Association and any others possessed of rights growing out of the building of the project. And the contract must be construed as having been entered into prior to January 24, 1911. So that these lands are properly classified as coming under section 2 of the Reclamation Extension Act, with a fixed construction charge of \$30 per acre.

Other contentions of the appellants will be passed upon without specific reference to their form as presented in the appeal.

Prior to the execution of the supplemental contract of January 24, 1911, it had been found that the cost of the work would exceed \$30 per acre, the estimated construction charge theretofore announced. Under article 4 of the original agreement the construction charge must "be apportioned equally per acre among those acquiring such rights." These facts occasioned the supplemental agreement of January 24, 1911, the purpose of which was to permit of an increase to cover the actual cost of construction (which must be returned to the reclamation fund—see *Swigart v. Baker*, 229 U. S. 187), with the

proviso that the increase should not apply to public lands entered before January 24, 1911, or to lands held in private ownership and signed under contract with the Water Users' Association or held under trust deeds by that association under a contract executed prior to that date. The present State lands sold in 1917 and 1918 do not fall within the language of the proviso to article 4 of the supplemental contract as they are neither public lands entered nor private lands contracted before January 24, 1911. This was also clearly recognized in the public notice of May 2, 1912, which distinctly required that all State lands for which applications were not filed within two years from its date would be required to pay a construction charge of \$40 per acre.

It is argued, however, that the acts of the State of South Dakota above quoted should be construed as constituting a contract with the Belle Fourche Valley Water Users' Association entered into prior to January 24, 1911, or as an application for a water right which would entitle these lands to be placed in class A of the public notice of May 2, 1912, reference being made to the fact that this Department has held that State lands under such local legislation is land which has "become subject to the terms and conditions of the reclamation law" prior to the passage of the act of August 13, 1914, *supra*.

The law of South Dakota requires that State lands within an irrigation project of the United States shall be sold in accordance with the system of farm units and that the State's title shall not issue until its purchaser has "fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water." This does not constitute any contract with the Water Users Association nor an application for the purchase of a water right from the United States. The State may or may not offer its lands for sale but when it does it is under the above statutory conditions. The State does not fix the construction charge upon a Federal irrigation project which is announced by the Secretary of the Interior under the reclamation laws in such an amount as to secure the return to the United States of the cost of such project. The purchaser from the State is accordingly bound by the construction charge in effect when his application for a water right to the United States is filed, being in this respect in a situation analogous to an entryman of public land. This is not inconsistent with the holding of the Department that such State lands may receive the privileges of section 2 of the reclamation extension act of August 13, 1914, *supra*, because there, by the action of the State legislature, the lands had previously become subject to the terms and conditions of the reclamation law while here there can be no application to purchase a water right until after a sale by the State and the ap-

plicant must accordingly pay the construction charge in effect at the time his application is presented.

The State lands also are not embraced within the public notice of July 6, 1916, as from what has been said above that notice was clearly restricted to certain private lands subject to trust deeds executed on or before January 24, 1911, and not at the time of the notice included in a water right application.

The decision of the Director fixing the construction charge of \$40 per acre for these lands is correct. The appeal raises a further question not considered by the Director as to when the first installment of the construction charge should become due, it also appearing that a further sale of State lands is to be held April 2, 1919.

Section 2 of the act of August 13, 1914, provides in part:

That any person whose land or entry has heretofore become subject to the terms and conditions of the reclamation law shall pay the construction charge, or the portion of the construction charge remaining unpaid, in twenty annual installments, the first of which shall become due and payable on December first of the year in which the public notice affecting his land is issued under this act, and subsequent installments on December first of each year thereafter. The first four of such installments shall each be two per centum. * * *

Section 14 provides:

That any person whose land or entry has heretofore become subject to the reclamation law, who desires to secure the benefits of the extension of the period of payments provided by this act, shall, within six months after the issuance of the first public notice hereunder affecting his land or entry, notify the Secretary of the Interior, in the manner to be prescribed by said Secretary, of his acceptance of all of the terms and conditions of this act, and thereafter his lands or entry shall be subject to all of the provisions of this act.

It is suggested that a public notice should be issued specifically defining the time for payment of the installments upon these State lands.

The State purchasers may if they so desire pay the construction charge in accordance with the public notice of May 2, 1912. While the language of the act of August 13, 1914, is not apt when applied to these State lands its meaning and intent are fulfilled by the payment of the first installment required by section 2 upon December 1, following the filing of the application for a water right, which unless otherwise specified will be accepted as being made under the terms of the reclamation extension act.

The action of the Director of the Reclamation Service is accordingly affirmed and he will take the proper steps to carry this decision into effect.

SLETTE v. HILL.

Decided April 1, 1919.

CONTEST—ABANDONMENT—EVIDENCE.

A charge of abandonment is not sustained by evidence to the effect that the residence maintained was not of the character contemplated by section 2291, Revised Statutes, as amended by the act of June 6, 1912, provided a sufficient period of the lifetime of the entry remains within which to meet the requirements of the law as to residence, unless it be made to appear that the entryman has not acted in good faith.

VOGELSANG, *First Assistant Secretary*:

Ezra N. Hill has appealed from a decision of the Commissioner of the General Land Office dated November 21, 1918, reversing a decision of the register and receiver at Glasgow, Montana, and holding for cancellation, on the contest of Othelia Slette, his homestead entry, made July 16, 1915, for W. $\frac{1}{2}$, Sec. 17, T. 34 N., R. 43 E., M. M.

The application to contest was filed March 13, 1917, and charged that entryman—

has wholly abandoned said lands for a period of more than six months last past, and during said period of six months last past the said Ezra N. Hill has not had or maintained a residence in good faith upon said lands.

Testimony was submitted before a designated officer near the land, on August 27-29, 1917, and by decision of February 5, 1918, the local officers recommended that the contest be dismissed.

The extent to which entryman resided on the land is not seriously disputed. He was granted an extension of time until May 16, 1916, within which to establish residence. Three days prior to said date he went to the land with sufficient household goods and a supply of provisions, and remained three days. He had been, for some years, engaged in the practice of law, maintaining an office in Glasgow, more than 50 miles from the land, and was also interested, with a partner, in the sale of automobiles and land. He had rented his home in Glasgow, but had reserved one room for the use of himself and wife when in town. They occupied the room at various times after May 13, 1916, except that Mrs. Hill, because of ill health, was absent from the State at various times during 1916 and 1917. After remaining on the land for three days in May, 1916, entryman's next stay was for a week or ten days in June. He was on the land four days in July, three days in August, one day in September, four days in October (his wife remained five days), two days in November (Mrs. Hill was there seven days), and two days in December. The house on the land was built in January, 1916, and was remodeled late in the fall of that year at a cost of \$100. Ten acres were broken in November, and in December he made arrangements for further

breaking. Prior to the hearing, more than 100 acres had been broken, under a contract entered into before the initiation of the contest.

While entryman's residence prior to the date of the contest would not sustain final proof, it was sufficient, with the improvements made, to indicate that he had no intention of abandoning the land. Less than ten months had elapsed from the date entryman was required to establish residence, and more than forty months of the statutory life of the entry remained.

A charge of abandonment is not sustained by evidence to the effect that the residence maintained was not of the character contemplated by section 2291, Revised Statutes, as amended by the act of June 6, 1912 (37 Stat., 123), provided sufficient of the lifetime of the entry remains within which to meet the requirements of the law as to residence, unless it is made to appear that the entryman has not acted in good faith.

It clearly appearing that entryman had not abandoned the land, nor acted in bad faith, the contest must be dismissed.

The decision appealed from is reversed.

SLETTE v. HILL.

Motion for rehearing of departmental decision of April 1, 1919, 47 L. D., 108, denied by First Assistant Secretary Vogelsang, May 29, 1919.

JOHN A. EDDY (ON REHEARING).

Decided April 8, 1919.

FOREST LIEU SELECTION—ACT MARCH 3, 1905.

The proviso to the act of March 3, 1905, authorizing the making of a new forest lieu selection, provides no specific period within which its benefits may be claimed, and any attempt to limit the right of reselection to a certain time is an abridgment of the selector's rights and without authority of law; but in the absence of an application to select a specific tract of land, the Department will not attempt to determine whether the selector, or those for whom he acts, is entitled to make further selection.

VOGELSANG, *First Assistant Secretary:*

This is a motion for rehearing filed by the Alamogordo Lumber Company in the matter of an application for authority to make a new selection under the act of March 3, 1905 (33 Stat., 1264), wherein the Department, by decision (unreported) of February 19, 1919,

declined to express an opinion as to whether the right of reselection existed.

It appears that by deeds executed July 7, 1899, and filed for record twenty-one days later, John A. Eddy relinquished to the United States the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 8, T. 1 N., R. 8 W., S. B. M., and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, said township, within the limits of what was then known as the San Gabriel Forest Reserve, and on December 17, 1904, applied (No. 12391) to select in lieu thereof, under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 25, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 26, T. 16 S., R. 11 E., N. M. P. M., New Mexico.

By decision dated August 4, 1905, the Commissioner of the General Land Office rejected the selection as to NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 26, for conflict with a prior homestead entry, and returned the abstract of title for additional certificate, besides requiring the filing of a new non-mineral, nonsaline, and nonoccupancy affidavit, the affidavit filed with the selection having been executed July 5, 1904. Said decision allowed the selector sixty days from notice within which to select another tract in lieu of said NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 26. No action being taken by Eddy, the selection was canceled April 25, 1906.

On January 24, 1918, resident attorneys for the Alamogordo Lumber Company, claiming that Eddy acted for them in the matter as trustee without interest, applied to the Commissioner of the General Land Office for permission to make a new selection under the act of March 3, 1905, *supra*. By decision dated February 16, 1918, the Commissioner denied the request, holding that it could not be contended that the cancellation of the selection was "not the fault of the party making the same," and that while it was probably true that the selector did not wish to complete the selection as to one 40-acre subdivision and lose the other, such reason could not be accepted as warranting the allowance of further selection.

The Department, by said decision of February 19, 1919, declined to pass on the merits of the reason given for failure to take any action under the Commissioner's decision of August 4, 1905, stating:

The right to make a new selection given by the act of March 3, 1905, *supra*, is so closely akin in principle to the right of second entry accorded by various statutes as to make the established practice relative to second entries controlling in cases where applications for a new selection are presented; and it has long been a well-established rule of administration from which there is no departure that an applicant's right to make a second entry will not be considered and adjudicated until he has selected and applied to enter a particularly designated tract. This rule is too generally known to require the citation of supportive authorities, and it is well worthy of application and enforcement in the present case.

Upon mature consideration, it is considered that appellant is entitled to an expression of the views of the Department as to the cor-

rectness of the reason assigned by the Commissioner in the decision appealed from for holding that no right of further selection exists.

It has long been the established practice that where an application conflicts in part with the prior entry of another, the applicant is at liberty to demand the allowance of the application to the extent that it is free from conflict, or to abandon the application in its entirety.

The act of March 3, 1905, *supra*, was in force when the Commissioner first considered the selection, and his decision of August 4, 1905, in so far as it required the selection of another 40-acre tract within sixty days from notice, was clearly an attempt to abridge the selector's rights. Said act does not limit the time within which its benefits may be claimed, and an attempt to limit the right of reselection to any certain time is without any authority.

If Eddy, or the company for which he was acting, did not desire to secure one of the 40-acre tracts selected unless the other subdivision could also be acquired, it was entirely proper to refuse to file further affidavits or furnish a continuation of the abstract. And such refusal can not be termed a "fault" of the selector, within the meaning of said act of March 3, 1905.

It follows that the reason announced by the Commissioner for holding that no right of reselection exists is erroneous. But in the absence of an application to select a specific tract of land the Department will not attempt to determine whether the selector or the company for which he was acting is entitled to make further selection.

The rule here announced will hereafter be followed, except in those cases involving questions similar to those determined in the case of James H. Harte, wherein the Department, by decision of March 26, 1919 (47 L. D., 99), held that the entry for the base land was erroneously canceled on March 30, 1904, and that although the selection was rejected on April 6, 1904, it was nevertheless legally pending on March 3, 1905, and comes within the provisions of the act of the latter date. In all cases involving the rejection of a selection under the exchange provisions of the act of June 4, 1887, *supra*, where the rejection was based on the cancellation of the entry for the base land, and it is claimed that such cancellation was erroneous under the decision of the Supreme Court of the United States in *Lane v. Hoglund* (244 U. S., 174), the selector should, by petition or motion, apply for the reconsideration of the decision canceling the entry, before attempting to secure the benefits of the act of March 3, 1905. Such petitions or motions, when filed in the General Land Office, should be treated as current business and acted on promptly.

Said departmental decision of February 19, 1919, is recalled and vacated, and the decision appealed from is modified to agree with the views herein expressed.

WADIN v. HEIRS OF JENSEN ET AL.

Decided April 8, 1919.

INSANE ENTRYMAN—GUARDIAN—ACT OF JUNE 8, 1880.

Where an entryman has made due compliance with the requirements of the homestead law prior to becoming insane, it is the duty of the guardian, immediately after appointment, to submit final proof as provided by the act of June 8, 1880; and his failure to so act, and the subsequent death of the claimant, does not demand the rejection of the proof thereafter submitted by such guardian within the statutory life of the entry establishing compliance with law.

VOGELSANG, *First Assistant Secretary*:

On April 29, 1910, J. Henry B. Jensen made homestead entry at the Los Angeles, California, land office for farm unit "B" of Sec. 6, T. 16 S., R. 23 E., S. B. M. (56.65 acres), within the limits of the Yuma Irrigation Project. Against said entry, on July 3, 1916, Lillian A. Wadin filed contest affidavit, alleging that the entryman died on April 18, 1916, intestate, never having been married, and leaving no widow or children, and no heirs whatsoever, except certain non-resident aliens. Service of notice of the contest was made by publication.

Charles F. O'Neil, on August 31, 1916, filed an application to intervene, making the same charges as made by Wadin, and alleging that he was formerly an employe of the deceased entryman, having been so employed from June 6, 1913, to March 6, 1914, and from March 17, 1915, to April 18, 1916, at an agreed wage of \$50 per month, making a total of \$1,100 thus earned; that he received altogether the sum of \$285, leaving \$815 still due; that the entry, in its present improved condition, is worth approximately \$5,000; that immediately after the death of the entryman he laid claim to the land as a settler, and thereafter consulted an attorney as to the proper procedure for acquiring title to the land, and but for the delay of said attorney in taking the action for which he was retained, a proceeding for the acquisition of the legal title to the land would have been commenced prior to the filing of the contest of Wadin.

On November 14, 1916, Francis W. Rogers, as guardian of the estate of said Jensen, insane, entered his appearance and moved that the contest be dismissed. He alleged that Jensen became insane about the month of October, 1915; that by order of the Superior Court at Los Angeles, entered on October 25, 1915, he was duly appointed guardian of the estate of said insane person; that he qualified as such guardian; that on November 16, 1915, letters of guardianship were issued to him; that he has never been discharged as such guardian, and at all times since the issuance of the letters of guardianship has been and still is the duly appointed, qualified, and acting guard-

ian of the estate of said Jensen; that he was about to submit proof on Jensen's entry, under the provisions of the act of June 8, 1880 (21 Stat., 166), and that he has never been served with any notice of the contest.

On May 24, 1916, Ray Edgar, public administrator of Imperial County, California, applied to the Superior Court of that county for issuance of letters of administration of the estate of said Jensen. The court entered an order June 9, 1916, appointing said Edgar administrator of the estate.

A hearing was had on January 17, 1917, before the local officers at El Centro, the land having been transferred to their district, and by decision of December 31, 1917, they found that O'Neil had not retained an attorney to initiate a contest, the amount paid by him being merely a consultation fee, and that Wadin was entitled to a priority of right. Said decision further held that upon the death of Jensen without heirs other than aliens the land, *eo instanti*, reverted to the United States, and became subject to entry by the first qualified applicant, subject to any priority of right. The local officers recommended that all of the proceedings except the contest of Wadin be dismissed, and that upon a proper showing of qualifications she be awarded a prior right to make homestead entry for the land.

On appeal the Commissioner of the General Land Office, by decision of November 12, 1918, held that the land had escheated to the United States, and that neither Edgar as administrator nor Rogers as guardian has any legal standing in the case; that O'Neil had not established any claim to the land, and held the entry for cancellation. An appeal on behalf of O'Neil, and a joint appeal on behalf of the heirs, Rogers, as guardian, and Edgar, as administrator, brings the case before the Department.

It appears that on February 14, 1917, final five-year proof on the entry in question was submitted by said Rogers, as guardian of the estate of the entryman, from which, as well as from the testimony submitted at the hearing, it appears that Jensen had resided on the land from the date of his entry to the date of his commitment to a State hospital for the insane, in October, 1915. He died on April 18, 1916, at the State hospital, of "general paresis." The only heirs surviving him were four sisters, three brothers, and his mother, citizens and residents of the Kingdom of Denmark. Entryman had been on May 6, 1908, admitted to citizenship in the United States. The claim was valued by different persons at \$5,000 to \$7,000. The project manager certified that all payments then due on account of construction and maintenance had been paid; that one-half the irrigated area had been cleared and leveled; that sufficient laterals had

been constructed; that the land had been put in good condition, watered, and cultivated; that a satisfactory crop had been raised thereon for the past two successive years, and that reclamation as required by law had been made.

The act of June 8, 1880 (21 Stat., 166), under which the final proof was submitted provides:

That in all cases in which parties who regularly initiated claims to public lands as settlers thereon, according to the provisions of the preemption or homestead laws, have become insane or shall hereafter become insane before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane, and the requirements in homestead entries of an affidavit of allegiance by the applicant in certain cases as a prerequisite to the issuing of the patents shall be dispensed with so far as regards such insane parties.

It is contended by O'Neil that the guardian was without authority to submit final proof after the death of entryman, and cites the decision of the Supreme Court of California in *Livermore's Estate* (132 Cal., 99; 64 Pac. Rep., 113). In that case a guardian, after the majority and death of his ward, filed his account, and the probate court decreed that the ward's estate was indebted to the guardian. Thereupon the guardian applied for an order to sell the real estate of the late ward, and the order was granted. On appeal, the Supreme Court held that the guardian had no power to execute a deed after the death of the ward, and intimated that his only course was to administer in the proper court upon the estate of the deceased ward. The decision was stated to be based on the provisions of the State Code, which explicitly defines the powers and duties of a guardian of a minor ward.

Said Rogers was appointed guardian of the person and estate of the entryman under the provisions of sections 1763 and 1764 of the State Code. Section 1765 thereof provides:

Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

Section 1802:

The marriage of a minor ward terminates the guardianship of the person of such ward, but not the estate; and the guardian of an insane or other person may be discharged by the court, when it appears on the application of the ward or otherwise, that the guardianship is no longer necessary.

It is apparent that Rogers at the date the final proof was submitted continued to be guardian of the estate of the deceased entryman, and that he was acting within the scope of his authority when he submitted the proof. Nothing said by the court in Livermore's Estate, *supra*, is considered as expressing anything contrary to the conclusion reached by the Department. The conveyance of real property is entirely different from taking action to protect the property of the ward, especially in a case such as this where the guardian was the only representative qualified and authorized to perform the necessary act.

It is also contended that the act of June 8, 1880, *supra*, does not contemplate the submission of final proof by a guardian after the death of the entryman. In Heirs of Anthony Siankiewicz (38 L. D., 574) it was held that said act "can be applied only in case the entryman be living at the time the application is made to offer proof." But in Hughes v. Heirs of Meadows, on rehearing (45 L. D., 4), it was held that the quoted statement was mere dicta and will not be followed.

It was unquestionably the duty of the guardian, immediately after his appointment, to submit final proof on his ward's entry. His failure to do so must be treated as a mistake, for which Congress by section 2457, Revised Statutes, has made provision.

Counsel is in error in his contention that a patent issued in the name of a deceased person is void. He correctly states the common law rule, but the act of May 20, 1836 (5 Stat., 31), now section 2448 of the Revised Statutes, obviates this result. It is the rule of the Land Department that final certificate and patent will issue in the name of a deceased homestead entryman in cases where the right to patent accrues prior to his death. (Heirs of Isidore Driscoll, 38 L. D., 407.) And in cases arising under the exchange provisions of the act of June 4, 1897 (30 Stat., 36), although the heirs or legal representatives of the selector may be required to complete the proceedings after his death, the patent will issue in his name. (Heirs of George Liebes, 33 L. D., 461.)

It having been clearly established that entryman earned title to the land prior to being declared insane, the mere fact that the guardian was remiss in his duty will not be held to demand the rejection of the proof.

The statutory life of the entry had not expired when the contest of Wadin was initiated. It was not charged that there had been any failure to comply with the law, and it has developed that neither residence nor cultivation was required after the date entryman was declared insane. He had earned title to the land prior thereto. Hence, it must be held that no proper ground of contest existed.

The intervener, O'Neil, acquired no rights by his presence on the land after the death of the entryman. The land did not escheat to the United States, as acceptable final proof was submitted during the lifetime of the entry.

The decision appealed from is accordingly reversed, the contest of Wadin and the claim of O'Neil are dismissed, and the final proof submitted by the guardian is accepted.

INTERMARRIAGE OF HOMESTEADERS—ACT OF APRIL 6, 1914.

[Circular No. 330.¹]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 8, 1919.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

1. Your attention is directed to the act of Congress of April 6, 1914 (38 Stat., 312), relating to the rights of homesteaders who intermarry:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry: *Provided,* That the provisions hereof shall apply to existing entries.

2. The act applies to entries initiated before or after its date, and to become entitled to its benefits it is required that each of the parties shall have complied with the requirements of the homestead laws for not less than one year next preceding their marriage. Where the parties, or either of them, are entitled to credit for such compliance prior to entry, that time may be counted in making up the period of one year, and it follows that neither of the entries need be one year old at the time of marriage.

3. The law confers upon the husband the privilege of electing on which of the two entries the family shall reside. His election must be supported by the affidavits of both the parties, describing their entries and showing the facts as to the residence, cultivation, and improvements already had in connection therewith. Only in cases where the tracts involved are situated in different districts will it be

¹ Reprint, as amended, of Circular of June 6, 1914 (43 L. D., 272).

necessary that the election and affidavits be executed in duplicate; then copies of all papers must be filed in each office.

4. The local officers will make due notation of the filing of the election on their records as to the entry, or entries, within their district, and will at once forward the papers, with their recommendations, to the General Land Office, which will promptly pass upon the question of accepting the election.

5. Though the election be accepted, proofs on the entries will be submitted separately, as in other cases; it will be necessary to show residence on the selected homestead from approximately the date of the marriage, and on the entries of the respective parties before that time. The act makes no change whatever in the requirements as to cultivation or improvements, as the case may be, or as to the necessity of having a habitable dwelling on the land; compliance with the homestead law in these regards must be shown as to each entry, precisely as though the marriage had not taken place.

6. If proof be made on the entry selected as the home before title to the other is earned, residence may nevertheless be continued on the perfected entry and credited to the other. However, the act has no application to cases where the requirements of law have been fulfilled, and proof made, as to one of the entries prior to the marriage.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

RESERVOIRS FOR WATERING STOCK ON UNSURVEYED LANDS— PRIOR REGULATIONS AMENDED.

INSTRUCTIONS.

[Circular No. 638.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 8, 1919.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

It is ordered that paragraph 36 of the circular of June 6, 1908 (36 L. D., 567), being a part of that portion of said circular which relates to use and occupancy of public lands with and by reservoirs for stock-watering purposes under the act of January 13, 1897 (29 Stat., 484), be, and the same is hereby, amended to read as follows:

36. (a) In any case where the proposed reservoir is to be located upon unsurveyed public land, the declaratory statement may be filed, the land being

therein described by metes and bounds and, as well, by the description which it is believed it will bear when officially surveyed. Proof of construction must be submitted at the end of the same period of time and in the same manner as is prescribed and required in cases where the lands have been previously surveyed. Such proof should embrace the field notes and a plat of a survey such as is required in cases of reservoirs on surveyed lands, with such modifications as are necessary (paragraph 32), the initial point of such survey being fixed by means of a traverse line run to the nearest existing corner of a public-land survey, not more than six miles distant from such point; if there be no such corner within that limit of distance, then the reference should be to some well-known or easily identifiable natural monument or, such monument being absent, to a fixed, permanent, and readily recognizable artificial monument.

(b) Any reservation made pursuant to this statute secures only a license to use and occupy the reserved land with and for a reservoir, and this license may endure permanently or may be of transient duration. No estate in the land is granted. For this reason it is administratively undesirable that private surveys made pursuant to the statute and these regulations shall be preserved and established by subsequent public-land surveys and approved plats thereof. When, therefore, the public-land surveys have been extended over land covered by a reservoir declaratory statement affecting unsurveyed lands, the declarant shall adjust his survey to the lines of the official survey, showing the location of the reservoir with respect to said lines by means of properly established tie lines. Any subsequent reservation which may be ordered will be of those subdivisions thus shown to be occupied by or necessary for the proper use of the reservoir.

(c) An annual affidavit of maintenance must be submitted the same as though the reservoir had been constructed on surveyed lands. Nothing in these regulations contained shall preclude the General Land Office or the Department from requiring additional information in any case where that information is deemed proper or necessary.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

CONTESTS INVOLVING PASTURE AND WOOD RESERVE LANDS IN OKLAHOMA—ACT OF MARCH 3, 1919.

INSTRUCTIONS.

[Circular No. 639.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 8, 1919.

REGISTER AND RECEIVER, GUTHRIE, OKLAHOMA:

The act of Congress approved March 3, 1919 (40 Stat., 1318), entitled "An Act To authorize the contesting and cancellation of certain homestead entries, and for other purposes," provides:

That the homestead entries made for pasture and wood reserve lands in the Kiowa, Comanche, and Apache Reservations, in the State of Oklahoma, opened to settlement and entry upon sealed bids, as authorized by the Act of June fifth, nineteen hundred and six (Thirty-fourth United States Statutes at Large, page two hundred and thirteen), be, and the same are hereby, made subject to contest, upon charges alleging that the entryman never established residence upon the land, or that having established such residence he failed to maintain same, or to improve and cultivate the land in accordance with law; and upon proof sustaining such charges, submitted in accordance with the rules of practice, the entries will be canceled and the money paid by the entrymen in default will be forfeited: *Provided*, That any person who has been residing upon the land for at least two years prior to the cancellation of such entry, and if there be no such settler, then the successful contestant, shall, if qualified to make a homestead entry, have a preference right for a period of sixty days from notice, to make a homestead entry for the land, paying therefor the price bid by the original entryman, or a price to be fixed by appraisalment upon the applicant's request, the improvements made by such settler not to be taken into consideration in making such appraisalment: *Provided, further*, That should there be two settlers on a tract, the land will be partitioned to them upon mutual agreement, or will be sold to the settler submitting the highest bid at a public offering: *And provided further*, That payment for the land shall be made in four equal installments, one installment at the date of entry, and the other installments in one, two, and three years thereafter: *And provided further*, That failure to comply with the homestead law or to make the annual payment when due in the case of any entry under this Act shall be a sufficient cause for the cancellation of the entry and the forfeiture of the money paid: *And provided further*, That any vacant lands in the wood and pasture reserves in said Indian reservations, opened to entry under said Act of June fifth, nineteen hundred and six, for which no preference right of entry exists, as herein provided, or under the Act of June twenty-eighth, nineteen hundred and six (Thirty-fourth Statutes at Large, page five hundred and fifty), shall be subject to sale at public auction to the highest bidder under rules and regulations to be provided by the Secretary of the Interior: *And provided further*, That the moneys received from the sale of the lands under this Act shall be deposited in the Treasury of the United States, shall draw interest, and be administered in accordance with the provisions of section two of said Act of June fifth, nineteen hundred and six.

In addition to the cancellation of homestead entries, upon contests, authorized by the said act, they may be canceled upon proceedings instituted by the Government for failure of the entrymen to submit proof and make payment by the 1919 anniversaries of the dates thereof. See department instructions of September 3, 1914. (43 L. D., 376).

In acting upon contests, and in serving notice of default to entrymen who fail to submit proof and make payment within the prescribed period, you will be governed by the following regulations:

ACTION TO BE TAKEN ON CONTESTS.

1. *When hearing may be ordered.*—A hearing may be ordered on an application to contest an entry at any time before, but not after,

you have reported the entry to this office for cancellation for failure of the entry man to submit proof and make payment within the prescribed period.

2. *Sworn statement required of contestant.*—A contestant will be required to furnish with his application to contest or at least before a hearing is ordered thereon, a statement sworn to by himself and corroborated by the affidavits of at least two persons showing whether the land is or is not settled upon by a settler or settlers other than himself, and if such sworn statement shows that the land is settled upon by a settler or settlers other than himself, the names and addresses of each such settler and the period during which each of them has been residing upon the land, if that information is known.

3. *Sworn statement required of settler.*—If an application to contest is allowed, and if the affidavits furnished by the contestant show that there is a settler or settlers upon the land other than himself, you will promptly advise such settler or settlers of the pending contest, furnish each of them with a copy of these instructions, and notify each that if he contemplates basing any right of entry on a preference right under the said act of March 3, 1919, he shall, within thirty days from notice, furnish a statement under oath, corroborated by two witnesses, showing the time his settlement commenced and the acts constituting such settlement. Failure to furnish such statement will be constructed as a waiver on the part of such settler of any claims under this act, *provided* that a settler not named by the contestant may file such statement at any time prior to the cancellation of the original entry.

4. *Method of determining person entitled to preference right where there is but one settler—When rights may be exercised.*—Upon the cancellation of the homestead entry as the result of said contest proceedings, and where it appears that a settler has been residing upon the land for at least two years prior to the cancellation of such entry, and where it further appears that such residence was initiated prior to the filing of the aforesaid contest affidavit, you will, by registered mail, notify him that he will be allowed sixty days, after receipt of notice, within which to file in your office sworn statements in duplicate and duly corroborated, showing that he is entitled to the preference right under said act to enter said premises under the homestead law, together with his application to enter said land under said law (based upon such preference right), showing his qualifications to make homestead entry thereof. Such showing shall, on the filing of the homestead application referred to, be deemed to be and considered and treated as a part thereof. Upon the timely filing of said homestead application, accompanied by said sworn statement, you will receive and suspend the same, and at once notify the successful contestant, by registered mail, of the filing of said homestead applica-

tion and accompanying papers, and advise him that he will be allowed thirty days from date of receipt of such notice within which to show cause why the homestead application should not be allowed. Upon the expiration of the said thirty days, and in the absence of protest against the application on the part of the successful contestant, you may, if all else be regular, allow the homestead entry of the settler. If, however, the successful contestant timely protests the allowance of the aforesaid application to make homestead entry and applies for a hearing to contest the right of said applicant to enter said premises in the exercise of his preference right mentioned and referred to in said act, a hearing shall be ordered and held by you as in other cases.

5. *Partition of land between or sale to two or more settlers.*—Should there be two or more settlers upon the land, each claiming to be entitled to a preference right of entry under said act of March 3, 1919, the land will, upon proof of such claim and all else being regular, be partitioned to them upon mutual agreement, or will be sold to the settler submitting the highest bid at public offering in conformity with said act. If such settlers desire to partition the land between them, they must do so within the sixty-day period. Or, if they desire to have the land sold, it may be offered for sale to them by you at your office at any time within the said sixty-day period, but you will not accept any bid which is less than the price at which the land formerly sold. Except in case of protest filed by the successful contestant, entry must be made within the sixty-day period, regardless of whether the land is partitioned between the settlers or sold to the one submitting the highest bid therefor.

6. *Method of determining person or persons entitled to preference right where there is more than one settler*—*When right may be exercised.*—Where the settlers mutually agree to partition the land between them and seasonably apply to make homestead entry thereof based upon such agreement and their claim to preference right, you will, where the original homestead entry has been canceled as the result of contest proceedings brought by a person other than one of said settlers, receive and suspend said homestead applications, notify the said successful contestant by registered mail of the filing of said partition agreement and of said homestead applications, and allow him thirty days from date of receipt of such notice within which to show cause why the aforesaid homestead applications should not be allowed. Copies of said partition agreement should be filed in your office by the homestead applicants along with their said homestead applications, and one of such copies should be by you transmitted to said successful contestant along with the notice hereinabove mentioned. Upon the expiration of said thirty days, and in the absence of protest against the allowance of said applica-

tions, you may, if all else be regular, allow the same. If, however, the successful contestant timely protests the allowance of the afore-said applications and applies for a hearing to contest the right of said parties under said premises, a hearing shall be ordered and held by you as in other cases.

Where it is seasonably made to appear that the settlers are unable to arrive at any partition agreement and one of such settlers seeks to have the land sold to one of them at a public offering as provided for in the second proviso to said act, and to enter the premises under the homestead law at the price fixed at said sale, and where it further appears that the original homestead entry has been canceled as a result of contest proceedings brought by a contestant other than one of said settlers, you may proceed with the sale as hereinbefore authorized, sell the land to the settler submitting the highest bid therefor at the public offering, receive and suspend the homestead application based thereon, and notify the successful contestant that he will be allowed thirty days from and after date of receipt of notice in which to show why the homestead application of the successful purchaser should not be allowed. Upon the expiration of said thirty days, in the absence of objections upon the part of the successful contestant, you may, if all else be regular, award the land to the settler submitting the highest bid therefor at a public offering, and allow his homestead application to proceed to entry. If, however, the successful contestant timely protests the allowance of the afore-said application to make homestead entry and sale, and applies for a hearing to contest the right of said applicant and bidder to enter said premises, a hearing shall be ordered and held by you as in other cases.

If, within said sixty-day period the settlers do not mutually agree to partition said premises, or, if, during said period either of them shall fail to request that the land be put up for sale at public auction, you will advise the successful contestant that he will be allowed thirty days from date of receipt of notice within which to enter said premises in the exercise of his right as a successful contestant.

7. *Fees, commissions and purchase money required.*—A settler or a successful contestant must accompany his application to enter with the usual homestead fee and commissions, and, unless he files an application for appraisalment, he must also accompany his application to enter with one-fourth of the price bid for the land by the original entryman. If he files an application for appraisalment, he will be required to accompany his application to enter with only the usual homestead fee and commissions, pending action on the application for appraisalment and after appraisalment he will be allowed thirty

days from receipt of notice within which to pay one-fourth of the purchase money.

8. *Sale of vacant lands.*—The sale authorized by the said act of March 3, 1919, of vacant lands for which no preference right of entry exists, will be made the subject of future instructions.

ACTION TO BE TAKEN ON ENTRIES WHERE PROOF AND PAYMENT ARE NOT
MADE WITHIN PRESCRIBED PERIOD.

1. *Notice to be served on entryman in default.*—In each case where proof and payment are not made by the 1919 anniversary of the date of entry, either under an entry allowed under the act of June 5, 1906 (34 Stat., 213) or under the act of June 28, 1906 (34 Stat., 550), you will serve notice on the entryman advising him of the default and that the entry will be promptly reported by you to this office for cancellation for such failure if proof is not submitted and if all sums due, both of principal and interest, are not fully paid on or before the expiration of six months from the date said entry became in default.

2. *Issuance of final certificate after expiration of statutory period.*—Where proof and payment are made after the statutory period has expired but within the said six months, you will, in the absence of further objection, issue final certificate under the entry, accompanying the same with a memorandum showing the facts. If all else be found regular in this office the case will then be submitted for confirmation to the Board of Equitable Adjudication.

3. *Entries to be reported for cancellation.*—Where proof and payment are not made within the statutory period or within the said six months, you will at once make report transmitting evidence of service of notice, whereupon such further action will be taken by this office as the circumstances warrant.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

OREGON AND CALIFORNIA LANDS—USE OF TIMBER ON UNEN-
TERED TRACTS OF CLASS 3.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 19, 1919.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

I return herewith, without approval, instructions to the chief of field division at Portland, Oregon, to the effect that unentered tracts

of class 3, Oregon and California grant lands, as defined in section 2 of the act of June 9, 1916 (39 Stat., 218), are not subject to the act of March 3, 1891 (26 Stat., 1093), extended to the State of Oregon by the act of March 3, 1901 (31 Stat., 1436), and the regulations of March 25, 1913 (42 L. D., 22). It appears that the chief of field division entertains an opinion contrary to yours.

The act of March 3, 1891, *supra*, provides, in part:

In any criminal prosecution or civil action by the United States for a trespass on such public timberlands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timberland for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; * * * *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations * * *

The regulations of March 25, 1913, *supra*, state:

In accordance with the authority expressly conferred upon the Secretary of the Interior by the terms of the act of March 3, 1891, *supra*, *settlers upon public lands* and other residents of the States above named are hereby granted the privilege of cutting and removing, free of charge, timber from unoccupied, unreserved, nonmineral public lands within said States, strictly for their own use when actually needed for firewood, fencing, building, or other agricultural, mining, manufacturing, and domestic purposes, under the following conditions: * * *

Section 1 of the act of June 9, 1916, reverts the title of certain lands, formerly within the specified railroad grants, in the United States. Under section 2 the lands are divided into three classes:

1. Lands valuable for power sites;
2. Timberlands which are lands bearing a growth of timber not less than 300,000 feet board measure on each forty-acre subdivision;
3. Agricultural lands which include all lands not falling within the other two classes, except mineral lands, as provided in section 3.

Section 2 contains the further proviso:

That all the general laws of the United States now existing or hereafter enacted relating to the granting of rights of way over or *permits for the use of public lands* shall be applicable to all lands title to which is reverted under the provisions of this Act.

Under section 4, the timber on the lands of class 2 is sold for cash, the land itself, after the removal of the timber, being subject to free homestead entry, and the lands of class 3 are subject to homestead entry at \$2.50 per acre. Under section 10, all money received from the land and timber is placed in a special fund to be designated "The Oregon and California land-grant fund" out of which the

railroad company is to receive \$2.50 per acre for all the lands re-vested in the United States, and the United States is to be ultimately reimbursed for the moneys advanced for taxes due and unpaid. Section 10 also provides:

* * * That if, upon the expiration of ten years from the approval of this act, the proceeds derived from the sale of lands and timber are not sufficient to pay the full amount which the said railroad company, its successors or assigns, are entitled to receive, the balance due shall be paid from the general funds in the Treasury of the United States, and an appropriation shall be made therefor. * * *

Should instead there be a surplus, it is to be distributed as directed in the concluding paragraph of section 10.

Your position is stated as follows:

It will therefore be seen that one of the sources from which the company is to receive its payment for the lands, and the United States be reimbursed for its expenditures, is the receipts under homestead entries of lands embraced in class 3, and that in view of such provision we are not authorized to take any action tending to the diminution of this fund, which would necessarily result if the timber on such lands was removed therefrom. While it is true that these lands are classified as agricultural, yet, in many cases, they carry a valuable growth of timber, which would be a substantial inducement to their appropriation under the homestead law. On the other hand, the removal of the timber from lands of this character would leave them in an exceedingly undesirable state; in fact, cut-over lands, for which there is but little call. Indeed, this element of value is recognized by the act itself, it being provided that the payment of \$2.50 per acre shall not be required of homestead entrymen for lands of class 2, when the same shall become subject to entry as agricultural lands.

Waiving the question as to whether the right to cut timber, as controlled by the regulations of March 25, 1913, is such a permit "for the use of public lands" as is defined in the proviso to section 2 of the act of June 9, 1916, the Department is not able to concur in the above reasoning. In its instructions of May 26, 1916, as to an analogous situation arising upon ceded Ute Indian lands in Colorado, the Department said:

The cutting of the timber upon a particular tract does not necessarily prevent its sale and disposition. It does not do so as a matter of law and in some instances, as a matter of fact, might even aid in its disposition. It would also aid in the disposition of other lands within the ceded area, as without such privilege it might render settlement or mineral development in certain localities practically impossible.

The purpose of the requirement of a payment of \$2.40 per acre for land in class 3 is to obtain a fund with which to compensate the grantee railroad company for its equity in the lands. In the case of lands of class 2, this amount is derived from the sale of the timber. Congress no doubt was of the opinion that land bearing less than 300,000 feet board measure for each forty-acre subdivision did not bear a sufficient stand of timber to warrant its disposition by cash

sale, and that such an amount of timber would not interfere with agricultural use. Lands in class 3 may bear no timber at all, and should some or all of any timber be removed prior to homestead entry, the tract is still subject to disposition at \$2.50 per acre. Of course lands of class 2 being heavily timbered would be less desirable for settlement after the timber has been removed than those of class 3, as they are more difficult to clear of the stumps, etc., and also are, in many instances, located at greater distances from the villages, towns, and other centers of supplies, etc.

In the instructions of May 26, 1916, concerning Ute lands, it was further observed:

The privilege of cutting timber for the settlers' own use would be highly necessary in the extension region embraced in the above acts, and would be conducive to the settlement and entry of the lands. The lands having been thrown open to settlement and declared to be public lands of the United States, it was the evident intention of Congress to have the privilege afforded settlers * * * by the act of * * * March 3, 1891, *supra*, likewise apply to the territory ceded by the Indians.

The above remark likewise applies to the unentered lands of class 3 of the Oregon and California grant. The privilege of cutting timber for the settlers' own use, afforded by the act of March 3, 1891, is an incident necessary to and inherent in the right of homestead entry and settlement given in the act of June 9, 1916.

I am accordingly of the opinion that the act of March 3, 1891, and the regulations of March 25, 1913, *supra*, are applicable to the unentered lands of class 3, and you will advise the chief of field division in harmony herewith.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

HENRY JACOBSEN.

Decided April 21, 1919.

ENLARGED HOMESTEAD—SECTION 7, ACT OF JULY 3, 1916.

As the additional enlarged homestead entry authorized by section 7 of the act of July 3, 1916, can only be made by one "who shall have submitted final proof" on his original entry, proof in support of such an additional entry embracing incontiguous land within the 20-mile limit must show the required compliance for a period of at least three years from date of such former proof, except that residence may be maintained upon either tract.

DEPARTMENTAL INSTRUCTIONS DISTINGUISHED.

Knute Arithon (46 L. D., 168), distinguished.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Henry Jacobsen from a decision of the Commissioner of the General Land Office dated September 9, 1918, reject-

ing the final proof on his additional homestead entry (012095) for SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 25, T. 12 N., R. 5 E., B. H. M., Bellefourche, South Dakota, land district.

The said entry was formerly an entry under sections 1 to 5 of the enlarged homestead act, and was allowed on July 11, 1916, as a second entry, his former entry (04125), made October 11, 1909 (for NE. $\frac{1}{4}$, Sec. 31, T. 12 N., R. 6 E., B. H. M.), having been relinquished March 17, 1915, on which date he applied to make the entry first above described and to make a desert-land entry for the tract relinquished. It appears that on September 26, 1916, he applied for the reinstatement of his former homestead entry as to E. $\frac{1}{2}$ NE. $\frac{1}{4}$ said Sec. 31, and on November 14, 1916, filed a further application praying that the entry made on July 11, 1916 (012095), be allowed to stand as an additional entry. By decision of February 20, 1917, the Commissioner of the General Land Office reinstated entry 04125 to the extent of the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ said Sec. 31, and held:

As stated, the act of July 3, 1916, does not validate H. E. 012095 as to any part of the land included therein, and it is therefore held for cancellation in its entirety. However, if proof be submitted on H. E. 04125 and be found satisfactory, H. E. 012095 will be permitted to remain intact as to 240 acres of the tract included therein, the land to be given up being designated by claimant if he so desires.

On March 22, 1917, Jacobsen filed a relinquishment of two 40-acre subdivisions embraced in entry 012095, thus reducing its area to the 240 acres on which final proof was submitted November 7, 1917.

Final five-year proof on entry 04125 was submitted May 26, 1917, and final certificate issued the same day.

The decision appealed from held that entry 012095 did not become a valid additional entry until the date on which proof was submitted on the original entry (May 26, 1917), and that residence and cultivation from that date must be shown. The final proof was accordingly rejected as premature, and the final certificate held for cancellation.

The act of July 3, 1916 (39 Stat., 344), adding a new section (7) to the enlarged homestead act, provides that an entry thereunder can be made only by a person "who shall have submitted final proof" on his original entry. As Jacobsen was not qualified to make the entry in question until May 26, 1917, it follows that the proof submitted during the November following was premature. Final proof to be acceptable must show residence on the land or on the original, which is within the twenty-mile limit, for three years after May 26, 1917, together with the required cultivation, as reduced by the Commissioner's decision of January 14, 1918—that is, the cultivation of ten acres during the second year after May 26, 1917, and each year thereafter until proof, and a showing that the remainder of the land has been used for grazing purposes.

In the case of Knute Aritheon (46 L. D., 168), the claimant had perfected his original entry, and on November 9, 1914, made an additional entry for 80 acres under the act of March 2, 1889 (25 Stat., 854). He established residence thereon May 19, 1915, and on August 25, 1916, the entry was changed in character to an entry under section 7 of the enlarged homestead act and amended by adding thereto a tract of 160 acres of *contiguous land*. The Department held that claimant stood in the position of one who establishes residence on land prior to entry, and was entitled to claim credit for residence from the date it was actually established *on any portion of the land*.

The case of Jacobsen is entirely different from the case cited, as at no time has Jacobsen resided on the land embraced in his additional entry, but has made his home continuously since 1910 on an incontiguous tract.

The decision appealed from is affirmed.

HENRY JACOBSEN.

Motion for rehearing of departmental decision of April 21, 1919, 47 L. D., 126, denied by First Assistant Secretary Vogelsang, June 14, 1919.

SOLDIERS, SAILORS, AND MARINES SERVING DURING OPERATIONS ON THE MEXICAN BORDER AND DURING THE WAR WITH GERMANY—CREDIT ON ACCOUNT OF SERVICE—ACT OF FEBRUARY 25, 1919.

INSTRUCTIONS.

[Circular No. 641.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 25, 1919.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

PERIOD OF SERVICE.

Under the terms of the act of Congress of February 25, 1919 (40 Stat., 1161), a copy of which is appended, any officer, soldier, sailor, or marine who has served, or shall serve, not less than 90 days in the Army, Navy, or Marine Corps of the United States during the war with Germany and its allies, or during the operations in Mexico or along the borders thereof, who has been honorably discharged,

who has not exhausted his homestead right, and who makes a homestead entry, is entitled to have the term of his service, but not exceeding two years, deducted from the three years' residence required under the homestead laws. If his service continues after the end of the war under the same enlistment (having served 90 days during the war), he may have credit for his entire period of service. If he was discharged on account of wounds or disability incurred in the line of duty, he obtains credit for his whole term of enlistment; and said term extends to the end of the war if he enlisted or was drafted for its duration. However, in neither of these cases can the credit given exceed two years.

With respect to the period of the operations in Mexico or along the borders thereof, the privilege is given also to persons in the National Guard of any State engaged in the service of the United States.

Hereafter, in this circular, the word "soldier" will be used to designate any person of the classes mentioned, as defined by the public resolution of August 29, 1916, and the act of July 28, 1917, copies of which are appended.

CREDIT ON ACCOUNT OF MILITARY SERVICE.

2. A soldier is required to establish residence upon the land involved within six months after his entry is allowed, unless an extension of time is granted on account of climatic reasons, sickness, or other unavoidable cause. If he has filed a declaratory statement, as hereinafter explained, he must file his application for entry and establish residence within six months after the filing of such statement.

Residence and cultivation must be continued for such length of time as will make up three years, when added to the soldier's credit on account of military service; but he is entitled, on proper notice, to absent himself for five months in each year, which may be divided into two periods, if he so desires.

Proof can not be submitted and final certificate and patent be issued until the soldier shall have had residence and cultivation for at least one year, which means seven months' actual residence on the land, plus not exceeding five months' absence during that year. This is irrespective of the credit to which he may be entitled. He must also show that there is a habitable house upon the land.

If he obtains so much credit for military service that there is required only one year's residence upon his claim, he must show only such amount of cultivation as will evidence his good faith as a homestead claimant. If his credit is such as to require more than one year's residence, he must show cultivation to the extent of one-

sixteenth of the area of the land beginning with the second year of the entry. If the credit is so small that there is required more than two years' residence, he must prove cultivation of one-sixteenth of the area during the second year and one-eighth thereof during the third year and until submission of proof.

STOCK-RAISING ENTRIES.

3. In connection with entries under the stock-raising homestead act the usual credit on the residence period is given, but the requirements as to improvements are the same on a soldier's entry as on that of a civilian.

FOUR-YEAR AND FIVE-YEAR PROOFS.

4. Under the act of February 25, 1919 (40 Stat., 1153), the Department may make an order, pursuant to a homesteader's application, permitting him to show, on final proof, residence for six months in each of four successive years, or residence for five months in each of five successive years, where the climatic conditions would make residence on the homestead for seven months in each year a hardship. In such cases credit on account of a period of military service will be allowed, which credit may exceed two years; but at least one year's compliance with the homestead laws must be shown on such entries, regardless of the amount of credit to which the soldier is entitled. As to entries (other than stock-raising claims) where more than two years' residence is required, there must be shown cultivation of one-sixteenth of the area during the second year and one-eighth thereof during the third year and until submission of proof.

COMMUTATION.

5. No credit for military service is allowed where commutation proof is submitted.

OPERATIONS IN MEXICO.

6. The operations in Mexico or along the border thereof, above referred to, are regarded as having begun May 9, 1916, the date of the President's order mobilizing the militia of Arizona, New Mexico, and Texas. Persons then serving in the Army, Navy, or Marine Corps and in the National Guards of those States who were mustered into service will be given credit on account of their service from that date. Such members of the National Guards of the other States and the District of Columbia as were mustered into the Federal service will be given credit from June 18, 1916, the date of the order for their mobilization. Credit for service will be given the

guardsmen until the dates of their discharge from the service, but the operations referred to will be held to have continued until after the beginning of the war with Germany, there not being any material interruption in the service of those who were mustered into the United States Army during said war.

DURATION OF THE WAR.

7. The war with Germany and its allies commenced April 6, 1917, and its termination will be marked by the date of the proclamation of the treaty of peace by the President of the United States.

BEGINNING OF SERVICE.

8. So far as concerns the war with Germany, the service begins, within the meaning of this act, from the time of voluntary entrance of privates into the Army, Navy, or Marine Corps, or appointment of officers (including those appointed from the Officers' Training Corps); in the case of a person enlisted in the Naval Reserve, from the time he was called into active service; in the case of a drafted man, from the time he was mustered into service; in the case of members of the Federalized National Guard, from the time they were mustered into the United States service, and the act has no application to other State troops; in the case of members of the Red Cross, only from the time they actually became identified with and a part of the military or naval forces of the United States, and the act does not apply to other members of the Red Cross.

EVIDENCE OF SERVICE.

9. A party claiming the benefit of his military service must file with the register and receiver a certified copy of his certificate of discharge, showing when he enlisted, when he was discharged, and the organization in which he served, or the affidavit of two disinterested witnesses, corroborative of the allegations contained in his affidavit on these points, or if neither can be procured, his own affidavit to that effect. In all cases the facts as to the alleged service will be verified from the records of the War or Navy Department.

10. An alien who has served in the Army, Navy, or Marine Corps during the war with Germany and its allies is in the same position with regard to citizenship as though he had declared his intention to become a citizen, and is, therefore, qualified in that respect to make a homestead entry. (Sec. 1 of the act of May 9, 1918, 40 Stat., 542). However, he is not entitled to receive final certificate and patent until he shall have been fully naturalized.

SOLDIERS' DECLARATORY STATEMENTS.

11. A soldier may, if he so desires, file a declaratory statement at the proper local land office, describing the land for which he desires to file homestead application within the next six months. His affidavit, showing his right to file the statement and thereafter to make homestead entry, must be executed in the same manner as a homestead application; that is, within the county or land district in which the tract is situated, before the register or the receiver, or before a United States commissioner or the judge or clerk of a court of record. The statement loses all validity unless followed by the filing of an application within the six months' period, accompanied by the regular fee and commissions; and the six months allowed for establishing residence dates from the filing of the statement.

The only essential advantage of this course of procedure is that the payment of the fee and commissions and, in case of Indian lands, the first installment of the price may be thus postponed; for the office fees in connection with a declaratory statement amount to only \$2 in the more easterly States and \$3 in the far-western States. However, it must be remembered that a soldier who files a declaratory statement and fails to make entry following same has used his homestead right and will not be permitted to make another filing unless he can show reasons beyond his control which prevented his making entry and perfecting title thereunder.

The present act does not extend section 2309, Revised Statutes, to the soldiers referred to therein and, therefore, there is no authority of law to allow them to execute declaratory statements *through agents*.

RIGHTS OF WIDOW AND HEIRS.

12. If the soldier makes a valid settlement on public land or files a declaratory statement or makes a homestead entry, and dies before perfecting it, the right to perfect the claim, with credit for his military service, passes to his widow; or if there be no widow to his heirs and devisees. The devisees take precedence over the heirs except when the latter are all minor children of the soldier.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

AN ACT To extend the provisions of the homestead laws touching credit for period of enlistment to the soldiers, nurses, and officers of the Army and the seamen, marines, nurses, and officers of the Navy and the Marine Corps of the United States who have served or will have served with the Mexican border operations or during the war between the United States and Germany and her allies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subject to the conditions therein expressed, as to length of service and honorable discharge, the provisions of sections twenty-three hundred and four and twenty-three hundred and five, Revised Statutes of the United States, shall be applicable in all cases of military and naval service rendered in connection with the Mexican border operations or during the war with Germany and its allies as defined by public resolution numbered thirty-two, approved August twenty-ninth, nineteen hundred and sixteen (Thirty-ninth Statutes at Large, page six hundred and seventy-one), and the act approved July twenty-eighth, nineteen hundred and seventeen, (Fortieth Statutes at Large, page two hundred and forty-eight).

Approved, February 25, 1919. (40 Stat., 1161.)

REVISED STATUTES.

(As amended by act of Mar. 1, 1901, 31 Stat., 847.)

SEC. 2304. Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days, and who was honorably discharged * * * shall, on compliance with the provisions of this chapter as hereinafter modified, 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; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement.

SEC. 2305. The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements: *Provided*, That in every case in which a settler on the public land of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine during the War with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or

marriage, then his minor orphan children or his or their legal representatives, to make final proof upon and receive Government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such lands shall issue.

Public resolution No. 32, approved August 29, 1916, provides:

That the provisions of the act approved June 16, 1898, chapter 458 (30 Stat., 473), shall be applicable in all cases of military service rendered in connection with operations in Mexico, or along the border thereof, or in mobilization camps elsewhere, whether such service be in the military or naval organization of the United States or the National Guard of the several States now or hereafter in the service of the United States. (39 Stat., 670.)

The act of June 16, 1898, provides:

That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine during the existing war with Spain, or during any other war in which the United States may be engaged, his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits of contest, and proved at the hearing in cases hereafter initiated, that the settler's alleged absence from the land was not due to his employment in such service: *Provided*, That if such settler shall be discharged on account of wounds received or disability incurred in the line of duty then the term of his enlistment shall be deducted from the required length of residence without reference to the time of actual service: *Provided further*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements. (30 Stat., 473.)

Section 1 of the act of July 28, 1917, provides:

That any settler upon the public lands of the United States, or any entryman whose application has been allowed, or any person who has made application for public lands which thereafter may be allowed under the homestead laws, who, after such settlement, entry, or application, enlists or is actually engaged in the military or naval service of the United States as a private soldier, officer, seaman, marine, national guardsman, or member of any other organization for offense or defense authorized by Congress during any war in which the United States may be engaged, shall, in the administration of the homestead laws, have his services therein construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, entryman, or person unless it shall be alleged in the

preliminary affidavit or affidavits of contest and proved at the hearing in cases hereinafter initiated that the alleged absence from the land was not due to his employment in such military or naval service; that if he shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence, without reference to the time of actual service: *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year. (40 Stat., 248.)

CORNELIUS WILLIS ET AL. (ON PETITION).

Decided April 29, 1919.

CONFIRMATION—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

The receipt issued by the receiver of the local land office under the system of accounts adopted July 1, 1908, for money transmitted with a final proof which had not been the subject of examination and approval, is not the "receiver's receipt upon the final entry" as contemplated by the proviso to section 7 of the act of March 3, 1891; nor does a claimant gain any right thereunder by the erroneous issuance of the register's final certificate pending consideration by the Department of the issues raised upon appeal duly prosecuted.

VOGELSAW, *First Assistant Secretary*:

This a petition for the exercise of supervisory authority, filed by the Clearwater Timber Company, transferee of Cornelius Willis, who, on August 24, 1909, at the Lewiston, Idaho, land office made homestead entry for lots 3 and 4, Sec. 25, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 36, T. 41 N., R. 5 E., B. M.

Final five-year proof was submitted on said entry on July 23, 1910, at which time the final commissions (\$6.00) were paid to the receiver, who issued his receipt therefor on July 28, 1910. Final certificate was withheld at the request of chief of field division. Under date of April 10, 1913, adverse proceedings were directed by the Commissioner of the General Land Office. The transferee denied the charges and a hearing was had. The local officers, by decision of May 20, 1914, held that the Government had failed to sustain the charges. On appeal to the Commissioner of the General Land Office by the Solicitor for the Department of Agriculture (the land being within the limits of the St. Joe National Forest under withdrawal of November 6, 1906), the proceedings were dismissed by decision of January 2, 1915, it being held under the departmental decision in Jacob Harris (42 L. D., 611) that the proceedings were barred by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095-1099), and the issuance of final certificate was directed. Whereupon, on February 15, 1915, the receiver deposited in the United States Treasury the final commissions paid to him by the entryman and the register issued a final certificate. Thereafter, within the time al-

lowed by the Rules of Practice, the Solicitor for the Department of Agriculture filed an appeal to this Department and, by decision of May 10, 1915 (unreported), it was held that Willis's alleged settlement was not a valid claim at the date of the withdrawal of November 6, 1906, and that the withdrawal therefore attached to the land on that date and precluded perfection of the entry thereafter. The cancellation of the entry was directed.

The petition now before the Department urges that said departmental decision be recalled and vacated and a patent issue, the contention being made that the case comes within the rule laid down by the Supreme Court of the United States in *Lane v. Hogleund* (244 U. S., 174).

The proviso to section 7 of the act of March 3, 1891, *supra*, reads as follows:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead * * * laws, * * * and where there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

The question presented is whether a final receiver's receipt upon the entry of Willis was issued more than two years prior to the institution of the proceedings which resulted in the cancellation of the entry. To be sure the receiver, on July 28, 1910, issued to Willis a receipt (No. 532,564) for the \$6.00, which had been transmitted with the final proof to the local officers by the proof taking officer. Said receipt contained the following:

This receipt is evidenced only of the receipt of the amount indicated, and must be issued at the time the money is received, without regard to the subsequent allowance or rejection of the application, entry, etc., due notice of which will be given.

When the act of March 3, 1891, *supra*, was passed by Congress and until July 1, 1908, when money was received at the local office in connection with a final proof a notation thereof was made by the receiver in a book provided for that purpose, but a receipt was not issued unless and until the final proof was found acceptable. If a protest by a field officer against the acceptance of the proof had been made, the receiver did not issue a receipt for the amount tendered until the protest was disposed of. In the absence of a protest, the proof was examined in due course and, if it appeared regular, the receiver issued a final receipt for the money paid and the receipt was forwarded to the entryman, indicating that he appeared entitled to a patent for the land entered. The form used at the date of said act and long prior thereto follows:

(No. 4-140.)

Final receiver's receipt No. —.

Application No. —.

HOMESTEAD.

RECEIVER'S OFFICE _____

_____ 18—

Received of _____ the sum of _____ dollars — cents, being the balance of payment required by law for the entry of _____ of section _____, in township _____, of range _____, containing _____ acres, under section 2291 of the Revised Statutes of the United States.

Receiver.

On July 1, 1908, a new system of accounts was introduced by the Land Department and receivers were thereafter required to use but one form of receipt blank (Form 4-131) for all moneys collected by them, and it was required (paragraph 71 of circular No. 105) that "receivers must issue receipts for the full amount of money tendered *at the time* the money is tendered." Paragraph 73 provided:

The issuance of a receipt by a receiver of public moneys does not mean that the application, entry, proof, etc., in connection with which it is issued, is allowed or approved, or will be allowed or approved. It merely means that the receiver has received the money and that it is in his custody or control until it is applied or returned.

Congress was of course familiar with the prevailing practice of the Land Department and when, in the act of March 3, 1891, supra, it referred to a receiver's receipt upon final entry, it was with knowledge that such receipts were not issued until the local officers had examined and approved the final proof. The act therefore clearly meant that after a final proof, acceptable on its face, had been made, the required moneys had been tendered, and the receiver had indicated that the proof was acceptable by issuing his final receipt, no proceedings could be instituted against the entry after the lapse of two years from the date of such final receipt. It was certainly not intended by Congress that the making of final proof and the payment of the amount due should require the issuance of patent unless the local officers, upon consideration of the proof, found it acceptable and had indicated their ruling thereon by the receiver issuing his final receipt. See in this connection Fred B. Garrett *et al.* (44 L. D., 115).

In the case of Veatch, Heir of Natter (On Rehearing) (46 L. D., 496), the Department held (syllabus):

The two-year period fixed by the proviso to section 7 of the act of March 3, 1891, which begins to run from the date of the issuance of the "receiver's receipt upon the final entry" has no application to an original homestead entry which has never ripened into a *final entry* through offer of proof, payment, and the judicial determination of the register that the requirements of law have been met, of which his certificate is the formal expression.

It is obvious that Willis gained no right by virtue of the issuance of the register's final certificate on February 15, 1915, before the

Department had passed upon the issues raised in the appeal of the Solicitor of the Department of Agriculture. That certificate was, under the circumstances shown, issued without authority of law.

Reconsideration of the final proof in connection with the testimony submitted at the hearing does not convince the Department that any error was committed in cancelling the entry.

For the reasons aforesaid the petition is denied.

**REGULATIONS FOR THE RELIEF OF SETTLERS UPON CERTAIN
LANDS IN THE STATE OF MONTANA—ACT OF FEBRUARY 28,
1919.**

[Circular No. 643.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 2, 1919.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES, BILLINGS,
BOZEMAN, GLASGOW, GREAT FALLS, HAVRE, HELENA, KALISPELL,
LEWISTOWN, MILES CITY, AND MISSOULA, MONTANA:

Appended hereto is a copy of the act of Congress, approved February 28, 1919 (40 Stat., 1204), providing for the relief of certain settlers upon indemnity lands of the Northern Pacific Railway Company in the Indian reservation therein described in the State of Montana.

In response to request that it indicate its formal acceptance of the provisions of the act the Railway Company by its Land Commissioner on March 25, 1919, advised this office that it was willing to proceed with the adjustment under the act in meritorious cases, in accordance with the previous correspondence leading up to the passage of the act. Such correspondence indicated that the number of cases to be adjusted would not exceed sixty, embracing not more than 17,000 acres.

LANDS SUBJECT TO ACT.

The lands affected by the act are lands within the indemnity limits of the grant to the Northern Pacific Railroad (now Railway) Company, through that portion of the former reservation for the Gros Ventre, Piegan, Blood, Blackfoot and River Crow Indians, lying south of the Missouri River in the State of Montana, found to be in the possession of actual bona fide qualified settlers under the homestead laws of the United States, who have made substantial improvements thereon and which lands have been adjudged by the Secretary of the Interior to inure to the Northern Pacific Railway Company under the grants made to its predecessor in interest, the Northern Pacific Railroad Company.

SETTLER CLAIMS.

The list of sixty cases hereinbefore referred to, does not appear to have been filed, but the company will be requested to file the same for consideration. Upon receipt of said list, the cases of the various settlers will be examined. Where they are found to come within the terms of the act, the company will be requested to file relinquishments of the lands involved in favor of the settlers and to select other lands in lieu thereof, as provided by the act.

It is not intended by this statement to assume that the sixty cases referred to are all the cases which come within the provisions of the act, but where other conflicting claims are brought to the attention of the Department and it is found that they are of the character contemplated by the act, and the lands adjudged to inure to the Northern Pacific Railway Company under the grants made to its predecessor in interest, the Northern Pacific Railroad Company, under the acts of July 2, 1864 (13 Stat., 365), and May 31, 1870 (16 Stat., 378), the attention of the officers of the railway company will be called thereto and relinquishments will be requested for the benefit of the settler claimants.

RELINQUISHMENTS—HOW MADE.

Relinquishments by the railway company may be the same in manner and form as those provided for by the circular of February 14, 1899 (28 L. D., 103), under the act of July 1, 1898 (30 Stat., 597-620). Where title has passed to the company by patent, a formal deed of reconveyance will be required, accompanied by evidence satisfactorily showing that the company has not sold or contracted to sell the tract therein described or in any manner encumbered the same.

DISPOSITION OF LAND RELINQUISHED.

Upon the filing with and acceptance by the Commissioner of the General Land Office of relinquishments by the railway company, the lands relinquished will be treated as having reverted to the United States and the settler claimants will be permitted to perfect their claims in the manner provided by the homestead laws. The railway company, upon proper application, will be permitted to select an equal quantity of other lands in lieu of those relinquished, in the manner directed by the act, to which it shall receive title as though originally granted.

LAND SUBJECT TO LIEU SELECTION.

The lands subject to selection in lieu of those relinquished are surveyed public lands within the State of Montana, not mineral, and

not otherwise appropriated at the date of selection. Lands withdrawn or classified as coal lands are subject to selection by the company, but as to these, the act provides that the company shall receive the restricted patent provided for by the act of June 22, 1910 (36 Stat., 583).

ACT NOT MANDATORY.

It is to be observed that the act is not mandatory upon the railway company, but authorizes it to file relinquishments in favor of such settlers, within the territory designated as have made substantial improvements upon lands adjudged by the Secretary of the Interior to have inured to the railway company under the grants mentioned. It depends for its effect upon the concurrent action of the railway company, the Land Department and the settlers affected thereby.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

AN ACT For the relief of settlers on certain railroad lands in Montana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the adjustment of the grants to the Northern Pacific Railroad Company, if any of the lands within the indemnity limits of said grants through that portion of the former reservation for the Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Indians lying south of the Missouri River in the State of Montana, be found in possession of an actual bona fide qualified settler under the homestead laws of the United States who has made substantial improvements thereon and such land has been adjudged by the Secretary of the Interior to inure to the Northern Pacific Railway Company under the grants made to its predecessor in interest, the Northern Pacific Railroad Company, the Northern Pacific Railway Company, upon request of the Secretary of the Interior may file a relinquishment of said lands in favor of the settler and shall then be entitled to select an equal quantity of other lands in lieu thereof from any of the surveyed public lands within the State of Montana, not mineral and not otherwise appropriated at the date of selection, to which it shall receive title the same as though originally granted: *Provided, however,* That lands withdrawn or classified as coal lands may be selected by said company, and as to such lands it shall receive a restricted patent as provided by the Act of June twenty-second, nineteen hundred and ten.

Approved, February 28, 1919. (40 Stat., 1204.)

PETRONILO GARCIA.

Decided May 6, 1919.

MILITARY RESERVATION—RESTORATION—HOMESTEAD APPLICATION.

Lands temporarily withdrawn from settlement and all forms of disposal for use by the War Department in connection with the construction through said lands of the military road to Fort Bayard, are not "included within the limits of a military reservation" within the meaning of the act of July 5, 1884; and when such withdrawal is vacated and the lands restored to the public domain they are not subject to disposition thereunder.

VOGELSANG, *First Assistant Secretary*:

By its decision on June 22, 1918, the General Land Office rejected Petronilo Garcia's homestead application, Las Cruces 018213, filed May 7, 1918, for the N: $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, T. 18 S., R. 13 W., N. M. P. M., on the ground that the two tracts first named were not subject to homestead entry because they were on June 5, 1916, restored by Executive order for disposal under the act of July 5, 1884 (23 Stat., 103), after they had been temporarily withdrawn on May 2, 1914, in connection with the location and construction of a military road.

That act declares "that whenever, in the opinion of the President of the United States, the lands, or any portion of them, *included within the limits of any military reservation*" have become useless for military purposes they must be exposed to sale at public auction after having been first appraised, and if advisable surveyed into small tracts or town lots, except in cases where they are claimed under a homestead settlement made before they were included in the reservation; and it is well settled that such lands, can not be disposed of under the homestead laws or in any manner other than that mentioned in the act. William H. Carson (19 L. D., 205); State of Utah (30 L. D., 301); Northern Pacific Ry. Co. (37 L. D., 667).

The appeal of Garcia from the decision mentioned, therefore, presents the question as to whether the lands here involved, which never formed a part of an actual military reservation, come within the provisions of that act, or in other words, were they at the time of and before their restoration "included within the limits of a military reservation" in the sense in which those words were used in the act? If not they should not be disposed of under the act of July 5, 1884, *supra*.

The Executive order of May 2, 1914, which withdrew these lands did not put them within or make them a part of a military reservation; but, on the contrary, it recognized the fact that they were outside of the reservation and merely declared that they were only "temporarily withdrawn from settlement and all forms of disposal

for use by the War Department in connection with the construction through said lands of a military road from the railroad station at Bayard, to Central, en route to Fort Bayard."

In the opinion of this Department, lands withdrawn as these lands were are not either under the letter or the spirit of the act of 1884, lands "included within the limits of a military reservation" and their final disposal is not for that reason, controlled by that act.

It is a well known fact that unusually desirable lands have, as a very general rule, been selected as sites for military posts and this is especially true in arid sections of the country such as the one in which these lands are located. And it is further known that as an incident to their occupation by the army the Government, at very considerable expenditures of money has supplied them with water, or selected them at places where ample water was easily available, and has largely enhanced their value by the erection of buildings and other improvements, and possibly by the breaking and cultivation of some parts of the land, and the building of roads. It is also true that in many instances trading points and settlements have been established in the vicinity of such posts, which add to the value and attractiveness of the lands.

When Congress passed the act of 1884, it knew and considered these facts, and—

Because of the enhanced value of lands in abandoned military reservations, or because of other reasons growing out of their former use and surroundings, it was deemed more conducive to the public interests to set them apart for disposition in certain designated modes, to the exclusion of others, than to unconditionally restore them to the public domain, (State of Utah, 30 L. D., 301, 304),

and in effect give them away to homesteaders who would not make any payment to compensate the Government for the money it had expended in their improvement.

None of the reasons which induced Congress to pass that act are present in this case; and it can not be held that it was intended by it that lands outside of military reservations temporarily withdrawn merely to expedite and facilitate the possible location and building of a road across them should be disposed of only in the manner prescribed in that act. The entire NW. $\frac{1}{4}$ of Sec. 1, and five other tracts, aggregating approximately 360 acres were embraced in this withdrawal, and it is unreasonable to suppose that the President intended to hold all these lands in reservation even if the contemplated road should be later located across each of them. The temporary withdrawal was evidently made to prevent possible embarrassment that might arise in securing rights of way if the lands were permitted to be entered before the location and establishment of the road.

Aside from his inherent power to *reserve* lands for military occupation the President was expressly authorized to "temporarily withdraw" lands for "public purposes to be specified in the orders of withdrawals" by the act of June 25, 1910 (36 Stat., 847), which provides "that such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress," and inasmuch as the language he used in making the withdrawal now under consideration was practically the same as the language usually used in making withdrawals under that act it may reasonably be presumed that he intended it to be a withdrawal under that act and not one made under his power to reserve lands for permanent military occupation. This conclusion is supported by the fact that the order of June 5, 1916, restored the lands to the control of this Department for disposal under the act of 1884, "or as may be otherwise provided by law," and adequate provision has been made for their disposal by laws other than the act of 1884.

For these reasons the decision appealed from is hereby reversed and the case is remanded for further consideration and adjudication in accordance with the conclusion here reached; but in this connection attention is called to the fact that the return of the appraisers by whom this land was appraised strongly indicates that it is mineral in character, and more than usual attention should for that reason be given to that question before a nonmineral entry is allowed for them.

VESTA E. CRABBS.

Decided May 6, 1919.

ENLARGED HOMESTEAD—STATE OF NEBRASKA.

While the provisions of the Kinkaid Act are applicable only to certain designated lands in Nebraska, Congress has made no provision for the allowance of enlarged homestead entries in that State.

Vogelsang, First Assistant Secretary:

Vesta E. Crabbs has appealed from a decision of the Commissioner of the General Land Office dated March 19, 1918, rejecting her application to make entry under section 7 of the enlarged homestead act for W. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 14, T. 35 N., R. 66 W., 6th P. M., Douglas, Wyoming, land district.

Applicant's original entry embraced 160 acres in the O'Neill, Nebraska, land district, and it was held in the decision appealed from that the enlarged homestead act did not apply to land in Nebraska, hence could not be designated thereunder.

The act of February 19, 1909 (35 Stat., 639), provided for enlarged homestead entries in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the then Territories

of Arizona and New Mexico. The act of June 13, 1912 (37 Stat., 132), extended the provisions of said act to the States of California and North Dakota, and it was extended to the States of Kansas and South Dakota by the acts of March 3, 1915 (38 Stat., 953), and March 4, 1915 (38 Stat., 1162), respectively. The act of June 17, 1910 (36 Stat., 531), applicable to Idaho alone, is identical, as to its main provisions, with the act of February 19, 1909, *supra*.

It thus appears that Congress made no provision for enlarged homestead entries in the State of Nebraska. The so-called Kinkaid Act, allowing homestead entries for not to exceed 640 acres, applies to that section of Nebraska in which applicant's original entry is located, but that fact does not confer on her any rights under the act here involved.

The land in the original entry not being subject to designation under the enlarged homestead act, an additional entry thereunder can not be allowed.

The decision appealed from is affirmed.

CASTLE PEAK IRRIGATION PROJECT, UTAH—ACT OF FEBRUARY 28, 1919.

INSTRUCTIONS.

[Circular No. 645.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 6, 1919.

REGISTERS AND RECEIVERS, SALT LAKE CITY, AND VERNAL, UTAH:

Your attention is directed to the act of February 28, 1919 (40 Stat., 1210), which reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any qualified entryman who has heretofore made bona fide entry upon land subsequently withdrawn under the provisions of the reclamation act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), for the Castle Peak irrigation project, in Utah, upon filing an application to have his entry made subject to all the charges, terms, conditions, provisions and limitations of the reclamation act, together with a satisfactory showing of full compliance with the homestead laws under which such entry was made to the date of such application, may be granted leave of absence from the land until the Secretary of the Interior announces the availability of a water supply for the irrigation of the land, or until the lands embraced in his entry shall be restored to the public domain; *Provided*, That the period of actual absence under this act shall not be deducted from the full time of residence required by law.*

This act applies to any qualified entryman, who, prior to the passage thereof, made a bona fide homestead entry upon public land, which subsequent to date of such entry has been withdrawn under the pro-

visions of the reclamation act of June 17, 1902 (32 Stat., 388), in connection with the Castle Peak irrigation project, Utah.

Any such entryman desiring to avail himself of the benefits of said act should file in the proper local land office an application asking to have his entry made subject to all the charges, terms, conditions, provisions, and limitations of the reclamation act and requesting leave of absence in accordance with the act, if he desires such leave.

Such application must be sworn to by the applicant and corroborated by two witnesses in the land district, or county, within which the entered lands are located, before an officer authorized to administer oaths and having an impression seal. The application should contain the serial number and description of the entry and show the date of establishment of residence on the land, date, and duration of all absences therefrom, area of land cultivated each year since date of entry, and the character, extent, and value of all improvements placed on the land, to the end that it may be ascertained whether the entryman has fully complied with the homestead laws under which his entry was made to the date of such application.

Registers and receivers will examine all such applications and are authorized to suspend them with notice to cure defects within thirty days, or to reject them, subject to the usual right of appeal to the Commissioner of the General Land Office. If the showing made is found satisfactory, the register and receiver will grant the entryman leave of absence from the land until the Secretary of the Interior announces the availability of a water supply for the irrigation thereof or until the lands embraced in the entry shall be restored to the public domain.

These applications are to be forwarded with the regular monthly returns.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

**PROOFS, AFFIDAVITS, OATHS—EXECUTION BEFORE DEPUTY
CLERKS OF COURTS.**

INSTRUCTIONS.

[Circular No. 644.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 8, 1919.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

The instructions of March 1, 1907 (35 L. D., 436), directing that oaths, affidavits and proofs required in public land matters, made

after May 1, 1907, before deputy clerks of courts, be not accepted, are hereby vacated.

Hereafter, such oaths, affidavits and proofs made before a duly qualified deputy clerk of court, who regularly acts for the clerk and performs the duties of the office in the name of his principal at the county seat, may be accepted.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SHEARER v. PFANN.

Decided May 14, 1919.

CONTEST—AFFIDAVIT SIGNED BY ANOTHER—NOTARY PUBLIC.

The act of July 28, 1917, clearly contemplates that an affidavit be made the basis of all contests thereafter initiated against homestead entrymen, and a purported affidavit to which contestant's name is signed by another, and executed before a notary public then acting as his attorney, is an absolute nullity, and affords no valid basis for contest.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by William J. Shearer from the decision of the Commissioner of the General Land Office of February 12, 1919, dismissing his contest against homestead entry 014355, for the W $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 24, T. 18 N., R. 2 W., B. M., Boise land district, Idaho, and the additional homestead entry 019656, for the SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 23; SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 24, same township and range, both entries made by Gregor Pfann.

The original entry was made May 13, 1913, and the additional entry, September 20, 1916. November 10, 1916, Pfann submitted final proof on both entries, but the same was rejected by the local officers for insufficient residence by the entryman upon the land, and that action was affirmed by the Commissioner's decision of May 26, 1917, the entries having been permitted to remain intact.

January 3, 1918, Shearer filed in the local office an application to contest the said entries charging that the entryman had failed to establish or maintain bona fide residence upon the land and had failed to cultivate any portion thereof; also that he had been absent from the land for more than one year last past, and that those defaults were not due to military or naval service. The affidavit was sworn to by the contestant before one L. L. Burtenshaw who, it appears, was then Shearer's attorney. This affidavit was rejected by

the local officers because it was executed on an old form and the contestant was notified to file a new application, using the new form. Thereupon and on January 11, 1918, there was filed in the local office a second application by Shearer to contest the said entry, which application purports to have been subscribed and sworn to January 9, 1918, by said Shearer before said Burtenshaw who was then also Shearer's attorney. This application sets forth substantially the same charges as those contained in the first application and differs therefrom only in the fact that the corroborating affidavit sets forth the facts upon which the knowledge of the corroborating affiants is based. Notice of the filing of this application issued and was duly served upon the entryman February 14, 1918. Answer thereto was filed March 2, 1918. Notice of the hearing issued and hearing was had April 16, 1918, before the Clerk of the District Court of the Seventh Judicial District of the State of Idaho in and for the county of Adams, and from the evidence adduced at said hearing the local officers found that the entryman had abandoned the land and accordingly recommended that the entry be canceled.

On appeal from that action, the Commissioner, in the decision here complained of, found that the second application to contest was not signed or executed by the contestant himself but that the contestant's wife had signed the contestant's name for him while he himself was in Canada; also that his attorney in the contest proceeding acted as the notary in the execution of the paper; that the affidavit was therefore a forgery; that the jurat besides being made by the contestant's attorney in contravention of the regulations was false and that the affidavit as a whole was a nullity. It was, therefore, held that, although notice issued on said purported affidavit and hearing had been had thereon, the contest was null and void *ab initio*. For that reason the contest was dismissed.

By act of July 28, 1917 (40 Stat., 248), it is provided that thereafter no contest shall be initiated on the ground of abandonment nor allegation of abandonment sustained, against any settler upon the public lands of the United States, or any entryman whose application has been allowed under the homestead laws, unless it shall be alleged in the preliminary affidavits or affidavits of contest and proved at the hearing, in cases thereafter initiated, that the alleged absence from the land was not due to such person's employment in the military or naval service of the United States during any war in which the United States may be engaged. This provision clearly contemplates that an affidavit shall be made the basis of all contests thereafter initiated against homestead entrymen. The purported affidavit upon which the notice in this case was issued was, for the reasons stated in the Commissioner's decision, an absolute nullity

and hence afforded no valid basis for a proceeding against the entryman.

It is suggested in the record on behalf of the contestant that the first affidavit, which was executed by the contestant himself, afforded a sufficient basis for the notice. Should that proposition be urged the answer thereto is that the said affidavit, having been executed before a notary public who was then the contestant's attorney, afforded no proper basis for the proceeding in view of the provisions of the act of June 29, 1906 (34 Stat., 622), amending section 558 of the Code of the District of Columbia, which prohibits a notary public from administering oaths in connection with matters in which he is employed as counsel, attorney or agent or in which he may be in any way interested, before any of the Departments of the United States Government. Opinion of the Attorney General of April 18, 1907 (26 Ops. Atty. Gen., 236); Home Mining Co. (42 L. D., 526).

For the reasons stated the decision appealed from is affirmed.

COYLE v. DRAKE.

Decided May 14, 1919.

CONTEST—ABANDONMENT—LEAVE OF ABSENCE.

Absence under leave improvidently granted by the local officers on an insufficient showing apparent upon the records of the Land Department, but without fraud or misrepresentation on the part of the entryman, can not be held to constitute abandonment, nor afford a basis for contest.

VOGELSANG, *First Assistant Secretary*:

May 29, 1916, Howard M. Drake made second homestead entry 034705 for the S. $\frac{1}{2}$ N. $\frac{1}{2}$, N. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 18, T. 12 N., R. 30 E., M. M., within the Lewistown, Montana, land district.

December 7, 1916, the entryman applied for and later secured leave of absence from December 26, 1916, to December 26, 1917, on the grounds that it was necessary for his wife to go east and take care of her sick mother, and that since they had no income whatever, it was necessary for him to work and support himself and wife and her mother.

On April 1, 1918, Edward J. Coyle filed a contest against said entry, alleging:

That the leave of absence obtained by the said Howard Mitchell Drake and now running was procured by fraud, and that the statements contained therein as to being unable to reside on the land on account of sickness of either entryman or his wife are untrue and were not true at the time such application was made; that the said leave of absence was fraudulently obtained for the

sole purpose of evading residence upon the said claim, and the said entryman has wholly abandoned the said land for more than six months last past; that said entryman's absence from the land is not due to his service in the army or navy of the United States or any branch thereof; that he has wholly failed to cultivate the said land as required by law.

The entryman failed to appear on the date set for the hearing, although duly served with notice. The contestee offered evidence in support of his contest affidavit, and the register and receiver recommended that the entry be canceled. The entryman applied for a rehearing, alleging that he had employed an attorney to represent him who failed to appear, and that he desired another opportunity to present the facts. The Commissioner directed that he present a verified statement as to the employment of an attorney and the defense he desired to make, but he failed to do so. Upon a review of the record of the hearing, the Commissioner decided on January 4, 1919, that the contest should be dismissed, saying:

The contest should not have been allowed, as it plainly appears that this entryman in applying for the leave of absence, never suggested nor represented that he did so because of the ill health of either himself or his wife; the showing actually made and upon which the leave was allowed remaining unchallenged either by the allegations of the contestant, or the relevant testimony adduced on the hearing; no charge being made that the entryman had failed to establish his residence on the homestead.

The leave of absence, therefore, remaining intact, the charge of abandonment for six months preceding the contest is of no consequence whatever; and assuredly the statement alleged to have been made by the wife, as to her unwillingness to make the land her home, affords no ground for disturbance of the entry at this time.

That was the only possible decision under the circumstances. It was evidently assumed, in the contest affidavit, that the entryman had applied for leave of absence on the grounds of the sickness of himself or wife, which was not the case. Hence the hearing was on a point that in no way affected the validity of the entry. There was no evidence to show that the leave of absence had been fraudulently secured, although the facts alleged in support thereof did not warrant its allowance. This objection was, however, apparent upon the records of the Land Department, and could not be made the subject of a private contest. See Rule of Practice 1. Moreover, absence under leave improvidently granted by the local officers, but without fraud or misrepresentation on the part of the entryman, can not be held to constitute abandonment.

The decision of the Commissioner is affirmed.

INSTRUCTIONS.

May 20, 1919.

STOCK-RAISING HOMESTEAD LANDS—PREFERENCE RIGHTS.

The preference right accorded to one who files petition for the designation of land under the stock-raising homestead act of December 20, 1916, is not defeated by the preference right of additional entry of adjoining land accorded under the provisions of section 8 of said act, to one who thereafter makes an original homestead entry under section 2289 Revised Statutes; in the former case the right is initiated by the filing of a proper application for designation, and in the latter by the allowance of the original entry.

VOGELSANG, *First Assistant Secretary*:

Informally you [Commissioner of the General Land Office] request advice upon a question arising under the act of December 29, 1916 (39 Stat., 862), relating to stock-raising homesteads, which may be stated as follows:

Has a qualified person who has duly made entry of land under section 2289, Revised Statutes, a preference right of additional entry of adjoining land by virtue of section 8 of said act of December 29, 1916, as against one who, prior to such entry, had filed an application to enter the same land, accompanied by fees and commissions and a petition for its designation under that act?

Section 2 of said act authorizes the Secretary of the Interior to designate stock-raising lands and provides that upon application to enter any such lands, by a qualified person, accompanied by the regular fees and commissions, and a showing that the land applied for is of the character contemplated by said act, the application shall be suspended until it shall have been determined that the land is subject to designation; that during such suspension the land described in the application shall not be disposed of, and that "if the said land shall be designated under this act then such application shall be allowed."

Section 8 of said act provides, among other things—

That any homestead entrymen or patentees who shall be entitled to additional entry under this act shall have, for ninety days after the designation of lands subject to entry under the provisions of this act and contiguous to those entered or owned and occupied by him, the preferential right to make additional entry as provided in this act: * * *

The question as formulated above presupposes that both the applicant for designation of the land and the applicant for additional entry under section 8, are qualified to enter it and that either of the applications would be allowed in the absence of the other. Hence, the question is: which one of the applicants has the better right under conflicting claims?

Construing this question in the Circular of Instructions of January 27, 1917, paragraph 13 (a) (45 L. D., 625, 633), it was said:

* * * This right [the preferential right under section 8] is superior to the right of entry accorded a person who had filed application for entry of the land under this act accompanied by petition for its designation. * * *

Obviously, this statement of the law is inconclusive and misleading. It may be read to mean that an entry made under section 2289 Revised Statutes gives to the entryman a preference right of additional entry whether such original entry was made either before or after the date of an application for designation of the same land. Upon mature consideration, I am convinced that it was not the purpose of Congress to permit the right accorded to a petitioner for the designation of land to be defeated by one who thereafter makes an original homestead entry of adjoining land. To so hold, would be to invite entries in advance of designation, over large areas for the purpose of securing preference rights of additional entry, resulting in a defeat of the claim under the application for designation. In instances where there is no application for designation, the statute plainly gives the entryman a preference right, but this is because no other right exists of prior initiation. An application for designation conforming to the statute creates a right of entry upon designation of the land and this is a preferential right in the same sense as the right given by section 8. In the one case, when the designation is made the right relates in point of time to date of the application for designation; in the other, to the date of the original entry. Under familiar rules of construction the first in time is first in right.

You will give this letter due publication.

**MILITARY SERVICE—ACTS OF JULY 28, 1917, AND FEBRUARY
25, 1919.**

INSTRUCTIONS.

[Circular No. 646.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 4, 1919.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

In applying credit for military or naval service in connection with final proofs on homestead entries you will make no distinction between the Act of July 28, 1917 (40 Stat., 248) and the Act of February 25, 1919 (40 Stat., 1161); i. e., if the claimant has had two years military service, he will only be required to comply with the law as to residence for one year and cultivate a sufficient area to

demonstrate his good faith; if he has only one year's military service, he must comply with the law as to residence for two years and cultivate at least one-sixteenth of the area the second year. If, however, the soldier delays the submission of proof beyond the period of residence required, the cultivation necessary for the years elapsing before the submission of proof must be shown.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SEWELL A. KNAPP.¹

Decided June 1, 1918.

STATE SELECTION—ACT OF JUNE 16, 1880—JURISDICTION.

As the granting act of June 16, 1880, expressly provides that selections thereunder shall be duly certified to the State by the Commissioner of the General Land Office and "approved by the Secretary of the Interior," such approval operates to pass the fee title to the State; thereafter the jurisdiction of the Government is at an end, and so long as that certification and approval are outstanding it is without power to allow any application for or entry of the land involved.

VOGELSANG, *First Assistant Secretary:*

Sewell A. Knapp has appealed from the Commissioner's decision of September 15, 1917, affirming the action of the local officers in their rejection of his mineral application 010030, for the Belleville placer mining claim.

The Belleville placer claim covering 100 acres was, according to the record, located August 11, 1904, by said Knapp and seven others. The location embraced the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, T. 4 N., R. 34 E., M. D. M., Carson City, Nevada, land district. By various conveyances the apparent ownership of the claim passed into the hands of said Knapp, who, on April 9, 1917, filed mineral application therefor through F. R. Porter, his attorney in fact. On the same day the local officers rejected the application "for the reason that the portion of land applied for in Section 10 (90 acres) was approved to the State of Nevada * * *". The applicant promptly appealed to the Commissioner, urging that the said certification to the State was a nullity because of the mineral character of the land. Objection to favorable action on the appeal was presented by those claiming under the patent issued by the State in 1904, for the NE. $\frac{1}{4}$ of said Sec. 10.

¹ See decision on petition, page 156.

The Commissioner found that said NE. ¼, Sec. 10, had been selected by the State of Nevada on September 30, 1890, pursuant to the act of June 16, 1880 (21 Stat., 287), in partial satisfaction of the grant there made, which is sometimes designated as the 2,000,000 acre grant, and that such selection was approved under date of April 12, 1901, in list No. 33, and was certified to the State of Nevada on April 23, 1901. The Commissioner concluded that the legal title to the ground was outstanding, and consequently that the Land Department had no authority to entertain the mineral application as to the land in said NE. ¼, Sec. 10. The rejection of the application as to that area was affirmed.

Appellant, relying upon section 2449, Revised Statutes, contends that the certification to the State was null and void on account of the mineral character of the land and that the State's patent conveyed no title to its grantee. He asserts that the legal title is still in the United States and that his mineral application should be recognized and allowed. Counsel representing the Argentum Mining Company of Nevada and the Belleville Tailings Association, claiming in privity with the State's title, opposed the contentions and arguments put forward by the appellant.

The record, consisting of the application papers, the various briefs and *ex parte* affidavits and exhibits filed, has been examined with care. Therefrom it appears that the ground contains a deposit of tailings from two mills located thereon. These mills were operated continuously from about the year 1876 to 1893. The tailings still remaining are upon the same quarter section where they were originally deposited. On behalf of the applicant for patent it is not affirmatively or satisfactorily made to appear that the mill operators and their successors have ever abandoned or ceased to assert claim to and ownership of these tailings. On the contrary, there is much in the record tending to show that the former owners of the ores and mills, and their successors in interest, have continuously asserted claim and control of said tailings deposits and have protected them from trespass and depletion. Natural conditions existing on the land in connection with a railway embankment have served to confine and impound, it is estimated, over 100,000 tons of tailings upon the area sought.

In connection with this point the Nevada case of *Ritter v. Lynch et al.* (123 Fed., 930, 935), which involved a deposit of tailings at Virginia City, Nevada, is applicable.

Judge Hawley, in the course of his opinion rendered in that case, used the following language:

Abandonment is a question of intent, to be determined by the special facts in any given case. In order to constitute abandonment of the right of possession which the defendant had acquired, there would have to be shown a clear and unequivocal act or acts of the parties, showing a determination on their part to

surrender their right to the property. There must be the concurrence of the intention to abandon and the actual relinquishment of the property, and of their right, dominion, and control over it. The record clearly shows—independent of the testimony of Mrs. Lynch that she had never in any manner, shape, or form intended to abandon or release her claim to the tailings—that the property was never abandoned by the defendants. The facts disclosed by the record are, in my opinion, sufficient to show that the defendants have preserved their ownership of the tailings and possession of the land upon which they were impounded, and that plaintiff did not, by his acts, acquire any right or title thereto as against the defendants.

Thus at the very threshold of this proceeding the applicant is met with a question as to the placer mineralization of the ground and as to its availability in any event in connection with his asserted placer mining location. Not until these matters are determined in his favor can the application as presented be allowed and passed to publication.

The two tribunals below have held that the tracts in said Sec. 10 are nonpublic lands, not subject to application and patent. The act of June 16, 1880 (21 Stat., 287, 288), in part reads as follows:

Sec. 2. The lands herein granted shall be selected by the State authorities of said State from any unappropriated, non-mineral, public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this act the same shall be duly certified to said State by the Commissioner of the General Land Office and *approved by the Secretary of the Interior.* (Italics supplied.)

Sec. 3. The lands herein granted shall be disposed of under such laws, rules, and regulations as may be prescribed by the legislature of the State of Nevada: *Provided*, That the proceeds of the sale thereof shall be dedicated to the same purposes as heretofore provided in the grant of the sixteenth and thirty-sixth sections made to said State.

Section 2449, Revised Statutes, in substance provides that where lands had been granted to any State by a law of Congress, and where such law does not convey fee simple title or require patent, the list which is certified by the Commissioner of the General Land Office shall be regarded as conveying the fee simple of the lands that are of the character contemplated by the act and intended to be granted,—

* * * // but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby. //

In his opinion of November 19, 1915, the Attorney General had occasion to consider and discuss the question of certification under that section in connection with the school land-grant to the State of Colorado. In the course of that opinion the Attorney General said:

Inasmuch as the granting acts under consideration did not convey the title of indemnity school lands and did not require patents to be issued therefor, the Commissioner's certificate in this case was authorized and its effect is governed by this section of the Revised Statutes. But the list under considera-

tion also bears the approval of the Secretary of the Interior. That fact leads me to observe that this statute does not say that certification by the Commissioner shall be the exclusive method of passing title, but only says that his certification shall have that effect, where title is not conveyed or patents required by the grant. It is therefore pertinent to inquire whether there is any law authorizing the transfer of title in such cases by approval of the Secretary. If the grant in this case had authorized the selection of indemnity school lands "subject to approval by the Secretary of the Interior," as in a similar grant to California (act of March 3, 1853, sec. 7; 10 Stat., 247), or "with the approval of the Secretary of the Interior," as in the grant to the Dakotas, Montana and Washington (act of February 22, 1889, sec. 10; 25 Stat., 679), I should be constrained to hold that the approval of the Secretary passed the title without regard to the Commissioner's certificate and unaffected by section 2449 of the Revised Statutes. (*Mullen v. United States*, 118 U. S., 271, 273, 273; *Johanson v. Washington*, 190 U. S., 179, 184.)

It will be noted that the granting act of June 16, 1880, *supra*, expressly requires the approval of the Secretary. According to the Attorney General's opinion such approval pursuant to the granting act operates to pass the fee title to the State. Therefore, in the case at bar the legal title to the land in said Sec. 10 has passed out of the Government and thus it no longer has any jurisdiction or authority over the same, and so long as that certification and approval are outstanding is without power to allow any application or entry for the land.

The appellant has cited certain decisions and authorities tending to support his views and has also called attention to the Nevada Statutes which provide for a reservation of minerals from patents issued by the State. However, in view of the above, it is obvious that such decisions and local laws can not have the effect of reinvesting the United States with legal title to lands already conveyed, in the absence of proper legislation by Congress authorizing re-vesting of title.

The record suggests two other objections to this mineral application. In the power of attorney from Knapp to Porter executed and acknowledged November 6, 1916, and recorded November 20, 1916 (four months prior to the filing of application), the former conveyed and granted to the latter an undivided seven-eighths interest in and to the placer mining locations situate in said SE. $\frac{1}{4}$, Sec. 3, and NE. $\frac{1}{4}$, Sec. 10, which description includes the land covered by the application. Porter is not a patent applicant, and Knapp upon the record at the date of filing possessed only an undivided one-eighth interest in the claim.

There is also found with the papers certified copies of findings of fact, conclusions of law and a default judgment, all dated December 5, 1912, in the case of the Rhodes Mining Company *v.* The Belleville Placer Mining Company, from the District Court of the 1st Judicial District of the State of Nevada, in and for the County of Ormsby. The last-named corporation was the successor to and sub-

stituted for S. A. Knapp *et al.*, the original defendant in the action, who claimed and asserted an adverse interest in said NE. $\frac{1}{4}$, Sec. 10. The court adjudged the plaintiff to be the fee simple owner and entitled to possession of the premises and all the tailings thereon, and it was decreed that the defendant and its predecessors had no right or title therein and that the defendant be perpetually enjoined from claiming or asserting any right, title or interest in and to the land and the tailings. The plaintiff in the action set up title under the patent from the State of Nevada. On March 19, 1917, in the District Court of the 7th Judicial District in and for the County of Mineral said Knapp obtained against the Belleville Placer Mining Company, sole defendant, a decree adjudging that the conveyances made by him and his associates of the Belleville placer claim to one Lynch and the conveyance by Lynch to said company be canceled and held for naught. It will be observed that this decree was entered upon a default long after the Rhodes Mining Company obtained judgment and that such company was not a party to the action. Knapp's claim of title and his showing with respect to ownership of the asserted Belleville placer claim are, therefore, in a most unsatisfactory state.

The Department finds that further discussion of the record is unnecessary. The judgment of the Commissioner affirming the rejection of the mineral application as to the area within said NE. $\frac{1}{4}$, Sec. 10, T. 4 N., R. 34 E., M. D. M., is clearly correct and is hereby affirmed.

SEWELL A. KNAPP (ON PETITION).

Decided June 24, 1919.

STATE SELECTION—ACT JUNE 16, 1880.

As approval by the Secretary of the Interior, upon due certification, of a selection made by the State of Nevada pursuant to the act of June 16, 1880, operates to pass the fee title, the land involved is not thereafter within the jurisdiction of the United States.

STATE SELECTION—MINING CLAIM—REVESTING TITLE.

An act of the State of Nevada, permitting mineral prospecting and location of mining claims upon lands duly certified to the State, can not have the effect of reinvesting the United States with legal title to lands already conveyed, in the absence of proper legislation by Congress authorizing the revesting of title.

DECISIONS DISTINGUISHED.

Cases of *Heydenfeldt v. Daney Gold and Silver Mining Company* (93 U. S., 634); *Noyes v. Mantle* (127 U. S., 348); *Burke v. Southern Pacific Railroad Company* (234 U. S., 669), and *Stanley v. Mineral Union et al.* (63 Pac., 59), distinguished.

VOGELANG, *First Assistant Secretary*:

A motion for rehearing has been filed by Frank R. Porter, claiming to act as attorney in fact in the matter of mineral application

No. 010030, filed April 9, 1917, at Carson City, Nevada, by Sewell A. Knapp, and including, among other lands, certain tracts in the NE. $\frac{1}{4}$, Sec. 10, T. 4 N., R. 34 E., M. D. M., which was ordered rejected as to the land in Sec. 10 by the Department in its decision of June 1, 1918 (47 L. D., 152). A motion for rehearing filed by the applicant was denied February 7, 1919 [not reported], and the application was rejected to that extent by the Commissioner February 19, 1919. The matter will accordingly be considered as if presented on a petition for the exercise of the Department's supervisory authority.

The application was based upon the Belleville placer location made August 11, 1904. The NE. $\frac{1}{4}$ of the above Sec. 10 was selected September 30, 1890, by the State of Nevada under the act of June 16, 1880 (21 Stat., 287). The selection was approved April 12, 1901, and the land certified to the State April 23, 1901. A protest against the allowance of the application was filed by the Argentum Mining Company and the Belleville Tailings Association, who claimed title under the State through certain mesne conveyances. The Department in brief in its prior decisions took the position that the approval and certification of the land to the State passed the title thereof out of the United States, and that the land was no longer within its jurisdiction.

The present petition asserts certain alleged defects in the title of the protestants. Even if such defects exist, they are immaterial if the prior view of the Department is correct.

In support of the contention that this Department has jurisdiction to allow the mineral application and grant patent therefor, the cases of *Heydenfeldt v. Daney Gold and Silver Mining Company* (93 U. S., 634); *Noyes v. Mantle* (127 U. S., 348); *Burke v. Southern Pacific Railroad Company* (234 U. S., 669), and *Stanley v. Mineral Union et al.* (63 Pac., 59) are cited.

The case of *Heydenfeldt v. Daney Gold and Silver Mining Company*, *supra*, involved a patent by the State of Nevada issued July 14, 1868, for lands granted to it in place under the act of March 21, 1864 (13 Stat., 32), in support of common schools. Prior to the survey of the school section there involved, certain parties had gone into possession of part thereof, discovered minerals, and claimed it under the mining laws. The United States issued a patent for the mining claim March 2, 1874, and in a controversy between the owner of the State title and the claimant under the mineral patent, the Supreme Court sustained the latter. The court in brief held that minerals were excluded from the grant in place to the State, and since the land was claimed and known to be mineral prior to the survey, title to this particular school section did not pass to the State. This is in harmony with the long-established rule of this Department that lands known to be mineral in character prior to survey

and claimed under the mining laws do not pass under the grant of section 16 or 36 to a State in support of common schools.

Noyes v. Mantle, supra, involved the case of a lode known to exist at the time of the filing of an application for a placer claim within whose boundaries the lode was situated. Under such circumstances the title to the appropriate area including the lode does not pass under the placer patent by virtue of section 2333 Revised Statutes. In *Burke v. Southern Pacific Company, supra*, the Supreme Court held that while mineral land was excepted from the grant to the Southern Pacific Railroad Company, the issuance of patent by the Land Department was a determination that the land was of the proper character and that such patent could not be collaterally attacked by a stranger who had no interest in the land at the time the patent was issued. The court pointed out that the appropriate remedy was, if the Land Department had been induced by false proofs to issue such a patent for mineral lands, either a bill in equity on the part of the Government to cancel the title, or by a prior mineral claimant in order to have the patentee declared a trustee for him. This decision does not support the contention of the petitioner, but in fact refutes it, since evidently the court was of the opinion that all jurisdiction over the land had been lost by the Land Department by the issuance of patent, or as in this case, by the approval and certification.

Stanley v. Mineral Union et al., supra, is likewise inapplicable to the present case. It was decided under an act of the Legislature of Nevada approved March 5, 1887, permitting mineral prospecting and the location of mining claims upon lands certified to the State under the act of June 16, 1880, *supra*. As to this feature, it is clear that the local law of Nevada can not have the effect of reinvesting the United States with legal title to lands already conveyed, in the absence of approved legislation by Congress authorizing the revesting of the title, as was pointed out by the Department in its decision of June 1, 1918. The entire record considered, no reason is found for disturbing the prior rulings of the Department. The petition is accordingly denied.

ALBERT W. C. SMITH.

April 24, 1919.

INSTRUCTIONS.

RIGHT OF WAY—RECLAMATION—ACT OF AUGUST 30, 1890.

The act of August 30, 1890, reserves perpetually to the United States an easement and right of way through and over all lands west of the one hundredth meridian thereafter patented under any of the public-land laws; and thereunder, in the necessary construction, maintenance, and operation of any ditches, canals, or laterals for the purpose of irrigation and reclamation of arid lands, the Government is not liable for damages resulting to the land; nor can they be included in the computation of the actual value of improvements thereon for which compensation may be made.

HALLOWELL, *Assistant to the Secretary*:

I am in receipt of your [Director of the Reclamation Service] letter of April 3, 1919, requesting instructions as to a claim for damages presented by Albert W. C. Smith.

Smith upon July 30, 1907, made homestead entry No. 01972 at Billings, Montana, for farm unit K, or the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 33, T. 3 N., R. 29 E., M. M., Huntley Project, returned as containing 40 irrigable acres. At and prior to the entry the tract was traversed by a waste-water ditch running approximately through its center in a north and south direction; a county road ran along its western and southern sides and a lateral ditch along its eastern side, but no reduction in the irrigable area of the tract was made by reason thereof. (See Williston Land Co., 39 L. D., 2.) Final proof was made April 20, 1915, the final certificate is dated July 27, 1915, but patent has not yet issued. The entry is subject to the following provision contained in the act of August 30, 1890 (26 Stat., 391):

That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

After the entry was made another lateral was constructed, crossing the tract east to west, on account of which the irrigable area of the entry was upon October 9, 1918, reduced by 2.8 acres. Upon July 3, 1918, the acting chief of construction reported that the value of the improvements on the right of way for this lateral was from \$200 to \$250. He further stated:

The new lateral, aside from the fact that it, together with waste-water ditch, divides the farm into quarters, is objectionable for additional reasons. The slope of the land is from south to north, and before the lateral was constructed the entryman was able to irrigate both the east and west half of his entry without serious difficulty. It is now necessary, however, for him to irrigate each quarter separately. It has been necessary for him to construct an additional head ditch along the north side of the newly constructed lateral. Since the new lateral has a light grade it was necessary that the head ditch have a light grade also, or that it diverge from the lateral, which would result in additional loss of land. * * *

It will be obvious to anyone having a knowledge of land values that the farm has been damaged a great deal more than the mere value of the land taken and the value of the improvements on the land taken. It is my opinion that, aside from the value of the right of way taken, the value of the farm has been reduced probably as much as \$1,200.

The question presented is as to whether such resultant damages to the tract may be allowed in view of the act of August 30, 1890, *supra*.

By that act it was the evident intention of Congress to reserve perpetually to the Government an easement and right of way through and over any and all lands west of the one hundredth meridian, that the Government might grant to settlers and purchasers subsequent to the passage of the act, and to thereby reserve the easement and right of way for the construction, maintenance, and operation of any ditches and canals the Government may construct at any time in the future for the irrigation and reclamation of arid lands. (*Green v. Wilhite et al.*, 93 Pac., 971.) The requirement made by the act as to the future disposition of public lands was known to all, and all entrymen thereafter acted in the light of that knowledge so charged to them. (*United States v. Van Horn et al.*, 197 Fed., 611, 615.) In a large sense the Secretary of the Interior in building and operating these canals acts as the trustee for the settlers, upon whom primarily rests the burden of their cost, and into whose hands their control will ultimately pass. (*United States v. Minidoka and S. W. R. Co.*, 176 Fed., 762, 771.)

The rights of the owner of an easement are paramount to the extent of the grant or reservation to those of the owner of the soil. An easement gives to the owner thereof all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement. Where the easement is not specifically defined, the rule is that it need be only such as is reasonably necessary and convenient for the purpose for which it was created. A grant or reservation of an easement in general terms is limited to a use such as is reasonably necessary and convenient, and as little burdensome to the servient estate as possible for the use contemplated. In other words, an unlimited conveyance of an easement is in law a grant of unlimited reasonable use. (9 R. C. L., pp. 784, 785, 786, 787.)

Under the above principles it is clear that the United States, under the reservation of the right of way contained in the act of August 30, 1890, has the right to use such portion of the tract entered as is necessary for the construction, operation, and maintenance of the lateral. The United States is not liable for damages resulting to land "because it did that which it had a right to do." (*Jackson v. United States*, 230 U. S., 1, 22.) This is also in harmony with Secretary Fisher's instructions of November 9, 1912, as to certain homestead entrymen in the Grand Valley Project, in which he said:

* * * I am of the opinion that I would not be justified in authorizing the expenditure of any public money for land damages to these entrymen resulting from the construction of such a canal. But it does not seem to be the intent of the statute to confiscate the actual value of improvements on lands subject to such a reserved right of way. In determining the value of the improvements consideration should be given to their actual cost and to the cost of replacing them with others of equal value, but no element of land damages should be included in the computation.

You are accordingly advised that Mr. Smith may be compensated for the actual value of his improvements, but that no allowance can be made for the resultant damages to the land.

EDWARD C. MOYS.

Decided May 1, 1919.

NORTHERN PACIFIC ADJUSTMENT—ACT OF JULY 1, 1898.

The purpose of the act of July 1, 1898, was to settle disputes arising out of conflicting claims of settlers and the Northern Pacific Railway Company to lands within the limit of the latter's grant, and one who long prior to the passage of the act had recognized the company's claim by procuring conveyance of the disputed tract therefrom for a valuable consideration, does not come within the purview of the said act.

NORTHERN PACIFIC ADJUSTMENT—ACT OF JULY 1, 1898.

One who abandons settlement on a tract in conflict with the Northern Pacific Railroad Company under its grant, and thereafter exhausts his homestead right by perfecting an entry under the general provisions of the homestead laws, is not entitled to any adjustment under the provisions of the act of July 1, 1898.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by Edward C. Moys from the decision of the Commissioner of the General Land Office of December 7, 1918, rejecting his petition for the adjustment under the provisions of the act of July 1, 1898 (30 Stat. 597), of his alleged claim to the canceled portion of his Walla Walla homestead entry No. 5959.

The tracts with respect to which the adjustment is sought are the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, T. 14 N., R. 43 E., W. M. From the recitals contained in the decision appealed from it appears that these tracts together with the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of the same section were included in a preemption filing made by Moys in November, 1883, based on a settlement alleged to have been made September 15, 1877. The area is within the indemnity limits of the grant by the act of July 2, 1864 (13 Stat. 365), and the joint resolution of May 31, 1870 (16 Stat. 378), to the Northern Pacific Railroad now Railway Company. May 20, 1884, it was selected by the company as indemnity, as per list No. 3. The local officers rejected Moys's filing for the stated reason that the land was a part of an odd-numbered section within the limits of the withdrawal of February 21, 1872, for the benefit of the company. On appeal from such rejection the Commissioner, by decision of January 17, 1889, reversed the action of the local officers on the ground that the withdrawal did not affect the status of lands within the indemnity limits of the company's grant. He held that Moys having made the filing prior to the date of the

company's selection, had a superior right to the land as against the company. On appeal by the company that decision was affirmed by the Department August 6, 1894. By letter of December 8, 1894, the Commissioner declared the decision of the Department to have become final and pursuant to the Commissioner's instructions Moys was notified that he would be allowed thirty days within which to make application for the land.

In the meantime and on November 28, 1892, Moys made homestead entry of certain lands in the Coeur d'Alene land district, Idaho, but on October 29, 1894, he relinquished the same and on May 9, 1895, filed in the Walla Walla local office his preemption declaratory statement for the above-described tracts in section 5. Thereupon and by the Commissioner's decision of June 6, 1895, the company's selection of the tracts was canceled. October 19, 1897, Moys changed his preemption filing to said homestead entry No. 5659 and on October 7, 1899, submitted final proof thereon showing continuous residence on the land from the fall of 1877, except for the years 1891 and 1892, when he swears he was "off and on" the land. Final certificate issued on the entry October 12, 1899.

The matter thus stood until June 2, 1900, when by letter of that date the Commissioner instructed the local officers to notify Moys that his claim to the land was within the purview of the said act of July 1, 1898, and the regulations of February 14, 1899 (28 L. D. 103), issued thereunder, and that he would be allowed sixty days within which to proceed in the manner prescribed by the regulations. Moys, within the time allowed, filed his election to retain the lands, whereupon demand was made upon the company as per Washington List No. 17, to relinquish its claim to the land as required by the act. In response to said demand the company filed its relinquishment of the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said Sec. 5, but declared its inability to relinquish the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of the section because it had sold said tracts to Moys.

It filed evidence showing that on June 30, 1887, Moys purchased from it for a consideration of \$416, the said N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and that a deed therefor was delivered to Moys at the time of the purchase; that on the same date Moys also purchased the said NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ for a consideration of \$720, the deed to which was executed and delivered to Moys December 16, 1891.

Upon receipt of this showing by the company, the Commissioner, by decision of April 12, 1901, held Moys's final entry as to the said N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ for cancellation for the stated reason that:

It is thus shown that during all of the time of his contest with the company, Moys was claiming under his preemption right, and it was not until after the final decision in his favor that he applied to transmute his preemption to a

homestead, but at no time during the controversy did he disclose to this office that he had purchased the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of his claim from the company, which fact is now for the first time made known to it. This purchase made after the assertion of his claim, and while his right was *sub judice*, was an abandonment of the claim, and a settlement of the controversy with the company to the extent of those tracts, and I must rule that to that extent his homestead claim should be canceled.

Respecting the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5, it was held that Moys having apparently maintained his right and claim thereto, was entitled to relief under the provisions of the said act of 1898. No appeal having been filed from this action, the Commissioner by decision of May 10, 1902, canceled the final certificate and entry as to the said N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, and on the same day reinstated the company's said List No. 3 and these tracts were patented to the company November 14, 1902. The entry as to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 5 was patented to Moys August 29, 1902.

March 27, 1914, Moys under the provisions of section 6 of the act of March 2, 1889 (25 Stat., 854), made additional homestead entry 03205 for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 32, T. 14 S., R. 42 E., W. M., Vale, Oregon, land district, which he subsequently amended so as to describe the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$. In connection with his application to make such entry he filed an affidavit executed by him November 24, 1908, wherein he recited the making and completion of his Walla Walla homestead entry 5959 for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said Sec. 5 and also averred that he settled upon the land included in his Coeur d'Alene homestead entry within six months from November 28, 1892, the date of the entry, erected on the land a dwelling house 14 by 16 feet and resided there for a period of about four months.

The application for adjustment of the claim to the area first hereinabove described was filed on or about June 6, 1918, and is based on the stated ground that there was a pending conflict between Moys's homestead entry and the railroad selection on January 1, 1898, which, it was argued, is the only requisite for adjustment prescribed by the act of 1898; that the claim being within the purview of the act, the entryman was entitled either to receive a patent to the land under his homestead entry or to relinquish it and select other land; and that the Commissioner erroneously held in his decision of April 12, 1901, that the entryman's right with respect to the land under the act of 1898, was affected by the fact that he had purchased it from the railroad company.

The grounds assigned by the Commissioner for the rejection of the petition for adjustment were (1) that in view of Moys's purchase from the company of the 120 acres in question long prior to the passage of the act of 1898, there was at the date of the act no con-

flict between Moys and the company for adjustment and that the act can have no application to a controversy that had been settled long before its passage; (2) that Moys having acquiesced for more than sixteen years in the decision of the Commissioner canceling his entry as to said 120 acres, can not now be heard to question its correctness; and (3) that having availed himself of the privilege of making and completing an additional entry under section 6 of the said act of March 2, 1889, thus evidencing an abandonment of whatever settlement claim he may have previously had to said 120 acres, he is now in any event precluded from claiming the benefits of the act of 1898, for the reason that he was not entitled to exercise a right of additional entry under the act of 1889, and at the same time maintain a right to transfer his alleged claim to the 120 acres to other lands under the act of 1898.

In the brief filed in support of the appeal, it is urged that if the petitioner waived anything by virtue of his purchase from the railroad company, it was only such right as he had at the time of the waiver; that six years thereafter he made homestead entry of the land and that that entry was of record January 1, 1898, and constituted a claim to the land at that date; that while the company's selection had then been canceled, there was nevertheless a possibility that it would be reinstated or that the company would resort to the courts, and that this possibility gave rise to such a conflict of claims between the petitioner and the company as would bring the case within the purview of the act of 1898.

In *Humbird et al. v. Avery et al.* (110 Fed., 465) the court at page 468, after setting forth the provisions of the act of 1898, said:

The obvious purpose of this act was to provide a certain, speedy, and equitable way in which all controversies between the railroad grantee or its successors and purchasers or settlers upon odd-numbered sections within the place or indemnity limits of the land grant, who claimed by color of any law of the United States or any ruling of the Land Department, should be settled and adjusted without contest or litigation either in the Land Department or in the courts.

And in *Humbird v. Avery* (195 U. S., 480) the court at page 499, said:

Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation, as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it became the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was, therefore, as the Circuit Court said, a

matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the Government, the railroad grantee, and individual claimants.

Clearly therefore, there must not only have been a conflict between claims of the classes named in the act, but a controversy or dispute between the company and a settler or purchaser claiming under color of title or claim of right under a law of the United States or a ruling of the Interior Department to bring the case within the scope of the act. There was no controversy or dispute whatsoever on January 1, 1898, or at the date of the act between the petitioner and the company. The petitioner had long prior thereto recognized the claim of the company to the land by purchasing it from the company for a substantial consideration and taking deeds therefor. Furthermore, after such purchase the petitioner abandoned whatever settlement claim he had previously asserted to the land and according to his own admission, established his residence on the land embraced in his Coeur d'Alene homestead entry made in 1892, thus electing for the time being at least to rely wholly upon whatever title to the land he had acquired from the railroad company. It is true that without a knowledge of all the facts, the Land Department canceled the company's selection of the land and permitted the petitioner to make homestead entry thereof and that that entry was intact at the date of the act thus giving rise to a technical conflict between the homestead claim of the petitioner and the claim of the company. Both of said claims, however, were then merged in the petitioner and upon the cancellation of his entry he continued to assert title to the land under his deeds from the company.

But even if the petitioner's claim to the land had been one that on the date of the act was subject to adjustment under the act in the manner now sought, his right to such adjustment was forfeited when he made, in 1914, the Vale, Oregon, additional homestead entry for 120 acres under the provisions of the act of 1889, and completed the same. The last proviso to the act of 1898 reads as follows:

All qualified settlers, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, * * * and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their bona fide residence and amount of their improvements upon their respective claims in the

said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made. * * *

Under said proviso a homestead settler or entryman upon or for land within the railroad limits to be entitled to transfer his claim to other lands and complete the same must be a person who was qualified to assert and maintain such a claim not only at the date of the act but at the time the transfer is sought to be made for the act permits proof to be made on claims so transferred only "as in other cases provided." By section 2298 of the Revised Statutes which is a part of the chapter relating to homesteads it is provided that "no person shall be permitted to acquire title to more than one quarter-section under the provisions of this chapter."

By section 6 of the act of March 2, 1889 (25 Stat., 854), pursuant to which the additional entry at Vale, Oregon, was made, it is provided that every person entitled under the provisions of the homestead laws, to enter a homestead, who had theretofore complied or who should thereafter comply with the conditions of said laws and who should have made final proof thereunder for a quantity of land less than 160 acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right so much additional land as added to the quantity previously so entered by him should not exceed 160 acres, but that in no case should patent issue for the land covered by such additional entry until the person making the same should have actually, in conformity with the homestead laws, resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws. In making the additional entry and completing the same to patent, the petitioner exhausted all of his rights under the general provisions of the homestead laws. Being thus disqualified from acquiring title to any more land under said general provisions he is for the same reason disqualified from transferring to other land and completing, under the provisions of the act of 1898, any settlement claim under the homestead law that he may have once asserted to the land here in question.

For the reasons stated it must be held that the petitioner is not entitled to any adjustment under the provisions of the act of 1898, with respect to the land included in the canceled portion of his Walla Walla homestead entry.

The decision of the Commissioner is accordingly affirmed.

EDWARD C. MOYS.

Motion for rehearing of departmental decision of May 1, 1919, 47 L. D., 161, denied by Assistant Secretary Hopkins, July 21, 1919.

PAYMENT OF WATER-RIGHT CHARGES BY ENTRYMEN IN MILITARY SERVICE—ACT OF MARCH 8, 1918.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Washington, D. C., May 16, 1919.

TO ALL FIELD OFFICERS OF THE RECLAMATION SERVICE:

1. Section 501, Act of March 8, 1918 (40 Stat., 440, 448), provides as follows:

That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws, the desert-land laws; the mining land laws, or any other laws of the United States, shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to perform any work or make any improvements thereon, or to do any other act required by any such law during the period of such service. Nothing in this section contained shall be construed to deprive a person in military service or his heirs or devisees of any benefits to which he or they may be entitled under the Act entitled "An Act for the relief of homestead entrymen or settlers who enter the military or naval service of the United States in time of war," approved July twenty-eighth, nineteen hundred and seventeen; the Act entitled "An Act for the protection of desert-land entrymen who enter the military or naval service of the United States in time of war," approved August seventh, nineteen hundred and seventeen; the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," approved August tenth, nineteen hundred and seventeen; the joint resolution "To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service," approved July seventeenth, nineteen hundred and seventeen; or any other Act or resolution of Congress: *Provided*, That nothing in this section contained shall be construed to limit or affect the right of a person in the military service to take any action during his term of service that may be authorized by law, or the regulations of the Interior Department thereunder, for the perfection, defense, or further assertion of rights initiated prior to the date of entering military service, and it shall be lawful for any person while in military service to make any affidavit or submit any proof that may be required by law, or the practice of the General Land Office in connection with the entry, perfection, defense, or further assertion of any rights initiated prior to entering military service, before the officer in immediate command and holding a commission in the branch of the service in which the party is engaged, which affidavit shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office.

2. Under the act of July 28, 1917 (40 Stat., 248), each entryman is protected from any contest on the ground of abandonment by reason of his entering the military service. (See also General Land Office Circular 564, August 22, 1917, 46 L. D., 174). Under section 501, Act of March 8, 1918, quoted above, a homestead entryman's

right is not to be "forfeited or prejudiced" by reason of his failure to do any act required by any law during the period of the military service. Under this provision he is excused from the payment of charges accruing during the period of such service if he so desires, his liability therefor being suspended in the meantime. (In this connection see Opinion, Attorney General, October 18, 1910, 39 L. D., 322, and also 39 L. D., 327-334.) Otherwise the water user after the completion of his military service, would be confronted with not only the then current charges but also all charges accruing during his military service, placing a heavy immediate burden upon him which might greatly prejudice his ability to perfect his entry and water-right application. While the owners of private land covered by a water-right application are not expressly within said section 501, since the private lands are presumably irrigated as an incident to the irrigation and ensuing disposition of the public land, the same rule is applicable to them.

3. Congress has not extended any relief to such water users as to defaults in the payment of construction and operation and maintenance charges together with the penalties imposed by sections 3 and 6 of the reclamation extension act of August 13, 1914 (38 Stat., 686), accruing prior to their induction into the military service. Such water-right applications are subject to forfeiture or cancellation if there is a default under the law at the beginning of the military service. The Department, however, will not exercise its power of forfeiture or cancellation during the military service, and will defer action toward such forfeiture and cancellation or the institution of any suit for the recovery of the amounts in default and the penalties until the expiration of the military service. Under section 501, *supra*, the penalties arising under said sections 3 and 6 of the reclamation extension act upon such prior defaulted construction or operation and maintenance charges will not run during the period of the military service.

4. The homestead entryman under the said section 501 is relieved from paying the construction charge accruing during the period of his military service, and this same rule applies in the case of an owner of private land. As to these the duration of the military service will be excluded from the period fixed for the annual payments of such charges in sections 1 and 2 of the reclamation extension act of August 13, 1914, as the case may be. The operation and maintenance charge is an annual charge for each year, and similarly may be paid by the water user after his discharge from the military service, the time for the payment thereof being hereby extended by a period equal to his military service.

5. The usual bills should be sent under the provisions of the various public notices and regulations to all holders of project lands

who have enlisted in the military service. These bills should be accompanied by a statement that the same are subject to the provisions of the Soldiers' and Sailors' Civil Rights Act of March 8, 1918 (40 Stat., 440, 448), and by a copy of this circular letter. If payment is made, no further action is necessary. If payment is not made, however, the project managers should write a special letter to each holder of project land in the military service advising him that:

(a) The construction charges accruing during the period of his military service will be put over until the expiration of the twenty-year period for making such payments and,

(b) The time for payment of the operation and maintenance charges due at the time he entered the military service and also those charges which accrued during his military service, will be extended from the date of his discharge for a period equal to his military service.

6. Section 500 of the Soldiers' and Sailors' Civil Relief Act, cited in circular letter No. 762, is not applicable and these instructions supersede said circular letter No. 762, which is hereby vacated.

MORRIS BIEN,
Acting Director.

Approved:

JOHN W. HALLOWELL,
Assistant to the Secretary.

INDEPENDENT LEAD AND COPPER COMPANY v. LEVELLE (ON REHEARING).

Decided May 16, 1919.

MINING LOCATION—CHARACTER OF LAND—JURISDICTION.

The mere fact that a tract of the public domain is covered by a mining location does not deprive the Land Department of its jurisdiction and authority, until issuance of patent, to investigate and adjudicate the facts establishing the character of the land, or the status of any claim asserted thereto under the public-land laws.

MINING LOCATION—CHARACTER OF LAND—JURISDICTION.

It is the peculiar function and duty of the Land Department to investigate and determine controversies involving the character of land arising between mineral locators and agricultural claimants preliminary to the issuance of patent, and in such cases the intervention of a local court is useless, except to preserve the *status quo* or to protect the property.

VOGELSANG, *First Assistant Secretary:*

The Independent Lead and Copper Company has filed a motion for rehearing in this matter, in which the Department, by decision

of March 13, 1919 [not reported], decided that the company's alleged prior lode locations and an approved mineral classification under the act of February 26, 1895 (28 Stat., 683), did not withdraw or reserve the land from homestead entry by Thomas Levelle, and that a hearing should be ordered upon the protest of the company, which, although technically defective, was sufficient to charge that the tracts involved were mineral in character.

On September 5, 1911, Thomas Levelle made homestead entry 06136, which was amended on June 7, 1913, so as to embrace the E. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 33, and on April 30, 1915, made additional enlarged homestead entry 011607 for the NE. $\frac{1}{4}$, said Sec. 33, T. 11 N., R. 4 W., M. M., Helena, Montana, land district. Final proof upon both entries was made August 6, 1918, and held suspended in the local office to await the disposition of the company's protest.

The original protest filed August 6, 1918, averred that the land was mineral in character, that it was embraced in lode mining locations owned by the company, antedating the homestead entries, and that a suit in ejectment had been instituted against Levelle to determine possessory right to the land. This protest was rejected by the local officers. On August 27, 1918, an amended protest was filed, in which it was asserted that the land was included in an approved mineral classification under the act of February 26, 1895, *supra*, and by reason thereof was withdrawn from homestead appropriation and reserved and set apart for disposition under the mineral land laws.

The questions of law suggested have been herein determined adversely to the protestant company. The present motion sets forth that the Department erred in ordering a hearing, as that is an erroneous method for determining the character of this land and will be a useless proceeding for the reason that any adjudication affecting title will be absolutely void and "in excess of jurisdiction"; and further that it was error not to recognize a distinction between appropriated and unappropriated land. In the brief it is contended that an approved mineral classification under the act mentioned by the terms of the law itself, and under the decision of the Supreme Court of Montana in the case of *Thomas v. Horst* (54 Mont. 260; 169 Pac., 731), is final and conclusive and binding upon the officers of the Land Department, and further that the mining locations constitute a grant (*Silver Bow Mining and Milling Company v. Clarke*, 5 Mont., 378; 5 Pac., 570), withdrawing the land from the public domain and from the jurisdiction of the Department and preclude the recognition of any subsequent agricultural appropriation. The protestant maintains that the only action for the Land Department to take is to ascertain the priority of the mining claims and thereupon cancel the homestead entries.

From the passage of the act of February 26, 1895, *supra*, until the present time, the Department has never given a mineral classification thereunder the force and effect contended for by the company. Such a classification has been considered as of the same effect as a mineral return by a Government surveyor. See instructions (25 L. D., 446). In the case of Adnah M. Kimpton (45 L. D., 110, 112) the Department said:

The supposed mineral classification was only for the purpose of facilitating administration of the Northern Pacific Railway Company's grant and no wise affected the real character of the land, nor barred question by anyone else than the railway company. The proofs to be submitted by one seeking to enter the land are simply those which a homestead applicant would have to submit, and differ in no respect therefrom.

Numerous prior decisions rendered by the Department of similar import are there cited.

The Ninth Circuit Court of Appeals in the case of *Lynch v. United States* (138 Fed., 535, 543), involving a timber trespass, was called upon to consider this matter, and that court used the following language:

It is assigned as error that the court refused to instruct the jury that the government was bound by the classification made by the mineral land commission, and could not be heard to impeach such determination by asserting that the land was not mineral. The Secretary of the Interior construed the act of February 26, 1895, very soon after it was passed, as intended to facilitate the adjustment of the grant of land to the Northern Pacific Railroad Company, by enabling the Secretary of the Interior to ascertain without delay what lands within the limits of the grant to said company in the states of Montana and Idaho were mineral in character, and excepted from the operation of the grant. The Secretary also determined that the classification of land as mineral under the act did not prevent the Land Department from making such disposition of the land as would be proper upon a subsequent showing that the land was not in fact mineral. 25 Land Decisions, 446, 447; 26 Land Decisions, 423, 424. This construction of the statute has been the law of that Department upon this subject for nearly eight years, and as far as we are advised, it has not before been questioned. The contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. *United States v. Johnston*, 124 U. S., 236, 253, 8 Sup. Ct. 446, 31 L. Ed. 389. We find no reason advanced in the defense to this action for holding that the construction placed upon the statute by the Secretary of the Interior is erroneous.

The case of *Thomas v. Horst*, *supra*, relied upon by counsel, was one in which the plaintiff having located certain lode claims upon an odd-numbered section, sought to have the holders of the legal title under the subsequently issued railway patent declared trustees

for him. In the course of the opinion the court said (169 Pac., 731, 733):

The classification having been completed, the officers of the Land Department were not authorized or permitted thereafter to examine into the character of land for which patent was applied, but by reference to their records they determined from the classification made whether the particular land was mineral or nonmineral in character.

The language used while of a general nature must be considered in the light of the facts and conditions presented by that case. The result reached by the court was to sustain the action of the Land Department in issuing patent to the railway company for the land. The case is not necessarily applicable to the particular facts and circumstances presented by the case at bar.

The mere fact that a tract of the public domain is covered by a mining location does not deprive the Land Department of its jurisdiction and authority to investigate and adjudicate the facts establishing the character of the land or the status of any claim asserted thereto under the public land laws. Such jurisdiction exists until patent has issued. In the case of *Clipper Mining Company v. Eli Mining and Land Company* (194 U. S., 220, 223, 234), which was a suit involving an adverse claim, the Supreme Court of the United States said in part:

Undoubtedly when the Department rejected the application for a patent it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have. * * *

The Land Office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location, and set it aside and in that event all rights resting upon such location will fall with it.

See also the cases of *J. B. Nichols and Cy Smith* (46 L. D., 20) and *H. H. Yard et al.* (38 L. D., 59).

It is the peculiar function and duty of the Land Department to investigate and determine controversies involving the character of land arising between mineral locators and agricultural claimants preliminary to the issuance of patent. In such cases the intervention of a local court is useless, except in order to preserve the *status quo* or to protect the property. "The Land Department is a special tribunal created by law for the purpose of determining the conflicting claims arising over the public land." *Thomas v. Horst, supra.*

The Department finds no reason to modify or disturb the conclusions reached in the decision rendered upon appeal, and the motion for rehearing is hereby denied.

ESROM TIBBETTS.

Decided May 22, 1919.

NATIONAL FOREST HOMESTEAD—OCCUPANCY UNDER SPECIAL USE PERMIT—ACT OF JUNE 6, 1912.

Prior lawful occupancy of land within a national forest under a special use permit, by one who, subsequent to enactment of the statute of June 6, 1912, procures the listing and homestead entry thereof under the act of June 11, 1906, is not settlement or residence within the purview of the act of March 4, 1913; and such entry can only be perfected under the provisions of said act of June 6, 1912.

VOGELSANG, First Assistant Secretary:

By decision of June 22, 1918, the Commissioner of the General Land Office rejected the three-year final proof submitted December 27, 1917, by Esrom Tibbetts on his homestead entry, made December 30, 1912, under the act of June 11, 1906 (34 Stat., 233), for the SE. $\frac{1}{4}$, Sec. 24, T. 32 N., R. 34 W., Kalispell, Montana, land district, on the ground that the cultivation shown was insufficient to warrant final proof and patent. Entryman has appealed to the Department.

The land is within the limits of the Kootenai National Forest, created August 13, 1906, and the plat of survey of the land was filed in 1906. Upon the application of Tibbetts the land was listed under the act of June 11, 1906, but prior to date of listing a special use permit was issued to him, March 15, 1910, and since October 6, 1906, he has resided continuously upon the land. The homestead improvements are valued at \$1,500. Three acres of land were cultivated during the years 1913 and 1914; 6 acres during the years 1915 and 1916, and $8\frac{1}{2}$ acres during the year 1917. The act of June 6, 1912 (37 Stat., 123), applicable to the case, requires the cultivation of one-sixteenth of the land during the second year of the entry, and not less than one-eighth beginning with the third year of the entry, and until final proof, but provides that the Secretary of the Interior may, "upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation."

Favorable reports upon the claim have been made by a special agent of the General Land Office and by the District Forester, the latter, however, suggesting that claimant be required to submit final five-year proof instead of three-year proof.

The entryman applied for reduction of the area of cultivation under the act of 1912, *supra*. Upon consideration of his application, a special agent of the General Land Office reported that the principal obstacle to cultivation was the timber upon the claim, consisting largely of lodge pole pine, with a limited amount of other pine, larch, and cedar, but that if cleared about 60 per cent of the land would be tillable. Thereupon, and under the regulations then in

force, the Commissioner of the General Land Office rejected the application for reduction of the area of cultivation.

The suggestion of the forest officer that applicant be allowed to make proof and obtain patent under the so-called five-year homestead law, i. e., the law in force prior to June 6, 1912, which requires no specific area of cultivation annually, is based upon the theory that the entryman has resided upon the land since 1906, and that consequently he would be entitled to make the suggested proof. However, his homestead entry was not made until subsequent to the enactment of the statute of June 6, 1912, *supra*. Five-year proof could only be permitted in such a case under the act of Congress of March 4, 1913 (37 Stat., 912, 925), which permitted persons—

who may have established residence upon unsurveyed lands (which are subject to homestead entry) prior to the passage and approval of the act of June sixth, nineteen hundred and twelve, * * *

to perfect their claims under the law existing at the time of the establishment of residence.

The lands here involved can not be said to have been "subject to homestead entry" at the time Mr. Tibbetts established his residence thereupon under the special use permit. They were a part of the national forest and not subject to entry, and while his occupation was regular and lawful under the special use permit, and as between the United States and the entryman he might be accorded credit for residence under the circumstances and prior to the actual entry of the land, he can not be held to have been a settler or resident upon lands subject to homestead entry within the purview of the act of March 4, 1913, *supra*. Consequently, he can not be permitted to make final five-year proof, but must perfect his claim, if at all, under the provisions of the act of June 6, 1912, *supra*.

Since the denial of his application for reduction of the area of cultivation, and since the decision of the Commissioner of the General Land Office, holding his entry for cancellation, the Department has modified paragraph 5 of the regulations of November 1, 1913 (42 L. D., 514), so that the holding that the area of cultivation will not be reduced because of expense or difficulty of removing standing timber shall not apply to lands with a growth of "stumps, brush, lodge pole pine, or other valueless or nonmerchantable timber" which will prevent the clearing and cultivation of the prescribed area. Instructions of December 24, 1918 (46 L. D., 509).

The character of this land and of the timber thereon, as set forth in the entryman's proofs and in the report of the special agent of the General Land Office, is such as to bring it within the purview of the amended regulations just cited and to warrant and justify this Department, particularly in view of the entryman's good faith as to

residence and improvement, in reducing the area of cultivation. Accordingly, under the authority of the act of June 6, 1912, and of the regulations cited, the amount of cultivation required of this entryman is reduced to 3 acres during the years 1913 and 1914; 6 acres during the years 1915 and 1916, and 8½ acres during the year 1917, the decision of the Commissioner reversed, and the case remanded in order that patent may issue, if otherwise regular.

Departmental decision of April 21, 1919 [not reported], in this case, which reversed the decision of the Commissioner upon different grounds, but also reached the conclusion that the final proof should be accepted, is hereby set aside, recalled, and vacated.

**REGULATIONS FOR THE SALE OF UNSOLD AND UNRESERVED
LOTS AND TRACTS IN PABLO, TABOR, AND D'ASTE TOWNSITES
IN THE FORMER FLATHEAD INDIAN RESERVATION, MONTANA.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., May 24, 1919.

THE COMMISSIONER OF THE GENERAL OFFICE:

Under the provisions of the act of June 21, 1906 (34 Stat., 354), you are directed to cause the unsold and unreserved lots and tracts in the Towns of Pablo, Tabor, and D'Aste townsites in the former Flathead Indian Reservation, Montana, to be offered for sale at public outcry under the supervision of the Superintendent of Opening and Sale of Indian Lands, at not less than their appraised value on the dates, at the places, in the manner and, under the terms hereinafter prescribed.

Time and Place of Sale.—At the places and beginning with the dates mentioned and continuing thereafter from day to day, Sundays and holidays excepted, the lots and tracts in the several towns will be offered for sale as follows: Pablo, June 23, at Pablo; Tabor, June 24, at Tabor; and D'Aste, June 25, at D'Aste.

Manner.—Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the lots and tracts are offered for sale hereunder, and any person may purchase any number of lots and tracts for which he is the highest bidder. Bidders will not be required to show any qualifications as to age, citizenship, or otherwise. If any successful bidder fails to make the payment required on the date of the sale, the lot or tract awarded to him shall be reoffered for sale on the following day.

Terms.—*Payments will be required as follows:* No lot or tract will be disposed of for less than \$10, and any lot or tract sold for \$10 must be paid for on the day it is sold; the minimum of \$10 and at least 25 per centum of the bid price of each lot or tract sold for more than \$10 must be paid on the date of the sale, and the remainder, if the price bid is \$50 or less, within one year from the date of the sale; if the price bid be over \$50 and less than \$100, 75 per centum of the cost may be divided into two equal payments due, respectively, one and two years from the date of the sale; if the price bid be \$100 or more, the 75 per centum remaining unpaid may be divided into three equal payments, due, respectively, one, two, and three years from the date of sale. No entry will be allowed until payment has been made in full for the lot, but in case of partial payment the register will issue a nontransferable memorandum duplicate certificate showing the amount of the bid and the terms of the sale, and reciting the right of the purchaser to make entry upon completing the payments; the receiver in such case will issue a memorandum receipt for the money paid. Nothing herein will prevent the transfer of the interests secured by the purchase and the partial payment of the lot or tract by deed, but the assignee will acquire no greater right than that of the original purchaser, and the final entry and patent will issue to the original purchaser when all payments are made.

Forfeiture.—*If any person who has made partial payment on the lot or tract purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot or tract will be forfeited and the lot or tract, after forfeiture is declared, will be subject to disposition. Lots or tracts remaining unsold at the close of sale or thereafter declared forfeited for non-payment of any part of the purchase price under the terms of the sale will be subject to private entry for cash at their appraised value.*

All persons are warned against forming any combination or agreement which will prevent any lot or tract from selling advantageously or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 59 of the Criminal Code of the United States, which reads as follows:

“Whoever, before or at the time of the public sale of any of the lands of the United States, shall bargain, contract or agree or attempt to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by intimidation, combination, or unfair management, shall hinder or prevent or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.”

The Superintendent of the Opening and Sale of Indian Lands will be, and he is hereby, authorized to appraise any unappraised lot

or tract or to cause any lot or tract to be reappraised which in his judgment is not appraised at the proper amount, and he may reject any and all bids for any lot or tract and at any time suspend, adjourn, or postpone the sale of any lot or lots, tract or tracts, to such time and place and he may deem proper.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

REGULATIONS FOR THE SALE OF CERTAIN LOTS IN MINNEOTA TOWNSITE IN THE FORMER ROSEBUD INDIAN RESERVATION, TRIPP COUNTY, SOUTH DAKOTA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 24, 1919.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Under the provisions of the act of March 2, 1907 (34 Stat., 1230), you are directed to cause the lots designated from "A" to "S" inclusive in the townsite of Minneota within the former Rosebud Indian Reservation, Tripp County, South Dakota, to be offered for sale at public outcry under the supervision of the Superintendent of Opening and Sale of Indian Lands at not less than their appraised value on June 14, 1919, and continuing thereafter from day to day, Sundays and holidays excepted, at the town of Minneota in the manner and under the terms hereinafter prescribed.

Manner.—Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the lots are offered for sale hereunder, and any person may purchase any number of lots for which he is the highest bidder. Bidders will not be required to show any qualifications as to age, citizenship, or otherwise. If any successful bidder fails to make the payment required on the date of the sale, the lot awarded to him shall be reoffered for sale on the following day.

Terms—Payments will be required as follows: No lot will be disposed of for less than \$10, and any lot sold for \$10 must be paid for on the day it is sold; the minimum of \$10 and at least 25 per centum of the bid price of each lot sold for more than \$10 must be paid on the date of the sale, and the remainder, if the price bid is \$50 or less, within one year from the date of the sale; if the price bid be over \$50 and less than \$100, 75 per centum of the cost may be divided into two equal payments due, respectively, one and two years

from the date of the sale; if the price bid be \$100 or more, the 75 per centum remaining unpaid may be divided into three equal payments, due, respectively, one, two, and three years from the date of sale. No entry will be allowed until payment has been made in full for the lot, but in case of partial payment the register will issue a nontransferable memorandum duplicate certificate showing the amount of the bid and the terms of the sale, and reciting the right of the purchaser to make entry upon completing the payments; the receiver in such case will issue a memorandum receipt for the money paid. Nothing herein will prevent the transfer of the interests secured by the purchase and the partial payment of the lot, by deed, but the assignee will acquire no greater right than that of the original purchaser, and the final entry and patent will issue to the original purchaser when all payments are made.

Forfeiture—If any person who has made partial payment on the lot purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot will be forfeited and the lot, after forfeiture is declared, will be subject to disposition. Lots remaining unsold at the close of sale or thereafter declared forfeited for nonpayment of any part of the purchase price under the terms of the sale will be subject to private entry for cash at their appraised value.

All persons are warned against forming any combination or agreement which will prevent any lot from selling advantageously or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 59 of the Criminal Code of the United States, which reads as follows:

“Whoever, before or at the time of the public sale of any of the lands of the United States, shall bargain, contract, or agree or attempt to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by intimidation, combination, or unfair management, shall hinder or prevent or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.”

The Superintendent of the Opening and Sale of Indian Lands will be, and he is hereby, authorized to appraise any unappraised lot or to cause any lot to be reappraised which in his judgment is not appraised at the proper amount, and he may reject any and all bids for any lot and at any time suspend, adjourn, or postpone the sale of any lot or lots to such time and place as he may deem proper.

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

REGULATIONS FOR THE SALE OF LOTS IN THE TOWNSITES OF OMAK, NESPELEM, ASTOR, AND INCHELIUM, IN THE FORMER COLVILLE INDIAN RESERVATION, AND KLAXTA, IN THE FORMER SPOKANE INDIAN RESERVATION, WASHINGTON.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., May 24, 1919.

THE COMMISSIONER OF THE GENERAL OFFICE:

Under the provisions of the act of March 22, 1906 (34 Stat., 82), you are directed to cause the unsold and unreserved lots in the townsites of Omak, Nespelem, Astor, and Inchelium within the former Colville Indian Reservation, Washington, and under the provisions of the act of May 29, 1908 (35 Stat., 459), to cause the unsold and unreserved lots in townsite of Klaxta, in the former Spokane Indian Reservation, Washington, to be offered for sale at public outcry under the supervision of the Superintendent of Opening and Sale of Indian Lands, at not less than their appraised value, on the dates, at the places, in the manner, and under the terms hereinafter prescribed.

Time and place of sale—Omak at Omak July 5; Nespelem at Nespelem July 10; Astor at Astor July 14; and Inchelium and Klaxta at Spokane, Washington, July 17, 1919, beginning on the dates mentioned and continuing thereafter from day to day, Sundays and holidays excepted, as long as may be necessary.

Manner.—Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the lots and tracts are offered for sale hereunder, and any person may purchase any number of lots and tracts for which he is the highest bidder. Bidders will not be required to show any qualifications as to age, citizenship, or otherwise. If any successful bidder fails to make the payment required on the date of the sale, the lot or tract awarded to him shall be reoffered for sale on the following day.

Terms.—*Payments will be required as follows*: No lot or tract will be disposed of for less than \$10, and any lot or tract sold for \$10 must be paid for on the day it is sold; the minimum of \$10 and at least 25 per centum of the bid price of each lot or tract sold for more than \$10 must be paid on the date of the sale, and the remainder, if the price bid is \$50 or less, within one year from the date of the sale; if the price bid be over \$50 and less than \$100, 75 per centum of the cost may be divided into two equal payments due, respectively, one and two years from the date of the sale; if the price bid be \$100 or

more, the 75 per centum remaining unpaid may be divided into three equal payments, due, respectively, one, two, and three years from the date of sale. No entry will be allowed until payment has been made in full for the lot, but in case of partial payment the register will issue a nontransferable memorandum duplicate certificate showing the amount of the bid and the terms of the sale, and reciting the right of the purchaser to make entry upon completing the payments; the receiver in such case will issue a memorandum receipt for the money paid. Nothing herein will prevent the transfer of the interests secured by the purchase and the partial payment of the lot or tract, by deed, but the assignee will acquire no greater right than that of the original purchaser, and the final entry and patent will issue to the original purchaser when all payments are made.

Forfeiture.—If any person who has made partial payment on the lot or tract purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot or tract will be forfeited and the lot or tract, after forfeiture is declared, will be subject to disposition. Lots or tracts remaining unsold at the close of sale or thereafter declared forfeited for nonpayment of any part of the purchase price under the terms of the sale will be subject to private entry for cash at their appraised value.

All persons are warned against forming any combination or agreement which will prevent any lot or tract from selling advantageously or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 59 of the Criminal Code of the United States, which reads as follows:

“Whoever, before or at the time of the public sale of any of the lands of the United States, shall bargain, contract or agree or attempt to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by intimidation, combination, or unfair management, shall hinder or prevent or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.”

The Superintendent of the Opening and Sale of Indian Lands will be, and he is hereby, authorized to appraise any unappraised lot or tract or to cause any lot or tract to be reappraised which in his judgment is not appraised at the proper amount, and he may reject any and all bids for any lot or tract and at any time suspend, adjourn, or postpone the sale of any lot or lots, tract or tracts, to such time and place as he may deem proper.

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

CHARLES A. CRANE.

Decided May 24, 1919.

RESERVATION—EXCEPTING CLAUSE IN PATENT.

Neither the act of March 4, 1913, nor the instructions of January 13, 1916, authorize the withdrawal or reservation of public land, or insertion of an excepting clause in a patent for said land, over which may pass a trail or right of way for a prospective road.

VOGELSANG, *First Assistant Secretary*:

On May 20, 1915, Charles A. Crane established and has since then continuously maintained his residence on and fenced a tract of public lands which adjoins the Shoshone National Forest and is embraced in the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lot 4, Sec. 18, T. 47 N., R. 102 W., 6th P. M., for which, on November 20, 1915, he filed his homestead application, Lander 07756, which was rejected by the local office for the reason that the township mentioned was then suspended for a resurvey.

Crane's appeal from the rejection of that application was pending before the General Land Office at time the lands again became subject to entry, and he then withdrew his appeal and filed a new application to enter the land which was allowed, as Lander 010180, on February 8, 1918, under which a final certificate was later issued to him on final proof filed April 27, 1918.

Five days after Crane's entry was allowed, or on February 13, 1918, the Acting Forester filed in the General Land Office—

* * * duplicate copies of tracings and field notes of a traverse survey defining the location of a roadway (known as Dick-Creek Road) crossing the public domain in Township 47 North, Range 102 West, 6th P. M., (including public lands and also a part of the land embraced in Crane's entry) *which was constructed* (italics supplied) by the Forest Service under the act of March 4, 1913 (37 Stat., 828), and is used in connection with the administration of the Shoshone National Forest."

Accompanying these papers was a letter from the Acting Forester, addressed to the Commissioner of the General Land Office, and dated February 12, 1918, which contained a request—

* * * that a right of way for the maintenance of this line be reserved, and noted upon the records of your Department, and that there be excepted from the subsequent conveyance of the land by patent said right of way, and appurtenances thereto, in accordance with the opinion (instructions) of the First Assistant Secretary of the Interior, dated January 13, 1916. (44 L. D., 513.)

On February 25, 1918, the General Land Office, acting on the assumption justified by the Acting Forester's statement, that the road

had already been constructed, posted the "tracings and field notes" on its tract books, and forwarded copies of them to the local officers with directions that they make proper notations thereof on their records and file them "for future reference should occasion arise."

It will be noted that the Commissioner did not attempt to comply with the Acting Forester's request "that a right of way for the maintenance of this line be reserved," and he did not reserve any part of the lands embraced in Crane's entry, or any of the public lands covered by the field notes.

On July 24, 1918, Crane filed with the General Land Office a protest "against establishing through his homestead a right of way for forest reserve use of the Dick Creek Road" in which he stated that prior to June 13, 1918, he had no knowledge of the fact that such a road was contemplated, and that its establishment and maintenance over his land would greatly injure him.

This protest was forwarded by the General Land Office to the Forest Service for its consideration, and in his letter of October 24, 1918, the Acting Forester said in response to it:

Mr. Crane alleges that the withdrawal of the right of way should not be made because the road has not been constructed, and asks that the survey be modified so as to keep it entirely within the boundaries of the National Forest. It is true that no road has been constructed, although it is proposed that at some time a road shall be built along the right of way as surveyed. There is, however, a trail constructed by the Forest Service at some time prior to 1911, which has been well marked and well used since that year. During the fiscal years 1915 and 1916, the sum \$512.76 from improvement funds and \$133.67 from the allotments for statutory and general expense salaries was spent in the maintenance and upkeep of the trail. The route on which the withdrawal was requested in my letter of February 12, 1918, and upon which the trail has been constructed, is the only practicable one in that vicinity, and is of considerable importance for the accommodation of travel across Section 18 from one portion of the Forest to another. The right of way connects with and forms a part of a stock driveway extending west through the S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 9, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 10, T. 47 N., R. 103 W., which was withdrawn by executive order on May 9, 1912, and is necessary to allow full and proper use of that withdrawal. It is impracticable to confine the route entirely to the National Forest, since a high ridge and rough rim rocks would prevent the establishment of a trail entirely within the boundary.

Although it is possible to go from the Woods River to the Greybull District by another route than that suggested, the distance is thereby increased one-half, and the roundabout route does not serve the desired purpose. Besides being continually used by Forest officers and the public in general, three or four bands of sheep are driven to and from the summer range each year over this trail. It is, therefore, felt that the suggested route is the only practicable one, and should not be amended.

Upon receipt of these statements the Commissioner of the General Land Office dismissed the protest without further investigation or

showing, and the case is now before this Department for consideration on Crane's appeal from that action in which he complains: (1) That the protest should not have been dismissed "on the mere report of the Acting Forester"; (2) that it was error not to have referred "the whole matter for careful investigation and report by some impartial officer not connected with the Forest Service"; and (3) that he should "be deprived of his land, and oppressed by having thousands of sheep forced through his cattle ranch without adequate and ample compensation being awarded to him."

There is no statute or regulation which in terms authorizes the reservation of lands for the specific purposes indicated. The act of March 4, 1913 (37 Stat., 828, 843), under which the Acting Forester said this road "was constructed" is silent as to the reservation of lands for any of the purposes mentioned in it. It is merely a part of an appropriation act making provision for the general expenses of the Forest Service and reads as follows: "For the construction and maintenance of roads, trails, bridges, fire lanes, telephone lines, cabins, fences and other improvements necessary for the proper and economical administration, protection and development of the national forests, \$400,000." This provision has been recurrently repeated in a number of appropriation acts, one of which was referred to in the instructions of August 31, 1915, (44 L. D., 359).

The instructions of January 13, 1916 (44 L. D., 513), relating to roads, and the kindred instructions of August 31, 1915, *supra*, relative to telephone lines have to do with lands within national forests which have been or will be listed for homestead entry and over which roads or lines were constructed before the lands were entered. They did not discuss the possibility of rights of way over unreserved public lands, or over entered lands located either within or outside of national forests; and neither of these instructions gave direction for the actual reservation of any lands. They did no more than to safeguard and preserve the interests of the Government by directing the insertion of the following clause in final certificates and patents embracing lands over which telephone lines and roads had already been constructed:

Excepting, however, from this conveyance that certain telephone line (or road) and all appurtenances thereto, constructed by the United States, over, through or upon the land herein described, and the right of the United States, its officers, agents or employees to maintain, operate, repair or improve the same so long as needed or used for or by the United States.

From this it will be seen that no attempt has been made to presently reserve any of the lands in Crane's entry, and that none of

them has been reserved, even if entered land could be lawfully placed in reservation for the purposes indicated. He is, however, under the present state of the record embarrassed by the fact that the excepting clause quoted above will be inserted in his patent if no relief is given him under his protest.

It is not necessary to here consider the effect of the action already taken on Crane's rights under his entry, because, even if it be admitted that the establishment and use of the trail, or the making and filing of the survey did create a right paramount to his, neither of those facts would justify either an express withdrawal and reservation of the land, or the insertion of the excepting clause in the patent. The regulations of January 13, 1916, on which the Acting Forester relied, can not be invoked for that purpose because they do no more than to provide for the insertion of the excepting clause in patents to land over which roads were actually established before they were entered, and do not relate to prospective roads, or authorize the withdrawal or reservation of lands of any kind for such roads; and even if it be admitted that the construction and maintenance of the trail over the lands for forest administration purposes would impress the lands with an easement under section 2477, Revised Statutes, or otherwise, that fact, which can not be here admitted, would not warrant the insertion of the excepting clause in the patent because there is no statute requiring such a limitation in the patent, and its insertion would not add to the quality of any easement that might possibly have already been conferred.

This Department has heretofore refused to insert such an excepting clause in patents to lands over which rights of way have been acquired under either section 2477, Revised Statutes, or the act of March 3, 1891 (26 Stat., 1095); Douglas County, Washington (26 L. D., 446); West Elk Land and Live Stock Co. v. Telck (45 L. D., 460), and for the reasons there given such a clause should not be inserted in the patent to Crane.

The decision appealed from is, therefore, reversed, and it is directed that the notations heretofore made on the records of the General Land Office and the local office be eliminated and that a patent be issued in this case without the insertion therein of the eliminating clause, if there are no other reasons why such a patent should not be issued.

PARIS GIBSON ET AL.

Decided May 29, 1919.

PRACTICE—GOVERNMENT PROCEEDINGS—BURDEN OF PROOF.

Where an entry has been regularly allowed upon a sufficient *prima facie* showing, or final or other proof submitted exhibiting compliance with the law under which the entry was made, the burden is upon the Government to sustain charges preferred against such entry or proof by a field officer.

DEPARTMENTAL DECISION EXPLAINED.

Sarah Frazier (41 L. D., 513), explained.

VOGELSANG, *First Assistant Secretary*:

Upon the suggestion of the Commissioner of the General Land Office the Department has reconsidered the above-entitled case, in which by decision of April 1, 1919 [not reported], it affirmed his decision dated November 12, 1918, dismissing proceedings instituted by the Forest Service against mineral entry 037318, made March 1, 1917, at Lewistown, Montana, by Paris Gibson, Theodore Gibson, Donald Gibson and Mary Gibson for the Boiler placer claim, survey No. 9947, embracing 39.486 acres, in the unsurveyed W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 7, T. 14 N., R. 11 E., M. M., and within the Jefferson National Forest.

The charges preferred were as follows:

1. That a valid discovery of mineral has not been made upon the Boiler placer claim.
2. That the Boiler placer claim is not chiefly valuable for building stone.
3. That as much as \$500 has not been expended upon, or for the benefit of, the Boiler placer claim.
4. That title to the land covered by the Boiler placer claim is being sought for speculative purposes.

No reason is found for disturbing the prior finding of the Department that the evidence does not sustain the charges.

In its brief upon appeal the Forest Service, however, contended that the burden of proof was upon the claimants to refute the charges, citing Sarah Frazier (41 L. D., 513). In that case Frazier made homestead entry February 23, 1904. Final proof was submitted June 2, 1909, upon which action was suspended by the register and receiver and the proof referred to the chief of field division for investigation because the showing as to residence was not satisfactory. November 1, 1910, adverse proceedings were directed upon the report of a field officer upon the charge that "entrywoman did not establish and maintain a residence on the land." After a hearing the register and receiver recommended rejection of the proof and cancellation of the entry. The Commissioner reversed their action but the Department sustained it, stating, under the above circumstances:

The decision of the Commissioner goes upon the principle that the burden of proof is upon the Government, whose officer in this case made a charge of

nonresidence, to show that the entrywoman has *not* complied with the law, the statement being made therein that—
“there is some ground for suspicion that residence was not maintained upon the entry to the exclusion of a home elsewhere. The testimony, however, is conflicting and it is not believed that the doubt engendered amounts to proof of noncompliance with the law.”

This case, however, is one where the entrywoman has made final proof, and, in such case, the Department as custodian of the public lands, must see to it that no title to any part of such land passes out of the Government until the law has been complied with, and the fact of such compliance must be affirmatively established by the one claiming to be so entitled.

Subsequently, and upon July 3, 1913 [not reported], First Assistant Secretary Jones advised the Commissioner that it was not intended by the Frazier decision—

to inaugurate a new rule with respect to the burden of proof, nor to modify the circular of instructions approved by the Department, governing proceedings on reports of special agents. * * * The rule as it existed prior to the Frazier decision will not be disturbed.

That rule may be stated as follows: Where an entry has been regularly allowed upon a sufficient *prima facie* showing, or final or other proof submitted exhibiting compliance with the law under which the entry was made, the burden is upon the Government to sustain charges preferred against such entry or proof by a field officer. (See Franklin L. Bush *et al.*, 2 L. D., 788; George T. Burns, 4 L. D., 62; John W. Hoffman, 5 L. D., 1; Henry C. Putnam, 5 L. D., 22; United States *v.* Barbour, 6 L. D., 432; Perry Bickford, 7 L. D., 374; John A. McKay, 8 L. D., 526; Albert H. Cornwell, 9 L. D., 340; and the regulations of November 4, 1895, 21 L. D., 367; July 16, 1898, 27 L. D., 239; August 18, 1899, 29 L. D., 141; February 14, 1906, 34 L. D., 439; June 26, 1907, 35 L. D., 632; September 30, 1907, 36 L. D., 112.) Where an entry has been regularly allowed the ordinary rule that one who challenges its validity must sustain the burden of proof applies. (See Gonzalez *v.* Stewart, 46 L. D., 85, 88, and also Central Pacific Railway Company, 46 L. D., 435.)

When an entryman has submitted final or other proof and the entry is also the subject of an adverse report by a field officer the proof should first be examined by the Commissioner. If upon its face the proof discloses noncompliance with law it should be held for rejection and the entry held for cancellation or allowed to remain intact subject to future compliance with law, as the case may be, thus making proceedings upon the adverse report unnecessary. Should the proof, however, *prima facie* show compliance with law and the adverse report sufficiently challenges its correctness or verity, or disputes the validity of the entry, proceedings upon the adverse report will be instituted. If such proceedings result in a hearing the burden of proof to sustain the charges preferred will be upon the Government, in accordance with the views above expressed.

The action of the Commissioner in this case is affirmed and he will hereafter be governed by the within instructions as to adverse proceedings upon the report of field officers. The Solicitor for the Department of Agriculture will be allowed the usual time to file a motion for rehearing of this decision if he so desires.

CHARLEY ANDERSON.

Decided June 6, 1919.

INDIAN ALLOTMENT—ACT OF FEBRUARY 8, 1887.

While the Indian's assertion of claim to land embraced in an allotment application under section 4 of the act of February 8, 1887, must be based upon the reasonable use or occupancy thereof consistent with his mode of life, yet in examining the acts of settlement and determining the intention and good faith of the applicant, due and reasonable consideration should be given to the habits, customs, and nomadic instincts of the race, as well as the character of the land and climate.

INDIAN ALLOTMENT—CHARACTER OF LAND.

The mere fact that a tract of vacant public land has growing upon it some valuable timber is not of itself sufficient to prevent its being taken as an Indian allotment under the fourth section of the act of February 8, 1887.

INDIAN ALLOTMENT—PERIOD OF TIME AFTER APPROVAL.

Where a long period of time elapses after approval of an Indian allotment under the fourth section of the act of February 8, 1887, it will be assumed that the Department had before it ample evidence, both as to the Indian's settlement and character of the land involved, to warrant such approval.

VOGELSANG, *First Assistant Secretary:*

December 10, 1896, the local land officers at Seattle, Washington, allowed an allotment application filed by Charley Anderson, a Skagit River Indian, under the fourth section of the act of February 8, 1887 (24 Stat., 388), or unsurveyed land described as the NW. $\frac{1}{4}$, Sec. 2, T. 34 N., R. 10 E. Anderson alleged in his application that he had made settlement on the land and that it was only valuable for grazing purposes. The application was approved by the Department January 26, 1909, but no trust patent issued for the reason that the land was at the time unsurveyed.

August 26, 1913, the Commissioner of the General Land Office replied to a request of the Commissioner of Indian Affairs under date of August 7, 1913, to be advised as to the status of a number of approved fourth section allotments in the Seattle land district, including that of Charley Anderson. The Commissioner of Indian Affairs had asked whether there was any objection to the issuance of trust patents on these allotments. In his reply the Commissioner of the General Land Office stated that on March 7, 1908, the Forester of the

Forestry Service had addressed a number of letters to his office containing reports adverse to a number of Indian allotments including that of Charley Anderson; that these reports were practically the same in every case, namely, that the lands covered by these allotments were more valuable for their timber than for agricultural purposes and that no settlement or improvements had ever been made by the allottees. The Commissioner of the General Land Office concluded as follows:

This office has advised the Forestry Service on July 24, 1913, that it was assumed that when the Secretary of the Interior gave his approval to these allotments there was then before him, the correspondence had between this office and your office, relative to same, with the adverse reports of the Forestry Service and other correspondence as was pertinent to the cases and that such approval in effect, constituted a determination that the allotments were not to be denied on the ground and for the reasons suggested in the Forester's letter of March 7, 1908, and that this office would, therefore, consider the matter closed and the allottees entitled to patents for the lands approved to them by the Secretary of the Interior, in due course of office procedure, after the investigation in the field recommended by the Geological Survey, and the surveying of the lands involved, unless it was desired by them to invoke the attention of the Secretary of the Interior to the facts once again and should so advise this office of such desire and intention.

No further report has been received from the Forestry Service.

October 19, 1916, a mineral inspector of the General Land Office submitted report based on an examination made in 1914, of the land embraced in Anderson's allotment. He found the land to be rough, well timbered, and that it had no agricultural value except for grazing; that there were no improvements on the land and no evidence to show that any were ever made. The inspector interviewed Anderson on April 26, 1916, at which time the latter stated that his allotment was made by the Indian agent who did not consult the Indians as to the land they desired to have allotted to them; that the Indian agent did not examine the lands which he allotted to the Indians in that locality but "took a piece of common paper and blocked out the allotments in a bunch." This was either in the year 1895 or 1896; that the Indian agent told the Indians the allotments were all right and would make good places for them to live; that the Indians supposed the allotments were on one side of Illabot Creek, probably on the northeast side and down near the Skagit River where the land is better but they subsequently discovered that their allotments were situated on the mountain on the southwest side of Illabot Creek. From the inspector's report the fact appears to be that Illabot Creek flows diagonally through the land embraced in Anderson's allotment in a northwesterly direction into the Skagit River.

The inspector stated in his report that Anderson built a shack on what he thought was his place about two years after the allotment

was made and then found, after seeing a map, that he was wrong; that after that "he did not build a cabin or make any improvements on his allotment but did build a cabin on the SW. $\frac{1}{4}$, Sec. 2, on the allotment of Julia Sious, his mother; that Anderson told him he had never lived on his allotment nor had he cut any shingle bolts therefrom. The inspector further stated: "the theory that this, and adjoining allotments were made in a fraudulent attempt to get title to valuable timber lands is not borne out by the facts, for at that time those lands had little or no value for the timber and it was agricultural, and not timber, lands, that the Indians wanted. If any fraud was perpetrated, it was on the Indians."

December 26, 1917, the Commissioner of the General Land Office, "in view of the fact that no settlement was ever made on the land embraced in this application, and that the same is shown not to be desirable for allotment purposes," recommended that the approval of Anderson's allotment by the Department on January 26, 1909, be revoked. The Department approved this recommendation January 5, 1918, and the local officers were advised of the decision on January 26, 1918, and directed to notify Anderson that his allotment was held for rejection subject to his right of appeal to the Department within thirty days from date of receipt of notice. The local officers on July 13, 1918, transmitted evidence of service on the Indian agent by registered letter delivered February 9, 1918, and an unclaimed registered letter addressed to Anderson, reporting no action taken.

August 1, 1918, the Commissioner of the General Land Office finally rejected Anderson's allotment and closed the case.

March 17, 1919, the local officers transmitted an application by Anderson for reinstatement of his allotment and the Commissioner of the General Land Office forwarded the same to the Department as an appeal from its rejection. With the application is an affidavit by Anderson in which he states that he is an Indian of the full blood belonging to the Skagit River tribe of Indians; that he was born on the Skagit River in Skagit County, Washington, and has lived in said county all his life, being the son of Charley Sious and Julia Sious; that he made settlement upon the land embraced in his allotment prior to filing application therefor; that he built a small house and established residence on the land and while he has not made continued residence upon the land since the date of his application he had lived up and down the river as Indians usually do, since that date and still resides there; that he was informed many years ago that his allotment had been approved and that he believed his patent to said land would issue in due course of time after survey in the field, which survey he is informed has been made within the last three or four years. He further states that a

portion of the land is agricultural in character and that the whole of it, or nearly all of it, is good pasture land and is valuable for pasture and agricultural purposes when the timber is removed; that he had no knowledge of any proceedings pending against his allotment until February 19, 1919, when he was in the local land office in connection with his deceased father's allotment and for the first time discovered that his own allotment had been canceled without notice having been served upon him by the Indian agent or any other person.

The Commissioner of the General Land Office on January 26, 1918, in denying an application to contest one of the approved fourth section allotments referred to herein, that to Charley Sious, on the ground of failure to make settlement and that the land was timber in character, stated in reference to the allotment application: "inasmuch as this application was filed more than twenty years ago and as the party alleged compliance with the law at that time and as the showing made by the Indian was satisfactory to the Department, and the allotment was approved April 23, 1908, it is not thought that an affidavit of contest in which the said showing is controverted should be made the basis of a contest at this time."

The allotment application of Anderson was filed in 1896, alleging prior settlement, and approved by the local officers. It was approved by the Department in 1909. It must be assumed as stated by the Commissioner of the General Land Office in his letter of July 24, 1913, to the Forestry Service and as intimated by him in the Charley Sious case that the Department had before it ample evidence both as to the Indian's settlement and as to the character of the land embraced in his allotment to justify its allowance. The law contains no requirement of "actual residence" on the part of an applicant under the fourth section and in instructions promulgated as early as 1903 (32 L. D., 17), it was held that the mere fact that a tract of land has growing upon it some valuable timber is not of itself sufficient to prevent its being taken under that section. In the regulations of April 15, 1918 (46 L. D., 345), it was stated that in examining the acts of settlement and determining the intention and good faith of an Indian applicant under the fourth section, due and reasonable consideration should be given to the habits, customs and nomadic instincts of the race as well as to the character of the land taken in allotment; and that the Indian's assertion of claim to the land must be based upon the reasonable use or occupancy thereof consistent with his mode of life and the character of the land and climate.

The only basis for the action of the Commissioner of the General Land Office and the Department in canceling Anderson's allotment is the report of the mineral inspector as to the character of the land and as to what was *told* him in regard to Anderson's settlement, there

being no legal evidence furnished as to the latter to support the inspector's declarations, deductions and recommendations. It is the opinion of the Department in view of Anderson's present affidavit that no sufficient reason appears to justify a rejection of his allotment in face of its prior approval, which as stated, must be assumed to have been made on a showing of settlement and as to the character of the land deemed satisfactory at the time; and especially in view of the long period that has elapsed rendering it well-nigh impossible to ascertain the true situation as to the Indian's connection with the land.

The Department's approval under date of January 5, 1918, is hereby revoked, the Commissioner's action of August 1, 1918, is reversed, Anderson's allotment will be reinstated and in the absence of other objection patent will issue on said allotment.

**INSTALLMENT PAYMENTS REQUIRED IN CONNECTION WITH
HOMESTEAD AND OTHER ENTRIES AFTER PERIOD OF MILITARY OR NAVAL SERVICE.**

INSTRUCTIONS.

[Circular No. 647.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 9, 1919.

**REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:**

Payments required in connection with entries of ceded Indian lands and other entries by those in the military or naval service were suspended during the period of such service by section 501, of the act of March 8, 1918 (40 Stat., 440, 448).

No direction was given in Circular No. 600 (46 L. D., 383), issued under the said section 501, as to when the said suspended payments must be paid, other than the direction that—

* * * no entries will be canceled upon the ground indicated (nonpayment of sums due) until the expiration of six months after the end of the war and after the discharge of the entryman from the service unless such discharge shall have occurred at an earlier date, in which case said six-months' period will begin to run from the time of his discharge.

The period of the military or naval service should not be considered a part of the aggregate period of time originally allowed for the completion of installment payments, and the time for making such payments should be appropriately extended. Where the duration of the military or naval service is one year or less, the time of

payment of each installment maturing during or after the term of the military or naval service, under the law under which the entry was made, will be extended for one year; where the military or naval service is between one and two years, the extension will be for two years; and similar extensions will be granted for longer terms of military or naval service. The payments so extended will be due upon the same day of the year as now fixed, and no interest will be charged during the period of the suspension of any payment.

As to entries in reclamation projects, see Circular, dated May 16, 1919, issued by the United States Reclamation Service (47 L. D., 167).

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

WELLS AND HEMMERLE (ON REHEARING).

Decided June 14, 1919.

PRACTICE—APPEAL FROM ACTION OF LOCAL OFFICERS.

The Rules of Practice prescribed for the orderly transaction of the business of the Land Department, and for the protection of private rights, do not recognize letters to the Commissioner of the General Land Office as appeals from the action of the local officers; such appeals must be duly served and filed *in the local land office* within the period of time allowed therefor.

VOGLESANG, *First Assistant Secretary:*

John W. Wells has filed an informal motion for a rehearing under the decision rendered by this Department on April 1, 1919 [not reported], which rejected his original and supplemental applications, Glenwood Springs 011555, to enter the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, and S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and S. $\frac{1}{2}$ N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, T. 3 N., R. 86 W., 6th P. M., as additional to his original homestead entry, Glenwood Springs 03020, embracing the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ N. $\frac{1}{2}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 25, and the S. $\frac{1}{2}$ S. $\frac{1}{2}$ NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and N. $\frac{1}{2}$ N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, in the same township; under which he made final proof on June 24, 1916, and received final certificate dated July 15, following.

These applications were held by this Department to be subject to the homestead entry, Glenwood Springs 012438, made by Mrs. May Hemmerle for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, and the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 26, which was sustained by the decision complained of.

Wells's additional homestead application was executed on November 18, 1916, before a United States commissioner and filed in the local land office on December 1 following. It was rejected by the register and receiver on December 11, 1916, for the reason that it failed to include the S. $\frac{1}{2}$ N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, mentioned above, thus leaving the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, incontiguous to the lands embraced in the original entry, and it did not adjoin the other tracts embraced in the application.

Notice of the rejection of this application and the repayment of the moneys he paid under it were received by Wells through registered mail on February 12, 1917, and that notice told him that he would have thirty days within which to appeal from that rejection. He did not appeal, but on February 13, 1917, addressed a letter to the Commissioner of the General Land Office in which he called attention to rejection of his application and asked the Commissioner to advise him what to do in the matter, but the Commissioner did not advise him what action he should take, the record in the case not being before him. No notice was given by Wells to the register and receiver that he had written that letter, and no mention was made of it on their records. Not having been informed that the matter had been taken up with the General Land Office in that informal manner, the local officers considered that the lands became subject to entry at the expiration of the time given Wells for appeal and on March 15, 1917, allowed the entry of Mrs. Hemmerle mentioned above.

On April 16, 1917, Wells filed another, or supplemental, application to enter, in which the land was correctly described. This application was suspended by the local office to await action on his petition for the designation of the lands under the enlarged homestead law which was filed with his original application.

By its decision of November 13, 1917, the General Land Office suspended Mrs. Hemmerle's entry and announced that if the lands were finally designated under Wells's petition the entry would be canceled and his application allowed, otherwise the entry was to be relieved from suspension and be permitted to remain intact subject to compliance with the law.

The decision of this Department of April 1, 1919, on Mrs. Hemmerle's appeal from that action, reversed the decision below and rejected Wells's applications on the ground that his failure to appeal left the land subject to her application to enter; and a very careful reexamination of the record, and a serious consideration of the questions involved, not only shows that that decision was correct, but discloses other reasons not mentioned in it why Wells's original

application was fatally defective, and could not have been properly allowed in the form in which it was presented.

It can not be correctly said that Wells's letter to the Commissioner was tantamount to an appeal and saved to him any rights he may possibly have had under his application as against a subsequent applicant.

The Rules of Practice prescribed for the orderly transaction of the business of the Land Department, and for the protection of private rights do not recognize such letters as appeals. Rule 47 of those Rules (44 L. D., 404) declares that:

No appeal from the action of the register and receiver will be considered unless notice thereof is served and filed with the local officers in the manner and within the time prescribed by these rules;

and Rule 65, which relates particularly to appeals from the rejection of applications to enter, provides that:

The party aggrieved will be allowed thirty days from the receipt of notice in which to file notice of appeal *in the local land office*. The notice of appeal, when filed, will be forwarded to the General Land Office with full report upon the case, which should recite all the facts and proceedings had. * * *

The wisdom of these rules requiring appeals to be filed and made of record in the local land office is fully demonstrated in the present case, which shows that the recognition of any other form of appeal, such as a personal letter to the Commissioner, is likely to cause confusion in administration, and also to work irreparable injury to subsequent applicants, who are permitted to make entry by the local officers when they have no notice or knowledge that such appeals have been taken. In this case, before she made her application, Mrs. Hammerle caused inquiry and a search of the records of the Glenwood Springs land office to be made, and she was informed that no one was adversely claiming the land; and so it was that she presented her application and her entry was allowed. Very soon after the allowance of her entry, and before Wells filed his supplemental application, Mrs. Hemmerle established and thereafter maintained her residence on the land until within about a month before her entry was suspended. During that time she, a widow with a small daughter dependent upon her, made what was to her a considerable expenditure in the sum of \$445 in the erection of a dwelling house, the fencing of 60 acres and the plowing and seeding of 4 acres of the land. Wells has never in any way improved the land.

But if Wells's letter be considered as an appeal, or even if he had regularly appealed, that fact would not call for the cancellation of Mrs. Hemmerle's entry and the allowance of his application, because such an appeal would not have given him rights superior to hers. The law under which his application was presented (section 3, act of February 19, 1909, 35 Stat., 639, as amended by the act of

March 3, 1915, 38 Stat., 956), forbids the allowance of an application to enter which embraces a tract, as in this case, that is not contiguous to either the lands covered in the original entry, or the other lands embraced in the application; and neither the General Land Office nor the Department could have sustained the appeal and directed the register and receiver to allow the application in the form in which it was presented, and must have affirmed their action in rejecting it. The most that Wells could have accomplished by an appeal under any circumstances would have been to have secured an order remanding the case with directions to the local office that he be permitted to so amend his application as to make it conform to the statute. That action could have been taken, and probably would have been taken by this Department through the exercise of its supervisory power, in the absence of an intervening adverse right; but it would not have been taken if a right such as Mrs. Hemmerle's had intervened and attached before Wells filed his supplemental application.

The most that an appellant in such a case as this can demand as a matter of right is that he receive the judgment of the appellate tribunal as to the correctness of the action of the local office in rejecting his application on the ground on which it was rejected (*Spalding v. Hake*, 34 L. D., 541); because an appeal from an action properly rejecting an application would not have reserved the land from entry by others, and make it subject solely to such amended application as the appellant may later present (*McInturf v. Gladstone Townsite*, 20 L. D., 93.)

But aside from these considerations, the record discloses the fact that the original application should have been rejected for the further reason that it was not filed until more than ten days after the date on which it was executed, and could not, therefore, have been properly allowed, under the rule laid down in *Race v. Larson* (43 L. D., 313), and the directions given by this Department in its regulations of September 8, 1914 (43 L. D., 378).

There is still another reason why neither the original nor the supplemental application could have been allowed in the form in which they were presented, and should have been rejected.

The law under which these applications were presented declared that persons, such as Wells was, who had already made final proof under their original entries could not make an additional entry under that act if they did not at the date of their applications for the additional entry still own and occupy the lands covered by their original entries; and in the regulations issued under that act on April 17, 1915 (44 L. D., 66), this Department said that "a statement showing continued ownership and occupancy must be inserted in Form 4-004 in case of applications under this act." The

form there mentioned, 4-004, was the form used by Wells in making these applications, but he failed to insert that statement in either of them, and did not in any other manner attempt to show that he at that time owned and occupied the entered land, a showing that was absolutely necessary to the allowance of his entry, and without which it could not have been properly allowed.

From all this it abundantly appears that the decision complained of was sustained by both the law and the equities of the case, and must be adhered to. To hold otherwise, and cancel Mrs. Hemmerle's entry, would be to do her an unwarranted and unconscionable wrong, because she made her entry at a time when Wells had wholly failed to place any evidence either on the local land office records or on the land itself by way of improvements that he continued to assert an interest in or claim to it after he was notified of the rejection of his application. The motion for a rehearing is accordingly denied, and action will be taken in accordance with the views here expressed.

It is noted, however, that there are thirty acres of the land applied for by Wells, the S. $\frac{1}{2}$ N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 26, that is not embraced in Mrs. Hemmerle's entry, and he may be permitted to make an additional entry for these or other tracts upon the presentation of a proper application therefor, or under a proper amendment of his supplemental application already filed, if there are no controlling reasons to the contrary.

HEIRS OF ELLA J. CAMPBELL.

Decided June 16, 1919.

TIMBER AND STONE ACT—DEATH OF APPLICANT—RIGHTS OF HEIRS.

Where timber and stone application has been duly filed, notice of proof given, and the purchase money actually paid, the applicant has shown more than a mere intent to purchase—in fact is in practical effect a purchaser; and upon her death under such conditions, proof by the heirs that the law has been complied with should be accepted and patent issued thereon.

DEPARTMENTAL DECISION DISTINGUISHED.

Case of *Burns v. Bergh's Heirs* (37 L. D., 161), distinguished.

VOGELSANG, *First Assistant Secretary*:

July 14, 1916, Ella J. Campbell filed timber and stone statement 014588 for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 4, T. 13 N., R. 2 E., M. P. M., within the Helena, Montana, land district. The land was appraised at \$200; the purchase price was paid by the entrywoman on September 5, 1917, and final proof was set to be taken on November 28, 1917. At that time Mrs. Campbell was suffering from an illness which resulted in her death on January 7, 1918.

February 6, 1918, Fred C. Campbell, husband of the deceased entrywoman, made application to make proof on said entry for the heirs,

and proof was submitted by him April 19, 1918, final certificate issuing on said date.

February 20, 1919, the Commissioner of the General Land Office rejected said proof and issued an order to show cause why said entry should not be canceled. From said decision an appeal is now pending before the Department. In the opinion rejecting said proof the Commissioner said:

In the case of *Burns v. Bergh's Heirs* (37 L. D., 161) the Department held that no rights are acquired by the mere filing of a timber and stone sworn statement as will upon the death of the applicant prior to notice, proof and payment, succeed to the heirs.

The syllabus in the case referred to reads:

No such rights are acquired by the mere filing of a timber and stone sworn statement as will upon the death of the applicant prior to notice, proof and payment, descend to his heirs.

The case now pending is to be distinguished from that case in this, that in this case notice had been issued, payment for the land made, and everything done by the applicant except the making of formal proof, whereas in the former case merely an application had been made accompanied by the filing fee. When an application to purchase is made, notice of proof given and the money actually paid, the applicant has shown more than a mere intent to purchase, she is in practical effect a purchaser.

Under such conditions proof by the heirs that the law had been complied with should be accepted and patent should be issued to them.

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

ESCHERICH v. SCOFIELD.

Decided June 16, 1919.

ENLARGED HOMESTEAD—MARRIED WOMAN—ACT OF APRIL 6, 1914, AND SECTION 7, ACT OF JULY 3, 1916.

The provision of section 7 of the act of July 3, 1916, authorizing the allowance of an incontiguous additional homestead entry with credit for residence maintained upon the original entry when the distance between the two does not exceed 20 miles, does not permit of an additional entry by a married woman while residing upon the land embraced in her husband's entry; nor is such an entry authorized under the act of April 6, 1914, relating to the rights of homesteaders who intermarry.

VOGELSANG, *First Assistant Secretary*:

October 21, 1909, Carrie Stekelenberg, now Carrie Scofield, made homestead entry 04319, which she commuted November 16, 1911, and

patent issued therefor. November 4, 1909, Charles E. Scofield made homestead entry 04315 on which patent issued November 4, 1916. Said parties intermarried July 8, 1913, and established their joint residence upon the homestead of the husband in August of that year, where it was maintained until May 15, 1917, when they removed to the homestead of the wife.

July 3, 1916, each of these parties made incontiguous additional homestead entries; that of the wife being 014110 for the SE. $\frac{1}{4}$, Sec. 10, T. 17 N., R. 8 E., B. H. M., within the Bellefourche, South Dakota, land district.

May 3, 1917, George W. Escherich filed a contest affidavit against said entry, alleging:

That more than six months have elapsed since the said contestee, Carrie Scofield, made her additional homestead entry for said above described lands and she has not established residence thereon nor erected any buildings whatever thereon.

That said contestee, Carrie Scofield (nee Carrie Shields) is a married woman residing with her husband, Charles E. Scofield, who also, filed on an additional homestead entry on the 9th. day of October 1916.

That the said Carrie Scofield's said additional homestead entry is not contiguous to her original homestead entry on which she commuted.

June 8, 1917, said contestee filed an answer to said contest affidavit demurring to the sufficiency of the charge, saying:

That she demurs to the sufficiency of the charge, in that it wholly fails to show that she has not completed all residence requirements for both entries.

Affiant further says that her additional entry is within 20 miles of her original entry, and she is not required to establish residence thereon; further that affiant is entitled to the protection of the intermarriage of homesteaders law permitting residence by husband and wife on either one's entry, to count as residence on both entries.

Affiant further says that she has cultivated a portion of the additional entry, and has at all times, improved and extensively cultivated her original entry.

The matter thereafter came on for hearing and a stipulation of facts was filed by the parties that practically admitted the charges made by Escherich.

The register and receiver decided in favor of the contestee, but the Commissioner of the General Land Office reversed said ruling on August 28, 1918, and appeal is now pending before the Department.

Section 7 of the act of July 3, 1916 (39 Stat., 344), under which said entry was made, reads:

That any person who has made or shall make homestead entry of less than three hundred and twenty acres of lands of the character herein described, and who shall have submitted final proof thereon, shall have the right to enter public lands subject to the provisions of this Act, not contiguous to his first entry, which shall not with the original entry exceed three hundred and twenty acres: *Provided*, That the land originally entered and that covered by the additional entry shall first have been designated as subject to this Act as provided by section one thereof: *Provided further*, That in no case shall patent

issue for the land covered by such additional entry until the person making same shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise complied with such laws, except that where the land embraced in the additional entry is located not exceeding twenty miles from the land embraced in the original entry no residence shall be required on such additional entry if the entryman is residing on his former entry.

That law requires that the entryman shall actually and in conformity with the homestead laws reside upon and cultivate the lands so additionally entered, except when the homesteader is residing upon his or her former entry. There is no condition in the law in favor of a married woman, permitting her to make such an entry while residing with her husband on his homestead, and no liberal construction of the law would justify adding such a provision to its express terms. Nor does the act of April 6, 1914 (38 Stat., 312), which provides where residence on a homestead may be maintained by persons who marry after making homestead entry, relate to residence on an additional homestead entry made by a married woman.

There appears to be no law therefore that permits a married woman to make and perfect an incontiguous additional homestead entry while residing upon her husband's original homestead, and the residence established upon the original homestead of the applicant after the contest affidavit was filed does not cure the defect.

The decision appealed from is affirmed.

FENTRESS v. BOETCHER.

Decided June 19, 1919.

SETTLEMENT—ENLARGED HOMESTEAD—ACT OF AUGUST 9, 1912.

The requirement of the act of August 9, 1912, that one seeking to initiate a claim by settlement on land designated under the enlarged homestead law, must plainly mark the exterior boundaries of the land claimed, is so similar to the provision authorizing the initiation of a location on mineral land as to justify like interpretation, and application of the rule adopted under the mineral statute, that the marking is absolutely essential to the acquisition of a preferred right of entry.

VOGELSANG, First Assistant Secretary:

The appeal in this case presents the question as to whether the exterior boundaries of the tract in dispute, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, T. 10 N., R. 13 E., M. M., Lewistown, Montana, land district, were sufficiently marked to give the contestee a preferred right of entry.

That tract is inferior to the lands lying east and west of it, being, generally speaking, rough and fit mainly for grazing purposes. The northern and southern portions of it and the part which lies along its east line are covered with timber and are exceedingly rough. A

steep ridge or hill crosses the southern portion, south of which there are a few acres which, with lands in the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, form a cultivable bench.

The lands in this township at that time unsurveyed were designated, with other lands, for entry under the enlarged homestead laws on July 16, 1914, and the plat of the survey of the township was filed in the local office on December 12, 1917.

This tract is adjoined on the west, in part, by the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of that section, which was settled upon by Fentress in 1913, and it lies west and north of lands covered by Boetcher's settlement made April 9, 1914, for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 10.

The land not having been designated for entry under the enlarged homestead law at the time these settlements were made, Fentress and Boetcher proceeded on the theory that they were not entitled to initiate a claim by settlement to more than 160 acres each, and inasmuch as the tract now in dispute was less desirable than the lands adjoining it, neither of them embraced it in his original settlement. It appears that they talked together about that tract at or about the time they made their settlements, and they both say that it was then in their minds that by entering the lands covered by their settlements they would be enabled later to have the tract in dispute offered for sale as an isolated tract, when one or the other of them could buy it, but neither of them was willing to encumber his prospective "160-acre entry" with it.

They fail, however, to agree in their testimony as to the object and purpose for which the tract was to be purchased at an isolated-tract sale. Fentress said it was understood and agreed between them that "they would isolate it and buy it together," while Boetcher denied that there was such an agreement, and said that he told Fentress that "whoever could produce the money would get it."

From this it very clearly appears that neither of these parties intended to acquire title to this tract under the homestead laws at the time he made his original settlement, and can not now claim any interest in it by virtue of that settlement. It further appears, however, that soon after the land had been designated and it became possible that the tract might be later entered with the lands covered by his settlement, Boetcher abandoned the idea of isolating it, and on August 14, 1914, posted a single notice on a stake about $1\frac{1}{2}$ or 2 feet high at a point on or near the north line and a short distance east of the northwest corner of the tract, then unsurveyed, in which he claimed it as "additional" to the land covered by his original settlement. This was his only effort to mark the exterior lines of the tract prior to the time when Fentress built the fences hereinafter mentioned.

It does not appear that Fentress abandoned the idea of isolating the tract or concluded to initiate a settlement claim to it until about or shortly before May 7, 1915, and he said that he had no knowledge of Boetcher's having asserted a settlement claim to it until he heard a rumor to that effect about that time. He testified that on the morning of that day he went to Boetcher and asked him "what he thought about that 40" and Boetcher said, "I have located it— * * * If you want part of it, I will sell it to you." After this talk and on the same day Fentress built a fence on the north and east lines of the tract, beginning west of the northwest corner of the tract "up back of my house there," which is located near the northeast corner of the land covered by his (Fentress's) original settlement, "in order to make a pasture there sufficient to hold stock." Fentress says he saw Boetcher's notice for the first time on that day. Fentress did not place a fence on the south line of the land at that time, or at any time later, for the reason, as he says, "there is quite a steep hill and timbered ridge at the top," which served to keep his cows and horse in the pasture. It does not appear that Fentress placed a fence or other markings on the west line of the tract, but it is inferable that the fence and the hill inclosed the tract with the lands covered by his original settlement, a considerable portion of which was under cultivation and must have been fenced to keep out the range stock.

After Fentress had fenced and used the tract for about a year and a half as a pasture, Boetcher began building a fence along the west side of it at a time when Fentress was away from home. After he had built the fence for a short distance along that line, Fentress's wife went to him and protested and he stopped. Later he went to the line to continue building the fence and was stopped by Fentress himself. After Fentress had left his home temporarily in the fall of 1917, Boetcher extended his fence along the west line of the tract for some distance, but did not complete it to the southwest corner of the tract.

At the hearing Boetcher further based his claim on the fact that during the fall of 1914 he plowed a small portion of the land on the south end of the tract in connection with another very considerable portion of the bench, situated in the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ adjoining. The area of plowed land on the tract in dispute is variously estimated by the witnesses at from one-eighth of an acre to 2 acres. Boetcher planted grain on the land thus plowed and the adjacent land in 1915 and 1916, and sometime after Fentress had fenced the north and east lines of the tract Boetcher built a fence around the plowed land for the purpose of protecting his crops. A portion of that fence was located north of and near the south line of the tract in dispute. This fence was not built and the plowing was not done by

Boetcher for the purpose of marking the boundary of the tract and supporting his settlement claim, but for the evident purpose of protecting his crops, and it is more than probable that he did not know at the time he built the fence and plowed the ground that it embraced a part of the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and did not ascertain that fact until after Fentress had fenced the north and west lines.

On the day on which the plat of survey was filed, December 12, 1917, Boetcher filed his application to enter the tract in dispute and the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, covered by his original settlement. An affidavit was filed in support of this application, in which Boetcher based his claim to the tract in dispute on the allegation that he "posted notices" on it "notifying the public that I (he) claim said land as an additional filing to my original" but he made no specific reference to either the plowing or the fence, as supporting his settlement.

On January 11, 1918, Fentress filed an application to contest Boetcher's entry, in which he alleged that Boetcher's affidavit was false and fraudulent as to the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, in that he had "never performed any act whatever in connection with said land which would give him any right whatever in and to the same," and that he (Fentress) had "plainly marked the boundaries by a fence which completely inclosed said subdivision with my (his) claim."

Boetcher filed an answer, containing a general denial of these charges, and the case went to hearing on the issue thus joined, and later, after hearing had been held, at which the above facts were developed, the local office found that Boetcher had not marked the exterior boundaries of the tract, as was required by the act of August 9, 1912 (37 Stat., 267), and for that reason, sustained the contest. The General Land Office reversed that action by its decision of February 21, 1919, and the case is now before this Department for consideration on Fentress's appeal.

The privilege of initiating a claim to public lands through settlement under the homestead laws was first given by section 3 of the act of May 14, 1880 (21 Stat., 140), which reads as follows:

That any settler who has settled, or shall hereafter settle, on any public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed

a specified time within which to make his entry, to the exclusion of all other later applicants. That statute did not specify what acts should constitute a "settlement" or make the claimant a "settler," but in its administration this Department has accepted the word "settlement" as meaning the doing of any act on the land by a qualified person that indicates to others his desire and intention to acquire title to it under the homestead laws and it has recognized as a settler the per-

son who performs such acts. *United States et al. v. Atterbury et al.* (8 L. D., 173); *Bowman v. Davis* (12 L. D., 415); *Bowles v. Fraizer* (22 L. D., 310).

By the act of August 9, 1912 (37 Stat., 267), a person seeking to initiate a claim under the enlarged homestead law was required to do all of the things required under the former act and to do something more than that. That act provided "that any settler upon lands designated (for enlarged homestead entry) * * * shall be entitled to the preference right of entry accorded by that section (section 3, act May 14, 1880), provided he shall have plainly marked the exterior boundaries of the lands claimed as his homestead."

From this it will be seen that the claimant to a preference right must first be a settler; that is, he must have gone upon the land in person with the intention of acquiring title to it, and in furtherance of that intention done some act that would indicate that he intended to acquire it under the homestead law, and in addition to that he must plainly mark the exterior boundaries of the land "by a furrow or by sufficient notices posted on the various corners and at other points or in such manner as to make it easily understood, by one inspecting the land, to what extent it was claimed by the settler," as was said by this Department in its unpublished decision of June 10, 1918, in the case of *Dougherty v. Carder* (D-35856). It is by the doing of the acts of settlement formerly required and also the marking of the boundaries that this right is obtained, and it will not be conferred by the doing of one of these things only. They must cooperate to give that right.

The acts required by the act of 1912 are practically identical with those required in the initiation of a location on mineral land. A mineral claimant must make a discovery of minerals on the land he claims and in addition the land "must be definitely marked on the ground so that its boundaries can be readily traced." (Section 2324, Revised Statutes.) These statutes are so similar in their requirements that the boundaries be marked as to justify the construction of the act of 1912 by the rules of interpretation applied to the mining statute, and under these rules the marking is absolutely essential to the acquisition of the preferred right of entry, and "the requirement is an imperative and indispensable condition precedent to a location, and it is not to be 'frittered away' by construction." (2 *Lindley on Mines*, 872; *Ledoux v. Forester et al.* 94 Fed., 600, 602.)

*A location is not made by taking possession alone, but by working the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. (*Belk v. Meagher*, 104 U. S., 279, 284.)

As to what constitutes a sufficient marking of the boundaries, Judge Hanford said in *Ledoux v. Forester et al.*, *supra*:

Where the country is broken and the view from one corner to another is obstructed by intervening gulches and timber and brush, it is necessary to blaze the trees along the lines, or cut away the brush, or set more stakes at such distances that they may be seen from one to another, or dig the ground in a way to indicate the lines so that the boundaries may be readily traced.

An instruction to a jury containing that language was sustained by the Circuit Court of Appeals in *Carlton et al. v. Kelly* (156 Fed., 433, 435).

Applying these rules under the act of 1912, it must be held that the notice posted by Boetcher did not amount to such a marking of the boundaries as gave him a preferred right of entry under that statute, and his entry as to the tract in dispute must for that reason be held subject to such rights as Fentress gained by fencing the land.

The question arises as to whether Fentress's fences on two sides of the land gave him a preferred right of entry. That fence definitely fixed three corners of the tract and located two side lines. This, taken into consideration with the fact that the tract formed a part of the body of land on which Fentress had made settlement and was then residing, appears to be sufficient to give him a preferred right of entry.

In *Warnock v. De Witt* (40 Pac., 205) it was held that a claim marked by a discovery monument on which was placed a notice of location, and by a stake at each of three corners of the claim, and a monument at the center of each end line, leaving one corner unmarked, was a sufficient marking under section 2324, Revised Statutes.

It is believed from this that Fentress has gained a preference right to enter this tract, but it is shown by the records of the General Land Office that he made proof and received patent in 1917 to the lands covered by his original settlement, and it will therefore be necessary for him to make an additional entry of this land. Before he can do this, it will be necessary for him to show that he still owns and occupies the lands patented to him. Upon this showing, and a showing as to his further qualifications to make the additional entry, Boetcher's entry will be canceled as to the tract in dispute, and he will be permitted to make an additional entry. Otherwise his contest will be dismissed and Boetcher's entry will remain intact subject to future compliance with the law.

The decision appealed from is, for the reasons given, hereby reversed.

APPROXIMATION ABOLISHED AS APPLIED TO SOLDIERS' ADDITIONAL HOMESTEAD ENTRIES.**INSTRUCTIONS.**

[Circular No. 648.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 24, 1919.

REGISTERS AND RECEIVERS,**UNITED STATES LAND OFFICES:**

On June 13, 1919, the Secretary of the Interior made the following ruling in regard to the rule of approximation as applied to soldiers' additional homestead entries:

The Department has considered the present practice of permitting the rule of approximation to be applied to soldiers' additional homestead entries.

Approximation was permitted as to soldiers' additional homestead entries in the instructions of the Commissioner of the General Land Office, dated September 27, 1875 (see Miles Schoolcraft, 2 Copps Land Owner, 99), and in the case of Richard Dotson decided September 12, 1891 (13 L. D., 275). At that time, however, this Department held that the right of additional entry was personal to the soldier and could not be assigned. After the decision of the Supreme Court in Webster v. Luther (163 U. S., 331), the same practice still obtained. The result is that these rights are being located practically entirely by assignees of the parties entitled to the right. Such assignees purchase them from dealers in this so-called soldiers' scrip. By means of dividing the rights into various parts and by the application of the rule of approximation, areas of public land larger than necessary to satisfy the rights are being acquired by means of excess payments at \$1.25 per acre to the advantage of the dealer in the scrip but without material benefit to the soldier or his representatives and in violation of the spirit of the act of March 2, 1889 (25 Stat., 854), prohibiting private entry except in the State of Missouri.

In his opinion February 25, 1899 (28 L. D., 149), Assistant Attorney General Van Devanter, held that there was no reason for applying the rule of approximation to soldiers' additional homestead entries in Alaska since at that time the regular public land surveys had not been extended to the Territory and the lands were entered under special surveys. The area embraced in the surveys, therefore, could be made equal to the area of the right. Since assignments of soldiers' additional homestead rights may be made in amounts differing from the quantity of land in legal subdivisions according to the public surveys (William C. Carrington, 32 L. D., 203), and since two or more rights or portions thereof may be located upon the same tract of land (Ole B. Olsen, 33 L. D., 225), there is no practical reason necessitating the allowance of approximation, and as remarked in George E. Lemmon (36 L. D., 543), approximation is a purely administrative equitable rule not founded upon any law and can not be insisted upon as an absolute right, and where the privilege is abused to accomplish an evasion of the law, the Land Department has full power to change the rule to prevent such abuse.

Accordingly, the rule of approximation will no longer be permitted in the location of soldiers' additional homestead rights whether in their entirety, partly or in combination with other rights or parts thereof. These instructions will become effective September 1, 1919, and locations of such rights made on and after that date will be governed hereby. You will prepare the necessary instructions to the local land offices.

You are, accordingly, directed to require applicants for location of rights under sections 2306 and 2307 of the Revised Statutes (commonly known as soldiers' additional homestead entries) on and after September 1, 1919, to tender rights of sufficient area to equal the area of the land sought to be located.

CLAY TALLMAN,
Commissioner.

**DATE FOR ABOLISHING APPROXIMATION CHANGED—CIRCULAR
NO. 648, MODIFIED.**

[Circular No. 655.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 22, 1919.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Attention is directed to the following departmental letter of August 19, 1919:

Referring to my ruling of June 13, 1919, embodied in General Land Office Circular No. 648; June 24, 1919, in regard to rule of approximation, as applied to soldiers' additional homestead entries, it was directed that the new rule should become effective September 1, 1919. For good reasons shown, the Department is convinced that the time limit is too short, and same is hereby extended to December 1, 1919. You will give this modification the same publicity given the original instructions.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

Accordingly, on and after December 1, 1919, you will require applicants for location of rights under sections 2306 and 2307 of the Revised Statutes (commonly known as soldiers' additional homestead entries) to tender rights of sufficient area to equal the area of the land sought to be located.

C. M. BRUCE,
Acting Commissioner.

STATE OF CALIFORNIA.¹

Decided June 25, 1919.

SWAMP-LAND GRANT—CEDED LANDS.

The grant of swamp and overflowed lands to the State of California by the act of September 28, 1850, has no application to lands ceded by the State to the Government for the purpose of aiding in the operations of irrigation and reclamation conducted by the Reclamation Service.

VOGELSANG, *First Assistant Secretary:*

Lower Klamath Lake is situated partly in the State of California and partly in the State of Oregon, draining into the Klamath River. A portion of the lake is marked by precipitous banks, and contains water during the twelve months of the year. Surrounding the lake is an area nearly level, extending from the banks just mentioned to the higher lands in the foothills of the vicinity, this area being covered during nine or ten months of each year to a depth of from a few inches to several feet by the waters of the lake. Usually, due to recession of the waters, it is uncovered, or practically so, during the months of September and October. This portion of the area described supports a growth of tules, but is not susceptible of cultivation without drainage.

On February 3, 1905 (California Stats., 1905, page 4), the Legislature of California passed the following act:

Section 1. That for the purpose of aiding in the operations of irrigation and reclamation conducted by the Reclamation Service of the United States, established by the act of Congress approved June seventeenth, nineteen hundred and two (thirty-second Statutes, page three hundred and eighty-eight), known as the reclamation act, the United States is hereby authorized to lower the water levels of any or all of the following lakes: Lower or Little Klamath Lake, Tule or Rhett Lake, Goose Lake, and Clear Lake, situated in Siskiyou and Modoc Counties, as shown by the map of the United States Geological Survey, and to use any part or all of the beds of said lakes for the storage of water in connection with such operations.

Sec. 2. And there is hereby ceded to the United States all the right, title, interest, or claim of this State to any lands uncovered by the lowering of the water levels of any or all of said lakes not already disposed of by this State; and the lands hereby ceded may be disposed of by the United States free of any claim on the part of this State in any manner that may be deemed advisable by the authorized agencies of the United States in pursuance of the provisions of said reclamation act: *Provided*, That this act shall not be in effect as to lakes herein named, which lie partly in the State of Oregon, until a similar cession has been made by that State.

Similar legislation was enacted by the Legislature of the State of Oregon (see Oregon General Laws, 1905, page 63).

¹ See decision on motion for rehearing, page 212.

February 9, 1905, the Congress of the United States passed the following act (33 Stat., 714):

That the Secretary of the Interior is hereby authorized in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the national reclamation Act and which may involve the changing of the levels of Lower or Little Klamath Lake, Tule or Rhett Lake, and Goose Lake, or any river or other body of water connected therewith, in the States of Oregon and California, to raise or lower the level of said lakes as may be necessary and to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the national reclamation Act.

The Department is now in receipt, through the General Land Office, of the application of the State of California for a survey, with a view to the subsequent issuance of patent to the State under the swamp-land act of September 28, 1850 (9 Stat., 519), of alleged swamp and overflowed lands in T. 47 N., Rs. 2 and 3 E., and T. 48 N., Rs. 1, 2, and 3 E., M. D. M., California. The lands for which survey and patent are asked are areas lying between the precipitous banks in the lower portion of the Lower Klamath Lake area and the high ground. In other words, they are the lands covered with water during the major portion of the year, and containing the growth of tules heretofore mentioned.

This application is prosecuted upon the theory that the State of California did not cede the lands embraced in the State's present application to the United States by the act of February 3, 1905, *supra*, but that that cession related to and passed only the area of Lower Klamath Lake, which is covered by water during the entire year, viz, the inner or lower basin marked by banks from 3 to 7 feet in height. If this contention were correct, it would be the duty of this Department to take preliminary steps for determining whether or not the lands passed to the State of California under the swamp-land grant, and to this end the survey applied for would be a preliminary step. If, however, the area for which survey is asked was ceded by the State of California to the United States, it is not essential at the present time to discuss the swamp-land grant of 1850, or whether the lands here involved are swamp lands within the meaning of that act, or form the bed of a permanent lake, except for the purpose of determining the intent of the parties and the effect of the act of cession.

It appears from reports and documents in the record that the California and Oregon delegations to the National Irrigation Congress held at El Paso, Texas, on November 18, 1904, adopted a resolution urging the undertaking and construction of the Klamath project as an interstate enterprise, and requested Congressional and State legislative bodies to lend their aid and assistance to the Reclamation Service in providing such legislation as might be required. The

acts of the Legislatures of the States of California and Oregon, and the act of Congress of February 9, 1905, *supra*, followed. The Klamath project was undertaken under the provisions of the reclamation act and is now under construction.

It is asserted that between \$200,000 and \$300,000 have been expended from the reclamation fund in investigations and works connected, or which was thought would in future be utilized, with the reclamation of lands in Lower Klamath Lake. At the request of the Department an experiment station was established and maintained by the Department of Agriculture for several years upon the area adjacent to the lake for the purpose of ascertaining the constituents of the soil and its adaptation to agricultural productions.

By contract with a railroad company whose line crosses the outlet of the lake, the crossing was so constructed as to exclude the backing or overflow of waters from the Klamath River into the lake basin, gates being provided at the center of the outlet.

In the case of Churchill Company v. Kingsbury (174 Pac., 329), involving lands within the area for which survey was sought by the State, the Supreme Court of California held that the lands are not such as inure to the State under its swamp grant, but are a part of the lake bed, stating on page 331:

The agreed facts in this case show that the land in controversy is a part of the bed of Little Klamath Lake, a navigable body of water. During the greater part of the year, in ordinary seasons, the land is covered by the waters of the lake. It is uncovered only at times of low water. The extent of land covered by any navigable water must necessarily vary with the tide, or the rise or fall of the stream or lake. There will always be some land that is covered or uncovered as the water is high or low. Such land is no less a part of the bed because it is extensive in area. The record does not sustain the respondent's claim that the waters covering the lands in question are flood waters. The stipulation refers only to the high and low water stages reached in ordinary seasons. The lake consists of the body of water contained within the banks as they exist at the stage of ordinary high water.

Neither of the matters adverted to in the foregoing paragraphs are controlling in the matter at issue, for if the State ceded the area to the General Government it is immaterial whether it forms a part of the bed of the lake or is swamp land of the character contemplated in the act of 1850.

The act of February 3, 1905, *supra*, "ceded to the United States all the right, title, interest, or claim of this State to any lands uncovered by the lowering of the water levels of any or all of said lakes not already disposed of by this State."

It is admitted by all parties in interest that water covers the entire area involved during the greater part of the year, and that the drainage of the lake bed or the exclusion of any considerable part of the waters which normally found their way into it would

uncover a portion of the area involved; in fact, that it would ultimately uncover all of the lands except the small area surrounded by the precipitous banks hereinbefore described and which constitute the sump or deeper portion of Lower Klamath Lake. These lands, therefore, come within the wording of the statute ceding to the United States all right, title, interest, or claim of the State "to any lands uncovered by the lowering of the water levels." The latter portion of the clause above quoted is also, to my mind, significant; that is to say, that the State ceded its title to any lands "not already disposed of by this State." Within the area here in question the State had, prior to 1905, acquired from the United States title to several pieces of land and had, in turn, patented, deeded, and disposed of these areas to private individuals and corporations. If the cession were not deemed to include the so-called tules area surrounding the center of Lower Klamath Lake, why was it deemed necessary and advisable to include the excepting clause in the act of cession? The Attorney General for the State of California, in supplemental argument, questions this statement, stating that at the time of the passage of the act of 1905 the State had, in addition to patenting and selling the lands in the tules area, pending in the office of the State surveyor general eleven applications to purchase strips of land along the margin of Goose Lake, ten of which were subsequently passed to patent; sixty-six applications to buy lands underlying Tule Lake, all of which were subsequently rejected, and eighteen applications to purchase lands underlying the waters of Lower Klamath Lake, all of which were subsequently rejected. These applications to purchase referred to by the surveyor general could not have been regarded by the legislature as a disposal, because none of them had been allowed. Therefore, no lands within the inner area of Lower Klamath Lake or any of the other lakes had, at date of the act of cession, been "already disposed of" by the State. It follows, therefore, I think, from the reservation so made by the State Legislature, that they intended to cede and did cede all of the lands within Lower Klamath Lake, whether covered by water during the entire year or during only a portion of the year, excepting from the cession, however, lands within the tule area theretofore disposed of.

It seems to me that the 41st Legislature of the State of California recognized the fact that the State had, by the act of February 3, 1905, ceded the area here in dispute, for in its joint resolution No. 12, California Statutes, 1916, page 1872, it requested the Senators and Representatives of the State in Congress to endeavor to have legislation enacted—

ceding back to the State of California the right to use all or any part of the bed of "Lower or Little Klamath lake" for the storage of water connected with the operations of the reclamation service of the United States, and also ced-

ing back to the state all the rights, title, interest or claim of the United States, in or to any of the lands surrounding or connected with said lake in Siskiyou county, ceded to it by the above mentioned act of the legislature of California, to the end that such lake, water and lands shall be returned to said state, as they were prior to the approval of said act of the legislature approved February 3, 1905, and be governed by the general laws by which they were governed prior thereto, reserving, however, to the United States, the right to lower the water level in said lake, as provided in said act approved February 3, 1905.

The State of Oregon has also, through its Legislature, memorialized Congress to the same effect.

If we are to resort to outside matters in construing the intent and effect of the act of cession, reference may be had to the fact that from February 3, 1905, to July 30, 1917, the State asserted no right, title, claim, or interest in or to the lands involved, but allowed the Reclamation Service, Department of the Interior, to proceed with the Klamath Reclamation Project, upon the theory that the entire area in question had been ceded to the United States. Large sums have been spent upon the project, which would not have been expended had it not been contemplated to reclaim these lands; experiments as to the nature and character of the soil in the area were carried on for a number of years by the Government; arrangements made to satisfy certain vested water rights in Lower Klamath Lake; contract entered into with the railroad company securing structures which control the ingress and egress of waters from the lake area, all of which things were known to the general public and presumably to the authorities of the State of California, but without any assertion on the part of the State that the lands had not passed by cession, until the filing of the application for this survey, on July 30, 1917.

I think, however, it is not necessary to resort to these and other outside matters, because of the language of the legislative enactments of the State of California herein quoted. In my opinion, these constitute a cession of the entire area involved, "not already disposed of," by the State on February 3, 1905, and the lands having been so ceded are now held subject to disposition only under the general reclamation laws, and this Department is without authority to recognize or entertain any claim on the part of the State therefor under the swamp-land act or under any other existing laws.

In my judgment, the title of the United States to these lands can be divested only by act of Congress.

The application of the State for a survey, with a view to the selection of and the patenting to the State of the lands under the swamp-land act, is accordingly hereby denied.

STATE OF CALIFORNIA (ON REHEARING).

Decided August 13, 1919.

VOGELSANG, *First Assistant Secretary*:

The State of California, by its attorney general, has filed in this office a motion for rehearing of departmental decision of June 25, 1919 (47 L. D., 207), wherein was denied the petition of the State of California for the survey of alleged swamp and overflowed lands in the basin of Little Klamath Lake in northern California.

The ground for rehearing stated is that the departmental decision is contrary to law, and in support thereof the State urges that the decision complained of failed to take into consideration representations made by the Reclamation Service to the Governor and Legislature of the State of California prior to the passage of the act of February 3, 1905 (California Statutes, 1905, page 4), the limitation of granted area "shown by the map of the United States Geological Survey," the prior listing and patenting to the States of Oregon and California under the swamp-land act of lands adjacent to and of similar character of those here involved, and the decision of the Secretary of the Interior in State of California *et al. v. United States* (24 L. D., 68), directing a survey of some of the land embraced in the present application. It is also pointed out that under the present condition of the record, there is no evidence before the Interior Department upon which to base a finding as to the physical characteristics of the land.

In construing the act of the Legislature of the State of California, the Department would not be warranted in varying the terms of a plain statute and placing thereupon a construction inconsistent with its language, because of representations made by individual agents of the Department prior to the law's enactment, if such representations were made.

It may be stated, however, that the Reclamation Service does not admit having made any representations inconsistent with the conclusion reached by the Department in the decision complained of.

The reference to the map of the Geological Survey in the act in question was merely one of geographical location or designation of the several lakes named in the act, and is not construed as a definition of the boundaries of the lands ceded.

The remaining contentions deal with the alleged character of the land as swamp and overflowed, a question which was several times stated in the departmental decision to be immaterial, because whether the lands were swamp and overflowed or covered by a body of water, and therefore a part of the lake, if they were ceded by the State of California to the United States by the act cited, they are not now

subject to survey and disposition under the swamp-land act, and their character, and the decision of the Secretary of the Interior, rendered in 1897, many years prior to the passage of the act of cession, would have no bearing whatever upon the question at issue. Nor would the fact that the United States had theretofore patented some of these lands under the swamp-land act have any bearing, if the undisposed of lands were subsequently ceded by the State to the United States.

While the departmental decision discusses the entire subject, a paragraph upon page 11 of the decision states the grounds concisely as follows:

I think, however, it is not necessary to resort to these and other outside matters, because of the language of the legislative enactments of the State of California herein quoted. In my opinion, these constitute a cession of the entire area involved "not already disposed of" by the State on February 3, 1905, and the lands having been so ceded are now held subject to disposition only under the general reclamation laws, and this Department is without authority to recognize or entertain any claim on the part of the State therefor under the swamp-land act or under any other existing laws.

The motion for rehearing states no point not given careful consideration in the original decision, and a reexamination of the record discloses no reason for departure from the conclusion heretofore reached. The motion is denied.

**REGULATIONS FOR THE SALE OF LOTS IN BROWNING TOWNSITE,
WITHIN BLACKFEET INDIAN RESERVATION, TETON COUNTY,
MONTANA.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 30, 1919.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

Under the provisions of the act of March 1, 1907 (34 Stat., 1015, 1039), you are directed to cause the unreserved lots and the lots which are not entered by those having a preference right by virtue of residence and substantial improvements prior to the date of sale, in the Townsite of Browning, within the Blackfeet Indian Reservation, Teton County, Montana, to be offered for sale at public outcry under the supervision of the Superintendent of the Opening and Sale of Indian Lands, at not less than their appraised value, on August 4, 1919, and continuing thereafter from day to day, Sundays and holidays excepted, at the town of Browning, in the manner and under the terms hereinafter prescribed.

Manner.—Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the lots are offered for sale hereunder, and any person may purchase any number of lots for which he is the highest bidder. Bidders will not be required to show any qualifications as to age, citizenship or otherwise. If any successful bidder fails to make the payment required on the date of the sale, the lot awarded to him shall be reoffered for sale on the following day.

Terms—Payments will be required as follows: No lot will be disposed of for less than \$10, and any lot sold for \$10 must be paid for on the day it is sold; the minimum of \$10 and at least 25 per centum of the bid price of each lot sold for more than \$10 must be paid on the date of the sale, and the remainder, if the price bid is \$50 or less, within one year from the date of the sale; if the price bid be over \$50 and less than \$100, 75 per centum of the cost may be divided into two equal payments due, respectively, one and two years from the date of the sale; if the price bid be \$100 or more, the 75 per centum remaining unpaid may be divided into three equal payments, due, respectively, one, two and three years from the date of sale. No entry will be allowed until payment has been made in full for the lot, but in case of partial payment the register will issue a nontransferable memorandum duplicate certificate showing the amount of the bid and the terms of the sale, and reciting the right of the purchaser to make entry upon completing the payments; the receiver in such case will issue a memorandum receipt for the money paid. Nothing herein will prevent the transfer of the interests secured by the purchase and the partial payment of the lot, by deed, but the assignee will acquire no greater right than that of the original purchaser, and the final entry and patent will issue to the original purchaser when all payments are made.

Forfeiture—If any person who has made partial payment on the lot purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot will be forfeited and the lot, after forfeiture is declared, will be subject to disposition. Lots remaining unsold at the close of sale or thereafter declared forfeited for nonpayment of any part of the purchase price under the terms of the sale will be subject to private entry for cash at their appraised value.

All persons are warned against forming any combination or agreement which will prevent any lot from selling advantageously or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 59 of the Criminal Code of the United States, which reads as follows:

“Whoever, before or at the time of the public sale of any of the lands of the United States shall bargain, contract or agree or attempt to bargain, contract,

or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by intimidation, combination, or unfair management, shall hinder or prevent or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both."

The Superintendent of the Opening and Sale of Indian Lands will be, and he is hereby, authorized to appraise any unappraised lot or to cause any lot to be reappraised which in his judgment is not appraised at the proper amount, and he may reject any and all bids for any lot and at any time suspend, adjourn, or postpone the sale of any lot or lots to such time and place as he may deem proper.

S. G. HOPKINS,
Assistant Secretary.

**REGULATIONS FOR THE SALE OF LOTS IN THE TOWNSITES OF
DESMET, WORLEY, AND PLUMMER, IN THE FORMER COEUR
D'ALENE INDIAN RESERVATION.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 1, 1919.

THE HONORABLE,

THE SECRETARY OF THE INTERIOR:

There appears to be a demand for the public sale of the forfeited unreserved, and unsold lots and tracts in the townsites of Desmet, Worley, and Plummer, in the former Coeur d'Alene Indian Reservation, Idaho.

I, therefore, recommend that under the provisions of the act of June 21, 1906 (34 Stat., 337), the forfeited unreserved and unsold lots in the townsites of Desmet and Worley; and under said act, and the act of August 4, 1916 (39 Stat., 435), the forfeited unreserved unsold lots and acre tracts in Plummer townsite, be offered for sale at public outcry, under the supervision of the Superintendent of Opening and Sale of Indian Reservations, at not less than their appraised value on the dates, at the places, in the manner, and under the terms hereinafter prescribed.

Time and Place of Sale—Desmet at Desmet July 24; Worley at Worley July 25; and Plummer at Plummer July 26, 1919, beginning on the dates mentioned and continuing thereafter from day to day, Sundays and holidays excepted, as long as may be necessary.

Manner—Bids may be made either in person or by agent, but not by mail nor at any time or place other than the time and place when the lots and tracts are offered for sale hereunder, and any person

may purchase any number of lots and tracts for which he is the highest bidder. Bidders will not be required to show any qualifications as to age, citizenship, or otherwise. If any successful bidder fails to make the payment required on the date of the sale, the lot or tract awarded to him shall be reoffered for sale on the following day.

Terms—Payments will be required as follows: No lot or tract will be disposed of for less than \$10, and any lot or tract sold for \$10 must be paid for on the day it is sold; the minimum of \$10 and at least 25 per centum of the bid price of each lot or tract sold for more than \$10 must be paid on the date of the sale, and the remainder, if the price bid is \$50 or less, within one year from the date of the sale; if the price bid be over \$50 and less than \$100, 75 per centum of the cost may be divided into two equal payments due, respectively, one and two years from the date of the sale; if the price bid be \$100 or more, the 75 per centum remaining unpaid may be divided into three equal payments, due, respectively, one, two and three years from the date of sale. No entry will be allowed until payment has been made in full for the lot, but in case of partial payment the register will issue a nontransferable memorandum duplicate certificate showing the amount of the bid and the terms of the sale, and reciting the right of the purchaser to make entry upon completing the payments; the receiver in such case will issue a memorandum receipt for the money paid. Nothing herein will prevent the transfer of the interests secured by the purchase and the partial payment of the lot or tract, by deed, but the assignee will acquire no greater right than that of the original purchaser, and the final entry and patent will issue to the original purchaser when all payments are made.

Forfeiture—If any person who has made partial payment on the lot or tract purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot or tract will be forfeited and the lot or tract, after forfeiture is declared, will be subject to disposition. Lots or tracts remaining unsold at the close of sale or thereafter declared forfeited for nonpayment of any part of the purchase price under the terms of the sale will be subject to private entry for cash at their appraised value.

All persons are warned against forming any combination or agreement which will prevent any lot or tract from selling advantageously or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under section 59 of the Criminal Code of the United States, which reads as follows:

“Whoever, before or at the time of the public sale of any of the lands of the United States, shall bargain, contract or agree or attempt to bargain, contract,

or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by intimidation, combination, or unfair management, shall hinder or prevent or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both."

The Superintendent of the Opening and Sale of Indian Lands will be, and he is hereby, authorized to appraise any unappraised lot or tract, or to cause any lot or tract to be reappraised which in his judgment is not appraised at the proper amount, and he may reject any and all bids for any lot or tract and at any time suspend, adjourn, or postpone the sale of any lot or lots, tract or tracts, to such time and place as he may deem proper.

CLAY TALLMAN,
Commissioner.

Approved:

S. G. HOPKINS,
Assistant Secretary.

LEAVES OF ABSENCE ON ACCOUNT OF DROUGHT CONDITIONS.

Act of July 24, 1919.

INSTRUCTIONS.

[Circular No. 652.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 29, 1919.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

A clause in the Agricultural Appropriation Act of July 24, 1919 (Public No. 22), provides as follows:

"That any homestead settler or entryman who, during the calendar year 1919, finds it necessary to leave his homestead to seek employment in order to obtain food and other necessaries of life for himself, family, and work stock, because of great and serious drought conditions, causing total or partial failures of crops, may, upon filing with the register and receiver proof of such conditions in the form of a corroborated affidavit, be excused from residence upon his homestead during all or part of the calendar year 1919, or the current year of such homestead which may fall principally in the year 1919, and in the making of final proof upon such an entry, absence granted under this act shall be counted and construed as constructive residence by said homesteader."

2. No blanks will be furnished for these applications but they should cover the following points:

- (a) Name and address of entryman.
- (b) Serial number of entry.

- (c) Description of the land embraced in the entry.
- (d) The date the entry was *allowed* by the register.
- (e) Character and extent of drought conditions affecting the entry.
- (f) Effect of drought on crops of entryman.
- (g) Necessity of entryman seeking employment elsewhere because of drought conditions.
- (h) Period of leave applied for.

Points (e), (f), and (g) should state the facts fully and in detail. The "current year" of an entry is counted from the date of its allowance; hence the period applied for (h), can not extend beyond December 31, 1919, *unless* the entry was *allowed* on a date earlier than July *first* of the year in which the entry was allowed, in which case leave may, *on proper showing*, be granted for the balance of the current year of the entry, which in no case can extend beyond June 30, 1920.

3. A person who is granted a leave under this act will obtain credit as for residence, during the time of his absence, as though actually living upon the entry. If this absence is for a period during which a certain amount of cultivation would have been required under the provisions of the homestead law, he will be given credit as for cultivation also during the time of absence.

4. The act applies to entrymen, only if they have established residence upon their claims. It applies also to settlers who have not made entries. If the latter file applications for leaves of absence you will assign them current serial numbers. If the settler has theretofore filed notice of absence under the act of July 3, 1916 (39 Stat., 341), the application under this act will be given the serial number already assigned such notice of absence.

5. You will allow a leave of absence if a proper showing be made and will forward the papers with your regular returns. If you reject an application you will allow the usual time for appeal and if this be filed you will forward all papers by special letter.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

THORNE ET AL. v. KIRKPATRICK ET AL.

Decided May 14, 1919.

COAL ENTRY—PREFERENCE RIGHT.

A coal claimant's preference right of entry under section 2348 *et seq.*, Revised Statutes, is essentially of the same legal character and status as a settler's right.

PATENT ANNULLED—NOTATION OF RESTORATION—COAL DEPOSITS SUBJECT TO APPROPRIATION.

Coal deposits in land segregated from the public domain by entry and patent which is later annulled, is not subject to a preference-right claim or to the lawful possession of a coal claimant until its restoration is duly noted upon the records of the local land office.

DEPARTMENTAL DECISION CITED AND FOLLOWED.

Case of California and Oregon Land Co. *v.* Hulen and Hunnicutt (46 L. D., 55), cited and followed.

VOGELSANG, *First Assistant Secretary:*

Robert M. Thorne, James Arthur Whitworth, Arthur E. Williams and James Colman, who on June 27, 1916, filed their coal declaratory statement 04024 and on June 26, 1917, presented their application to purchase, covering Sec. 34, T. 22 N., R. 7 E., W. M., Seattle, Washington, land district, have appealed from the decision of the Commissioner of the General Land Office dated October 2, 1918, holding their coal claim for rejection because no preferential right was shown as against the applications to purchase filed by others.

The section above described appears to have been subject to successive coal filings for many years prior to 1901. In that year prior to September three-fourths of the section was embraced in three homestead entries and in November the residue was included in a homestead application. September 9, 1901, the above-named declarants offered for filing their coal declaratory statement for said section, accompanied by the proper fee, which was refused. They alleged possession on September 2, 1901, the opening of valuable mines of coal, and the expenditure of \$5,000 as follows:

Prospecting for, locating, stripping, and opening valuable veins of coal thereon, running tunnels to and upon said veins of coal and preparing them to produce coal for shipping purposes in paying quantities and quality.

These coal claimants applied for a hearing, which was ordered and upon their motion was several times continued. In 1902 they filed a petition asking that the Government make a special investigation, sink shafts, drive tunnels, and do all things necessary to determine the coal character of the land, it being alleged that these coal claimants and their workmen had been ordered from the land by certain of the homestead claimants and kept off with threats and firearms.

October 6, 1902, the Commissioner of the General Land Office considered the matter and stated that it was presumed that when the coal claimants offered their filing and applied for a hearing, they were prepared to prove the coal character of the land, or at least were possessed of evidence which in their opinion was sufficient to call for the cancellation of the homestead entries. Their petition was by the Commissioner denied, their protest against the homestead entries and their coal declaratory statement rejected "without prejudice to their right to begin proceedings anew when they believed themselves ready to do so." No appeal was taken.

The homesteads above referred to were commuted and thereunder the entire section passed to patent in 1903 and 1904. In 1906 the patentees conveyed to one C. J. Smith, who later deeded the land to the Washington Securities Company. By decree of February 25, 1911, the homestead patents were annulled and the Government title to the land quieted, upon the ground that the land prior to the homestead entries and prior to patent was known to be coal in character. Upon successive appeals the decree was sustained. See case of Washington Securities Co. v. United States (194 Fed., 59, and 234 U. S., 76). The decree, having become final, was recorded in the county records on April 10, 1916. May 18, 1916, the Commissioner directed the local officers to issue thirty days' notice prior to the notation of the restoration of the land on their records and at 2 p. m. on the day fixed by them, to proceed to act upon all applications in the manner prescribed by the circular of May 22, 1914 (43 L. D., 254). The Commissioner further directed that upon notation of the restoration, the lands "will be subject to such forms of appropriation as are permitted by the public land laws appropriate thereto." May 23, 1916, the local officers issued their notice, which concluded as follows:

Notice is hereby given that we will note the restoration of said lands on the records of this office at the hour of two o'clock p. m. on June 27, 1916, and that thereupon the lands will be subject to appropriation and entry.

On the day and hour fixed there were filed numerous homestead applications under the act of June 22, 1910 (36 Stat., 583), for the surface of the lands restored, certain of which applications were allowed and others rejected. The coal filings and applications herein mentioned were for the coal deposits reserved pursuant to said act of June 22, 1910, and so far as appears there exists no controversy between the surface agricultural claimants on the one hand and the claimants for the coal deposits on the other.

At 2 o'clock p. m. on June 27, 1916, there were present before the local land officers and acted upon by them coal filings and applications as follows:

03993, C. D. S., John Watson, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, W. $\frac{1}{4}$, SE. $\frac{1}{4}$; Rejected.

03995, C. D. S., Howard L. Aumack, NW. $\frac{1}{4}$; Rejected.

04021, Coal application, Lester E. Kirkpatrick and Chester Kirkpatrick, E. $\frac{1}{4}$; Rejected.

04022, Coal application, Wilbur H. Kirkpatrick and Edwin S. Eves, W. $\frac{1}{4}$; Rejected.

04024, C. D. S., Robert M. Thorne *et al.*, all section; Allowed.

04025, C. D. S., George B. Wilson, SW. $\frac{1}{4}$; Rejected.

The declaratory statements presented by Watson and Aumack were by the Commissioner finally rejected on June 5 and June 8, 1917. After June 27, 1916, other coal filings and applications were presented. On July 10, 1916, Edward Hedstrom filed his coal declaratory statement 04030 for the SE. $\frac{1}{4}$ of said section, which was rejected by the local officers. On March 27, 1917, Edward Proctor filed his coal declaratory statement 04239 for the NE. $\frac{1}{4}$ of said section. This was also rejected by the local officers.

The record shows that this section was on July 7, 1910, included within the outboundaries of a coal-land withdrawal. It was classified as coal land, price not fixed, and restored on August 6, 1914. It was on January 30, 1917, again withdrawn by the President from settlement, location, sale, or entry, and reserved for classification with respect to coal values, and is still so withdrawn.

The present declaratory statement of Thorne *et al.* was verified by each of the declarants before the register and receiver on June 27, 1916, and with regard to possession and improvements, contains essentially the same allegations as were contained in the filing tendered in 1902. The declaratory statement is supported by the allegations of each of the declarants to the effect that the association has never abandoned or released its claim to the land. On October 18, 1916, the Commissioner held this filing for rejection substantially on the ground that a preferential right could not be based upon acts done prior to the patenting and cancellation of the earlier homestead entries, but at the same time the privilege of amendment by way of additional showing was extended. A showing was filed November 28, 1916, averring that two men employed by the association were at work on the land during the entire day of June 27, 1916, stripping, uncovering, and developing coal. Declarant Wilson (04030) on December 29, 1916, filed a protest against allowing any amendment. June 26, 1917, Thorne *et al.* filed their application to purchase pursuant to their asserted preferential right. Said Wilson, Hedstrom and Proctor protested this application. Notice was issued, was posted and published and proof filed. The claimants tendered \$12,500 as payment of purchase price for the land, which tender was refused by the local officers August 30, 1917, because of existing coal-land withdrawal. Thereupon Thorne *et al.* promptly appealed. On September 15, 1917, the Commissioner instructed the local officers not to ask for payment of the purchase price and under no circum-

stances to issue final certificate. October 2, 1918, the decision now complained of was rendered. The Commissioner found that there was no affirmative showing as to the opening and improving of a mine subsequent to June 27, 1916, and even if there had been, it could avail the claimants nothing as against the Kirkpatrick applications filed on that day so long as such applications remained in good standing. The coal filing of Thorne *et al.* was accordingly held for rejection, and the present appeal followed.

On October 2, 1918, the Commissioner also considered and acted upon the Kirkpatrick applications (04021, 04022) and reversed the action of the local officers in rejecting them, and notwithstanding the coal withdrawal, directed that notice be issued and given, but that no payment of purchase price be accepted and no final certificates issued. The requisite notices were issued, posted and published. Said Wilson, Hedstrom and Proctor filed protests, upon which the local officers on December 11, 1918, ordered hearing. Kirkpatrick *et al.* appealed, and the Commissioner on January 10 and January 17, 1919, respectively, vacated the orders for hearings.

Furthermore, on October 2, 1918, the Commissioner decided that the coal claims of Wilson (04025), Hedstrom (04030), and Proctor (04039) were subordinate to the Kirkpatrick applications, and their several coal filings were held for rejection. These three cases are now before the Department on appeal and have been considered in connection with the record in the present case.

The primary question to be determined herein is whether the appellants, Thorne *et al.*, could gain or initiate any rights under the coal-land laws between September 2, 1901, the date of their alleged possession, and June 27, 1916, the date upon which the land was restored. With respect to asserted settlement rights upon entered and patented lands, the Department in the case of the California and Oregon Land Company *v.* Hulen and Hunnicutt (46 L. D., 55; 56, 57) said:

The correct rule is that when a decree canceling a land patent becomes finally effective, the patented lands are thereby restored to the public domain, but they are not thereby restored to appropriation until the local officers are instructed by the Commissioner that the lands are restored to entry and have in accordance with instructions made notation of restoration upon the records of the local office. * * *

* * * the orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

In the unreported cases of William H. Anstead (04000; D-34738), decided September 29, and on rehearing November 8, 1917, and A. L. Howard *et al.* (03975; D-34877), considered October 25, and on

rehearing November 26, 1917, involving conflicts in this same section between surface homestead applicants, certain of whom asserted settlements prior to June 27, 1916, on portions of the land; the Department invoked and applied the ruling above set forth.

A coal claimant's preference right under section 2348 *et seq.*, Revised Statutes, or the lawful possession of coal lands contemplated by section 2401, Revised Statutes, is essentially of the same legal character and status as a settler's right. Under the ruling above announced, Thorne *et al.* could and did gain no preference right to or lawful possession of the land or the coal deposits contained therein prior to 2 p. m., June 27, 1916, the ground being covered by the homestead entries duly of record and patented. The declaratory statement presented served no useful purpose and was erroneously allowed, but even when allowed, it constituted no bar to the Kirkpatrick applications to purchase, which should have been received and promptly allowed and passed to notice and proof, as was held by the Commissioner. Those applications, however, have now been intercepted by the coal withdrawal of January 30, 1917, and will be held in abeyance until the land shall be appraised and restored, all else being regular.

Upon the filing of the Kirkpatrick applications at the hour of restoration the land was withdrawn from subsequent appropriation and was not thereafter open for the acquirement of a preference right or for coal filing by any other person while said applications were pending before the Land Department. In the face of those applications and of the Executive withdrawal of January 30, 1917, the application to purchase filed June 26, 1917, by Thorne *et al.*, the proofs offered and the tender of the money thereunder were of no avail.

While a considerable period of time has elapsed since the filing of the Kirkpatrick applications, so far as is made to appear no laches or undue delay can be charged to those claimants, as they timely appealed and have consistently maintained and pressed their claims to this land.

From the foregoing it follows that the coal declaratory statement, the application to purchase, proofs, and tender of payment offered by Thorne *et al.* were properly rejected by the Commissioner and must stand rejected. The action of the Commissioner herein is found to be correct and is hereby affirmed.

THORNE ET AL. v. KIRKPATRICK ET AL.

Motion for rehearing of departmental decision of May 14, 1919 (47 L. D., 219), denied by First Assistant Secretary Vogelsang, November 19, 1919.

WALKER MINING COMPANY.

Decided July 11, 1919.

RIGHTS OF WAY—SECTION 4, ACT OF FEBRUARY 1, 1905.

An application for a right of way for a reservoir site within the limits of a forest reserve, shown to be reasonably needed for the purpose of the storage of tailings produced by the milling and reduction of copper ores, is clearly within the contemplation of that provision of section 4 of the act of February 1, 1905, authorizing the granting of such rights of way for the purposes of mining, milling, and reduction of ores, during the period of their beneficial use.

HOPKINS, *Assistant Secretary*:

This is an appeal by the Walker Mining Company from the decision of the Commissioner of the General Land Office of May 19, 1919, rejecting its Susanville application 06712, filed under the act of February 1, 1905 (33 Stat., 628), for a right of way for a reservoir site within the limits of the Plumas National Forest.

The application was filed February 24, 1919. It describes the proposed reservoir in terms of the meander line thereof, which bounds an area of 90.24 acres, situated in parts of Secs. 7 and 18, T. 24 N., R. 12 E., and Secs. 12 and 13, T. 24 N., R. 11 E., M. D. M. It declares that the reservoir is desired mainly for the purpose of the storage of tailings produced by the milling and reduction of copper ores at what is denominated the Walker mill, situated at a point approximately 3,900 feet to the northeast of the area described. Said area is shown by the plat of the company to be situated at the confluence of Dolly Gulch Creek (flowing through part of a natural creek bed, extending in a southwesterly direction from the said mill) and Little Grizzly Creek.

The action of the Commissioner is based on the stated ground that a depression in the earth's surface, suitable for use as a depository for mill tailings, is not a reservoir within the meaning of the act of February 1, 1905, *supra*, which contemplates only the use of water for certain purposes.

It is urged in the appeal that as a necessary part of the process of milling and reducing copper ores at the company's plant, the tailings will be transported through the natural channel of the Dolly Gulch Creek bed to the tailings storage reservoir, being carried in suspension in the creek waters; that the impounding of these tailings will require the construction of a dam, back of which there will always be more or less water. It is declared that the purpose of the reservoir is to bring about a proper settlement of solid matter from the water so that only clear water may pass on down the stream below the reservoir site. Attention is directed to the fact that in connection with the operation of the mill it is necessary to provide a tailings pond for the impounding of its present and

future mill tailings, as required by the State Fish and Game Commission; that in this case if the tailings in suspension were permitted to float down the creek with the water, without being intercepted by the proposed reservoir, such tailings would prove a nuisance to others desiring to use the water flowing through the creek.

By section 4 of the said act of February 1, 1905, it is provided:

That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

By these provisions the Department is clearly authorized to grant rights of way for reservoirs used in connection with the milling and reduction of ores and reasonably needed for such purposes. The use sought to be made of the proposed reservoir is, in the opinion of the Department, well within the purposes contemplated by the act and, in the absence of objections other than those found by the Commissioner, the application will be allowed.

The decision appealed from is accordingly reversed, and the case is remanded for appropriate action hereunder.

DOMINGUEZ v. CASSIDY.

Decided July 21, 1919.

STOCK-RAISING HOMESTEAD—DESIGNATION OF LAND—CONTEST.

Under the act of December 29, 1916, authority is vested in the Secretary of the Interior to designate lands which "in his opinion" are subject thereto under the terms of said act; and when his opinion has been so expressed and the authority exercised fairly, without deception or fraud, and an entry has been duly allowed as result thereof, it will not be subject to contest on the charge that such designation was improperly or erroneously allowed.

HOPKINS, *Assistant Secretary*:

March 26, 1915, Thomas Cassidy made homestead entry 019678 for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 14, and the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, T. 29 N., R. 35 E., N. M. P. M., within the Clayton, New Mexico, land district. On July 18, 1917, he filed application 025235 for stock-raising homestead entry additional thereto, under the act of December 29, 1916 (39 Stat., 862), for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 11, and the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 14 in said township, together with an application for designation of the land on the usual form provided therefor. Said land was thereafter duly designated as subject to entry under said act, and his entry was allowed June 13, 1918.

October 17, 1918, Desiderio Dominguez filed an application to contest said entry, charging:

That said entry was erroneously allowed under the act of December 29, 1916, and had been improperly designated under said act for the reason that the original entry 019678 made March 26, 1915, for S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$, Sec. 14, T. 29 N., R. 35 E., is good level land growing fine crops of beans, sorghum, maize, corn, etc., capable of supporting the average family; said land contains a spring from which water can be had the year round; that the additional herewith is level land, capable of producing valuable crops of grains, and abundant water can be had at a depth of six feet from the surface, excepting 40 acres which is not so level; that there is a permanent water hole on said land situated in "Rhode Canon," which latter is not a canyon but a creek running through said additional entry; that it was an error that said lands were designated under the stock-raising homestead law; that the contestant herein protests against the allowance of said additional entry as being contrary to the letter and spirit of the act of December 29, 1916, inasmuch as the first entry above described has irrigation possibilities and produces valuable crops of grains, and the additional herewith is likewise of this character, with a permanent water hole on same.

On March 13, 1919, the Commissioner of the General Land Office rejected said application to contest, and the applicant has appealed to the Department.

Section 2 of said act of December 29, 1916, provides:

That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this Act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family: *Provided*, That where any person qualified to make original or additional entry under the provisions of this Act shall make application to enter any unappropriated public land which has not been designated as subject to entry (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this Act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the said land shall be designated under this Act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal; but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands.

Authority is thus vested in the Secretary of the Interior to designate lands which "in his opinion" are subject to designation under the terms of said act. And where his opinion has been expressed and the authority exercised fairly and without deception or fraud, and an entry has been duly allowed as the result of such designation, it will not be subject to contest on the charge that the designation was improperly and erroneously made.

Of course in case an entryman has induced the designation by deception or fraud, his entry should be subject to contest on charges that the facts were such as to exclude the land from the operation of said act; that it was not properly subject to designation, and that the designation was erroneously induced by deception or fraud.

In this case it appears that the designation was regularly allowed as the result of the independent investigation and action of the officers of the Government acting in behalf of the Secretary of the Interior. The application to contest the entry was therefore properly denied, and the decision of the Commissioner is affirmed.

STOCK-RAISING HOMESTEADS—ACT OF DECEMBER 29, 1916.

INSTRUCTIONS.

[Circular No. 523.]¹

[Reprint of July 30, 1919, including supplemental instructions of Mar. 23, 1917 (Circular 533), instructions of Oct. 31, 1918 (Circular 624), and instructions of Feb. 8, 1919 (Circular 635). Changes have been made in pars. 4, 6, and 13.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., July 30, 1919.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES.

SIRS: The following instructions are issued under the provisions of the act of Congress of December 29, 1916 (39 Stat., 862), relating to stock-raising homesteads, as amended by the act of October 25, 1918 (40 Stat., 1016):

WHAT LANDS SUBJECT TO ACT.

1. The Secretary of the Interior is authorized, pursuant to application or otherwise, to designate unreserved public lands in any of the public-land States, but not in Alaska, as "stock-raising lands." This includes ceded Indian lands, unless entries therefor are limited to a smaller area by the acts governing their appropriation; but it does not include lands in national forests. From time to time lists of land thus designated will be sent to the registers and receivers in the districts wherein the land is situated, and they will be advised of the dates when the designations become effective.

2. The lands to be designated are those the surface of which is, in the opinion of the Secretary of the Interior, chiefly valuable for grazing and raising forage crops, which do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that 640 acres are reasonably required to support a family. The classification will be made, so far as practicable, to exclude lands that are not chiefly valuable for grazing and raising forage crops, either because too valuable for such use or too poor for such use. Lands which are capable of producing valuable crops of grain or other food cereal or fruit are not subject to designation, being, if otherwise subject to entry, disposable under the 160-acre or 320-acre homestead law, according to their character. Lands of such arid or poor character that they are worthless or fit only for occasional grazing in connection with large areas

¹ See also Circular 660 (47 L. D., 248), and Circular 665 (47 L. D., 250).

of other land are not subject to designation and entry under this act. No tract may be designated which contains a water hole, or other body of water, needed or used by the public for watering purposes, and such tracts may be reserved by the President and kept open to the public use under rules prescribed by the Secretary of the Interior. Whether the land will or will not support a family is not guaranteed in any manner by the designation of the land as subject to this act. The homesteader himself must take the burden of accepting the land designated as of a character that meets the requirements of the law.

FEES AND COMMISSIONS.

3: The fee and commissions on all entries under this act are calculated on the same basis as other entries. For a tract of less than 81 acres the fee is \$5, and for that area or more it is \$10. The commissions, both on making the entry and on submitting final proof, amount to 3 per cent on the Government price (\$1.25 or \$2.50 per acre, as the case may be) of the land, in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, and to 2 per cent in the other States. For example, on an entry for 640 acres in Washington, not within granted railroad limits, and therefore \$1.25 land, the payment on making entry would be \$34, and on submitting proof would be \$24, in addition to testimony fees and publication fees payable to a newspaper.

QUALIFICATIONS FOR ENTRYMEN.

4. (a) Any person qualified under the general laws to make homestead entry (that is, who has not exercised his right, or who is entitled to restoration of his right under general provisions of law) may make a stock-raising homestead entry for not exceeding 640 acres of unappropriated, surveyed land, in reasonably compact form, which has been designated by the Secretary as above indicated. No rights can be acquired by an application for unsurveyed land; but where a tract of unsurveyed land has been designated a settlement right on not more than 640 acres may be established and maintained if the boundaries are plainly marked on the ground.

(b) A person, otherwise qualified, who has partially exhausted his homestead right, securing title to a tract of land, is entitled to make an original entry under the stock-raising act for such an area as will not, with said tract, make up more than 640 acres; and the distance between the two tracts involved is immaterial: To illustrate, if he has a patented entry covering 120 acres he may make original stock-raising entry for a tract containing as much as 520 acres; if his patented entry covers 240 acres of land designated under the enlarged homestead act, he is still a qualified entryman under that act and is, therefore, entitled to enter under the stock-raising act a tract containing as much as 400 acres; if he has entered 160 acres of land not designated under the enlarged homestead act, he may file petition for its designation thereunder and his right to make original stock-raising entry will be contingent on designation as indicated.

(c) A person who has perfected, or has pending, an entry or entries initiated since August 30, 1890, under the desert-land, timber-

and-stone, or preemption laws for 320 acres in the aggregate is disqualified from making any kind of entry under this act. If he made entries under said laws for not more than 160 acres they do not affect his right under this act. If he has entered under the desert-land, timber-and-stone, or preemption laws more than 160 acres but approximately 40 acres less than 320 acres, he is entitled to make an original or an additional entry under this act; but the tract entered hereunder (which in no case must exceed approximately 640 acres), together with the land entered under the other laws mentioned, and his prior uncanceled homestead entry or entries, if any, must not aggregate more than 800 acres. In other words, a person who was qualified to make an original or an additional homestead entry under other laws for as much as approximately 40 acres can enter hereunder such an amount of land as will, with the area theretofore entered under the homestead laws, not exceed 640 acres, but the total of all entries under the agricultural public-land laws (i. e., timber and stone, desert land, preemption, and homestead) must not exceed 800 acres.

COMPACTNESS OF ENTRY.

5. With respect to compactness, no entry, nor any claim comprising an original entry and an additional entry under this act, shall entirely surround an unappropriated tract of public land, nor shall it have an extreme length of more than 2 miles if there be available land of the character described in the act the inclusion of which in the claim would reduce such length. An entry may not include two separate tracts, even though they corner on each other, unless each adjoins an original entry, as herein explained, except where entry is made under the proviso to section 3 of the act, and the homesteader is able to secure land adjoining his former entry for only part of the area he is entitled to take.

ADDITIONAL ENTRIES WITHIN 20 MILES.

6. Any person otherwise qualified who has a pending or perfected homestead entry made under a law other than the stock-raising homestead act for less than 640 acres of land, which shall be designated as stock-raising land, may, under the first proviso to section 3 of the act, as amended, make an additional entry for a tract of designated land within a radius of 20 miles from the tract originally entered, and making up therewith an area of not more than 640 acres.

Any person otherwise qualified who, when making an original entry under the stock-raising homestead act, is unable to secure the maximum area permitted by reason of adjoining lands or lands within a radius of 20 miles from the lands originally entered being reserved or covered by prior filings or entries, may, if the reservation be vacated, or if the intervening filings and entries be canceled as a result of relinquishment, contest, or otherwise, be permitted to enlarge his original entry, through amendment or by the filing of additional entry of designated lands within a radius of 20 miles from the tract originally entered, making up, with his first entry, an area of not more than 640 acres.

Such entries may include two incontiguous tracts if one of the tracts is contiguous to the original entry. But such applicant can not

be allowed to secure a tract incontiguous to his first entry unless he enters all available land contiguous thereto. If he applies for land which is incontiguous to the original entry, he must furnish an affidavit that there is no unappropriated, unreserved land contiguous thereto, of the character described in the act, other than that for which he applies; however, this affidavit will not be necessary if your records show that there is no other vacant contiguous land. The same limitation as to compactness of form will be enforced as with respect to original entries. It is immaterial whether a person applying for additional entry under this provision of the law resides upon or owns the land first entered. A married woman may not make an additional entry under this section unless her present situation is such that she would be qualified in that respect to make an original homestead entry.

An additional entry (under any section of the act) can be made only as additional to a pending or perfected entry, not to an unallowed application. Therefore, you will reject all such applications where the original entries have not yet been allowed at the time of filing.

If all the land involved makes up one tract, has already been designated under this act, and is subject to appropriation a claimant desiring to secure homestead entry for more than 320 acres must file an application under the stock-raising act. He is not entitled to make an entry for part of the tract under some other law and file application for additional entry under said act.

Even though a person has two pending or perfected homestead entries, he may nevertheless make an additional entry under the proviso to section 3, provided all the other lands involved lie within 20 miles of the tract first entered. Where proof has been submitted on the original entry, the person may make an additional entry for land contiguous thereto, under section 5 of the act, provided he still owns and resides upon the original tract. See paragraph 9 as to method of perfecting title to an entry under said section.

A person whose right has been restored by a second-entry act is in the position of never having made a homestead entry.

Where proof has been submitted on the original entry and there is no available vacant land contiguous thereto, claimant may have the pending additional entry changed to stand under the stock-raising act, and to include vacant land contiguous thereto. Though there be land contiguous to the original, and even though the two tracts first entered be more than 20 miles apart, he may have the additional entry changed to stand as an original under the stock-raising act and to include adjoining land.

PROOFS ON ABOVE ENTRIES.

7. The entries hereinbefore explained may be perfected by proofs submitted within five years after their dates, on a showing of compliance with the provisions of the three-year law (act of June 6, 1912—37 Stat., 123), except that expenditures for improvements must be shown in lieu of the cultivation required by that act. The entryman must show that he has actually used the land for raising stock and forage crops for not less than three years, and that he has made permanent improvements upon the land, having an aggregate

value of not less than \$1.25 per acre, and tending to increase the value of the land for stock-raising purposes; and at least one-half of the improvements must be placed upon the tract within three years after the date of the entry.

As to residence, this must be continued for three years, subject to the privilege of a five months' absence in each year, divisible into two periods, if desired, but credit on the residence period on account of military service during time of war will be allowed as on other homestead entries; where an entry has been made, additional to a pending entry, or to a perfected entry for a tract still owned by the claimant, the residence may be had on either of the tracts involved for three years after the additional is allowed, or becomes allowable. In other cases such residence must be on the land additionally entered. It must appear at the time of proof that there is then a habitable house on the land; but it will not be counted in estimating the value of the permanent improvements required to be placed on the tract, as above stated. If the entry comprises two noncontiguous tracts, the residence may be on either.

ADDITIONAL ENTRIES FOR CONTIGUOUS TRACTS BEFORE PROOF.

8. Under section 4 of the act any person having a homestead entry for land which shall have been designated under this act, upon which he has not submitted final proof, may make entry of contiguous designated lands, which, with the area of his original entry, shall not exceed 640 acres. On submission of proof on such additional entry, he must show residence on either tract to the extent ordinarily required, but will be entitled to credit for residence on the original tract before or after the date of the additional entry; he must also show improvements on the additional tract to the value of \$1.25 for each acre thereof. Proof on the additional entry may be submitted within five years after its allowance, when the requisite residence can be shown, but not before submission of proof on the original entry. Proof on the original entry must be submitted under the provisions of the law pursuant to which it was made and within its life, as limited thereby; but, subject to that condition, one proof may be submitted on the two entries jointly. If the original be commuted, three years' residence in all must, nevertheless, be shown in proof on the additional.

The marriage of a woman does not disqualify her from making an additional entry under this section; and husband and wife may make entries thereunder, additional to their respective pending entries, if an election as to residence on one of the original tracts, as provided by the act of April 6, 1914 (38 Stat., 312), has been accepted.

ADDITIONAL ENTRIES FOR CONTIGUOUS TRACTS AFTER PROOF.

9. Under section 5 of the act any person who has submitted final proof on an entry under the homestead laws for land designated under this act, who owns and resides upon said land, may enter land so designated contiguous thereto, which, with the area of his original entry, shall not exceed 640 acres; and in order to acquire title thereto it is necessary only that he show the expenditure on the additional entry of \$1.25 per acre for improvements of the kind above described.

At least half of such expenditures must be made within three years after allowance of the entry. Proof may be submitted at any time within five years after the entry is allowed.

Where satisfactory proof has been submitted on the original entry, the additional entry for contiguous land may be perfected under this section of the act regardless of the question whether it was three-year, five-year, or commutation proof.

ENTRIES IN LIEU OF RELINQUISHED LANDS.

10. (a) Under section 6 of the act, a person, otherwise qualified to make homestead entry, who has a perfected or an unperfected homestead entry for less than 640 acres of land which shall have been designated under this act, on which he resides and which he has not sold, and who is unable to make a full additional entry under the provisions of section 3 thereof, for the reason that there is not sufficient available land within the 20-mile limit to afford him the area to which he is otherwise entitled (as above indicated), may make an entry for the full area of 640 acres within the same land district, provided he shall relinquish the original entry, if not perfected, or reconvey the land to the United States, if final certificate has issued therefor.

(b) If proof has not been submitted on the original entry he must, with his relinquishment, furnish his affidavit, corroborated, so far as possible, by two witnesses, showing that at the time of filing application under this act he resided upon the land covered by said entry, that he has not sold, transferred, or conveyed the land or any interest therein, or made a contract or agreement so to do, and that there is not, within 20 miles of the land embraced in his original entry, a tract of land of the character described in this act, of area sufficient to make up, with such original entry, the area he is entitled to enter.

(c) If final certificate has issued on the first entry, it must be shown by a certificate from the proper recording officer of the county in which the land is situated, or by satisfactory abstract of title, that the applicant has not transferred any interest in the land sought to be reconveyed and that there are no liens, unpaid taxes, or other incumbrances charged against it. Moreover, reconveyance of the land must be made by deed executed by the entryman, and also by his wife if he be married, in accordance with the laws governing the execution of deeds for the conveyance of real estate in the State in which the land is situated. The deed of reconveyance should accompany the application, but should not be recorded until directed by this office. On acceptance of an application of this character the deed will be returned for recording and refiled in your office before the entry is allowed.

(d) Where proof has been submitted, but final certificate has not issued, the relinquishment must be accompanied by an abstract of title or certificate of recording officer, as above specified.

(e) Where the former entry for land already designated under this act has not been perfected and is relinquished, you will allow the application for entry under this act, if no other objection appears. Where final certificate has issued on the former entry you

will promptly forward the application and accompanying papers for consideration by this office.

(f) The land relinquished or reconveyed will not become subject to other appropriation until the new entry is allowed, and if an order for allowance thereof be made by this office its receipt in the local office will operate to restore to the public domain the tract originally entered.

(g) An application under this provision of the law may be accompanied by petition for designation under the act of the land sought and of the tract covered by the former entry, as hereinafter explained.

(h) Proof on an entry allowed under this section is governed by the same rules as though it were an original entry under this act.

(i) The fact that an applicant owns more than 160 acres of land, acquired otherwise than through homestead entry, does not exclude him from the privileges granted by this section.

PETITIONS FOR DESIGNATION.

11. (a) The proviso to section 2 of the act confers a preference right of entry upon a person pursuant to whose petition land has been designated. Any person qualified to make an original or an additional entry under this act may file an application to enter a compact body of unappropriated, unreserved, surveyed public land of the character described, which has not already been designated under this act, accompanied by petition, in duplicate, for the designation of such land and of the tract included in any former entry.

(b) He must, when he files said application, pay the regular fee and commissions; and if the tract is ceded Indian land he must at that time pay that part of its price ordinarily required when entry is made. The entire amount paid will be carried in the "Unearned money" account, and will be repaid by the receiver if the application be not allowed.

(c) All petitions for the designation of lands presented on behalf of individual applicants should be filed in the local land office. Individual petitions for designation will not be considered unless they are filed in connection with applications to make entry under the act.

12. (a) The petition must be in the form of an affidavit, executed in duplicate, and corroborated by at least two witnesses who are familiar with the character of the land. For convenience in filing it is desired that petitions be prepared on sheets not over 8½ by 11 inches in size with margins of an inch on the top and the left-hand side. The petition must contain the name and the post-office address of the applicant, a description by legal subdivisions of all the lands involved properly listed by entries with the serial number of each former entry. If the application contemplates the making of an original entry under this act, or if the application relates to a contiguous original and additional entry, only one petition need be filed. If, however, the lands which it is desired to have designated are comprised in two noncontiguous tracts, an additional copy of petition should be filed for each such tract.

(b) The petition should set forth in detail the character of each legal subdivision included in an application to make entry under this act and in any former homestead entries made under other acts. The information called for may be shown by means of a map or diagram

whenever the facts can be advantageously presented thereby. Photographs of the land, where available, are useful in indicating its character and topography and when presented should be located with reference to the land lines and to the direction in which they were taken. The location of corners of the public survey by which the applicant has determined the situation or legal description of the land should be indicated on the map or stated in the petition. It is believed that the requirements of these regulations as to furnishing a description of the land can properly be met only by a careful examination of the lands by the applicant, preferably assisted by a competent surveyor. Petitions which are deficient will be returned to the applicant for correction or he may be required to furnish supplemental affidavits concerning matters not discussed or which have not been described in sufficient detail. Care should be exercised in the preparation of petitions, as inaccuracies and omissions will tend to retard action, while false or misleading statements may lead to the rejection of the application.

(c) In the preparation of petitions attention should be given to the following considerations:

Surface water supply.—The relation of the lands to surface streams or springs rising on or flowing across or along them should be indicated, and the location of such water supplies should be accurately described with relation to the lines of the public surveys. If there is no surface water on the land, the location of such near-by sources of water supply upon which the applicant relies or which he proposes to use for stock-watering purposes should be described.

Underground water supply.—The location of any well or wells which may be present on the land should be described and information furnished in each instance concerning the depth of well, present depth of water, and yield. If there are no wells on the land, information should be furnished concerning any wells in the vicinity which may afford an indication of the probable depth of water on the lands applied for.

Irrigability.—If any part or parts of the land is irrigated, the location and source of water supply of such areas should be stated and the area irrigated in each legal subdivision indicated. If any portion of the land is under constructed or proposed irrigation ditches or canals, is crossed thereby, or is adjacent thereto, the relation of the lands to such water conduits and the possibility of their irrigation therefrom should be explained. If the lands are situated near or are crossed by streams which might afford a water supply for their irrigation, full particulars should be given as to the quantity of water available for this purpose and as to whether or not it can be applied to the lands. If artesian wells exist on or near the land or underground water is found under any part of the land at depths of less than 50 feet, the practicability of irrigating the land from underground sources should be fully discussed.

If the applicant has filed a notice of water appropriation or has acquired a right to use water for domestic, stock-watering, or irrigation purposes on the lands under the State law, a copy of such notice of water appropriation or water right should be furnished. Any attempts to irrigate and reclaim the land under the provisions of the desert-land act should be described and the reasons for lack of success stated.

Timber and vegetation.—The character of the surface of the land in both the original and the additional entry as it is at the time of application under this act and of the tree and plant growth thereon should be described and the approximate area in each legal subdivision which is of such character that it is included in each of the following general classes should be shown: Lands containing merchantable timber; lands containing timber which is not merchantable; lands covered with mesquite or similar growth; lands covered with sagebrush; open grass lands; lands covered with greasewood and allied plants; rocky wastes; alkali flats; sand dunes; lands in agricultural crops or under cultivation. If none of the above terms are applicable to any portion of the land, details of its character should be furnished. Where timber occurs an estimate of the amount of such timber on each legal subdivision should be made.

Agricultural value.—The acreage in each legal subdivision which is capable of producing agricultural or forage crops by cultivation should be stated by the applicant, as well as the number of acres which have actually been cultivated. If the applicant or his predecessors in interest have made agricultural use of the land in his original entry, the area planted, the kind of crops raised, the yield, and the value should be stated for the last five seasons, or such part thereof as the land may have been under cultivation.

Grazing value.—The applicant should indicate the grazing character of all the lands involved by describing them as winter, summer, spring, fall, or permanent range. If the land or any part thereof has been used for grazing, the nature and extent of such use should be stated. The applicant should also furnish an estimate of the number of head of cattle or other live stock which, in his opinion, can be maintained on the land throughout the year.

(d) The applications for entry, if otherwise allowable and accompanied by petitions for designation which are in all respects regular, will be suspended by you and retained in your office, but you will promptly forward both copies of the petition by special letter to this office, which will transmit one to the United States Geological Survey for consideration. Where defects appear in the petitions—especially (as to additional entries) failure to refer in the petition to the tract originally entered—you will call for supplemental evidence, as in other cases; if this is not furnished, you will forward all the papers to this office for consideration, making proper recommendations in connection therewith. If there are defects in an application, aside from the accompanying petition, you will take action in the same manner as with other defective applications for entry.

(e) No other entry of the land will be allowed before the application has been finally disposed of. However, later applications therefor should be received and suspended. If withdrawal of an application under this act be filed you will promptly notify this office thereof, inviting special attention to the pendency of the petition for designation, and will close the case on your records. Prior to final action on the application the applicant's homestead right will be in abeyance, and he will not be entitled to exercise same elsewhere, nor will he be permitted to have two applications under this act pending at the same time.

When designation of all the land involved has become effective you will allow the entry, unless the records show that there is pos-

sibility of a claim of preferential right for some part of the land under section 8 of the act, in which case the application will remain suspended until the expiration of the preferential right.

(f) If the Geological Survey advises this office that it is unable to classify the land, or some part thereof, as subject to designation, this office will, through the proper local land office, furnish the applicant with a copy of the Survey's report and will allow him 30 days within which to file response. At the applicant's option, he may either appeal from the finding to the Secretary of the Interior, alleging errors of law, or he may present further showing as to the facts, accompanied by such evidence as is desired, tending to disprove the adverse conclusion reached by the Survey.

Such appeal or showing, if filed, will be forwarded by you to this office, whence it will be transmitted to the Geological Survey for further consideration. That bureau will consider the evidence submitted, and if it warrants such action will recommend designation of the land, or if its conclusion be still adverse will transmit the record to the Secretary with report. The case will thereafter be considered as having the status of an appeal pending before the Secretary's office.

In cases where the applicant fails to furnish a showing or to appeal from the order of this office requiring him to furnish it within the 30 days prescribed or where the Secretary refuses designation final action will be taken and the case closed by this office on the basis of the designations which may have been theretofore made.

(g) It is expressly provided by the act that the filing of an application for entry of land thereunder, though accompanied by petition for its designation, confers upon the applicant no right to occupy the land sought. No settlement or improvements should therefore be made until after designation of the land.

PREFERENTIAL RIGHTS FOR ADJOINING LAND.

13. (a) Under section 8 of the act any person who, as the holder of a homestead entry or as patentee thereunder, is entitled to make additional entry under this act has a preferential right to enter lands lying contiguous to his original tract and designated as subject to the act, said right extending for a period of 90 days after the designation takes effect; it covers such land as the person is qualified to enter under section 4 or section 5 of the act. This right is superior to the right of entry accorded a person who had filed application for entry of the land under this act accompanied by petition for its designation. However, before a designation has been made the land is subject to settlement and entry under any other laws applicable thereto unless there is pending such application and petition.

(b) After the designation of land takes effect no application therefor will be allowed under this act or under any other law until 90 days shall have elapsed if the records show that it may conflict with a preferential right to be claimed on account of an entry for adjoining land. Otherwise an application under this act may be allowed immediately on the taking effect of the designation.

Where there is conflict between an application for a tract by a holder of adjoining land, claiming a preferential right, and an appli-

cation by one asserting no such right, you will allow the former and reject the latter subject to the usual right of appeal.

Where there is conflict between the applications of two or more persons claiming such preferential right of entry, you will, after the expiration of the 90-day period, notify the various applicants that they will be allowed 30 days from receipt of notice within which to agree among themselves upon the division of the tracts in conflict, by subdivisions, and that such division will be made by this office in the absence of an agreement. Unless an amicable adjustment is made, you will, pursuant to this notice, forward all the papers to this office for consideration, making on your schedules the necessary notations as to the method of transmittal. This office will thereupon make an equitable division of the different subdivisions among the applicants, so as to equalize as nearly as possible the areas which the different applicants will have acquired by adding the tracts thus allotted to those originally held or owned by them. An appeal will be allowed from the action of this office.

(c) Where there is but one subdivision adjoining the lands of two or more entrymen or patentees entitled to exercise preferential right of entry and seeking to assert same, said subdivision will be awarded to that person who first files application therefor with an assertion of such right.

(d) Where, on the date the designation of the land in question takes effect, the land originally entered by the possible claimant of a preferential right has not been designated under the act, the 90-day period accorded him will nevertheless begin to run from that date; but the entryman, in order to save his rights, must, within such 90-day period, file an application for the land claimed, accompanied by petition for designation of the original tract.

(e) A settlement right under any other applicable law, if initiated prior to designation or application and petition, will, if asserted in time, defeat a claim of preference right hereunder.

(f) The preference right of entry accorded to contestants by the act of May 14, 1880 (21 Stat., 140), is in no way affected by any of the provisions of this act.

(g) The fact that a person presents, with his application for entry under this act, the relinquishment of a former entry covering the tract sought confers upon him no preference right for entry of the land, and such application is subject to the preferential right given by section 8 of the stock-raising homestead law.

(h) An applicant for additional entry can not assert a preferential right as against a claimant whose application was filed before the date of the original entry of the former.

DISPOSAL OF COAL AND OTHER MINERAL DEPOSITS.

14. (a) Section 9 of the act provides that all entries made and patents issued under its provisions shall contain a reservation to the United States of all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same; also that the coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.

Said section 9 also provides that any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented under the act, for the purpose of prospecting for the coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on the land by reason of such prospecting.

It is further provided in said section 9 that any person *who has acquired from the United States the coal or other mineral deposits in any such land* or the right to mine and remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; or, second, upon payment of the damages to crops or other tangible improvements to the owner thereof under agreement; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon. This bond, the form whereof will be found printed in the appendix hereto, must be executed by the person who has acquired from the United States the coal or other mineral deposits reserved, as directed in said section 9, as principal, with two competent individual sureties, or a bonding company which has complied with the requirements of the act of August 13, 1894 (28 Stat., 279), as amended by the act of March 23, 1910 (36 Stat., 241), and must be in the sum of not less than \$1,000. Qualified corporate sureties are preferred and may be accepted as sole surety. Except in the case of a bond given by a qualified corporate surety there must be filed therewith affidavits of justification by the sureties and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States commissioner, or a United States postmaster as to the identity, signatures, and financial competency of the sureties. Said bond, with accompanying papers, must be filed with the register and receiver of the local land office of the district wherein the land is situate, and there must also be filed with such bond evidence of service of a copy of the bond upon the homestead entryman or owner of the land.

If at the expiration of 30 days after receipt of the aforesaid copy of the bond by the entryman or owner of the land no objections are made by such entryman or owner of the land and filed with the register and receiver against the approval of the bond by them, they may, if all else be regular, approve said bond. If, however, after receipt by the homestead entryman or owner of the lands of copy of the bond, such homestead entryman or owner of the land timely objects to the approval of the bond by said local officers, they will immediately give consideration to said bond, accompanying papers, and objections filed as aforesaid to the approval of the

bond, and if, in consequence of such consideration by them, they shall find and conclude that the proffered bond ought not to be by them approved, they will render decision accordingly and give due notice thereof to the person proffering the bond, at the same time advising such person of his right of appeal to the Commissioner of the General Land Office from their action in disapproving the bond so filed and proffered. If, however, said local officers, after full and complete examination and consideration of all the papers filed, are of the opinion that the proffered bond is a good and sufficient one and that the objections interposed as provided herein against the approval thereof by them do not set forth sufficient reasons to justify them in refusing to approve said proffered bond, they will, in writing, duly notify the homestead entryman or owner of the land of their decision in this regard and allow such homestead entryman or owner of the land 30 days in which to appeal to the Commissioner of the General Land Office. If appeal from the adverse decision of the register and receiver be not timely filed by the person proffering the bond, the local officers will indorse upon the bond "disapproved" and other appropriate notations, and close the case. If, on the other hand, the homestead entryman or owner of the lands fails to timely appeal from the decision of the register and receiver adverse to the contentions of said homestead entryman or owner of the lands, said register and receiver may, if all else be regular, approve the bond.

Mineral applications and coal declaratory statements for and applications to purchase the coal or other mineral deposits in lands entered or patented under the act, reserved as provided in the act, will, if all else be regular, be received and filed at any time after the homestead entry has been received and allowed of record: *Provided*, That the lands or the coal or other mineral deposits therein are not at the time withdrawn or reserved from disposition.

(b) Every application to make homestead entry under this act must contain a statement to the effect that the entry is made subject to a reservation to the United States of all the coal or other minerals in the land, together with the right to prospect for, mine, and remove the same. (See Forms 4-016 and 4-016a, Appendix.) The face of final certificates issued on every homestead entry made under the provisions of this act must bear the following:

Patent to contain reservation of coal and other minerals, and conditions and limitations as provided by act of December 29, 1916 (39 Stat., 862).

There will be incorporated in patents issued on homestead entries under this act the following:

Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove all the coal and other minerals from the same upon compliance with the conditions, and subject to the provisions and limitations, of the act of December 29, 1916 (39 Stat., 862).

Mineral applications and coal-declaratory statements, applications to purchase, certificates and patents issued subject to the provisions of this act for the reserved deposits will describe the coal or other mineral according to legal subdivisions or by official mineral survey, as the case may be, and payment will be made at the price fixed for the whole acreage.

Mineral applications and coal-declaratory statements and applications under the coal and mining laws for the reserved deposits disposable under the act must bear on the face of the same, before being signed by the declarant or applicant and presented to you, the following notation:

Patent shall contain appropriate notations declaring same subject to the provisions of the act of December 29, 1916 (39 Stat., 862), with reference to disposition, occupancy, and use of the land as permitted to an entryman under said act.

Like notation will be made by the register and receiver on final certificates issued by them for the reserved mineral deposits disposable under and subject to the provisions of this act.

DRIVEWAYS FOR STOCK.

15. The reservation of driveways for stock, provided for in section 10 of the act, will be considered on application of parties interested, on recommendation of other departments of the Government, or on the reports of agents of this department. Lands withdrawn for driveways for stock or in connection with water holes can not thereafter be entered, and all applications to make entry under this act for land so withdrawn, whether filed before or after the withdrawal, will be rejected.

MISCELLANEOUS PROVISIONS.

16. No credit will be given for any expenditure for improvements made prior to the designation of the land under this act.

17. Proofs on entries under this act must be submitted within five years after the dates of their allowance, and no such entry is subject to commutation.

18. Every person applying for entry under this act who has heretofore made entry or entries under the homestead laws must furnish a description thereof or such data as will enable this office to identify it or them.

19. A person who is qualified to make an entry under section 4 or section 5 of the act for a tract contiguous to his original entry may waive said right and make entry under the provisos to section 3 if he shows that there is not sufficient available land adjoining his first entry to afford him the area which he is entitled to enter.

20. A person who has made entry under section 6 of one of the enlarged homestead acts may make an additional entry under the provisos to section 3 or under section 4 or 5 of this act, provided all be designated as stock-raising land; but he must reside on the land entered under this act or on that originally entered, if contiguous thereto, to the extent required by the three-year homestead act.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

FORM OF APPLICATION FOR ORIGINAL ENTRY.

4-016.

[Form approved by the Secretary of the Interior Jan. 18, 1917.]

DEPARTMENT OF THE INTERIOR.

STOCK-RAISING HOMESTEAD ENTRY—ORIGINAL.

[Act of Dec. 29, 1916.]

United States Land Office-----

Serial No. -----

Receipt No. -----

APPLICATION AND AFFIDAVIT.

I, -----, of
(Give full Christian name.) (Male or female.)

-----, do hereby
(Give post-office address.)

apply to enter, under the act of December 29, 1916 (39 Stat., 862), sub-
ject to the reservation to the United States of all coal and other minerals
in the land, together with the right to prospect for, mine, and remove the same,
----- section -----
township -----, range -----,
meridian, containing ----- acres.

I do solemnly swear that I am not the proprietor of more than 160 acres of
land in any State or Territory; that I ----- citizen of
(Applicant must state whether native born, naturalized, or has filed declaration of
intention to become a citizen. If not native born, certified copy of naturalization or
declaration of intention, as case may be, must be filed with this application.)
the United States, and am -----; that this

(State whether the head of a family, married or unmarried, or over 21 years of age,
and if not over 21, applicant must set forth the facts which constitute him the head of
a family.)

application is honestly and in good faith made for the purpose of actual set-
tlement, use, and improvement by the applicant, and not for the benefit of any
other person, persons, or corporation; that I will faithfully and honestly en-
deavor to comply with all the requirements of law as to settlement and im-
provements necessary to acquire title to the land applied for; that I am not
acting as agent for any person, corporation, or syndicate in making this entry,
nor in collusion with any person, corporation, or syndicate to give them the
benefit of the land entered or any part thereof, or the timber thereon; that
I do not apply to enter the same for the purpose of speculation, but in good
faith to obtain a home for myself, and that I have not, directly or indirectly,
made, and will not make, any agreement or contract, in any way or manner,
with any person or persons, corporation, or syndicate, whatsoever, by which
the title which I may acquire from the Government of the United States will
inure in whole or in part to the benefit of any person except myself. I have
not heretofore made any entry under the timber and stone, desert land, or
preemption laws, except as follows: -----

I have not theretofore made a homestead entry except as follows: -----
I further state that the land is not occupied and improved by any Indian;
that it does not contain merchantable timber and no timber except -----;
is not susceptible of irrigation from any known source of water supply, except
the following areas:

(Here give subdivisions and areas of the land, if any, susceptible of irrigation.)
and does not contain any water hole or other body of water needed or used by
the public for watering purposes; that the land is chiefly valuable for grazing
and raising forage crops.

(Sign here with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided
by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by _____); that I verily believe

(Give full name and post-office address.)

affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me at my office in _____

(Town.)

(County and State.)

within the _____ land district, this _____ day of _____, 191 .

(Official designation of officer.)

and _____, of _____, and _____, of _____, do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____); and that said affidavit was duly subscribed (Give full name and post-office address.) and sworn to before me at _____ this _____ day of _____, 191 .

(Official designation of officer.)

UNITED STATES LAND OFFICE AT _____, _____, 191 .

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of December 29, 1916; that there is no prior valid adverse right to the same, and has this day been allowed.

Register.

UNITED STATES CRIMINAL CODE.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act Mar. 4, 1909, 35 Stat., 1111.)

FORM OF APPLICATION FOR ADDITIONAL ENTRY.

4-016a.

[Form approved by the Secretary of the Interior Jan. 18, 1917.]

DEPARTMENT OF THE INTERIOR.

STOCK-RAISING HOMESTEAD ENTRY—ADDITIONAL.

[Act of Dec. 29, 1916.]

United States Land Office-----

Serial No. -----

Receipt No. -----

APPLICATION AND AFFIDAVIT.

I, _____, of _____, do hereby apply
(Give full Christian name.) (Post-office address.)
to enter under the act of December 29, 1916 (39 Stat., 862), subject to the
reservation to the United States of all coal and other minerals in the
land, together with the right to prospect for, mine, and remove the same,
_____ section
township _____, range _____, _____ meridian, containing _____ acres,
as additional to my homestead entry No. _____, made
at _____ land office for
_____ section _____, township _____, range _____, _____ meridian.

I do solemnly swear that this application is made for my exclusive benefit as
an addition to my original homestead entry, and not directly or indirectly for
the use or benefit of any other person or persons whomsoever; that this appli-
cation is honestly and in good faith made for the purpose of actual settlement,
use, and improvement; that I will faithfully and honestly endeavor to comply
with all the requirements of the law; that I have not heretofore made an entry
under the timber and stone, desert land, or preemption laws, except as follows:
_____; that I have not heretofore made an entry under the homestead
laws (other than that above described), except _____.

I further state that the land applied for is not occupied and improved by any
Indian, and is unoccupied and unappropriated by any person claiming the same
under the public-land laws other than myself; that the land now applied for
and that embraced in my original entry above described do not contain mer-
chantable timber and no timber except _____; is not susceptible of irri-
gation from any known source of water supply, except the following areas:

(Here give the subdivisions and areas of the land, if any, susceptible of irrigation.)
and does not contain any water hole or other body of water needed or used by
the public for watering purposes; that the land is chiefly valuable for grazing
and raising forage crops.

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided
by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant
in my presence before affiant affixed signature thereto; that affiant is
to me personally known (or has been satisfactorily identified before me by
_____); that I verily believe

(Give full name and post-office address.)

affiant to be a qualified applicant and the identical person hereinbefore de-
scribed; and that said affidavit was duly subscribed and sworn to before me, at
my office in _____,

(Town.)

(County and State.)

within the _____ land district, this _____
day of _____, 191_____.

(Official designation of officer.)

We, _____, of _____,
 and _____, of _____,
 do solemnly swear that we are well acquainted with the above-named affiant
 and the lands described, and personally know that the statements made by him
 relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in
 my presence before affiants affixed signatures thereto; that affiants are to
 me personally known (or have been satisfactorily identified before me by
 _____); and that said, affi-
 (Give full name and post-office address.)
 davit was fully subscribed and sworn to before me at _____
 this _____ day of _____, 191_____.

 (Official designation of officer.)

UNITED STATES LAND OFFICE AT _____,
 _____, 191_____.

I hereby certify that the foregoing application is for surveyed land of the
 class which the applicant is legally entitled to enter under the act of December
 29, 1916; that there is no prior valid adverse right to the same, and has this
 day been allowed.

 Register.

UNITED STATES CRIMINAL CODE.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person,
 in any case in which a law of the United States authorizes an oath to be administered,
 that he will testify, declare, depose, or certify truly, or that any written testimony,
 declaration, deposition, or certificate by him subscribed, is true, shall willfully and con-
 trary to such oath state or subscribe any material matter which he does not believe to be
 true, is guilty of perjury, and shall be fined not more than two thousand dollars and im-
 prisoned not more than five years. (Act, Mar. 4, 1909; 35 Stat., 1111.)

FORM OF BOND FOR MINERAL CLAIMANTS.

4-684.

[Form approved by the Secretary of the Interior Jan. 18, 1917.]

Know all men by these presents: That I, _____ Give full name of principal
of _____, _____ County, _____ (or we, _____, of _____, _____
and sureties, and address of each.)
County, _____, and _____, of _____, _____ County, _____, as the case may
be), a citizen (or citizens) of the United States, or having declared my (or
our) intention to become a citizen (or citizens) of the United States, as principal
(or principals), and _____, of _____, _____ County, _____, and _____
of _____, _____ county, _____, as sureties, are held and firmly bound unto the
United States of America, for the use and benefit of the hereinafter-mentioned
entryman or owner of the hereinafter-described land, whereof homestead entry
has been made subject to the act of December 29, 1916 (39 Stat., 862), in the
sum of _____ dollars (\$_____), lawful money of the United States, for the
payment of which, well and truly to be made, we bind ourselves, our heirs,
executors, and administrators, successors, and assigns, and each and every one
of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this _____ day of _____, 19_____.

The condition of this obligation is such that, whereas the above-bounden
_____ has acquired from the United States the _____ deposits (together
with the right to mine and remove the same) situate, lying, and being within
the _____ of sec. _____, township _____, range _____, _____ land district,
_____ and whereas homestead entry, serial No. _____ has been made at _____
land office, of the surface of said above-described land, under the provisions
of said act of December 29, 1916, by _____.

Now, therefore, if the above-bounden parties or either of them, or the heirs
of either of them, their executors or administrators, upon demand, shall make
good and sufficient recompense, satisfaction, and payment unto the said entry-
man or owner, his heirs, executors, or administrators, or assigns, for all dam-
ages to the entryman's or owner's crops or tangible improvements upon said
homesteaded land as the said entryman or owner shall suffer or sustain or a
court of competent jurisdiction may determine and fix in an action brought on
this bond or undertaking, by reason of the above-bounden principal's mining
and removing of the _____ deposits from said described land, or occupancy
or use of said surface as permitted to said above-bounden principal under the
provisions of said act of December 29, 1916, then this obligation shall be null
and void; otherwise and in default of a full and complete compliance with
either or any of said obligations, the same shall remain in full force and effect.

Signed and sealed in the presence of and witnessed by the undersigned:

Residence _____

Residence _____

(Witnesses should give full names and addresses of each.)

Principal.
(The principal should sign first.)

Surety.
Residence _____

Surety.
Residence _____
(The principal and sureties should each sign full names and attach seals.)

An Act To provide for stock-raising homesteads, and for other purposes.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved

public land in reasonably compact form: *Provided, however,* That the land so entered shall theretofore have been designated by the Secretary of the Interior as "stock-raising lands."

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family: *Provided,* That where any person qualified to make original or additional entry under the provisions of this act shall make application to enter any unappropriated public land which has not been designated as subject to entry (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the said land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal; but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands.

SEC. 3. That any qualified homestead entryman may make entry under the homestead laws of lands so designated by the Secretary of the Interior, according to legal subdivisions, in areas not exceeding six hundred and forty acres, and in compact forms so far as may be subject to the provisions of this act, and secure title thereto by compliance with the terms of the homestead laws: *Provided,* That a former homestead entry of land of the character described in section two hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this act, which, together with the former entry, shall not exceed six hundred and forty acres, subject to the requirements of law as to residence and improvements, *(except that no residence shall be required on such additional entry if the entryman owns and is residing on his entry):* *Provided further,* That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land: *Provided further,* That instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than \$1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

SEC. 4. That any homestead entryman of lands of the character herein described who has not submitted final proof upon his existing entry shall have the right to enter, subject to the provisions of this act, such amount of contiguous lands designated for entry under the provisions of this act as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries, but improvements must be made on the additional entry equal to \$1.25 for each acre thereof.

SEC. 5. That persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired, may, subject to the provisions of this act, make additional entry for and obtain patent to contiguous lands designated for entry under the provisions of this act, which, together with the area theretofore acquired under the homestead law, shall not exceed six hundred and forty acres, on proof of the expenditure required by this act on account of permanent improvements upon the additional entry.

SEC. 6. That any person who is the head of a family or who has arrived at the age of twenty-one years and is a citizen of the United States, who has entered or acquired under the homestead laws, prior to the passage of this act, lands of the character described in this act, the area of which is less than six

* Words between asterisks inserted by Act of October 25, 1918 (40 Stat., 1016).

hundred and forty acres, and who is unable to exercise the right of additional entry herein conferred because no lands subject to entry under this act adjoin the tract so entered or acquired or lie within the twenty-mile limit provided for in this act; may, upon submitting proof that he resides upon and has not sold the land so entered or acquired and against which land there are no encumbrances, relinquish or reconvey to the United States the land so occupied, entered, or acquired, and in-lieu thereof, within the same land-office district, may enter and acquire title to six hundred and forty acres of the land subject to entry under this act, but must show compliance with all the provisions of this act respecting the new entry and with all the provisions of existing homestead laws except as modified herein.

Sec. 7. That the commutation provisions of the homestead laws shall not apply to any entries made under this act.

Sec. 8. That any homestead entrymen or patentees who shall be entitled to additional entry under this act shall have, for ninety days after the designation of lands subject to entry under the provisions of this act and contiguous to those entered or owned and occupied by him, the preferential right to make additional entry as provided in this act: *Provided*, That where such lands contiguous to the lands of two or more entrymen or patentees entitled to additional entries under this section are not sufficient in area to enable such entrymen to secure by additional entry the maximum amounts to which they are entitled, the Secretary of the Interior is authorized to make an equitable division of the lands among the several entrymen or patentees, applying to exercise preferential rights, such divisions to be in tracts of not less than forty acres, or other legal subdivision, and so made as to equalize as nearly as possible the area which such entrymen and patentees will acquire by adding the tracts embraced in additional entries to the lands originally held or owned by them: *Provided further*, That where but one such tract of vacant land may adjoin the lands of two or more entrymen or patentees entitled to exercise preferential right hereunder, the tract in question may be entered by the person who first submits to the local land office his application to exercise said preferential right.

Sec. 9. That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this act.

Sec. 10. 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 25, 1910, 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: *Provided*, That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock to summer and winter ranges or to shipping points, and may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands: *Provided further*, That such driveways shall not be of greater number or width than shall be clearly necessary for the purpose proposed, and in no event shall be more than one mile in width for a driveway less than twenty miles in length, not more than two miles in width for driveways over twenty, and not more than thirty-five miles in length, and not over five miles in width for driveways over thirty-five miles in length: *Provided further*, That all stock so transported over such driveways shall be moved an average of not less than three miles per day for sheep and goats and an average of not less than six miles per day for cattle and horses.

SEC. 11. That the Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this act for the purpose of carrying the same into effect.

Approved December 29, 1916 (39 Stat., 862).

STOCK-RAISING HOMESTEAD ACT—AMENDMENT OF SEPTEMBER 29, 1919—ADDITIONAL ENTRIES.

INSTRUCTIONS.

[Circular No. 660.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 20, 1919.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES.

The act of September 29, 1919 (41 Stat., 287), amends sections 4 and 5 of the stock-raising homestead act of December 29, 1916 (39 Stat., 862), so that additional entries may be made under said sections not only for lands contiguous to the original claims of the applicants, but for lands lying within a radius of 20 miles therefrom, provided the claimant takes all available contiguous lands of the character described in the act. This legislation refers to cases where the applicant has a pending original entry, or still owns and resides upon his original perfected claim. Nevertheless there remains one difference between entries under said sections including incontiguous lands, and those which may, as heretofore, be made under the provisos to section 3 of the act, notwithstanding a transfer of the entire original tract. Under said provisos, an entry can now be made only where the applicant no longer holds any part of his former claim. In connection with such an entry no credit can be given for residence on the original tract, nor for residence on the additional prior to the designation of the lands under the stock-raising act. Such credit is, however, given the homesteaders in case of entries under sections 4 and 5. It is to be understood that, in all cases where part, or all, of the land involved has not been

designated under the act, an application for entry may be accompanied by a petition in duplicate for designation thereof.

2. Pursuant to the above, paragraphs 8 and 9 of the instructions of January 27, 1917¹ (45 L. D., 625), are amended to read as follows:

8. (a) Under section 4 of the act any person having a homestead entry for land which shall have been designated under this act, upon which he has not submitted final proof, may make entry of contiguous designated lands, which, with the area of his original entry, shall not exceed 640 acres; if there is not sufficient vacant unreserved land of the proper character adjoining his pending claim, unapplied for by any other person, he may make up the deficiency by entering one or more other tracts lying within a radius of 20 miles from said claim, but he will not be permitted to take two or more tracts, while omitting from his application land adjoining one of them, which land is of the proper character and is not otherwise applied for. If there is no available land contiguous to the original claim, then the additional entry may be made so as to cover only an inconiguous tract or tracts.

The applicant is at liberty to file an affidavit corroborated by two witnesses to the effect that land, which should otherwise be included in his application, but which is omitted therefrom, is *not* of the character contemplated by the act, stating the facts upon which that allegation is based.

(b) On submission of proof on the additional entry, claimant must show residence on one of the tracts to the extent ordinarily required, but will be entitled to credit for residence on the original tract before or after the date of the additional entry; he must also show improvements on the additional tract or tracts to the value of \$1.25 for each acre thereof. Proof on the additional entry may be submitted within five years after its allowance, when the requisite residence can be shown, but not before submission of proof on the original. Proof on the original entry must be submitted under the provisions of the law pursuant to which it was made and within its life, as limited thereby; but, subject to that condition, one proof may be submitted on the two entries jointly.

The marriage of a woman does not disqualify her from making an additional entry under this section, and husband and wife may make entries thereunder, additional to their respective pending entries, if an election as to residence on one of the original tracts, as provided by the act of April 6, 1914 (38 Stat., 312), has been accepted.

9. (a) Under section 5 of the act, any person who has submitted final proof on an entry under the homestead laws for land designated under this act, who owns and resides upon said land, may enter lands so designated contiguous thereto, which, with the area of his original entry, shall not exceed 640 acres; the entry may be made to cover land inconiguous to the original claim, in whole or in part, under the same rules as govern entries under section 4, as set forth in paragraph 8 of this circular.

A married woman may make entry under section 5 of the act.

(b) In order to acquire title to the land it is necessary only that claimant show the expenditure on the additional tracts of \$1.25 per acre for improvements of the kind described in paragraph 7. At least half of such expenditures must be made within three years after allowance of the entry. Proof may be submitted at any time within five years after the entry is allowed.

Where satisfactory proof has been submitted on the original entry, the additional entry may be perfected under this section of the act regardless of the question whether it was three-year, five-year, or commutation proof.

¹ These instructions were amended and reprinted July 30, 1919 (47 L. D., 227).

3. Additional entries which have been made under the provisos to section 3 of the act by persons who at the time of the entry held pending entries or still owned and resided upon perfected entries will be considered and adjudicated in all respects as though made under section 4 or section 5 of the act as amended, as the case may be.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

STOCK-RAISING HOMESTEAD ACT—CIRCULAR NO. 660 CONSTRUED.

[Circular No. 665.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 19, 1919.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES.

In the fourth sentence of paragraph 1 of circular No. 660, dated October 20, 1919 (47 L. D., 248), the word "holds" is to be regarded as meaning "owns and resides upon."

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

THE NORTH STERLING IRRIGATION DISTRICT.

Decided August 1, 1919.

TIMBER AND STONE ACT—CORPORATION—QUALIFICATION.

An irrigation district is not a corporation within the contemplation of the regulations approved August 22, 1911, under the timber and stone act of June 3, 1878, and is therefore neither qualified nor entitled to make purchase thereunder.

VOGELSONG, *First Assistant Secretary:*

By its decision of December 23, 1916, the General Land Office rejected The North Sterling Irrigation District's application, Sterling 023369, to purchase the N. $\frac{1}{2}$ N. $\frac{1}{2}$ Sec. 2, T. 9 N., R. 53 W., 6th P. M., under the timber and stone act of June 3, 1878 (20 Stat. 89), for the reason among others, "that the application failed to show that each stockholder in the corporation was qualified to purchase

under the timber and stone law" and the case is now before this Department for consideration on appeal from that action.

The act under which this application was presented gives the right of purchase to "citizens of the United States, or persons who have declared their intention to become such," and to "an association of persons," and paragraph 8 of the regulations issued under that act (40 L. D., 238), declares that such purchases may be made "by a corporation, each of whose stockholders is so qualified."

The decision complained of was based in part on the erroneous assumption that this applicant is a "corporation" in the sense in which that word was used in those regulations, when in fact it is not such a corporation and has no "stockholders" such as ordinary private corporations have.

This applicant was organized and now exists under and by virtue of the laws of the State of Colorado (Sec. 3964 *et seq.*, Mills Annotated Statutes, 1912). It has territorial boundaries, includes and affects certain lands and the residents thereon and is invested with much larger powers than are accorded to mere private corporations. For its maintenance taxes are levied, assessed and collected under the laws of the State, and it has and exercises certain governmental functions and powers. It is a public rather than a private corporation, and belongs to that class of corporations which is devised as a constituent part of the government of the State. (40 Cyc., 817; 1 Dillon on Municipal Corporations, Sec. 34.) It is closely akin to a drainage or school district or to a levee district created under statutory authority which has been said to be:

A public political subdivision of the State, such as the State has power to create, under its police powers, and as such subdivision it exercises the prescribed functions of government in the district.

Morrison *v.* Morey (146 Mo., 543; 48 S. W., 629); Pioneer Irrigation District (119 Pac., 304, 307).

The decision appealed from was therefore erroneous in assuming that this applicant was a "corporation" within the meaning of the regulations and that reason should not have been assigned for the rejection of its application.

In the formulation and promulgation of the regulations mentioned, this Department evidently had in mind purely private corporations whose stock was held by private individuals, and considered and treated such corporations as "associations of persons" which were expressly authorized by the statute to purchase timber and stone lands.

It may be said that a person residing within an irrigation district is a member of it, in a political sense—in a sense akin to that in which private persons living within a town are members or citizens

of the town and that hence they are entitled to enjoy, in common with all other persons having a like status, the benefits conferred by such a district and are amenable to its regulations; but it can not be said that such a person bears the same relation or even a kindred relation to the district to that which exists between the stockholder and a private corporation of which he is a member. He is not in the same sense an integral or constituent part of the irrigation district, and has no alienable property rights in it. He may be forced to be a member of it, and he and his property may be subjected in a measure to its control without his own consent and even against his own protest because such districts in Colorado are established by the favoring votes of a bare majority of the persons qualified to vote on the proposition to establish it.

Again, in interpreting the regulations mentioned, the word "corporation" must be given its usually accepted meaning or significance; and while in some cases and for some purposes the courts have held that that word includes municipalities and quasi municipal corporations, it is a very general rule that it is limited to mere associations of individuals organized in the form prescribed by law for the promotion of private business enterprises and does not include what is known as public, municipal or quasi municipal corporations. *Emes v. Fowler* (89 N. Y. Supp., 685, 688); *Wallace v. Lawyer* (54 Ind., 501, 23 Am. Rpt., 661); *Donahue v. City of Newburyport* (211 Mass., 561); *Bramlett v. City Council of Greenville* (88 S. C., 110).

Road districts, a board of road commissioners declared by law to be "a body corporate," school boards and other similar institutions having corporate powers are not "corporations" in the sense in which that word is usually used. *Custer County Bank v. Custer County* (100 N. W., 424, 426); *Rees v. Olmsted* (135 Fed., 296, 301); *Agar v. Pagin* (39 Ind. App., 567); *Napa State Hospital Dasso* (96 Pac., 355, 357); and in *Reclamation District No. 70 v. Sherman* (105 Pac., 277, 280), it was held that a reclamation district was not a corporation in the sense in which that word was used in the constitution of California, which prohibits the creation of corporations by special acts of the legislature. In that case the court quoted with approval the statement that such districts "are special organizations, formed to perform certain work which the policy of the State requires or permits to be done, and to which the State has given a certain degree of discretion in making improvements contemplated."

From this it will be seen that the applicant in this case was neither qualified nor entitled to make a purchase under the timber and stone act. To hold otherwise would be to say that any public, municipal or quasi municipal corporation could acquire title under the public land laws not only to timber and stone lands, but also to coal lands,

mineral lands or desert lands, because the statutes under which those lands can be acquired all authorize entries by associations or corporations to the same extent to which the timber and stone lands may be purchased by them, and this Department has never recognized that right or sanctioned such entries.

The decision appealed from having been based on the assumption that the applicant was a corporation such as is qualified to make the entry was erroneous and should have been based on the reasons herein given. That decision is therefore modified to that extent and the application will be rejected when this decision becomes final.

JOSEPH J. OSTER.

Decided August 26, 1919.

THREE-YEAR HOMESTEAD—CULTIVATION—SUMMER-FALLOWING.

The Department adheres to the instructions contained in paragraph 27 of the circular of June 1, 1915, that the tilling of the land, or other appropriate treatment, in vicinities where summer-fallowing is generally followed or is necessary for the purpose of conserving moisture with view of making a profitable crop the succeeding year, will be deemed cultivation within the terms of the act of June 6, 1912.

VOGELSANG, First Assistant Secretary:

The Department has considered the case of Joseph J. Oster (Lewistown 032613) in the light of the suggestions contained in your [Commissioner of the General Land Office] letter of July 13, 1919, recommending that Oster's final proof be rejected and certificate canceled in the event that entryman fails to show by affidavit that 40 acres were planted to crop.

It appears that Oster made his entry June 14, 1915, under the act of February 19, 1909 (35 Stat., 639), for the E. $\frac{1}{2}$, Sec. 31, T. 20 N., R. 24 E., M. P. M., containing 320 acres, upon which final proof was submitted March 25, 1919, and certificate issued March 29, 1919.

Regarding the acts of cultivation performed, the proof shows that in 1916, during the first year, entryman broke 10 acres, which were not planted to crop; during the second year, 1917, he planted a crop on the 10 acres summer-fallowed the previous year, and summer-fallowed 10 additional acres; during the third year, 1918, he planted the 20 acres theretofore broken, and in addition thereto summer-fallowed 20 acres, making a total of 40 acres cultivated in that year.

You state "that while 40 acres had been broken, only 20 acres had been actually cultivated to crop," and are of the opinion that summer-fallowing is not "cultivation" within the meaning of the third proviso to the act of June 6, 1912 (37 Stat., 123); in other words, that

the word "cultivated" in said proviso means "cultivated to crops" as distinguished from summer-fallowing; and that therefore entryman should delay offering final proof until the end of the fourth year of the lifetime of his entry, or expiration of such portion thereof as he could show 40 acres actually planted. The Department can not concur in the construction placed by you upon said act and particularly paragraph 27 (a) of circular of June 1, 1915 (44 L. D., 91, 100).

The instructions cited provide:

Cultivation of the land for a period of at least two years is required, and this must generally consist of actual breaking of the soil, followed by planting, sowing of seed, and tillage of a crop other than native grasses. However, tilling of the land, or other appropriate treatment, for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year, will be deemed cultivation within the terms of the act (without sowing of seed), where that manner of cultivation is necessary or generally followed in the locality.

The act of June 6, 1912, *supra*, permits one to submit final proof at the expiration of three years from date of establishment of residence, and as was held in the case of *Bryant v. Hammer* (44 L. D., 152), the three-year period of cultivation required by said act "shall date from the time the entry is made and not from the time residence is established."

The instructions above quoted, which are applicable to entries in vicinities where summer-fallowing for the purpose of conserving moisture is the most profitable method of farming, define what is "cultivation" within the meaning of the act of June 6, 1912, *supra*, said instructions explicitly stating that "tilling of the land * * * will be deemed cultivation within the terms of the act (without sowing of seed)."

Your letter recommending rejection of the final proof and cancellation of the certificate is disapproved and, it appearing that the proof is not premature, but shows full compliance with law as to residence, cultivation, and improvements, the record is returned with the view of issuance of patent.

ADMINISTRATIVE ORDER.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 28, 1919.

The reservations heretofore inserted in patents for lands opened to entry under the act of June 21, 1906 (34 Stat., 336), and the reservations directed to be inserted under the acts of June 22, 1910 (36 Stat., 583), 39 L. D., 185, and July 17, 1914 (38 Stat., 509), 44 L. D., 35, will not be inserted in patents issued on entries made under

the act of December 29, 1916 (39 Stat., 862). The reservation directed to be inserted in patents under the latter act is broad enough to cover the reservations customarily inserted under the former acts.

CLAY TALLMAN, *Commissioner*.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

STATE OF NEW MEXICO.

Decided September 8, 1919.

SCHOOL INDEMNITY SELECTION—PUBLICATION OF NOTICE.

Directions given that suitable instructions be prepared providing for a general and uniform rule relative to publication of notice in the matter of State selections for educational and other purposes, such as now governs the publication of final proof notices.

VOGELSANG, *First Assistant Secretary*:

The State of New Mexico has appealed from decision by the General Land Office dated March 7, 1919, requiring republication of notice of application to select certain tracts contained in school indemnity list Roswell 044731. Certain other requirements were imposed by said decision with a view to completion of the selections but the only question raised by the appeal is with reference to the requirement of republication.

It appears that the publication was made once a week in a daily newspaper for five consecutive weeks. In the decision complained of it was held that this was not sufficient and that where publication is made in a daily newspaper the notice must appear in every issue of the paper for a period of thirty days, reference being made to general circular of January 25, 1904, page 75. The rule mentioned has reference to publication of notice of final proof and reads as follows:

Proof of publication will be the affidavit of the publisher or foreman of the newspaper employed that the notice (a copy of which notice must be annexed to the affidavit) was published in said newspaper once a week (if a weekly paper) for five successive weeks, or for thirty days in a daily paper, as the case may be. Such affidavit must show that the notice was published in the regular and entire issue of every number of the paper during the period and time of publication, and that the notice was published in the newspaper proper and not in a supplement. Affidavits of publication not in conformity with these requirements will be rejected by the register and receiver.

Reference was also made to circular of June 23, 1910 (39 L. D., 39), and it was held that the publication required thereby contemplated

a weekly newspaper and not a daily newspaper. The said regulations of June 23, 1910, specify the procedure to be followed in making State selections under grants for educational and other purposes. Sections 9, 11, and 19, provide:

9. Notice of selection of *all lands* must be given by publication once a week for five successive weeks in a newspaper of general circulation in the county where the lands are located, the paper to be designated by the register.

11. Proof of publication will be the affidavit of the publisher or foreman of the newspaper employed that the notice (a copy of which must be annexed to the affidavit) was published in said newspaper once a week for five successive weeks. Such affidavit must show that the notice was published in the regular and entire issue of the paper and was published in the newspaper proper and not in a supplement. * * *

19. All previous rulings and instructions not in harmony herewith are hereby vacated.

It must be held that this circular is the governing authority in the case, having been issued with special reference to this class of claims. It will be noted that no differentiation is made between publications in weekly and daily papers. The paper in question is published daily except Sundays. It is not shown whether there is a weekly issue, but it is assumed there is not. It was designated by the register as proper for publication of the notice of the selections in question. Furthermore, it is alleged that notices published in similar manner have heretofore been accepted without question. This assertion has not been definitely verified, but informal inquiry at the General Land Office discloses that such publications may have been passed inadvertently.

It appearing that the notice was published in accordance with the letter of the regulations in force, republication will not be required in this case and accordingly the action complained of is hereby vacated.

However, it is believed that the rule as to publication of final proof notices is the proper one and was really intended to be followed in all cases where notice by publication for thirty days is required, even though not so explanatorily stated. No doubt this rule has been generally applied, and any deviation therefrom has been due perhaps to inadvertence or oversight. A notice, to be most effective, should be continuous for the period required and should therefore appear in every number or issue of the publication employed. Notice given once a week in a daily paper is intermittent and not continuous.

It is, therefore, directed that suitable instructions be prepared for departmental consideration providing a general and uniform rule such as now governs the publication of final proof notices.

REGULATIONS OF JUNE 23, 1910, AMENDED.

[Circular No. 659.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 15, 1919.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES.

Pursuant to departmental decision of September 8, 1919, in State of New Mexico (47 L. D., 255), Rule 9 and the first paragraph of Rule 11 of the instructions of June 23, 1910 (39 L. D., 39), are hereby amended to read as follows:

9. Notice of selection of all lands must be given by publication in a daily or weekly newspaper of general circulation in the county where the lands are located, the paper to be designated by the register.

11. Proof of publication will be the affidavit of the publisher, or foreman of the newspaper employed, that the notice (a copy of which must be annexed to the affidavit) was published in said newspaper once a week (if a weekly paper) for five successive weeks, or for thirty days in a daily paper, as the case may be. Such affidavit must show that the notice was published in the regular and entire issue of every number of the paper during the period and time of publication, and that the notice was published in the newspaper proper and not in a supplement. Affidavits of publication not in conformity with these requirements will be rejected by the register and receiver.

The foregoing amendments will be effective as to all notices issued subsequent to November 1, 1919.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

DISCHARGED SOLDIERS AND SAILORS—TIME TO RETURN TO
HOMESTEADS.

INSTRUCTIONS.

[Circular No. 656.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 10, 1919.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The act of July 28, 1917 (40 Stat., 248), provides that, in connection with homestead claims, initiated prior to entering the service,

the military or naval service of the claimant shall be "equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon." In view of this provision, the soldier may, promptly upon his discharge, file in the U. S. Land Office in which his entry was made notice of his intention to take the five months' absence allowed in each residence year (or such lesser absence as he may be entitled to in that residence year); such period will be counted as residence and a contest on the ground of abandonment will not be permitted until the expiration of six months in addition to the absence taken under such notice.

Under this ruling, where the discharge occurs five months or more before the end of the residence year and proper notice is given, the entry will be protected from contest for eleven months after his discharge.

The residence years referred to in this circular are computed in periods of twelve months each, dating from the soldier's enlistment or entrance into the service, or from the date he established residence upon the land if he did so prior to entering the service.

D. K. PARROTT,

Acting Assistant Commissioner.

Approved:

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

HEIRS OF EDWARD B. BALDWIN.

Decided September 10, 1919.

REPAYMENT—PRICE OF LANDS EXCEPTED FROM RAILROAD GRANT.

The price of lands in an old-numbered section within the limits of a railroad grant, but excepted therefrom, is \$1.25 per acre; and where a purchaser thereof has been required to pay a higher price, he is entitled to the repayment of such excess.

CONFLICTING DECISION OVERRULED.

Departmental decision in Even Thorstenson (45 L. D. 96) overruled in so far as in conflict.

VOGELSANG, *First Assistant Secretary:*

This is an appeal by the heirs of Edward B. Baldwin from the decision of the Commissioner of the General Land Office, dated June 13, 1919, rejecting their application for the repayment of excess purchase money claimed to have been paid in connection with Denver, Colorado, cash entry No. 16467, the application being presented under section 2 of the act of March 26, 1908 (35 Stat., 48).

Edward B. Baldwin made cash entry September 24, 1895, under section 5 of the act of March 3, 1887 (24 Stat., 556), for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 15, T. 2 N., R. 69 W., 6th P. M., containing 80 acres, at \$2.50 per acre. This tract is within the limits of the grant made by section 3 of the act of July 1, 1862 (12 Stat., 489), and which passed to the Denver Pacific Railroad and Telegraph Company under the acts of March 3, 1869 (15 Stat., 324), and June 20, 1874 (18 Stat., 111). Said section 3 of the act of July 1, 1862, which granted the odd-numbered sections, excepted from the grant such tracts as had been sold, reserved, or otherwise disposed of by the United States, or to which a preemption or homestead claim may have attached at the time the line of the road was definitely fixed.

In the present case the tract was so excepted and the claim of the railway company to it under its grant failed. Baldwin had purchased the land from the railway company, but as above stated perfected his title under section 5 of the act of March 3, 1887, *supra*, which provided that such a purchaser could receive title from the United States by making payment for the land "at the ordinary Government price for like lands." The heirs contend that the ordinary price for such lands was \$1.25 per acre, and are seeking the return of such excess.

The Commissioner denied repayment under authority of the case of Even Thorstenson (45 L. D., 96). Since the Thorstenson decision, however, the question has been passed upon by the Supreme Court of the United States in the case of *The United States v. Laughlin*, decided April 14, 1919. That case involved in part the question as to the correct price to be charged for an odd-numbered section excepted from the grant to the Northern Pacific Railroad Company made by the act of July 2, 1864 (13 Stat., 365). In the course of the opinion the court said:

It is clear that the price of lands in odd-numbered sections was not fixed by the granting act of 1864. Sec. 6 fixed a price of two dollars and fifty cents per acre only for the alternate sections reserved to the United States—that is, those bearing even numbers. We need not pursue the suggestion of counsel for appellee that there could be no "reserved alternate sections," within the meaning of the price-fixing clause, until ascertainment of the granted sections by the filing and acceptance of a map of definite location; for, in any event, neither sec. 6 nor the withdrawal order made any provision for the price of land in the odd-numbered sections. In the absence of special provisions the minimum price was fixed by sec. 2357 Rev. Stat. at one dollar and twenty-five cents per acre, and under sec. 2259 a qualified preemptor was entitled to purchase at the minimum price. This was a substantial right, of which he could not be deprived by arbitrary action of the officers of the Government.

Under the above ruling of the Supreme Court it is clear that the "ordinary Government price for like lands" under the law was

\$1.25 per acre, and that the applicants therefore are entitled to a return of the excess. The case of Even Thorstenson, *supra*, as far as it conflicts herewith, is overruled.

The decision of the Commissioner is accordingly reversed and repayment will be allowed in the absence of other objection.

PRICE OF LAND WITHIN GRANTED LIMITS OF RAILROAD—PRIOR INSTRUCTIONS REVOKED.

[Circular No. 664.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 13, 1919.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES.

By decision of September 10, 1919, in Heirs of Edward B. Baldwin (47 L. D., 258), the Department overruled its decision in the case of Even Thorstenson (45 L. D., 96), and in effect its decision in the case of Walter Hollensteiner (38 L. D., 319), and the first paragraph of the instructions of March 2, 1910 (38 L. D., 468).

Pursuant thereto, in collecting commissions and in disposing of lands in odd-numbered sections within the granted limits of a railroad but excepted from the operations of the grant, the price should be computed at \$1.25 per acre, unless a different price is fixed in the granting act or in some other act of Congress.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

REGULATIONS TO GOVERN PROSPECTING FOR AND MINING OF METALLIFEROUS MINERALS ON UNALLOTTED LANDS OF INDIAN RESERVATIONS.

Section 26 of the act of June 30, 1919 (Public, No. 3), reads:

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him and under such terms and conditions as he may prescribe, not inconsistent with the terms of this section, to lease to citizens of the United States or to any association of such persons or to any corporation organized under the laws of the United States or of any State or Territory thereof, any part of the unallotted lands within any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming, heretofore withdrawn from entry under the mining laws for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals, which leases shall be irrevocable, except as herein provided, but which may be declared null and void upon breach of any of their terms.

That after the passage and approval of this section, unallotted lands, or such portion thereof as the Secretary of the Interior shall determine, within Indian reservations heretofore withheld from disposition under the mining laws may be declared by the Secretary of the Interior to be subject to exploration for the discovery of deposits of gold, silver, copper, and other valuable metalliferous minerals by citizens of the United States, and after such declaration mining claims may be located by such citizens in the same manner as mining claims are located under the mining laws of the United States: *Provided*, That the locators of all such mining claims, or their heirs, successors, or assigns, shall have a preference right to apply to the Secretary of the Interior for a lease, under the terms and conditions of this section, within one year after the date of the location of any mining claim, and any such locator who shall fail to apply for a lease within one year from the date of location shall forfeit all rights to such mining claim: *Provided further*, That duplicate copies of the location notice shall be filed within sixty days with the superintendent in charge of the reservation on which the mining claim is located, and that application for a lease under this section may be filed with such superintendent for transmission through official channels to the Secretary of the Interior: *And provided further*, That lands containing springs, water holes, or other bodies of water needed or used by the Indians for watering live stock, irrigation, or water-power purposes shall not be designated by the Secretary of the Interior as subject to entry under this section.

That leases under this section shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods: *Provided*, That the lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease and upon acceptance thereof be thereby relieved of all future obligations under said lease.

That in addition to areas of mineral land to be included in leases under this section the Secretary of the Interior, in his discretion, may grant to the lessee the right to use, during the life of the lease, subject to the payment of an annual rental of not less than \$1 per acre, a tract of unoccupied land, not exceeding forty acres in area, for camp sites, milling, smelting, and refining works, and for other purposes connected with and necessary to the proper development and use of the deposits covered by the lease.

That the Secretary of the Interior, in his discretion, in making any lease under this section may reserve to the United States the right to lease for a term not exceeding that of the mineral lease, the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided*, That the said Secretary, during the life of the lease, is hereby authorized to issue such permits for easements herein provided to be reserved.

That any successor in interest or assignee of any lease granted under this section, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the lease under which such rights are held and also subject to all the provisions and conditions of this section to the same extent as though such successor or assign were the original lessee hereunder.

That any lease granted under this section may be forfeited and canceled by appropriate proceedings in the United States district court for the district in which said property or some part thereof is situated whenever the lessee, after reasonable notice in writing, as prescribed in the lease, shall fail to comply with the terms of this section or with such conditions not inconsistent herewith as may be specifically recited in the lease.

That for the privilege of mining or extracting the mineral deposits in the ground covered by the lease the lessee shall pay to the United States, for the benefit of the Indians, a royalty which shall not be less than 5 per centum of the net value of the output of the minerals at the mine, due and payable at the end of each month succeeding that of the extraction of the minerals from the mine, and an annual rental, payable at the date of such lease and annually thereafter on the area covered by such lease, at the rate of not less than 25 cents per acre for the first calendar year thereafter; not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively; and not less than \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year.

That in addition to the payment of the royalties and rentals as herein provided the lessee shall expend annually not less than \$100 in development work for each mining claim located or leased in the same manner as an annual expenditure for labor or improvements is required to be made under the mining laws of the United States: *Provided*, That the lessee shall also agree to pay all damages occasioned by reason of his mining operations to the land or allotment of any Indian or to the crops or improvements thereon: *And provided further*, That no timber shall be cut upon the reservation by the lessee except for mining purposes and then only after first obtaining a permit from the superintendent of the reservation and upon payment of the fair value thereof.

That the Secretary of the Interior is hereby authorized to examine the books and accounts of lessees, and to require them to submit statements, representations, or reports, including information as to cost of mining, all of which statements, representations, or reports so required shall be upon oath, unless otherwise specified; and in such form and upon such blanks as the Secretary of the Interior may require; and any person making any false statement, representation, or report under oath shall be subject to punishment as for perjury.

That all moneys received from royalties and rentals under the provisions of this section shall be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the reservation where the leased land is located, which moneys shall be at all times subject to appropriation by Congress for their benefit, unless otherwise provided by treaty or agreement ratified by Congress: *Provided*, That such moneys shall be subject to the laws authorizing the pro rata distribution of Indian tribal funds.

That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the purpose of carrying the provisions of this section into full force and effect: *Provided*, That nothing in this section shall be construed or held to affect the right of the States or other local authority to exercise any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

That mining locations, under the terms of this section, may be made on unallotted lands within Indian reservations by Indians who have heretofore or may hereafter be declared by the Secretary of the Interior to be competent to manage their own affairs; and the said Secretary is hereby authorized and empowered to lease such lands to such Indians in accordance with the provisions of this section: *Provided*, That the Secretary of the Interior be, and he is hereby, authorized to permit other Indians to make locations and obtain leases under the provisions of this section, under such rules and regulations as he may prescribe in regard to the working, developing, disposition, and selling of the products, and the disposition of the proceeds thereof of any such mine by such Indians.

To carry this provision of law into effect the following general regulations are prescribed:

1. From time to time unallotted land on Indian reservations within the States named in the section above quoted will be declared subject to exploration. The land will be opened, only after reports have been received from the superintendent or other officer in charge (hereafter called the officer in charge) as to the desirability of such action and of the part, if any, which should be reserved in the interests of the Indians. Anyone desiring to prospect on any particular reservation may obtain information from the officer in charge thereof as to whether it is subject to lease.

2. All persons prospecting on unallotted Indian land under these regulations, or who may acquire rights of occupancy of such lands thereunder, in the use of the lands, are bound to a strict compliance with all the laws of the United States prohibiting the introduction of intoxicants into the Indian country and with the laws of the United States and the regulations of the Department of the Interior prescribed thereunder in respect to trade intercourse with the Indian tribes.

3. Should valuable metalliferous minerals be found the section contemplates the location of mining claims in the same manner as mining claims are located under the mining laws of the United States. Should the locator fail to file a duplicate copy of the location notice with the officer in charge of the land within 60 days or fail within one year thereafter to make application through the officer in charge to the Secretary of the Interior for a lease of the land he will thereby forfeit all preference right to a lease. Any locator who fails to comply with the United States mining laws and the regulations of the General Land Office prescribed thereunder as to the location of mining claims will also forfeit all preference right to a lease.

The regulations of the General Land Office provide, in effect that no lode claim can exceed a parallelogram 1,500 feet in length by 600 feet in width, but whether surface ground of that width can be taken depends upon the local regulations, or State or Territorial laws in force in the several mining districts; that no such local regulations, or State or Territorial laws shall limit a vein or a lode claim to less than 1,500 feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than 50 feet in width; that all records of mining locations shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim; that no lode claim shall be located until after the discovery of a vein or lode within the limits of the claim; that the claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral bearing vein, lode or crevice, and determine if possible the general course of such vein in every direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface; that his location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, etc., which may be in the immediate vicinity; that the claimant should also state the names of adjoining claims or if none adjoining the relative positions of the nearest claims; that he should drive a post or erect a monument of stone at each corner of the surface ground and at the point of discovery or discovery shaft should fix a post, stake or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed and in which direction from the point of discovery, it being essential that the location notice filed for record should state whether the entire claim of 1,500 feet is taken on one side of the point of discovery or whether it is partly upon one and partly upon the other; and if the latter, how many feet are claimed upon each side of the discovery point.

4. Lessees will have the right to mine only within the exterior boundaries of the leased lands and to lines drawn vertically downward therefrom. The provision of the general mining laws that the locator of a mining claim shall have the exclusive right to all veins, lodes, or ledges throughout their entire depth, the tip or apex of which lies inside the surface lines, extending downward vertically, does not apply to these leases, since the act limits the application of the general mining laws to the manner of the location of mining claims.

5. Individual placer claims are limited by the general mining laws to not more than 20 acres for one person, 40 acres for two, and 160 acres for an association of eight or more persons. Locations, if upon surveyed land, must be located in conformity to the legal subdivisions of the survey. If made upon unsurveyed land the locations must be marked in the same manner as lode locations, but shall conform as nearly as practicable to what would be public land surveys and the rectangular subdivisions thereof.

6. Before a lease will be granted covering a lode mining claim, or a placer claim, on unsurveyed land, it will be necessary for the locator, at his expense, to have the claim surveyed by a United States surveyor. The survey must be made in the form and manner required by and under the laws and regulations governing the survey of claims under the United States mining laws, application for such survey to be made to the United States surveyor general for the State wherein the claim is located. Two copies of the plat and two copies of the field notes must be filed by the locator with his lease.

7. Locators whose application for a lease has been approved will be allowed 30 days from the date of notification of approval within which to complete and file a lease with the officer in charge of the reservation, and the failure to complete and file a lease within that time will be cause for the forfeiture of the preference right to a lease in the discretion of the Secretary of the Interior.

8. Upon being notified of the acceptance of its application for a lease a corporation shall file a certified copy of articles of incorporation, and evidence showing compliance with local corporation laws if a foreign corporation: *Provided*, That if any such papers have already been filed a statement to that effect may be submitted.

Leases made by corporations shall be accompanied by an affidavit showing the authority of its officers to execute leases, bonds, and other papers.

9. Each lease shall be accompanied, at the time of filing, by the advance annual rental for the first year. No lease shall be forwarded by the officer in charge for favorable consideration unless the advance annual rental for the first year has been deposited with him.

10. Lessees shall furnish with each lease a bond with two or more personal sureties, or with an acceptable company authorized to act as sole surety. Said bond shall be in amounts as follows:

For less than 40 acres, \$500; for 40 acres and less than 80 acres, \$1,000; for 80 acres and less than 120 acres, \$1,500; for 120 acres and not more than 160 acres, \$2,000: *Provided*, That a lessee may file one bond in the sum of \$15,000 covering all the leases to which he is or may become the lessee. The right is reserved to increase the amount of the bond above the sums named in any case and to accept substitute bonds where the Secretary of the Interior deems it proper to do so.

11. Lessees may assign their leases or any part thereof or sublease the premises or any part thereof with the consent and approval of the Secretary of the Interior. Lessees shall not permit any person or persons to have possession of the leased premises, or any part thereof, save and except those rightfully entitled thereto pursuant to the conditions set forth in the law, regulations, and lease.

12. Leases shall be irrevocable except for breach of the terms and conditions of the same and may be forfeited and canceled by appropriate proceedings in the United States district court for the district in which the land or some part thereof is situated. Lessees may, with the consent of the Secretary of the Interior, surrender their leases in whole or in part upon payment of a fee of \$1, provided all royalties, rentals, and other obligations due and accrued up to the date of completion of their applications for surrender have been paid and fulfilled. If a lease has been recorded, the lessee shall execute a release, and record the same in the proper county recording office, and file the release with the officer in charge. An application for surrender will be considered as completed on the date of the filing of same in the office of the officer in charge, provided the foregoing regulations have been fulfilled.

13. Each lessee will be required to pay a royalty on production computed on the net value of the output of the minerals at the mine, payable at the end of each month. The law provides that this royalty shall not be less than 5 per cent, but in view of the impossibility of fixing in advance by regulation the exact royalty to be imposed upon the different minerals found, varying in value and in conditions under which they are mined, the royalty governing each lease will be fixed and determined prior to the issuance of each lease and incorporated therein. The term used in the law, "net value of the out-

put of the minerals at the mine," is construed to mean the gross value of the ores, less the cost of mining said ores, the cost of concentration, of handling, of transportation, of shipping from the mouth of the mine to the works where the ore is treated, and the cost of milling, reducing, or smelting. "Cost of mining said ore" covers only the cost of mining the ore produced and brought out of the mine during the month, and does not include cost of prospecting, of preliminary workings, or the cost of the mining plant.

14. In addition to the royalty on production the lessee will be required to pay advance annual rental of 25 cents per acre for the first year, 50 cents per acre for the second, third, fourth, and fifth years, respectively, and \$1 per acre for each year thereafter, the rental for any one year to be credited against the royalties as they accrue for that year. It will also be necessary for the lessee to expend annually not less than \$100 in development work for each mining claim located or leased in the same manner as required under the mining laws of the United States.

15. Each lessee shall keep books of accounts showing the amount of ore mined each month, the cost of mining same, the amount of ore shipped or other mineral substances sold or treated, and the amount of money received from the sale of ores, etc. The books of the lessee shall be open to inspection, examination, and verification by any officer of the Interior Department assigned to such duty by the Secretary of the Interior, and the duly authorized agents of the United States shall be permitted freely to make copies of all the accounts and other books of the lessee. All royalties due under the lease shall be paid to the officer in charge of the reservation in cash, or by certified check or other suitable form of exchange, and at time of payment each lessee must file with said officer a sworn statement showing the amount of ore mined during the preceding month, cost of mining and extracting the same, the amount of ore shipped or sold, and the amount received therefor. Lessee must also file with the officer in charge within 20 days after the reduction of the ores a duplicate of all mill and smelter returns.

16. Lessees shall file annual reports, accompanied by maps and diagrams when necessary, within 20 days after the close of each calendar year with the officer in charge, showing the extent, character, and location of all development work and mining operations, such annual reports to be in the form of sworn statements by the lessee or superintendent in charge of the work, and such other reports from time to time as the Secretary of the Interior may, in his discretion, require.

17. In mining operations the lessee shall keep the mine well and sufficiently timbered at all points where necessary in accordance with good mining practice and in such manner as may be necessary to the proper preservation of the property leased and safety of the workmen, compatible with economical mining. If it be necessary to use any wood, stone, coal, or other material the lessee shall first obtain written permission from the officer in charge and shall pay him, for the Indians, the current prices for all such material taken.

18. On expiration of the term of the lease or when a lease is surrendered the lessee shall deliver to the Government the leased premises with the mine workings in good order and condition, and bondsmen will be held for such delivery in good order and condition unless relieved by the Secretary of the Interior for cause. It shall, however, be stipulated that the machinery necessary to operate the mine is the property of the lessee, but that it may be removed by him only after the condition of the property has been ascertained by inspection by the Secretary of the Interior or his authorized agents.

19. It is expressly understood that any duly authorized agent of the Government shall be permitted from time to time, and at all times during the life of the lease, freely and without notice to enter upon and in all parts of the leased premises, and, if desired, take with him the local mine inspector and such mining experts as may be necessary for the purpose of inspection and examination thereof, with a view of ascertaining whether or not the terms and conditions of the agreement are being faithfully complied with, and to know that the mine is operated in workmanlike manner as required by the lease, and in compliance with the law of the State or Territory in which the mine is situated.

20. Any lessee desiring to use not to exceed 40 acres of unoccupied land for a camp site, milling, smelting, and refining works, or for other purposes connected with the proper development of the leased land, should make application therefor to the officer in charge for the land desired. The application must be accompanied by affidavits from two or more persons familiar with the ground,

that it is nonmineral, unoccupied, and necessary for the purpose of properly developing the lease.

21. No prospector, locator, or mine owner shall keep stock of any kind on the lands leased except by permit at such rates as may from time to time be established.

22. The provisions of the foregoing regulations shall apply to any Indian who has heretofore or may hereafter be declared by the Secretary of the Interior to be competent to manage his own affairs. Should Indians who have not been declared competent to manage their own affairs desire to obtain a lease of land the officer in charge of the reservation where the land is located will report all the facts in connection therewith whereupon suitable instructions will be given as to the manner of procedure.

23. On those reservations where unallotted Indian land may be leased for mining purpose under section 3 of the act of February 28, 1891 (26 Stat. L., 795), the provisions of section 26 of the Indian appropriation act of June 30, 1919, and the regulations herein prescribed shall hereafter govern the leasing of such unallotted land so far as metalliferous minerals are concerned.

24. These regulations shall take effect 45 days from and after the date of approval hereof, and shall be promulgated 20 days prior to their taking effect.

FORM OF MINING LEASE.

Mining Lease of Unallotted Lands on ----- Indian Reservation.

THIS LEASE, made and entered into in triplicate this ----- day of -----, 19____, by and between the Secretary of the Interior, party of the first part, hereinafter called the lessor, by reason of the authority vested in him in section 26 of the Indian appropriation act for the fiscal year ending June 30, 1920, and ----- of -----, State of -----, party of the second part, hereinafter called the lessee; witnesseth:

1. The lessor, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the lessee, doth hereby demise, grant, lease, and let unto the lessee for the term of 20 years with privilege of renewal for successive periods of 10 years upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods, from the date of signing hereof by the lessor, for the purpose of mining all the deposits of metalliferous minerals in or under the following described lands, to wit:

containing ----- acres, more or less, the same being within said reservation, with the exclusive right to prospect for, mine, and extract the minerals above named and no others, and to occupy and use so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, mining, extracting, storing, and removing such minerals; also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise a sufficient supply of water to carry on said operations, and the right to pass over and across said reservation for the purpose of said work.

2. The lessee hereby agrees to pay or cause to be paid to the superintendent or other officer of the United States having jurisdiction over the leased premises, hereinafter called the officer in charge, for the use and benefit of the Indians of said reservation, annually in advance, a rental of 25 cents per acre for the first year beginning with the date of execution of lease, 50 cents per acre per annum for the second, third, fourth, and fifth years, and \$1 per acre for each succeeding year, all rent paid in any year to be credited on the royalty for that year if production begins therein.

The lessee further agrees to pay as royalty on the production of ores and minerals under this lease a royalty of ----- per cent upon the net value of the output of the minerals at the mine, which is to be ascertained by deducting from the gross value of the ores and minerals the cost of mining said ores and minerals, the cost of concentration, of handling, of transportation, of shipping from the mouth of the mine to the works where the ore is treated, and the cost of milling, reducing, or smelting. It is understood and agreed that the cost of mining said ores covers only the cost of mining ores produced and brought out of the mine during the month, and does not include the cost of

prospecting or preliminary workings or of the mining plant. The lessee agrees to file with the officer in charge of the reservation within 20 days after the end of the month within which the minerals were extracted a sworn statement showing the amount of ore mined during the preceding month, cost of mining and extracting same, the amount of ore shipped or sold, and the amount received therefor. He also agrees to file with the officer in charge within 20 days after the reduction of the ores a duplicate of mill and smelter returns, and to pay all royalties under this lease monthly to the officer in charge of the reservation, or such officer or agent as may be designated by the Secretary of the Interior, payments to be made in cash or by certified check or other suitable form of exchange.

There shall be expended annually in development work on each lease a sum of not less than \$5 per acre, the total annual amount to be not less than \$100.

The royalties on all products mined under this lease shall be based on sworn reports and shall be paid within 10 days after the close of each month.

3. The lessee shall immediately upon notification of the signing of this lease by the lessor proceed to develop and work said mineral deposits, and during the entire term of this lease he shall prosecute such mining operations on said lands to the fullest practicable extent, the state of the market being considered; and his neglect or refusal to conduct actual mining operations for a period of six months at any one time (unless exempted by the lessor) shall operate as a forfeiture of all his rights under this lease, and subject it to cancellation by an appropriate proceeding in the United States district court for the district in which the land or a part of it is situated. Within 20 days after the close of each calendar year he shall file with the officer in charge an annual report, verified by oath, showing the charter and value of the development work performed and the gross output of his mining operations hereunder during the year; and within 20 days after demand by the lessor he shall file with the officer in charge of the reservation a sworn report, giving such information relative to his mining operations as may be demanded.

4. The lessee shall at all times conduct operations in a workmanlike manner, protect all mines and deposits, and not commit nor suffer any waste upon the reservation; and if it be necessary to use any wood, stone, coal, or other material thereon, he shall first obtain written permission from the officer in charge and shall pay to him for the Indians the current prices for all such material taken. He shall take good care of the land herein described, and not permit any nuisance to be maintained nor any intoxicating liquors to be sold or given away thereon for use as a beverage; he shall not use or permit the use of said lands and premises for any other purpose than as herein authorized, and at the expiration of this lease he shall return the same to the owners in as good condition as received, excepting for the ordinary wear and tear and unavoidable accidents in their proper use.

5. The lessee shall keep an accurate account of said operations, showing the whole amount of mineral mined or extracted and all mineral shipped, smelted, used, or disposed of, the cost of such operations, and the net value of the output of the minerals at the mine; and the officer in charge and other proper representatives of the department shall have the right at all times during the existence of this lease, and for six months thereafter, to make such reasonable examination of the papers and books of account of the said lessee, and of the mines, as may be necessary to obtain all information desired; and there is hereby created a lien on all implements, tools, movable machinery, and other personal chattels belonging to the lessee used in the said mining operations, and upon all minerals obtained from the land herein leased, as security for the monthly payment of said royalty.

6. The lessee in selecting employees shall give preference so far as practicable to Indians of the reservation who may be able and willing to perform the kind of work required; and he shall not retain in his employ any person objectionable to the officer in charge of the Indians. With each annual report he shall furnish the names and addresses of his employees.

7. The lessee shall not interfere with any personal or property rights or legitimate industry or occupation of the Indians without first obtaining consent in writing and paying proper compensation approved by the officer in charge; nor obstruct any road or trail now in use without permission of the officer in charge; and the right to cross the lands leased by the usual methods and in a manner not inconsistent with the mining operations herein provided for, is reserved for the Indians; and all rights to make and accept allotments within the boundaries of this lease of any lands deemed suitable for agriculture are hereby reserved.

8. The lessee shall not, without the consent of the lessor, assign or sublet any part of the lands leased. He may, however, surrender the lease for cancellation with the consent of the lessor, but the lessee or assignee should surrender his copy of the lease to the officer in charge, and all royalties and other obligations due and accrued to date of completion of application for cancellation, in addition to a cancellation fee of \$1, must be paid and discharged before such application will be considered, provided that if the lease has been recorded the lessee or assignee shall execute a release, record the same in the proper recording office, and file the release with the officer in charge. An application for cancellation will be considered as completed on the date such application is filed in the office of the officer in charge, provided the foregoing requirements have been fully observed.

9. In the event of failure or neglect of the lessee to perform any obligations under this lease, the lessor shall have the right at any time to cancel this lease by an appropriate proceeding in the United States district court for the district in which the land or a part thereof is situated, unless within 30 days after notice specifying the terms and conditions violated the lessee shall correct such failure and make good any loss caused thereby.

10. This lease is made and accepted, subject to existing law and any laws hereafter enacted as to said reservation, also to the regulations relative to such leases heretofore or hereafter prescribed by the lessor; and in no event shall the United States or the lessor be liable in damages or otherwise under the provisions hereof.

The obligations and agreements hereinbefore expressed shall extend to and be binding upon the successors in interest of the parties hereto.

11. Before this lease shall be in effect the lessee shall furnish a satisfactory bond with two or more personal sureties or with an acceptable company authorized to act as sole surety.

12. No prospector, locator, or mine owner shall keep stock of any kind on the lands except by permit at such rates as may from time to time be established.

13. It is expressly understood and agreed that there is reserved to the United States the right to lease under existing law or laws hereafter enacted so much of the surface of the lands covered by the lease as is not actually used or necessary for mining purposes.

Signed and sealed this _____ day of _____, 19__.

[SEAL.] _____

Secretary of the Interior.

[SEAL.] _____

Lessee.

Witnesses:

BOND.

KNOW ALL MEN BY THESE PRESENTS, That _____ of _____, as principal, and _____ as suret—, are held, and firmly bound unto the United States of America in the sum of fifteen thousand (\$15,000) dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, successors, executors, administrators, or assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this _____ day of _____, 19__.

The condition of this obligation is such that whereas the above-bounden _____, as principal, ha__ heretofore or may hereafter enter into mining leases covering unallotted Indian land on the _____ Reservation, in the State of _____, of various dates and periods of duration, covering the lands described in such leases, which leases have been or may hereafter be, signed by the Secretary of the Interior, and the identification of which herein is expressly waived by both the principal__ and suret__ hereto.

Now, if the above-bounden _____

shall faithfully carry out and observe all the obligations assumed in said in-

dentures of lease to which _____ is now or may hereafter become a party, and shall observe all the laws of the United States and regulations made or which shall be made thereunder for the government of trade and intercourse with Indian tribes, and all regulations that have been or shall hereafter be lawfully prescribed by the Secretary of the Interior relative to mining leases covering unallotted Indian land on the _____ Reservation and the development thereof, and shall in all particulars comply with the provisions of said leases and such regulations, then this obligation shall be null and void; otherwise to remain in full force and effect.

Signed and sealed in the presence of—
Witnesses:

Post office _____	}	as to _____	[SEAL.]
Post office _____			
Post office _____	}	as to _____	[SEAL.]
Post office _____			
Post office _____	}	as to _____	[SEAL.]
Post office _____			
Post office _____	}	as to _____	[SEAL.]
Post office _____			

DEPARTMENT OF THE INTERIOR,
Washington, D. C., _____

Approved:

_____,
Assistant Secretary of the Interior.

TO ACCOMPANY MINING LEASES COVERING UNALLOTTED INDIAN LANDS.

BOND.

KNOW ALL MEN BY THESE PRESENTS, That _____, of _____, as principal, and _____, of _____, as suret, are held firmly bound unto the United States of America in the sum of _____ dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, successors, or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this _____ day of _____, 19__

The condition of this obligation is such that whereas the above-bounden _____, as principal, entered into a certain indenture of lease, dated _____, with _____

_____ for the lease of a tract of land described as follows: _____

_____ and located in the _____ Reservation, in the State of _____ for _____ mining purposes for the period of _____ years from the date of approval thereof.

Now, if the above-bounden _____

shall faithfully carry out and observe all the obligations assumed in said indenture of lease by _____, and shall observe all the laws of the United States, and regulations made, or which shall be made thereunder, for the government of trade and intercourse with Indian tribes, and all the rules and regulations that have been, or may be, lawfully prescribed by the Secretary of the Interior relative to leases executed to cover unallotted Indian land on the _____, then this obligation shall be null and void; otherwise to remain in full force and effect.

Signed and sealed in the presence of—

Witnesses:

----- Post office----- -----	} as to-----	[SEAL.]
----- Post office----- -----		
----- Post office----- -----	} as to-----	[SEAL.]
----- Post office----- -----		
----- Post office----- -----	} as to-----	[SEAL.]
----- Post office----- -----		
----- Post office----- -----	} as to-----	[SEAL.]
----- Post office----- -----		

Two witnesses to each signature.

DEPARTMENT OF THE INTERIOR,
Washington, D. C.,

Approved.

Assistant Secretary of the Interior.

FORM OF PERMIT FOR CAMP SITES, MILLING, SMELTING, AND REFINING WORKS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,

RESERVATION.

By authority of the Interior Department permission is hereby granted to

lessee of mining lease No. _____, on the _____
Reservation, to use the following-described
tract of unoccupied land on the said reservation.

The land covered by this permit is to be used for camp sites, milling, smelting, and refining works, and for other purposes connected with and necessary to the proper development and use of the deposits covered by mining lease No. _____, all rights hereunder to cease and terminate upon the termination of the aforesaid mining lease.

In consideration of the above privilege the permittee agrees to pay on the date of the execution of this permit and annually in advance thereafter to the officer in charge of the said reservation for the use and benefit of the Indians the sum of \$ _____

(Not less than \$1 per acre.)

It is understood and agreed by the permittee that this instrument is not a lease, but a mere permit, and on failure of the permittee to fulfill its terms or to comply with the rules and regulations of the Secretary of the Interior relative

thereto, this permit may be revoked by the Secretary of the Interior and all rights thereunder will then terminate.

I agree to the foregoing conditions and stipulations.

The above permit is hereby approved:

Permittee.

Secretary.

EVIDENCE OF AUTHORITY OF OFFICERS TO EXECUTE PAPERS.

(To be sworn to by secretary or president of a corporation and sealed with its seal.)

I solemnly swear that _____ and _____ were on the _____ day of _____, 19____, the duly elected, qualified, and acting president and secretary, respectively, of _____, a corporation organized under the laws of _____, on which day they executed _____ mining lease for and in behalf of said corporation as lessee, covering certain unallotted Indian lands of the _____ Reservation; that they were fully empowered to execute said lease and all papers in connection therewith, and that their action in executing the same binds the said corporation to full performance of all obligations thereunder.

(Signed)

(Title)

This _____ day of _____, 19____

[CORPORATE SEAL.]

Subscribed and sworn to before me this _____ day of _____, 19____

(Signed)

[SEAL.]

(Title)

Note and carefully follow instructions and explanations on reverse.

Report No. _____ (Not to be filled in by lessee.)

LESSEE'S ANNUAL REPORT OF MINING OPERATIONS.

RESERVATION, STATE OF _____

LESSEE. YEAR ENDED _____

I, _____, being duly sworn, according to law, depose and say that I am the lessee (or the duly authorized agent of the lessee) above named; that I am familiar with all the mining operations under the lease hereinafter mentioned, and that I know of my own personal knowledge that the following statement is correct:

Table with 10 columns: Lease No., Description, Total on hand at beginning of year, Total mined, Total shipped, On hand, Freight charges, Transportation and handling charges other than railroad, Gross smelter returns, Royalty paid, To whom ore sold.

1 Should agree with total shown by remittance for year.

2 Should show all royalty paid during year and should total same as balance royalty in remittance reports for year.

Mining lease No.	Level.	Dimen- sions.	Labor.	Value.	Comment.
Shaft sinking.....					
Station cutting.....					
Drifting.....					
Cross cutting.....					
Winzing.....					
Raising.....					
Chutes.....					
Manways.....					
Pumps.....					
Air lines.....					
Water lines.....					
Track.....					
Powder magazines.....					
Bulkheading (not in ore).....					
Bulkheading (in ore).....					
Gob filling ¹					
Miscellaneous.....					

¹ Gob filling is necessary to hold ore bodies of size; must be done where necessary, but is not considered development.

(Name of lessee.)

(Signature of person sworn.)

(Capacity in which he is sworn.)

Subscribed and sworn to before me this _____ day of _____,
19__.

Notary Public.

My commission expires _____, 19__.

INSTRUCTIONS AND EXPLANATIONS.

1. A separate report must be submitted for each lease.
2. The report must be in the hands of the superintendent or other officer in charge within 20 days after December 31 of each year the lease is in effect.
3. The report must be submitted for every year during the life of the lease, regardless of whether or not mining operations are being carried on.
4. "On hand" should show the total tonnage unpaid for at the date of the report, including that remaining in the smelter, on the way to the smelter, and in the bins.
5. "Total shipped" should show separately each shipment made during the year on which separate payments of royalty were made, and separate royalties should be shown in "Royalty paid" column. All royalty should be paid promptly.
6. Any classification not included in this form may be added. If added on separate sheet, separate sheet must be made a part of this report and attached to same. Separate letters will not be considered part of the report.
7. The report must show all development work done during the period for which rendered, as reports may be compared with your workings at any time between reports.
8. Show clearly the dimensions of the workings, together with starting and ending points. Make these brief but accurate. Submit plats where practical. Include all permanent surface workings as development.

SEPTEMBER 10, 1919.

The foregoing regulations and forms are hereby approved.

CATO SELLS,
Commissioner of Indian Affairs.

Approved September 16, 1919.

FRANKLIN K. LANE,
Secretary of the Interior.

RECLAMATION—YUMA AUXILIARY PROJECT, FIRST MESA UNIT.**PUBLIC NOTICE.**

DEPARTMENT OF THE INTERIOR,

Washington, D. C., October 3, 1919.

1. *Lands set apart as First Mesa Unit.*—There are hereby set apart as the First Mesa Unit of the Yuma Auxiliary Project, Arizona, the unentered public lands shown on township plats of townships 9 and 10 south, range 23 west, G. and S. R. B. and M., approved on the date above given. Said plats are on file in the office of the project manager, United States Reclamation Service, at Yuma, Ariz., and in the local land office at Phoenix, Ariz.

2. *Value of land and water charges against same.*—The reasonable value of said lands so set apart is hereby fixed and determined to be \$25 per acre. The estimated cost of reclamation works hereafter to be constructed for the reclamation of said lands is hereby fixed and determined to be \$160 per irrigable acre. The proportionate cost of the reclamation works previously constructed for said Yuma Project and available for said lands, is hereby fixed and determined to be \$40 per irrigable acre. Said lands are subject to the payment of all of the above stated sums, and in addition an amount per irrigable acre sufficient to return to the United States the total actual cost of the works of said First Mesa Unit in the event that the actual cost of said works shall exceed the estimated cost thereof. Said lands are also subject to an annual charge, announced from time to time by the Secretary of the Interior, to cover the cost of operating and maintaining the irrigation works, which charge shall be paid each year in advance of the delivery of water.

3. *Sale of lands.*—Said unentered public lands shown on said plats will be sold at public sale to the highest bidder therefor, at Sunset Park in the city of Yuma, Ariz., on December 10, 1919, from 10 o'clock a. m. until noon and from 1 o'clock until 3 o'clock p. m. of that day, and each day thereafter, excluding Sunday, until all of said lands have been offered for sale: *Provided*, That no bid will be received for less than the value of the total area of the tract bid upon and the amount of the water charges against the irrigable area of the tract, as stated in paragraph two above: *Provided further*, That no person shall be permitted to purchase more than a total of 40 acres at said sale.

4. *Terms of purchase.*—Each successful bidder at the public sale will be required to execute at once, in duplicate, a land and water-right application as hereinafter provided, and at the same time make a deposit in cash, or by money order, certified check or draft of 10

per centum of the amount bid for the land and water right proposed to be purchased. Upon notice from the Secretary of the Interior that such bid has been accepted, the bidder shall be required to pay 15 per centum additional within 60 days after the date of such notice. In case of failure so to do the deposit shall be forfeited, the land and water-right application shall be canceled, and the land and water right in question shall be available for further sale. The remaining 75 per centum of the purchase price shall be paid in three annual installments, with interest at the rate of 6 per centum per annum on deferred payments until paid, running from the date of notice to pay the additional 15 per centum. Advance payments, however, may be made at any time. Upon full payment of the purchase price patent will issue for the land, which patent will contain a grant of the water right appurtenant to the land: *Provided*, That to each installment of the sale price of the land independent of the water right, there must be added and paid by the purchaser 2 per centum thereof, being the legal fees of the register and receiver of the local land office: *Provided further*, That in case the bids for the land and water rights shall not aggregate a sufficient amount within six months from the date of sale to meet the probable cost as announced herein all deposits will be returned and all land and water-right applications canceled.

5. *Land and water-right applications.*—Each successful bidder at the time of depositing 10 per centum of the sale price, must deliver to said project manager a land and water-right application executed in duplicate, for the land and water right proposed to be purchased, upon the form annexed hereto, marked Exhibit A. One of these applications will be filed with the United States Reclamation Service, and the other in the said local land office.

6. *Blank forms and farm unit plats.*—The project manager, United States Reclamation Service, Yuma, Ariz., will furnish, upon application by those interested, blank forms of said land and water-right application, without charge, and copies of said farm unit plats, which consist of three sheets, at the price of 10 cents per sheet.

7. *Qualifications of purchasers of public land.*—No qualification or limitation shall be required of any purchaser or patentee of public land except that he be a citizen of the United States. A corporation can not become a purchaser of public land at the sale. A purchaser is not required to live on or in the neighborhood of the land purchased. One who now holds land under a Federal irrigation project is not barred from becoming a purchaser hereunder.

8. *Preference rights.*—Any person who has made an entry which is now valid and subsisting or who has a preference right to make entry for any of the lands shown on the said plats may purchase said

land at the price of \$2.50 per acre and shall be subject to the same payments for the irrigation works as are required of persons holding private lands, as hereinafter stated. Entries under preference rights shall be made at said local land office at Phoenix, Ariz., on or before December 1, 1919.

9. *Construction of works.*—The construction of the irrigation system of the First Mesa Unit is dependent upon securing the necessary funds therefor from the sale of lands and water rights hereunder. If the bids received within six months aggregate a sufficient amount to justify the building of said system, construction work will be promptly begun and diligently prosecuted to completion as rapidly as the incoming payments will permit.

FRANKLIN K. LANE,
Secretary of the Interior.

EXHIBIT A.

[Form A-7-272 Yuma Mesa. (Oct. 1919.)]

Filed _____
Serial No. _____

LAND AND WATER-RIGHT APPLICATION.

(Act January 25, 1917, 39 Stat., 868, as amended.)

YUMA AUXILIARY PROJECT, ARIZONA.

FIRST MESA UNIT.

_____, 19____
Date.

I, _____ (Post-office address: _____), under the above-mentioned act and the regulations thereunder, for value received, for myself, and for my heirs, executors, administrators, and assigns, do hereby agree as follows:

(a) I will purchase from the United States _____ acres of land in the First Mesa Unit, Yuma Auxiliary Project, Arizona, described on township plats approved by the Secretary of the Interior on October 3, 1919, as farm unit _____, section _____, township _____ south, range 23 west, G. & S. R. B. & M., containing _____ acres of irrigable land; together with a water right for the irrigation of and to be appurtenant to said irrigable area.

(b) I will pay for said land the sum of \$_____ and for said water right the sum of \$_____, as follows: Ten per centum thereof on the date of this agreement; 15 per centum thereof within 60 days from date of notice of acceptance of my bid evidenced by this application; and the remaining 75 per centum in three annual installments beginning one year after date of notice of acceptance of my said bid; together with interest at the rate of 6 per centum per annum on deferred payments, and the legal fees of the register and receiver

of the local land office; also I will pay, in addition thereto and in advance of the delivery of water, the annual charges for operation and maintenance as announced by the Secretary of the Interior.

(c) In case the actual cost of the irrigation works of said First Mesa Unit shall exceed the sum of \$200 per irrigable acre, I agree to pay my proportionate share of the actual cost of the works.

(d) The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share, proportionate to irrigable acreage of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit. If measuring devices are not installed at the land the amount of water delivered shall be determined by the Reclamation Service official in charge of the project, a reasonable allowance being made for losses of water after passing the point of measurement.

(e) The United States and its successors in charge of the said unit shall have full control over all ditches, gates, and other structures owned or controlled by me or my successors in interest and which are required to deliver water hereunder; and proper officers and employees of the United States and its successors shall have at all times the right of access to the above-described premises whenever it is, in the judgment of the officer or employee in charge of said unit, necessary for them in the discharge of their duties of distributing water to exercise said control.

(f) The United States reserves the right upon my failure or the failure of my successors in interest to keep and perform any of the provisions in this instrument contained, by me and my successors in interest undertaker to be kept and performed, to refuse to deliver water to said land or to stop the delivery of water thereto if water is being delivered, and such refusal to deliver or stoppage of delivery of water shall not operate to cancel this application, but shall be considered as an additional remedy to the United States to any remedies existing by reason of the provisions of this application or otherwise.

(g) This application is subject to the condition that in case the bids received by the United States for the lands of said First Mesa Unit shall not aggregate a sufficient amount within six months from the date hereof to meet the probable cost of the works of said First Mesa Unit as stated in paragraph 2 of the Public Notice and Regulations approved October 3, 1919, all payments made hereunder will be returned to me and this application will be canceled; also to the further condition that the irrigation works for said land can not be built until the money therefor is received from the sale of said lands and water rights.

(h) No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon, nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such corporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat., 1109).

In witness whereof, I have hereunto set my hand and seal on the day and year first above written.

ACKNOWLEDGMENT.

STATE OF _____ } ss.
County of _____ }

On this _____ day of _____, 19____, before me personally came _____, to me known to be the individual described in and who executed the foregoing instrument and __he__ acknowledged to me that __he__ executed the same.

Notary Public.

My commission expires _____

AFFIDAVIT OF CITIZENSHIP.

STATE OF _____ } ss.
County of _____ }

_____ being first duly sworn, says that he is the person who signed the above instrument, and that he is a _____
(Applicant must state whether he is native born or naturalized.)

If not native born, record evidence of citizenship will be required before patent will issue.)
citizen of the United States of America.

Sworn to before me this _____ day of _____, 19____

Notary Public.

My commission expires _____

ACCEPTANCE.

Accepted this _____ day of _____, 19____, by authority of the Secretary of the Interior.

Project Manager, U. S. R. S.

CERTIFICATE OF REGISTER.

UNITED STATES LAND OFFICE AT PHOENIX, ARIZ.,

_____, 19____

I hereby certify that the records of this office disclose no objection to the foregoing application.

Register.

EDWARD R. BURT.

Decided October 4, 1919.

SECOND HOMESTEAD ENTRY—REINQUISHMENT—ACT OF SEPTEMBER 5, 1914.

Relinquishment of a homestead entry by a claimant because of establishment of residence in another State in order to institute divorce proceedings is the voluntary act of such entryman; and he is not therefore entitled to the benefit of the act of September 5, 1914, authorizing the allowance of a second homestead entry where the former entry was "lost, forfeited, or abandoned because of matters beyond his control."

VOGELSANG, First Assistant Secretary:

January 3, 1916, Edward R. Burt made homestead entry 028083 for lots 1 and 2 and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 2, T. 13 S., R. 5 E., S. B. M., 163.56 acres, Los Angeles, California, land district, which entry he relinquished June 27, 1916.

October 20, 1916, he made desert-land entry 029168 for said land, which he relinquished October 19, 1917, and on the same day he filed second homestead application 031008 for the same land.

He states his reasons for abandoning and relinquishing his earlier entries as follows:

Shortly after making my homestead entry in January, 1916, I had some legal trouble with my wife, and had to go to Reno, Nevada, in order to fight a divorce case instituted by me. The case did not come up finally until some time in July, 1917, but I had to spend nearly fourteen months in Nevada, as the matter was postponed from time to time. The above is the reason why I could not perfect my homestead entry, and which necessitated my turning it into a desert-land claim. And the condition of my affairs is such now, that I will be able to perfect my homestead under the homestead laws, while it would be practically impossible to prove up on this land under the desert-land act.

June 27, 1918, the Commissioner of the General Land Office rejected his application, holding that the showing made did not bring such application within the provisions of the act of September 5, 1914 (38 Stat., 712).

It is clear that Burt did not speculate in his homestead entry, nor commit a fraud, nor attempt to commit any fraud against the Government. The sole question presented is as to whether or not, upon the statement above quoted, his earlier homestead entry was lost, forfeited or abandoned by reason of matters beyond his control.

From the fact that the applicant spent nearly fourteen months in Nevada "in order to fight a divorce case instituted by me," it is evident that the "matter beyond his control" was his wife. This has probably occurred before in the public-land States, but so far as known, the Department has never considered it as justifying a second entry. From all that appears in the record the wife might have been relinquished in California without also relinquishing the entry. An absence of fourteen months in Reno was not necessary. Cali-

ifornia maintains an excellent judicial system. In its courts divorce proceedings are, and at all times mentioned by applicant were entertained. He should have utilized those courts in effecting his divorce. He chose his forum. Perhaps he saw some advantage in the divorce laws of Nevada that compensated him for the change of residence.

No reason has been alleged, however, which renders the relinquishment other than voluntary and for the entryman's convenience. And on that showing a second entry can not be allowed.

The decision appealed from is affirmed.

JACOBSEN v. RUSH.¹

Decided October 4, 1919.

NOTARY PUBLIC—ACT OF JUNE 29, 1906.

An affidavit of contest verified before the wife of contestant is insufficient under the act of June 29, 1906.

VOGELSANG, *First Assistant Secretary*:

December 9, 1910, James E. Rush made homestead entry 08511 for the SE. $\frac{1}{4}$, Sec. 31, T. 12 N., R. 6 E., B. H. M., Bellefourche, South Dakota, land district. Commutation proof was submitted on said entry July 1, 1912, and patent issued thereon to Rush October 28, 1912. November 16, 1915, he made additional entry 013052 under the act of February 19, 1909 (35 Stat., 639), for lots 1, 2 and 3, Sec. 6; T. 11 N., R. 6 E., B. H. M., 155.55 acres, Bellefourche, South Dakota, land district, as additional to his original entry 08511. May 31, 1918, Henry Jacobsen filed contest against said additional entry, charging:

That said James E. Rush never established residence upon said land or resided upon said land as required by law and has never resided upon the same; that entryman is not now or has he been engaged in the military service of the United States or her allies.

This affidavit was sworn to before Mabel Jacobsen, a notary public and wife of contestant Jacobsen. June 29, 1918, motion was filed on behalf of the entryman for dismissal of this case for the reason that said affidavit had been executed before the wife of contestant as notary public.

July 24, 1918, while this motion to dismiss was pending, contestant filed what he described as an amendment to the original application, charging:

That said James E. Rush never established residence on either the above-described entry or on his original entry, which has been abandoned since

¹ See decision on Motion for rehearing, p. 281.

commutation proof was submitted by said James E. Rush on his adjoining original entry; that he has made his home since abandonment in Bonilla, South Dakota, and that his absence from this land was not due to his service in any branch of the United States Army or Navy.

January 27, 1919, the local officers denied contestee's motion to dismiss, holding that the mere fact that the notary before whom the contest affidavit was verified was the wife of the contestant, would not justify such action, and further holding that an amended affidavit had been filed, as above stated.

May 2, 1919, the Commissioner of the General Land Office, considering the case upon the appeal of Rush, affirmed the action of the local officers, holding that the original affidavit was not invalidated because of its execution before the wife of the contestant, but further holding that as the attempted amendment introduced a new and entirely different cause of contest, it must be treated as having been initiated on the date it was filed, to wit, July 24, 1918, and thereupon required issuance of new notice thereon and allowed the contestant to proceed *de novo*. The latter holding of the Commissioner is because the contest affidavit of May 31, 1918, aside from any irregularity in the manner of its execution, was entirely insufficient, in that under the law the establishment and maintenance of residence on the original homestead would have met all the requirements of the case, while the contestant merely charged failure to establish and maintain residence on the land embraced in the additional entry. From this decision appeal has been taken to the Department.

The record has been examined in the light of all briefs filed in behalf of the respective parties, and the Department is convinced that the contest affidavit of May 31, 1918, verified before the wife of contestant, is insufficient under the act of June 29, 1906 (34 Stat., 622), and for this reason, as well as because it stated no cause of action, the motion to dismiss filed on behalf of contestee should have been sustained, and the decision appealed from is to this extent modified. The Commissioner's holding that notice might issue upon the contest affidavit filed July 24, 1918, and the contest be deemed initiated on that date, is in so far as shown by the record correct. All proceedings that may be taken under such affidavit, however, will be subject to review in the usual manner and will be considered by the Department only when properly presented upon appeal from action taken by the Commissioner. As thus modified, the decision appealed from is affirmed.

JACOBSEN v. RUSH (ON REHEARING).

Decided November 29, 1919.

CONTEST—PRACTICE—AMENDMENT.

An affidavit of contest that does not state a sufficient cause of action is not amendable so as to serve from the date of the original filing, but dates from the filing of the so-called amended affidavit.

VOGELSANG, *First Assistant Secretary*:

A motion for rehearing has been filed in behalf of Henry Jacobsen in the above-entitled case involving his contest against the additional entry of James E. Rush for lots 1, 2 and 3, Sec. 6, T. 11 N., R. 6 E., B. H. M., Bellefourche, South Dakota, land district. The entry under contest was made November 16, 1915, as additional to original entry for the SE $\frac{1}{4}$, Sec. 31, T. 12 N., R. 6 E., B. H. M., upon which final commutation proof was submitted July 1, 1912, and upon which patent issued October 28, 1912.

Jacobsen filed contest May 31, 1918, against the said additional entry alleging that Rush had never established residence upon said land or resided upon the same as required by law.

The law under which the entry was made does not require residence upon the additional entry but permits residence upon the original entry to the credit of the additional and where residence has already been performed upon the original sufficient to satisfy the additional no further residence is required. It was, therefore, held that the contest did not state a sufficient cause of action [47 L. D. 279]. Furthermore, the affidavit was executed before the wife of the contestant and it was held that such execution was not allowable under the act of June 29, 1906 (34 Stat., 622).

The contestant filed an amended contest affidavit July 24, 1918, and it was held that the contest should date from the filing of the so-called amended affidavit.

It is urged in the motion that the original application to contest was properly executed, and further that if deemed defective in that respect it was subject to amendment, the case of Stock Oil Company (40 L. D., 198), being cited. It may be conceded that if the only defect had been that of improper execution in the manner stated, the contest affidavit might have been amended, but aside from that it failed to state a good cause of contest and therefore it was not amendable so as to serve from the date of the original filing.

The Department can not concede, as urged, that the affidavit did state a good cause of action, nor that it was improper to consider that question in the absence of objection on the part of the contestee to that feature of the affidavit. The question of the sufficiency of

the affidavit having been brought up for adjudication, it was pertinent to consider its full purport and effect. The motion is accordingly denied.

EDWIN S. LOWER AND ANNIE R. DIXON.

Decided October 4, 1919.

INTERMARRIAGE OF HOMESTEADERS—ACT OF APRIL 6, 1914—WHO ENTITLED TO BENEFITS.

The marriage of a homestead entrywoman to one who has an existing additional homestead entry wherein, because of completed title to the original, no further residence is required, is not within the contemplation of the act of April 6, 1914, which accorded the right of election as to residence, where necessary in order to perfect each of the respective entries.

VOGELSANG, First Assistant Secretary:

August 23, 1906, Edwin S. Lower made homestead entry 02156 for the SW. $\frac{1}{4}$, Sec. 20, T. 5 N., R. 45 E., M. P. M., within the Miles City, Montana, land district, and on September 12, 1911, final five-year proof was submitted and patent issued April 25, 1912.

On January 15, 1917, Mr. Lower made homestead entry 034898 for the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, in the same section, as additional to his perfected or original homestead.

March 8, 1918, Annie R. Dixon made homestead entry 042482 for lots 3 and 4, and the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 2, T. 2 N., R. 44 E., M. P. M., within the Miles City, Montana, land district.

April 10, 1918, Lower filed an affidavit stating that he and said entrywoman were married March 18, 1918, and that they elected to reside upon the land embraced in his entries, under the provisions of the act of April 6, 1914 (38 Stat., 312), which reads as follows:

That the marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry. *Provided*, That the provisions hereof shall apply to existing entries.

It is alleged that the respective parties resided upon their homestead entries and fulfilled the requirements of law for more than one year preceding such marriage.

By decision of March 14, 1919, the Commissioner of the General Land Office denied the application to elect, upon the ground that the said remedial act did not apply, for the reason that Lower had completed title to his original entry and no further residence was required for completion of his additional entry, which was made under section 3 of the act of March 3, 1915 (38 Stat., 956). An

appeal from that action has brought the case before the Department for consideration.

The Department concurs in the view thus expressed by the Commissioner. The design of the said act was to avoid forfeiture of an entry, which was the result under the prior law where an entryman and an entrywoman intermarried in cases where residence was required on their respective entries. In such cases one of the entries had to be surrendered because the required residence could not be performed upon both by man and wife. That this was the purpose of the remedial act is shown by the report of the House Committee which had the bill under consideration, and wherein the object of the legislation was set forth in the language used by the Department in its report to Congress with reference thereto, in part as follows:

Where the two have made homestead entries in good faith and complied with the law for considerable periods, they are, under the law as it stands, reduced to the alternatives of surrendering one of the claims or of postponing their marriage until the requirements of the homestead law shall have been fulfilled as to one of them. Legislation remedying this condition would appear to be desirable.

Attention is also called to the language of the act according the right of election to reside upon one of the entries and then specifying as follows:

And residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry.

This clearly shows that the act contemplated a situation where there would be a forfeiture unless relief were granted. Such is not the situation in this case. The husband having already performed all residence requirements with reference to his entries, he is free to reside upon his wife's entry, and this is not a case calling for relief under the remedial act.

The decision appealed from is affirmed.

**ABSENCE DURING COURSE OF VOCATIONAL REHABILITATION—
ACT OF SEPTEMBER 29, 1919.**

INSTRUCTIONS.

[Circular No. 657.]

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 8, 1919.**

**REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES.**

The act of September 29, 1919 (41 Stat., 288), provides:

That every person who, after discharge from the military or naval service of the United States during the war against Germany and its allies, is furnished

any course of vocational rehabilitation under the terms of the Vocational Rehabilitation Act approved June 27, 1918, upon the ground that he comes within article 3 of the Act of October 6, 1917 (40 Stat., 398), and who before entering upon such course shall have made entry upon or application for public lands of the United States under the homestead laws, or who has settled or shall hereafter settle upon public lands, shall be entitled to a leave of absence from his land for the purpose of undergoing training by the Federal Board of Vocational Education, and such absence, while actually engaged in such training shall be counted as constructive residence: *Provided*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year.

1. Article 3 of the act of October 6, 1917 (40 Stat., 398, 405), referred to, provides for compensation by the Government to any person who has suffered disability on account of personal injury received, or disease contracted, in the line of duty while actively engaged in the military service, including members of the Army Nurse Corps (female) and of the Navy Nurse Corps (female). The present act is limited in its application to persons who come within these classes, being those referred to in said act of June 27, 1918.

2. Any person who has made or shall make a homestead entry, or has filed or shall file an application for such entry, which is subsequently allowed, or has made or shall make a valid settlement on the public land, pursuant to which he may thereafter be allowed to make homestead entry, and who, after the date of such entry, application or settlement is furnished a course of vocational rehabilitation upon the grounds above set forth, is entitled to a leave of absence from his claim during the period of his training and is entitled to have said period counted as constructive residence, subject to the condition that he can not receive final certificate and patent without a showing of one year's residence. Moreover, he is entitled, on proper notice, to absent himself for five months in each required year of residence, which may be divided into two periods if desired.

3. The fact that a claimant is entitled to credit on the residence and cultivation period on account of his military service does not preclude him from the allowance of credit under this act; but each homesteader must show at least one year's residence and cultivation irrespective of the total of the combined credit and leave of absence to which he may be entitled.

4. Under the legislation conferring special privileges on soldiers and sailors, one who is accorded so much credit for military service that there is required not more than one year's residence upon his claim, need show only such amount of cultivation as will evidence his good faith as a homestead claimant; if his credit is such as to require more than one year's residence he must show cultivation to the extent of one-sixteenth of the area of the land beginning with the second year of the entry; if the credit is so small that

there is required more than two year's residence, he must show cultivation of one-sixteenth of the area during the second year and one-eighth thereof during the third year and until submission of proof.

If, in view of these rules, the period of absence under the present act is during a time when cultivation would be required of the entryman, then he will be given credit for constructive cultivation also during that time.

5. A person who is entitled to the benefits of this act should forward to the local U. S. Land Office notice of his absence from the land and of the fact that he has been admitted to take a course of vocational rehabilitation under the above-mentioned provisions of the act of June 27, 1918, together with a certificate to that fact by the proper official. He should also file notice of his return to the land. The local officers will make due notations on their records.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

EXTENSION ACT OF AUGUST 13, 1914.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
RECLAMATION SERVICE,
Washington, D. C., October 18, 1919.

TO ALL FIELD OFFICERS:

1. This circular letter is issued for the purpose of correcting an existing confusion and lack of uniformity in connection with the approval of water-right applications, the charges for water rights, and the handling of water-right accounts, under the Extension Act. All orders, public notices, circular letters, and other instructions inconsistent with this circular letter are modified to conform herewith.

SECTION 1, EXTENSION ACT.

2. Upon acceptance of the Extension Act by the filing of a water-right application, or otherwise, the following-described lands become subject to the provisions of section 1 of said act, to wit:

(a) *Land in private ownership which was not made subject to the reclamation law prior to August 13, 1914 (38 Stat., 686).*

(b) *Public land entered not subject to the reclamation law and not subjected to said law after entry and before August 13, 1914. Such*

land is not considered public land in respect to water-right applications, Form B of the application being used.

(c) *Public land entered subject to the reclamation law on or after August 13, 1914.* As a general rule, for land of this class, both entry and water-right application are initiated simultaneously. Sometimes, however, entries are permitted under the last proviso of section 1 before public notice is issued, in which event, the order opening the lands should specify a reasonable time after date of public notice within which water-right application must be made and the initial installment paid.

In each of the above cases, the initial installment of the construction charge is payable at the time of filing water-right application, and the second on December 1 of the fifth calendar year. For example, if the initial payment was made December 2, 1914, the second installment would be payable on December 1, 1919. There can be no accumulation of either construction or operation and maintenance charges prior to filing water-right application in these cases. (See paragraph 4 of this circular letter in reference to the application of sec. 9 of the Extension Act to lands above referred to.)

SECTION 2, EXTENSION ACT.

3. Section 2 of the Extension Act specifically provides that the first installment of the construction charge "shall become due on December 1 of the year in which public notice * * * is issued." The subjecting of his land to the reclamation law is an agreement on the part of the owner or entryman to abide by the law and regulations issued thereunder. Such owner or entryman therefore has no right, after the issuance of public notice, to defer the filing of water-right application or to postpone the payment of installments of water-right charges. Congress evidently had this thought in mind in fixing the date so definitely. This construction charge is due and payable on December 1, *as stated in the law*, without reference to whether a water-right application is filed, and if payment is not made on that due date the penalties provided by section 3 of the Extension Act become effective. Public notices covering lands subject to section 2 will not be issued, as a rule, in the month of December. Section 9 of the Extension Act does not apply to lands subject to section 2. (See next paragraph.)

SECTION 9, EXTENSION ACT.

4. Section 9 of the Extension Act is intended to encourage the early filing of water-right applications for land which *has not been subjected to the reclamation law*. In the Extension Act Congress kept clear the distinction between the two classes of land involved, one subjected to the reclamation law and one not subjected to that

law. In the former case Congress fixed a definite date when the first installment of the construction charge should become due, and provided a penalty of 1 per cent a month for nonpayment. In the latter case, where the lands were not bound by any prior agreement, Congress provided the 5 per cent increase in section 9 to induce early application. From a careful survey of the entire law it appears evident that the application of section 9 is limited to *lands in private ownership not subject to the reclamation law and to entries not subject to the reclamation law*. Section 9, therefore, does not apply to any lands under section 2, which section deals exclusively with lands "subject to the terms and conditions of the reclamation law."

PROCEDURE.

5. Immediately upon issuance of public notice water-right accounts should be opened for all owners and entrymen whose lands are subject to section 2. For those who do not make water-right application the accounts should be kept in a separate place in the ledger and bills issued at the appropriate time, the same as for those who have made water-right applications. If the entryman or owner has accepted the extension act, the bill should conform to section 2 thereof, but if the extension act has not been accepted the bill should conform to the ten-year plan, and terms of payment as announced in the public notice. Operation and maintenance charges, as well as construction charges, may accrue before the making of water-right application. Payment may be accepted at any time, *but no water should be delivered until water-right application is filed*. In cases where a landowner holds title to more irrigable land than the limit fixed for the project for which an individual water right may be purchased, or where an entry covers land in excess of one unit as established by the public notice, payment of water-right charges for the entire area may be accepted from the owner or entryman pending disposition of the excess holding as provided by the regulations or pursuant to agreements made covering such disposition. Bills for water-right charges in cases of this kind, as well as the notices referred to in paragraph 6 hereof, should state specifically that water-right application can not be accepted for an area in excess of the limit fixed by law and the regulations thereunder.

6. Prompt action should be taken by project offices to prevent the accumulation of unpaid construction and operation and maintenance charges on land subject to section 2 for which water-right application has not been filed. In the case of entries on public land it is unnecessary to wait until the charges have become delinquent. Entrymen should be notified immediately after issuance of public notice that unless water-right application is filed before December 1 their entries will be reported for cancellation. In the case of land in private

ownership the owner should be notified immediately after issuance of public notice that he is expected to file water-right application promptly, and that charges will accrue, beginning December 1, whether or not water-right application is filed. The notice to non-residents should state that application can not be accepted until the required residence on the land or in the neighborhood is established, but that charges will nevertheless accrue as stated. If application is not filed by December 1, full report should be made to the Director through the District Counsel and Chief of Construction, with recommendation as to what action is desirable. If it should be established in any case that the land thought to be subject to the reclamation law prior to August 13, 1914, is not, in fact, subject to the law, then such land necessarily would come under section 1 and the provisions of section 9 in reference to the annual increase of 5 per cent would apply from date of public notice or from date of the Extension Act as the case may be.

7. Project managers are instructed to take into account immediately contract values and accrued charges to date for all land under public notice considered subject to section 2, for which water-right applications have not been filed, sending bills for the unpaid construction and operation and maintenance charges to owners and entrymen, giving sixty days in which to file water-right application. At the expiration of this time full report should be made to the Director through the District Counsel and Chief of Construction with such recommendation as appears desirable.

A. P. DAVIS,
Director.

Approved:

JOHN W. HALLOWELL,
Assistant to the Secretary.

WELLS v. FISHER.

Decided November 1, 1919.

PRACTICE—STATUTORY RIGHT.

No departmental regulation or practice, however long continued, can override a plain statutory right, unambiguous and not the subject of construction.

CONTEST—PREFERENCE RIGHT.

The preference right of entry accorded a successful contestant by the act of May 14, 1880, is a statutory right which can not be extinguished by any regulation in fatal conflict with and not authorized by law.

DECISION DISTINGUISHED.

Case of *Edwards v. Bodkin* (249 Fed., 562) cited and distinguished.

VOGELSONG, *First Assistant Secretary:*

This case involves the construction and application of the regulations of this Department relating to the acquisition and exercise of

preference rights gained by successful contestants in lands embraced in first form reclamation withdrawals.

Through his successful contest George H. Timmings gained a preferred right to enter the NE. $\frac{1}{4}$, Sec. 13, T. 7 S., R. 22 E., S. B. M., in 1908, while it was covered by a first form reclamation withdrawal. His application to make a desert-land entry was rejected, and he was notified that he would later be permitted to exercise his preferred right if, and when, the withdrawal was revoked and the lands restored to entry. This action was based on the regulations of June 6, 1905 (33 L. D., 607), which sanctioned contests against entries embracing lands included in first form withdrawals under the reclamation act; and declared that—

any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from the withdrawal and made subject to entry.

Later the withdrawal of these lands was vacated and they became subject to settlement on April 18, 1910, and to entry on May 18 following, on which latter date Lee E. Wells filed his homestead application based on a claim that he had settled on the land on April 18, 1910. On May 23, 1910, Timmings renewed his application to make a desert-land entry, and on the following day the local office suspended Wells's application to await action under Timmings's application in which he still claimed a preferred right to enter under his contest. Before further action was taken on either of these applications they were both suspended to await the final adjudication of a claim that had been asserted to the lands by the State of California, and they remained so suspended until in May, 1912, when the suspensions were relieved, and Timmings's entry was allowed and the application of Wells was rejected on the ground that Timmings's preferred right of entry gave him the superior claim to the lands. That action was later sustained by this Department in its decisions denying Wells's appeal, and his motion for a rehearing and petition for the exercise of its supervisory power. The case was finally closed as to Wells, and subsequent to that action Timmings sued in the local State court to oust him from the possession of the land. Wells defaulted when that case was called for trial, and the possession was awarded to Timmings on April 6, 1914. Wells then abandoned the land and did not thereafter actively assert any claim under his application and alleged settlement until February 8, 1919, when he filed a protest against the issuance of a final certificate on final proof presented on that date by Wayne H. Fisher, to whom the south half of the tract mentioned had passed by assignments under Timmings's entry. The local office suspended the final proof to await action on

the protest, and Fisher appealed to the General Land Office from that action.

When the record in the case reached the Commissioner of that office he forwarded it to this Department for its consideration with the statement that inasmuch as all the questions presented by the protest had been finally determined in the departmental decisions mentioned he did not feel at liberty to readjudicate them.

In this protest Wells does not question the sufficiency of either Fisher's final proof or the assignment under which he holds; but bases his attack on the ground that he "is the owner of said land and entitled to the possession thereof under and by virtue of his homestead entry made for the northeast quarter of said section 13 on May 18, 1910, in the exercise of a settler's preferred right of entry, which homestead entry is still valid under the laws of the United States." He further stated that he has instituted a suit against Fisher in a State court "wherein the title and the right to the possession of said land is involved," and asked that the final certificate be withheld "until said action has been determined and judgment therein entered."

In this connection it will be well to note and keep in mind the fact, which will be found very material later on in this decision, that Wells never had an entry covering these lands, and never had any other interest than that gained by his settlement and application to enter mentioned above, notwithstanding the fact that he asserts in his protest that he "is the owner of said land and entitled to possession thereof under and by virtue of his homestead entry."

This protest and the claim on which it is based, as well as the suit he says he has instituted, were evidently induced by the decision recently handed down by the United States Circuit Court of Appeals for the Ninth Judicial Circuit in the somewhat kindred case of *Edwards v. Bodkin* (249 Fed., 562).

This protest does not raise any questions that were not fully and finally disposed of adverse to Wells by this Department in its decisions mentioned above after it had three times given careful consideration to his case, and the protest might very well be brushed aside and denied for that reason; but in view of the fact that he may possibly pursue his contention in the courts and finally bring it before the same court by which *Edwards v. Bodkin* was decided, it is deemed advisable to here fully set out and consider the entire history of this case and point out wherein it differs from that case.

In that case, where *Edwards* sued in equity to have *Bodkin*, a patentee, declared his trustee, the court below sustained *Bodkin's* motion to dismiss the bill of complaint on the ground that it failed to state a cause of action; and when the appellate court considered

Edwards's appeal from that dismissal it assumed the facts alleged in the bill to be true, and from the bill found them to be as follows:

That in 1902, and before the lands there involved were embraced in a first form reclamation withdrawal, Edwards entered them under the homestead laws, and thereafter—

complied with all of the requirements of the homestead and reclamation laws, made final proof of such compliance before the United States land office for that land district, proved such compliance by two creditable witnesses, who made oath to all the items required by law to be made, paid all the fees required by law to be paid prior to receiving a patent for the land, published in due form notice to all persons having or claiming to have a better right to such land than the plaintiff, and required such persons to appear and exhibit such claim of right. No person appeared at the time and place and offered evidence of a better or of any right adverse to plaintiff; nor was notice ever given to plaintiff by the land office that the proof submitted was defective in any way as to the special or any of the conditions under which the entry was made. But the Land Department, without regard to the premises, refused to consider such proof and to issue a patent to plaintiff for the land described. After making the proof required, the plaintiff continued to reside upon the land, to cultivate and improve it in accordance with the purpose he had in making the entry, and kept his claim for a patent continually before the Land Department as a claim of legal right.

The court further found that on May 5, 1908, and while the lands were withdrawn under the first form, Bodkin served Edwards with notice of his contest theretofore filed, "in which he charged that Edwards had made no improvements thereon, and had abandoned the same for more than six months." * * *

And at the hearing of the contest it was proven, and conceded without dispute, that plaintiff had established a residence upon the land in controversy, had made improvements thereon, and that any lack of cultivation or absence from the land was due to its character and its dependence upon a system of irrigation to be provided by the Government under the reclamation act or some other system; that, instead of abandoning the land, plaintiff was residing on, reclaiming, cultivating, and improving it when he was served with the notice of contest.

This contest came up to this Department on appeal by Edwards from decisions adverse to him, and it was found here that the facts disclosed by the record in that case sustained the contest charges, and the entry was accordingly canceled.

The court, without having the record in the contest case before it, and basing its statements solely on the facts alleged in Edwards's bill of complaint, said, in questioning the soundness of the Department's action, that while it did not have the power to inquire into the correctness of the findings of fact on which the cancellation was based, although it believed that the case was erroneously decided on the facts, it did have power to "inquire into it as a question of law." And it was on that theory that the court held that this Department erred in its conclusion that Edwards had abandoned the land; a con-

clusion that might not have been reached if the court had had the benefit of all the facts disclosed by the contest record as the basis of its opinion instead of the mere allegations contained in Edwards's bill of complaint.

But be that as it may, the decision of the court in that case that Edwards had not abandoned the land covered by his entry can not be invoked, and is not controlling in this case, because Wells, the protestant here, has not attempted to, and can not, bring himself within the facts found by the court in that case as to Edwards's improvements and continued residence. In some respects the two cases are very similar. The lands involved in both of them are located in the same township, and they were both embraced in and similarly affected by the same reclamation withdrawals and orders of restoration; both the original entries embracing them were canceled on contests charging abandonment, and the preferred rights of both contestants were suspended under the regulations of June 6, 1905, *supra*, and both Edwards and Wells filed applications to enter on May 18, 1910; that of Edwards being an application for a second entry, and not an application for the reinstatement of his canceled original entry, a fact that was not brought to the attention of the court. Both of the applications to enter were suspended and finally rejected; in one case because of the preference right of Bodkin, and in the other because of the similar right claimed by Timmings. Thus far the history of the two cases is identical, but here the parallel between them ends, and a divergence fatal to Wells's protest begins, even if this Department should feel itself obliged to follow the decision of the court as to Edwards's rights. When he went into court Edwards claimed title through his original entry, and not through application filed on the day on which Wells applied to enter. Wells had never had an entry of these lands prior to presenting his application on May 18, 1910, and now bases his claim solely on that application and his alleged settlement. Bodkin contested and secured the cancellation of Edwards's entry while Timmings's contest was not against an entry made by Wells, but against one held by a stranger to the record. The court found that Edwards had fully earned a patent by compliance with the requirements of the law and Wells does not make a claim of that kind.

From this it will be seen that Wells can not base his hope of recovery on the first ground on which the court sustained Edwards's claim, i. e., that Edwards, through his supposed compliance with the law had earned the land under the doctrine announced in *Ard v. Brandon* (156 U. S., 537).

If there is merit in Wells's protest it must be found in his further and main contention that Timmings did not in 1910 have such a

preferred right under his contest as gave him a dominant interest in the land, superior to the claim of Wells under his settlement and application made and filed before Timmings presented his application on May 23, 1910. This contention is based on the theory that Timmings's preference right, although suspended under the regulations of 1905, was fully extinguished and killed by the later regulations of January 19, 1909 (37 L. D., 365), which not only forbade contests involving lands embraced in first form reclamation withdrawals, but declared that "in cases where contests have been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all rights acquired by reason of such contests."

After the court had held that Edwards had earned a patent it gave attention to the provisions of the regulations of 1905 and 1909, and its observations as to them in a measure tend to sustain Wells's contention that Timmings's preference right was extinguished before he attempted to exercise it. The court after calling attention to the fact that a contestant's preference right was a statutory right conferred by the act of May 14, 1880 (21 Stat., 140), very seriously questioned the power of this Department to hamper and delay its exercise as was attempted by the regulations of 1905. The court, however, without passing on that question, said that—

* * * If we hold that the Secretary of the Interior had the authority to make the regulations of June 6, 1905, we must also hold that he had the authority to make the regulations of January 19, 1909. If he had the authority to make, he had the authority to unmake. If he could amend or modify the statute in one case, he could do so in the other.

* * * We are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909.

In questioning the legality of the provision of the regulations of 1905 which prevents the immediate exercise of a contestant's preference right, and delays entries under such a right until the withdrawal has been revoked and the lands have been declared subject to entry, the court appears to have been unmindful of the fact that section 3 of the reclamation act of June 17, 1902 (32 Stat., 388), under which these lands were placed in a first form withdrawal, specifically empowers the Secretary of the Interior to "withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act" and then says that he "shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act." It is such withdrawals as these that are commonly known as "first form withdrawals" or "withdrawals under the first form," such as the one

here involved; and it necessarily follows that neither successful contestants nor any other person could be permitted to enter lands while they are embraced in such a withdrawal. To hold otherwise would be to say that any qualified person could, of his own volition, defeat the purposes of that statute, abrogate the withdrawal, and very seriously embarrass and hamper the construction of necessary irrigation works by simply prosecuting a successful contest.

But even if the regulations of 1905 were not authorized by law at the time they were promulgated, they were in effect sanctioned by Congress in section 5 of the act of June 25, 1910 (36 Stat., 835), which declared that "no entry shall hereafter be made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same." The things here required to be done before an entry can be made never occur, and can not be performed while lands are embraced in a first form withdrawal.

In so far as the court's comment on the effect of the regulations of 1909 is concerned it is evident that its attention had not been called to the later determinations of this Department as to soundness of the rule announced by that regulation, that a withdrawal extinguished a contestant's preference right, or to the fact that rule had long ago been abandoned as unwarranted, was no longer adhered to here.

As long ago as August 24 and September 4, 1912, and more than five years before the court rendered its decision in *Edwards v. Bodkin*, this Department gave this question further consideration and by its regulations bearing those dates (41 L. D., 171 and 241) abrogated the rule in question and declared that contestants' preferred rights to withdrawn lands should be suspended and their exercise permitted when and if the lands were restored to entry, because it then recognized the fact that, as was later said in *Beach v. Hanson* (40 L. D., 607), "The Land Department has no authority by regulation to disregard the act or deny the right" conferred on successful contestants by the act of May 14, 1880, *supra*. And it was on this ground that this Department based its decisions in this case, and in the case of *Edwards v. Bodkin* (42 L. D., 172), where it was said:

The preference right of entry conferred by the act of May 14, 1880, *supra*, upon any person who has contested, paid the land office fees, and procured the cancellation of a homestead entry is a statutory right which the Department is without authority to deny or disregard, by regulations or otherwise.

This doctrine has been followed since the rendition of that decision, as will be seen from the decision in the case of *John T. Slaton* (43 L. D., 212); and it incorporated it in paragraph 29 of the regula-

tions of May 18, 1916, and paragraph 2 of the regulations of May 17, 1917 (45 L. D., 385, 391, and 46 L. D., 121, 122).

From this it must be concluded that while the regulations of 1909 declaring the extinction of preference rights was in force at the time Timmings undertook to exercise that right, it can not be said that his right was extinguished by it, because that regulation undertook to do an impossible thing and was therefore without force and effect in law, inasmuch as it was in fatal conflict with and not authorized by law; and "no departmental regulation or practice, however long continued, can override a plain statutory right, unambiguous and not the subject of construction." (*United States v. Graham*, 110 U. S., 219; *United States v. Alger*, 152 U. S., 384; *Webster v. Luther*, 163 U. S., 331; *Francis M. Bishop*, 5 L. D., 429; *Hoyt v. Sullivan*, 2 L. D., 283)."

And so it is that Timmings's entry was properly allowed, Wells's application to enter was properly rejected, and his protest must be and is hereby denied; and Fisher's final proof must be accepted if there are not other controlling reasons to the contrary, and it is accordingly so ordered.

**FREE USE OF TIMBER—ACT OF MARCH 3, 1919—REGULATIONS OF
MARCH 25, 1913, AMENDED.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., November 3, 1919.

CHIEF OF FIELD DIVISION,
SALT LAKE CITY, UTAH.

On March 3, 1919, Congress approved an act (40 Stat., 1321), entitled: "An Act to grant to citizens of Malheur County, Oregon, the right to cut timber in the State of Idaho for agricultural, mining, or other domestic purposes, and to remove such timber to Malheur County, Oregon." The act provides as follows:

That section eight of an Act entitled "An Act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, chapter five hundred and sixty-one, as amended by an Act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page one thousand and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended by adding thereto the following:

That it shall be lawful for the Secretary of the Interior to grant permits under the provisions of the eighth section of the Act of March third, eighteen hundred and ninety-one to citizens of Malheur County, Oregon, to cut timber

in the State of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to Malheur County, State of Oregon.

Under the authority vested in the Secretary of the Interior, by the above-cited act of March 3, 1919, the general restriction against the export of public timber from the State in which it is cut as set forth in section 12 of circular No. 223 pertaining to the free use of timber on nonmineral public lands, issued March 25, 1913 (42 L. D., 22), with certain exceptions mentioned in that section, is hereby modified to the extent that citizens of Malheur County, Oregon, are to be permitted to take timber from the vacant, nonmineral public lands of Idaho and to export the same for their use in Malheur County, Oregon, pursuant to the rules and regulations contained in said circular No. 223. It is to be observed that the privilege is to be limited to citizens of Malheur County, Oregon.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

**FREE USE OF TIMBER—ACT OF MARCH 3, 1919—REGULATIONS OF
MARCH 25, 1913, AMENDED.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 3, 1919.

CHIEF OF FIELD DIVISION,
SAN FRANCISCO, CALIFORNIA.

On March 3, 1919, Congress approved an act (40 Stat., 1322), entitled "An Act to grant to citizens of Modoc County, California, the right to cut timber in the State of Nevada for agricultural, mining, or other domestic purposes, and to remove such timber to Modoc County, California." The act provides as follows:

That section eight of an Act entitled "An Act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, chapter five hundred and sixty-one, as amended by an Act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page one thousand and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended by adding thereto the following:

That it shall be lawful for the Secretary of the Interior to grant permits under the provisions of the eighth section of the Act of March third, eighteen hundred and ninety-one, to citizens of Modoc County, California, to cut

timber in the State of Nevada, for agricultural, mining, or other domestic purposes, and to remove the timber so cut to Modoc County, State of California.

Under the authority vested in the Secretary of the Interior by the above-cited act of March 3, 1919, the general restriction against the export of public timber from the State in which it is cut as set forth in section 12 of circular No. 223 pertaining to the free use of timber on nonmineral public lands, issued March 25, 1913 (42 L. D., 22), with certain exceptions mentioned in that section, is hereby modified to the extent that citizens of Modoc County, California, are to be permitted to take timber from the vacant, nonmineral public lands of Nevada and to export the same for their use in Modoc County, California, pursuant to the rules and regulations contained in said circular No. 223. It is to be observed that the privilege is to be limited to citizens of Modoc County, California.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

SMITH W. ALLISON.

Decided November 7, 1919.

SETTLEMENT—PREFERENCE RIGHT—ACT OF JUNE 9, 1916.

In the exercise of the preference right accorded to settlers under the provisions of the act of June 9, 1916, lands in more than one quarter section may be embraced in the application where there is fencing, improvement, or other evidence of appropriation on each of the tracts sufficient to identify them as being embraced within the settlement.

SECOND HOMESTEAD ENTRY—ACT OF JUNE 9, 1916.

The fact that a settler has made a former homestead entry and is not therefore entitled to make a second entry under the provisions of the act of September 5, 1914, is not a bar to the exercise of the preference right of settlers conferred by section 5 of the act of June 9, 1916.

VOGELSANG, *First Assistant Secretary:*

By its decision of July 31, 1919, this Department rejected, as to one of the tracts applied for, the application of Smith W. Allison to make a second homestead entry for two tracts, the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 15, T. 12 S., R. 8 W., W. M., within the forfeited grant to the Oregon and California Railroad Company, for the reason that the regulations issued under section 5 of the act of June 9, 1916 (39 Stat., 218), on which the application was based, declared that such applications could not be allowed when they embraced tracts in more than one technical quarter section.

Subsequent to that decision this Department gave further consideration to the interpretation of that act and so far relaxed the provisions of the regulations mentioned, by its administrative ruling of August 14, 1919 [not reported], as to sanction the allowance of applications embracing tracts in more than one quarter section in cases where there is fencing, improvement, or other evidence of appropriation on each of the tracts sufficient to identify them as being embraced within the settlement.

In view of this more recent construction of the act the decision mentioned is hereby set aside and the case is remanded for such further and appropriate action in accordance with that ruling as may be warranted by the facts now disclosed or which may hereafter be disclosed.

In its decision adverse to this application the General Land Office referred to facts that tend to show that Allison was not entitled to make a second entry under the act of September 5, 1914 (38 Stat., 712), on which his application was based; but that fact does not call for the rejection of the application because it is expressly provided in the act of 1916, itself, under which Allison claims a preferred right of entry, "that the prior exercise of the homestead right by such a person shall not be a bar to the exercise of such preference right;" and the benefit conferred by this provision has none of the conditions mentioned in the act of 1914 attached to it.

GOODWIN v. GOODIN.

Decided November 10, 1919.

CONTESTANT—PREFERENCE RIGHT.

While the preference right accorded by the act of May 14, 1880, is not assignable or transferable, a successful contestant in the exercise thereof is not required to show that he is seeking the land involved for his own continued use and benefit; and he may utilize a valid soldiers' additional right in the exercise of such preference right even though he contemplates transferring the land to another when the entry is perfected.

DECISIONS DISTINGUISHED.

Cases of *Schlabsz et al. v. Schulz* (38 L. D., 291); *Beery v. Northern Pacific Ry. Co. et al.* (41 L. D., 121), and *Martin v. Patrick* (41 L. D., 284) cited and distinguished.

VOGELSANG, *First Assistant Secretary*:

Within thirty days after he was notified that he had gained a contestant's preference right, Walter F. Goodin applied to make a soldiers' additional homestead entry, Great Falls 044672, for the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 8, T. 26 N., R. 3 W., M. M., in the exercise of that right; and Mary Louise Goodwin filed her homestead application, Great Falls 044709, for the same land and protesting

against the allowance of Goodin's application on the grounds (1) that she had made settlement upon and was in the occupation of the land at the time his application was presented; (2) that Goodin's application was not presented in his own interests but in the interests of other persons, and (3) that his soldiers' additional application should not be allowed because he stated in the contest affidavit under which he gained a preference right that he intended to make entry under the desert-land laws.

By its decision of April 12, 1919, the General Land Office sustained this protest and rejected Goodin's application, and the case is now up for consideration on his appeal from that action.

In the opinion of this Department none of the charges made in the protest justifies the rejection of Goodin's application to enter. Neither the settlement of Goodwin, which was made after the cancellation of the entry contested by Goodin, nor her occupation of the land at the date of his application to enter, defeated his preference right. (*Hodges et al v. Colcord*, 24 L. D., 221; *Thorbjornson v. Hindman*, 38 L. D., 335; *Arnold v. Burger*, 45 L. D., 453.)

It is not contended that the soldiers' additional right here involved was not valid, or that it was not formally assigned to him, or that it would for any reason not support his entry, and the mere fact that he is not seeking the land for his own continued use and benefit does not forbid the allowance of his application and will not invalidate his entry. He was not required to show that he was not seeking to make this entry for speculative purposes, as is the case with an applicant under the general provisions of the homestead laws. He gained a personal right and benefit by securing the cancellation of the former entry and it can not be said that he is guilty of fraud if he elects to utilize that right and benefit by entering the land and immediately transferring it to some other person.

The decision appealed from is based on the theory that by making this entry Goodin was, in effect, attempting to dispose of and transfer his preference right, a thing that he could not do, since that right in a personal one and not assignable. (*Taylor et al. v. Graves*, 36 L. D., 80; *Virinda Vinson*, 39 L. D., 449.) But that rule has never been applied, and can not be applied in a case of this kind. It is true that in the remotely kindred cases of *Schlabsz et al. v. Schulz* (38 L. D., 291), *Beery v. Northern Pacific Ry. Co. et al.* (41 L. D., 121), and *Martin v. Patrick* (41 L. D., 284), it was held that a contestant's preference right could not be used. But the similarity between those cases and this one is not sufficient to make the rulings there controlling here. In two of these cases there was effort to make a contestant's preference right the basis of lieu selections by railroad companies, and in the other case an attempt was made to use that

right in the making of a forest lieu land selection. The privilege to use that right for that purpose was denied on the ground that the right to make these selections was a personal right that could not be transferred and must be exercised, in the one case by the companies themselves, and in the other by the owner of the surrendered lands; and could not therefore be transferred to the holders of the contestants' preference rights. In such cases applications could be presented and prosecuted only in the names of the owners of a lieu selection right, the selections could be allowed only in their names and the patents thereunder would issue and convey title to the selected lands to them and not to the owner of the contestant's right. Here we find material distinction between those cases and the present one. In this case the title to the soldiers' right is held by Goodin himself. The entry will be his entry and in his name, and the patent will issue to and vest the title to the lands applied for in him.

The fact that Goodin stated in his application to contest that he intended, and was qualified, to make a desert-land entry and later applied to enter the land under another law, does not warrant adverse action on his present application. While Rule 2 of the Rules of Practice (44 L. D., 395), in its subdivision (e), requires that an application to contest must contain a "statement of the law under which the applicant intends to acquire title and the facts showing that he is qualified to do so," that fact does not prevent him from making entry under any other law under which he is qualified to enter. As was said in *Holmes v. Kinsey* (40 L. D., 557), and in *Judson v. Woodward* (41 L. D., 518, 519), the statement and showing required by that rule "are designed to insure good faith on the part of would-be contestants, and to prevent the filing and prosecution of speculative contests by those who are not qualified or who do not intend to acquire title to lands under appropriate public-land laws." The fact that Goodin stated at the time he initiated his contest that he intended to make a desert-land entry is not shown to have been false by the fact that he later changed his mind and applied under another law, and it does not sustain even a suspicion that he was guilty of fraud in doing so, any more than did the fact that the contestant in *Judson v. Woodward*, *supra*, entered other lands after beginning his contest, make his contest fraudulent, and the contest in that case was sustained regardless of the subsequent acts of the contestant.

For the reasons given the decision appealed from is hereby reversed, and when, and if this decision becomes final, the protest will be dismissed. Goodwin's application to enter will be rejected and Goodin's will be allowed and pass to patent, if there is no other controlling reason to the contrary.

WISE v. SCOTT.

Decided November 29, 1919.

PREFERENCE RIGHT—SOLDIERS' AND SAILORS' RIGHTS—ACT OF MARCH 8, 1918.

The act of March 8, 1918, relieving public-land claimants from penalty of forfeiture for failure to perform any material acts required by the law under which the claims were asserted, during the period of their military service, is sufficiently broad to include a preference right of entry resulting from a contest initiated prior to entering the service; and such right is not forfeited or prejudiced by reason of a successful contestant's failure to exercise it within the statutory period occurring during said military service.

VOGELSANG, *First Assistant Secretary*:

This is an appeal by Charles B. Scott from decision of the Commissioner of the General Land Office dated February 13, 1919, rejecting his application made in the name of C. Blaine Scott for second entry under the act of September 5, 1914 (38 Stat., 712), embracing the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 9, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, and E. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 15, T. 3 S., R. 44 W., 6th P. M., Sterling, Colorado.

The reason for the rejection by the Commissioner of Scott's second entry application was that his former entry was canceled upon contest alleging failure to establish and maintain residence, and that said entry was not lost, forfeited or abandoned because of matters beyond his control within the purview of the act of September 5, 1914.

It appears that Scott's homestead entry, which was for the same land above described, was canceled by the Commissioner September 29, 1917. This action was taken in view of departmental decision of July 17, 1917, sustained on motion for rehearing September 10, 1917, under the successful contest of Lincoln S. Wise on the ground, as stated, that Scott failed to establish and maintain residence on the land. The application of Scott to make second entry was filed November 23, 1917, prior to the time Wise received notice of the cancellation of Scott's entry and of the preference right of entry earned by his contest, and was suspended by the local officers pending exercise by Wise of his preference right. At the time Wise received the notice he was a soldier in the United States Army and stationed at Camp Kearney, California. His contest was initiated prior to entering the military service. There was some delay in properly executing Wise's application to enter, so that it did not reach the local office until thirty-three days after the date on which he received the notice, but in the meantime Wise was in correspondence with the local officers. The local officers suspended Wise's application to exercise his preference right to await action on Scott's second entry applica-

tion, they concluding that the latter should have precedence because Wise's application to enter the land was not received in their office until after expiration of the statutory preference-right period of thirty days.

It having been finally determined upon the evidence that Scott's former entry ought to be canceled, and formal action having been taken accordingly, the controlling question presented by Scott's appeal from the rejection of his second entry application is as to the effect of the act of March 8, 1918 (40 Stat., 440, 448), known as the Soldiers' and Sailors' Civil Relief Act, on existing law granting preference right of entry to a successful contestant. Section 501 of that act provides, among other things—

That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws * * * shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to perform any work or make any improvements thereon, or to do any other acts required by any such law during the period of such service.

A proviso in this section reads as follows:

That nothing in this section contained shall be construed to limit or affect the right of a person in the military service to take any action during his term of service that may be authorized by law, or the regulations of the Interior Department thereunder, for the perfection, defense, or further assertion of rights, initiated prior to the date of entering military service * * *

In circular of May 16, 1918 (46 L. D., 383, 384), under the act, it is said:

The general purpose of the act is to relieve claimants, under the conditions stated, from the penalty of forfeiture on the ground of their failure to do any act required by the law under which their claims are made *during the period of their military service.*

A preference right of entry is a recognized right under the homestead laws. The act of May 14, 1880 (21 Stat., 140), grants to a successful contestant a preference right for thirty days to enter the land involved in his contest. The language of the act of March 8, 1918, "failure * * * to do any other act required by any such law during the period of such service," is broad enough to save a preference right of entry growing out of a contest initiated by a person prior to entering military service, and such right is not forfeited or prejudiced by reason of the successful contestant's failure to exercise the right within the existing statutory period of thirty days where such failure occurs during the period of military service. In other words, under the provisions of the act of March 8, 1918, as to a successful soldier contestant such as Wise, the statute limiting exercise of a preference right of entry to a period of thirty days from notice does not run during a period of military service. This act, being remedial and for the protection of persons entering the military service of their country, should be liberally construed in order to effectuate its purpose.

For the reasons given herein the Commissioner's decision of February 13, 1919, rejecting Scott's second entry application, is hereby affirmed.

Whether or not Scott has a right to make second entry will be determined if and when he presents application for some other tract subject to entry.

HOMESTEAD ENTRIES WITHIN NATIONAL FORESTS—REGULATIONS OF AUGUST 19, 1913—AMENDED.

[Circular No. 663.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 15, 1919.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES.

Section 5 of Circular No. 263, dated August 19, 1913 (42 L. D., 331), is hereby amended to read as follows:

In addition to the publication and posting above provided for, you will, on the day the list is filed in your office, mail a copy of the notice by registered letter to any person known by you to be claiming a preferred right of entry as a settler on any of the lands described therein, and also at the same time mail a copy of the notice by registered letter to the person on whose application the lands embraced in the list were examined and listed, and advise each of them of his preferred right to make entry prior to the expiration of sixty days from the date upon which the list is filed. Upon receiving evidence of service of such notice or notices, you will forward same to this office.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSAANG,
First Assistant Secretary.

**HEIRS OF BISHOP v. ATLANTIC AND PACIFIC RAILROAD COMPANY
ET AL.**

Decided January 7, 1920.

RAILROAD GRANT—ACT OF JULY 27, 1866—SETTLEMENT.

No interest whatever, contingent or otherwise, passed under the railroad grant of July 27, 1866, to lands in odd-numbered sections which were embraced in valid homestead settlements existing at the time the company filed its map of definite location.

RAILROAD GRANT—SETTLEMENT—SUBSEQUENT CLAIMANT.

A claimant, asserting that lands were excepted from a railroad grant by a settlement existing at the date of the filing of the company's map of definite location, must show by a preponderance of the testimony that the settlement was made in good faith to obtain title under the homestead or preemption laws, and that the settler was fully qualified; but he is not required to show that rights acquired by reason of such settlement passed to him through conveyances from subsequent occupants of the land who were also qualified to make and maintain such a settlement.

SAME.

In a contest involving the question as to whether a settlement on lands within the primary limits of a railroad grant excepted the land from the grant, the claimant may offer oral testimony in support of his claim if the facts as to such settlement are not disclosed by the records of the Land Department.

SETTLEMENT—UNSURVEYED LAND—QUALIFICATIONS.

Where a homestead settler on unsurveyed land has in good faith fully complied with the requirements of law as to residence, improvement, and cultivation, and is thus entitled to offer proof and receive patent were the land surveyed, he should be permitted, upon survey thereof, to make entry if he show that he was duly qualified to do so at the time he completed compliance, regardless of the fact that he may have later become disqualified through the purchase and ownership of other lands.

CASE CITED AND DISTINGUISHED—CONFLICTING DECISIONS OVERRULED.

Case of *Tarpey v. Madsen* (178 U. S., 215), distinguished; cases of *Gallup v. Northern Pacific Ry. Co.*, decided March 30, 1911 (unpublished), and *Perry v. Central Pacific R. R. Co.* (39 L. D., 5), overruled in so far as in conflict.

VOGELSANG, *First Assistant Secretary*:

On June 17, 1918, John Jones Bishop filed his application to enter the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 14, and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, T. 19 N., R. 17 W., G. and S. R. M., against the allowance of which E. B. Perrin filed a protest, urging that the two tracts in Sec. 15 belonged to him as grantee of the Atlantic and Pacific Railroad Company, which acquired them by filing its map of definite location on March 12, 1872, under its grant made by the act of July 27, 1866 (14 Stat., 292), and because the other tract is a part of the Prescott National Forest.

For the purpose of showing that these lands were excepted both from the grant to the company and from the forest reservation, a number of affidavits was filed in support of the application to enter in an attempt to establish the fact that the lands were covered by a valid subsisting homestead settlement, both at the date of the filing of the map of definite location and when the national forest was created.

These affidavits allege that the lands are in a very arid and rough part of Arizona; and that a spring on them has caused the lands

to be used and occupied for many years by various live stock men as follows: From 1871, or more than a year before the map was filed, to about 1878 by one Farnsworth, who was then "claiming it as a squatter's right under the homestead laws;" from 1881 to 1885 by the Coffey family, and in 1888 and for a while thereafter by J. H. Drew. About 1897 W. G. Shook and George Barrett went into possession of and occupied the land until 1900, when they surrendered it to Drew, who disposed of his claim to Jack Webb. In 1902 Bishop acquired possession of and thereafter continued to occupy the land as his home until his death in the fall of 1918, and during that time made permanent improvements valued at \$10,000.

By its decision of May 16, 1919, the General Land Office held that these affidavits did not convincingly show facts necessary to the support of an order for a hearing, and directed that the heirs be permitted to make further showings. The case is now up for consideration on appeal from that action.

At the proper time the dismissal of the protest was moved on the ground that it was not served; and the appeal was possibly defective because notice thereof was not served on either Perrin or the railroad company. It is not necessary, however, to consider these possible defects at this time because, independent of the protest and leaving it out of consideration, the application to enter can not be now sustained because it is not supported by such a *prima facie* showing as is necessary to establish the claim that Farnsworth's settlement excepted the land from the operation of the grant, inasmuch as there is no allegation showing that he was qualified to make and maintain the settlement.

There can be no question as to the fact that Bishop's settlement and continued residence and improvements gave a right to enter all these lands, if the tracts in Sec. 15 are free from the grant to the company, regardless of their inclusion within the national forest, because the proclamation creating that forest in terms excepted from its immediate operation all lands "upon which any valid settlement has been made pursuant to law, if the statutory period within which to make entry or filing of record has not expired," a period which had not expired when Bishop applied to enter because the plats of the first survey of these lands were not filed until during the month in which the application to enter was presented.

The decision appealed from was based on the assumption that before a hearing could be ordered, it would be necessary for Bishop's heirs to show not only that Farnsworth made a valid settlement, but that it must be alleged that each of the subsequent and intervening occupants were qualified to make entry, and further, that their

rights and those claimed by Farnsworth passed by assignment or otherwise to each of the succeeding occupants and finally to Bishop.

This holding was based on and justified by the Department's unpublished decision of March 30, 1911, in the case of Gallup *v.* Northern Pacific Ry. Co. and by its inferential holding in Perry *v.* Central Pacific R. R. Co. (39 L. D., 5); but on further consideration it is believed that those decisions, in so far as they relate to the qualifications of, and transfers to, intervening occupants, are not sound in principle nor in harmony with the long and well-settled doctrine that the right acquired by a settlement under the homestead laws is a mere personal privilege which can not be assigned or transferred except through inheritance (Knight *v.* Haucke, 2 L. D., 188; Stone *v.* Cowles, 14 L. D., 90; Dobie *v.* Jameson, 19 L. D., 91; Bellamy *v.* Cox, 24 L. D., 181); and that rule has been applied in kindred cases involving railroad grants (Dunnigan *v.* Northern Pacific R. R. Co., 27 L. D., 467; Ross *v.* Hastings and Dakota Ry. Co., 29 L. D., 264).

Aside from being in conflict with this established doctrine, the holding in the Gallup case can not be sustained on any other theory than that by filing its map of definite location the company gained a contingent interest in the land which would ripen into a full title if, and when, the rights under the settlement lapsed or were otherwise extinguished.

The grant in this case was made by the act of July 27, 1866, *supra*, which in terms gave the company in question only such odd-numbered sections, or parts of such sections, as were at the time of the filing of the map not "reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights," and the assumption that the company took any interest whatever in such lands as were covered by valid settlements is in fatal conflict with the great weight of authority, which fully supports the contrary doctrine, as will be seen from Southern Pacific Railroad Co. *v.* Lopez (3 L. D., 130) and Jones *v.* Southern Pacific R. R. Co. (19 L. D., 270), which involved the grant here under consideration, and also from Frank *et al.* *v.* Northern Pacific Ry. Co. (37 L. D., 193); DeLong *v.* Clarke (41 L. D., 278); St. Paul, Minneapolis & Manitoba Railway Company *v.* Donohue (210 U. S., 21), and the very recent decision in Northern Pacific Ry. Co. *v.* McComas (39 Supreme Court Reporter, 546) relating to kindred grants.

From this it follows that if Farnsworth was in good faith actually maintaining a valid settlement on the land in Sec. 15 at the time this company filed its map, neither it nor Perrin as its transferee has any right in or title to the land whatever, either present, contingent, reversionary or otherwise; and they can not at this time nor at any future time successfully assert any interest whatever through the

filing of the map of definite location as against the heirs of Bishop or the Government.

Counsel for Perrin very ably contends in opposition to the conclusion that the company's grant was possibly defeated by Farnsworth's settlement, that the contrary doctrine was recognized by the Supreme Court in *Tarpey v. Madsen* (178 U. S., 215), but a close examination of that case will show that his contention is not well founded because the controlling facts upon which the decision in that case was based radically differ from the facts in the case now under consideration. After the company under which Tarpey claimed as transferee had on October 20, 1868, filed its map of definite location under a grant practically identical with the grant under which Perrin claims, one Olney on April 29, 1869, filed in the proper United States land office his preemption declaratory statement, in which he alleged that he made settlement on the land there involved on the 6th day before the date upon which his declaratory statement was filed; but he did not ever claim, either in the declaration or otherwise, that he had been on the land or had any connection with or claim to it prior to the filing of the map of definite location. Later Olney abandoned the land and did not make any further attempt to acquire title to it, and did not transfer his interests in it to Madsen or any other person. Twenty-seven years after the filing of the Olney declaration Madsen entered the land under the homestead law, claiming that he made settlement on it in 1888, or about twenty years after the company's map was filed. This entry by Madsen was the result of his successful contest against the company, prosecuted before the Land Department, in which he claimed that the grant to the company was defeated by the fact that Olney was a settler on the land at the time the map was filed, a claim that Olney did not pretend to make in his declaratory statement, which was filed only seven months after the filing of the map.

The patent issued to Madsen under his entry was attacked in the courts by Tarpey and when his suit came before the Supreme Court Mr. Justice Brewer, in deciding it and after noting the facts just mentioned and laying particular emphasis on Olney's failure to allege settlement prior to the filing of the map, very ably and clearly pointed out the fact that the relative rights of a settler and a company claiming under grants such as these must for obvious reasons be determined from the facts disclosed by the records of the Land Department and from those facts alone. He then held in effect that in such cases the company's "rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain [oral] testimony" which might be offered to overcome a definite and positive statement made by the settler in his own declaration then of record.

The wisdom of this statement can not be questioned, but the decision in that case is not controlling here because there the land involved had already been surveyed and the filing of the declaratory statement was therefore both possible and necessary, while in this case the land was not surveyed for more than forty-seven years after Farnsworth made his settlement. During all that time and until within a few days of the date on which Bishop's application was filed, it was impossible for a declaratory statement to have been filed or an entry to have been made. From this it will be seen that it will be impossible for Bishop's heirs to support their claim by record evidence of a settlement, and they must therefore be permitted to rely on oral testimony to establish it.

The decision appealed from did not require a further showing as to Bishop's qualifications to make a homestead entry because the record as it then stood showed him to be qualified; but a question has lately been raised as to his being disqualified by his having contracted to purchase a much larger area of other lands. There is no statement as to when this contract was entered into and no copy of it is at hand. For these reasons this Department will not at this time undertake to express any opinion as to the effect of that transaction, but it is well to here note the fact in order that the heirs may be properly advised that it will be necessary for them to remove all question as to Bishop's qualifications before an entry can be allowed on the pending application. It should, however, be remembered that even if Bishop was not qualified and his application is finally rejected for that reason, that fact alone will not strengthen or in any way benefit Perrin's claim to the land. His right as the company's transferee must abide the determination as to the effect of Farnsworth's settlement. If that settlement excepted the land from the grant the company never had any interest in it and Perrin took nothing from its conveyance to him. In this connection it may be well to note the fact that if Farnsworth's settlement defeated the company's primary right to this land, it would still have the privilege of selecting it in lieu of lands lost by reason of such settlements or otherwise from its original grant, if the land was not now included within the national forest (29 Op. Atty. Gen., 498; 41 L. D., 571, 573). Being within the national forest and subject only to the rights of Bishop's heirs, these lands will, if those rights fail for any reason other than the insufficiency of Farnsworth's settlement, become and remain a part of the national forest. For that reason they could not be selected by the company or otherwise disposed of while that status remains except through a possible designation under the act of June 11, 1906 (34 Stat., 233).

These considerations lead to the conclusion that before a hearing will be ordered the heirs of Bishop must file a verified showing to

the effect that at the time the company's map was filed Farnsworth was: (a) A citizen of the United States or had declared his intention to become such a citizen; (b) that he was then at least twenty-one years of age or the head of a family; (c) that he was not then the proprietor of more than 160 acres of other land; (d) that he had not before then made an entry under the homestead laws; and (e) that he had in good faith made and was then maintaining a settlement on the land with the *bona fide* intent to and for the purpose of acquiring title to it under either the homestead or the pre-emption law. A mere occupation without such qualifications and intent would not defeat the grant (*Tarpey v. Madsen*, 178 U. S., 215).

If these facts are not shown it will be useless for the heirs to make any attempt to show that Bishop was qualified to make an entry because in the absence of a satisfactory showing as to Farnsworth's settlement the land must be presumed to have passed to the company under its grant, and Bishop gained nothing by his settlement, occupation and improvement.

But if a satisfactory showing is made as to Farnsworth's settlement, then the heirs must show either (f) that the contract of purchase did not give such a proprietorship of other lands as disqualified him from making a homestead entry, or (g) that he had resided upon the land and otherwise complied with the requirements of the homestead laws for five years before he entered into that contract.

Under a strict interpretation of the pertinent statute it is necessary for one seeking an entry under the homestead laws to show himself fully qualified at the time his application to enter is filed; but in cases such as this one where the Government failed to render it possible for an applicant to make his filing and proof before or as soon as he had met all the other requirements essential to a patent, he should be permitted to make entry on showing that he was qualified to enter at the time he did meet them; and disqualifications arising after that time should not be counted against him (*Tarpey v. Madsen*, 178 U. S., 215).

If, as is said, Bishop established a residence on this land in 1902 and resided on it and otherwise complied with the law until he completed his five years in 1907, the entry should be allowed if it is shown that he was then qualified, and if the land does not belong to Perrin or the company, regardless of the fact that he may after that time have purchased other lands, because the Government by its failure to survey the land at an earlier date made it impossible for him to make entry and proof.

The decision below is accordingly so modified as to make it conform to the conclusions here stated, and the case is hereby remanded with directions that each of the contending parties be furnished with a

copy of this decision. Bishop's heirs will be allowed ample time within which to make the required showings and serve notice thereof on Perrin, and he will be permitted to file such showings in rebuttal thereof as he may care to make, and serve copies thereof on Bishop's heirs. The General Land Office will upon receipt of such showings take such further and proper action in the case as the facts may warrant, but if the heirs fail to make any further showings, the application to enter will be finally rejected and the case will be closed.

The decisions in the cases of *Gallup v. Northern Pacific Ry. Co.* and *Perry v. Central Pacific R. R. Co.* are, in so far, and only in so far, as they are in conflict with the views here expressed, hereby overruled.

IRRIGATION OF ARID LANDS IN NEVADA—ACT OF OCTOBER 22, 1919.

[Circular No. 666.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 12, 1920.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES, NEVADA:

The following instructions are issued under the provisions of the act of Congress approved October 22, 1919 (41 Stat., 293), entitled "An Act To encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes."

BENEFICIARIES UNDER THE ACT.

1. The act, as the title indicates, is limited in its operation to lands in the State of Nevada and is designed to encourage the development and utilization of subterranean waters for irrigation purposes. It confers upon the Secretary of the Interior authority to grant permits to citizens of the United States, or associations of such citizens, giving the exclusive right to explore not to exceed 2,560 acres of land selected by them.

The only qualifications provided in the act for persons receiving the benefits thereof are that the applicant, or each member of an association of applicants, shall be a citizen of the United States; that he shall not be a beneficiary under any other application or permit under this act for land situated within an area of 40 miles square, and that he has not been a permittee under any other permit under this act, which has been canceled for failure to comply with its terms.

Married women, if their interest is actual and *bona fide*, have the same privileges as unmarried persons. A corporation is not considered as an association of persons, within the meaning and purpose of the act.

A permit under the act is not assignable but the interest of a deceased permittee will pass to his legal representative.

The 40-mile square limitation is construed to mean an area of that extent in which the lands covered by a permit theretofore granted are in the approximate center; to avoid possible violation of this provision of the act, applicants for more than one permit are advised not to include in their applications for additional permits any lands within less than 20 miles of *any boundary* of the lands included in any other application or permit in which the applicant is interested.

LANDS SUBJECT TO THE ACT.

2. Lands to be designated and made subject to disposition under this act are those public lands which are unreserved, unappropriated, nonmineral, nontimbered, and not known to be susceptible of successful irrigation from any known source of water supply, at a reasonable cost. Lists will be furnished the registers and receivers of the different local land offices from time to time and they will be advised of the dates when the designations become effective.

APPLICATION.

3. Any qualified applicant desiring to explore for water under the terms of this act should file with the register and receiver of the land office of the district in which the land is situated, an application for permit, together with a corroborated affidavit as to the character of the land, and pay the filing fee of 1 cent an acre for each acre of land involved.

No blank forms will be furnished, but the application and affidavit may be combined substantially as in Form A, printed at the end of these regulations. Same should be filed in duplicate and cover the following points:

(a) *Name* and *post office* address of the applicant or of each member of an association of applicants.

(b) *Citizenship*.—If the applicant or each member of the association of applicants is a native-born citizen of the United States, the application and affidavit must so state. If a naturalized citizen, the application should state the fact, and be accompanied by a certified copy (special form for land cases) of certificate of naturalization. It should be noted that unlike most public-land laws, no rights may

be initiated under this act by an alien who has only filed a declaration of intention to become a citizen.

(c) *Special requirements.*—In accordance with the specific requirements found in sections 1, 2, and 3 of the act, the application should include an averment that neither the applicant nor any member of an association of applicants has filed an application under this act for lands within an area of 40 miles square embracing the lands in the present application; that no permit heretofore granted to him, or to any association of which he was a member has ever been canceled for noncompliance with the terms and conditions of such permit; that the application is honestly and in good faith made for the purpose of reclamation and cultivation, and not for the benefit of any other person or corporation, and that he is not acting as agent for any person, corporation, or syndicate, to give them the benefit of the land applied for, or any part thereof, and that he will faithfully and honestly endeavor to comply with all the requirements of the act.

(d) *Description of land applied for.*—If the land is *surveyed*, it should be described by legal subdivisions. If the land is *unsurveyed*, it should be described with reference to locality, natural objects, and permanent monuments as fully and carefully as possible, with such detail and precision that the boundaries and location of the land may be readily traced and ascertained; if the land is situated within a reasonable distance from a known corner of the public land survey, the course and distance should be given from such Government corner to a described point on the boundary of the land applied for; also, where practicable, the land should be described, as nearly as can be ascertained, in accordance with the legal subdivisions of the regular extension of the Government survey over the land. In this connection, all applicants for unsurveyed lands are urged to make a complete metes and bounds survey of the land applied for, with an accurate tie-line by course and distance to a Government corner, otherwise, with the large areas that may be embraced in applications under this act, it will be impossible to prevent conflicts and consequent controversy and litigation. If impracticable to make such a survey prior to filing the application, it may be made later, and the descriptions in the application and permit, if granted, may be amended accordingly. All corners of unsurveyed land selected should be marked with substantial post or rock monuments.

All land applied for must be contiguous and situated in reasonably compact form; in the absence of special or unusual conditions, an application for land extending more than 4 miles in any one direction will not be considered acceptable.

(e) *Character of the land.*—This showing should not only allege that the land applied for is "unreserved, unappropriated, nonmineral, nontimbered public land of the United States in the State of

Nevada, not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply," but should also include such a complete statement of pertinent specific facts as will afford an adequate basis for classification and designation, such as (1) the lay of the land, slope; (2) whether timber, sagebrush, or grassland; (3) kind of soil; (4) altitude; (5) length of growing season; (6) rainfall and distribution thereof through the year; (7) location with respect to any surface water supply for irrigation; (8) what is known as to underground water supply on the land or in the vicinity; (9) whether land will mature crops by dry-farming methods; together with any additional facts having a direct or indirect bearing on the question of whether the land may properly be designated, the chances of successful development, and the good faith of the applicant.

(f) *Corroboration*.—If, at the time of filing application, the land has *not* been designated as subject to the act, all that portion of the combined application and affidavit (Form A) relative to the character of the land *must be corroborated by two disinterested witnesses*, having personal knowledge of the facts, substantially in the manner shown in Form B; or by a separate and independent affidavit containing an affirmative statement of the facts; but, if the land is already designated at time of filing application, no corroborating witnesses are required.

(g) *Verification*.—The application and corroborating affidavits, if required, may be subscribed and sworn to before any officer authorized to administer oaths and having an official seal.

ACTION ON APPLICATION.

4. Upon receipt of the papers, the register and receiver will carefully examine the same and if found regular transmit them to the General Land Office for appropriate action. In case the land has not been designated, the application will be suspended by the General Land Office until such time as it shall have been designated, or until it shall have been determined that it is not of the character contemplated by the act. If the land shall subsequently be designated under the act, the application will then be approved and a permit issued, if no good and sufficient reason for disapproval be then apparent; otherwise it will be rejected, subject to the right of appeal. During the term of suspension the land will not be subject to disposal in any way.

CONDITIONS OF PERMITS.

5. Permits will be granted only upon condition that active operations be begun for the development of underground water within six

months from date of approval and continued diligently in good faith until water has been developed in quantity sufficient for the practicable irrigation of not less than 20 acres, or until the date of expiration of the permit; and if the permittee shall not continue such operations in good faith and with reasonable diligence, or if he shall violate any of the terms of the permit, upon presentation of satisfactory proof thereof, the permit will be forthwith canceled and he will not again be granted a permit under the act. The law authorizes no extension of time within which to comply with the requirements of the permit.

PROGRESS REPORTS.

6. At or near the end of the six months' period, beginning with the date of the permit, and again at the end of the first year of the life of the permit, if final proof of water development and reclamation has not been submitted, the permittee, or at least one member of an association of permittees, must file in the proper local land office a properly executed affidavit, corroborated by at least two disinterested witnesses, having knowledge of the facts, showing when the work of exploration was begun, in what manner and to what extent it has been prosecuted, and what results have been obtained. This affidavit may be made before any officer authorized to administer an oath.

CONDITIONS FOR PATENT.

7. (a) The permittee is allowed two years from the date of his permit in which to complete the work of exploration, and whenever he shall within that time satisfactorily establish that sufficient water has been discovered, developed, and made permanently available to produce a profitable agricultural crop other than native grasses, upon not less than 20 acres of the land described in the permit, he will be entitled to patent for one-fourth of the land embraced in the permit. No mere perfunctory or questionable compliance with the law will be accepted. The best and only conclusive evidence of a sufficient permanent water supply to produce a profitable agricultural crop is to produce it; hence, no patent will be granted until the full 20 acres have been cleared, leveled, ditched, plowed, fenced, and an agricultural crop actually planted and raised by irrigation, all in accordance with good farming practice. The wells, pumps, or other works and equipment for the development and supplying of water must be of a permanent and dependable character, suitable for use year after year. A detailed statement of costs of irrigation and production of crops from such water

supply will be required; to this end, accurate account should be kept of such costs. No patent can be granted under the act if the cost of irrigation from the developed water supply is practically prohibitive; the act requires a successful development and demonstration of the use of subterranean water, as the principal condition precedent for patent.

(b) *The land selected for patent* shall be in compact form according to legal subdivisions of the public-land surveys, if the land be surveyed. If the land be *unsurveyed*, the permittee may, at any time during the life of his permit, apply to the United States surveyor general for the State of Nevada, for a survey of the land for which he intends to make application for patent. The surveyor general will thereupon make an estimate of the cost and call on the permittee for a deposit of the amount of the estimate. If the deposit made should prove insufficient, an additional deposit will be called for. If the applicant has not taken steps to procure a survey before submitting final proof, after final proof has been submitted and examined, if same is found satisfactory and acceptable, and in the meantime the public-land system of surveys has not been extended over the lands in question, call will be made on the permittee to make the necessary deposit with the United States surveyor general for Nevada to cover the cost of survey, in which case the issuance of patent will be suspended until the survey is made and accepted. Wherever practicable, such official survey will be an extension of the regular system of township surveys, in which case the selection for patent must be conformed to the legal subdivisions of such survey.

(c) The act provides that all entries made and patents issued under its provisions shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands entered and patented, together with the right to prospect for, mine, and remove the same.

(d) On the issuance of patent, the remaining area within the limits of the land embraced in the permit will thereafter be subject to entry and disposal only under the act of May 20, 1862 (Sec. 2289, U. S. Rev. Stat.), entitled "An Act To secure homesteads to actual settlers on the public domain," and amendments thereto, in areas not exceeding 160 acres.

FINAL PROOF.

8. (a) Final proof of the discovery, development and availability of sufficient water to justify patent, may be made by the permittee, or in case of his death, by his heirs, executors or administrators, or in case the permittee is an association of individuals, by any

member of such association at any time after such discovery and development as hereinbefore defined, but must be made within two years after the date of the permit; but an additional period, not to exceed one year, may, upon proper showing, be allowed within which to make the required proof of actual irrigation and cultivation.

(b) When a permittee has reclaimed the land and is ready to make final proof, he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land, selected by him for patent, and give the serial number of the permit and name of the claimant. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in the notice, two of whom must be used in making proof. Care should be exercised to select as witnesses persons who are familiar, from personal observation, with the land in question, and with what has been done by the claimant toward reclaiming and improving it. Care should also be taken to ascertain definitely the names and addresses of the proposed witnesses, so that they may correctly appear in the notice.

(c) This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land, and it must also be posted in a conspicuous place in the local land office for the same period of time. The permittee must pay the cost of the publication, but it is the duty of registers to procure the publication of proper final-proof notice, and registers should accordingly exercise the utmost care in that behalf. The date fixed for the taking of the proof must be at least 30 days after the date of first publication. Proof of publication must be made by the affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local office.

(d) On the day set in the notice (or, in the case of accident or unavoidable delay, within 10 days thereafter) and at the place and before the officer designated, the claimant will appear with two of the witnesses named in the notice and make proof of the reclamation of the land. The testimony of each claimant should be taken separately and apart from and not within the hearing of either his witnesses, and the testimony of each witness should be taken separately and apart from and not within the hearing of either of the applicant or of any other witness, and both the applicant and each of the witnesses should be required to state, in and as part of the final-proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others.

(e) Final proof may be made before the register and receiver of the land district in which the land is located, or before a United States commissioner, or a judge or clerk of a court of record, in the county or land district in which the land is situated. The only condition permitting the taking of such evidence outside the proper land district is where the county in which the land is situated lies partly in two or more land districts, in which case such evidence may be taken anywhere in the county. In case the proof be taken outside the county wherein the land lies, then, unless it was taken before the proper register or receiver, the applicant or entryman must show by his affidavit that the qualified officer employed was the one whose place of business, *in the land district*, is nearest to or most accessible from the land in question. Forms of final proofs will be furnished in due time.

CONTESTS AND PROTESTS.

9. Contests and protests may be made against applications, permits, and final proofs under this act, the same as other entries or selections under the public-land laws, and same will be disposed of in accordance with the Rules of Practice so far as applicable. No preference right, however, can be gained by such contest or protest, but if successful, the entire area embraced in the permit will revert to the public domain and the land will be subject to the applicable public-land laws.

APPLICATIONS FILED PRIOR TO ISSUANCE OF REGULATIONS.

10. As to applications filed subsequent to the passage of the act and prior to the receipt by you of these regulations, you were instructed by telegraph to receive and suspend same, pending receipt of regulations. You will now take up and examine such applications, and, if for lands otherwise available, such applications may be placed of record and given a serial number. If such applications conform substantially in all essential respects to the requirements of these regulations, same will be transmitted to the General Land Office for further action. If such applications are deficient in material requirements under these regulations, you will hold same for rejection and mail the applicant a copy of these regulations, together with a notice that he will be given 30 days in which to file a satisfactory application conforming to the regulations. In case of conflict, precedence will be given in order of filing, as in other cases.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

FORM A.

APPLICATION FOR PERMIT.

(Act of Oct. 22, 1919—41 Stat., 293.)

United States Land Office-----

Serial Number-----

Receipt Number-----

APPLICATION AND AFFIDAVIT.

I, ----- (male or female) of -----

-----, a -----

(Applicant must state whether native born, or naturalized. See par. 3b.)

citizen of the United States, of the age of ----- years, do hereby apply for a permit under the act of October 22, 1919 (41 Stat., 293), to drill or otherwise explore for water beneath the surface of the following-described land in the county of -----, State of Nevada, to wit (see par. 3d) :

and in support of this application I do solemnly swear that I have not heretofore been granted a permit under this act within an area of forty miles square, in the approximate center of which the land described in this application is located, and have no application for such a permit pending at this time, except Permit No. ----, issued on -----; nor has any permit, covering lands within the State of Nevada, heretofore issued to me under this act, been canceled for failure to comply with its provisions; that this application is honestly and in good faith made for the purpose of reclamation and cultivation, and not for the benefit of any other person, corporation or syndicate; that it is my intention to begin active operations looking to the development of the subterranean waters of the lands described within six months from the date of the approval of this application and the issuance of a permit, and to conduct such operations in good faith and with reasonable diligence until water has been developed in quantity sufficient for the practical irrigation of not less than twenty acres of said land, or until the date of expiration of the permit, unless it shall be sooner satisfactorily demonstrated that the development of subterranean water for irrigation of said land is impracticable; that I will honestly endeavor to comply with all other requirements of the act under which this application is filed, and with the terms and conditions of the permit if issued; that the facts herein stated are based on my personal knowledge of the conditions obtaining with respect to the land herein described and to the best of my knowledge and belief, said land is unreserved, unappropriated, nonmineral, nontimbered, public land of the United States, not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply; that it is -----

(Here state character of the land and other data required by par. 3e.)

Subscribed and sworn to before me at my office at _____
in _____ County, within the _____ land dis-
trict, this ____ day of _____, 19__.

(Official designation.)

FORM B.

CORROBORATING AFFIDAVIT.

(Required only in cases where land applied for has not been designated.)

STATE OF _____,

County of _____ ss:

The undersigned citizens of _____, County of _____,
State of Nevada, being duly sworn under oath according to law each for himself
and not one for the other, deposes and says that he has personally examined
the land described in the within application of _____ for a permit
under the act of October 22, 1919 (41 Stat., 293), to explore for subterranean
waters on said land; that he has read the foregoing application and affidavit
and knows the contents thereof, and that the same is true to the best of his
knowledge and belief.

AN ACT To encourage the reclamation of certain arid lands in the State of Nevada, and
for other purposes.

*Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled,* That the Secretary of the Interior
is hereby authorized to grant to any citizen of the United States, or to any
association of such citizens, a permit, which shall give the exclusive right, for
a period not exceeding two years, to drill or otherwise explore for water beneath
the surface of not exceeding two thousand five hundred and sixty acres of
unreserved, unappropriated, nonmineral, nontimbered public lands of the United
States in the State of Nevada not known to be susceptible of successful irrigation
at a reasonable cost from any known source of water supply: *Provided,*
however, That not more than one such permit shall be issued to the same citizen
or the same association of citizens within an area of forty miles square: *And*
provided further, That said land shall not be fenced or otherwise exclusively
used by the permittee except as herein provided: *And provided further,* That
said land shall theretofore have been designated by the Secretary of the In-
terior as subject to disposal under the provisions of this act.

SEC. 2. That the Secretary of the Interior is hereby authorized, on application
or otherwise, to designate the lands subject to disposal under the provisions of
this act: *Provided, however,* That where any person or association qualified to
receive a permit under the provisions of this act shall make application for
such permit upon land which has not been designated as subject to disposal
under the provisions of this act (provided said application is accompanied and
supported by properly corroborated affidavit of the applicant, in duplicate,

showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal.

SEC. 3. That any qualified applicant for a permit under section 1 of this act shall file with the register or receiver of the land district in which said land is located the application for such permit and shall make and subscribe before the proper officer and file with said register or receiver an affidavit that such application is honestly and in good faith made for the purpose of reclamation and cultivation and not for the benefit of any other person or corporation, and that the applicant is not acting as agent for any person, corporation, or syndicate in making such application, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land applied for or any part thereof, and that the applicant will faithfully and honestly endeavor to comply with all of the requirements of this act, and shall pay to said register and receiver a filing fee of 1 cent per acre for each acre of land embraced in said application, and such applicant shall then be entitled to receive such permit after the lands embraced therein are designated as provided in section 2 of this act.

SEC. 4. That such a permit shall be upon condition that the permittee shall begin operations for the development of underground waters within six months from the date of the permit and continue such operations with reasonable diligence until water has been discovered in the quantity hereinafter described, or until the date of the expiration of the permit. Upon the presentation at any time of proof satisfactory to the Secretary of the Interior that any permittee is not conducting such operations in good faith and with reasonable diligence, or has violated any of the terms of the permit, the Secretary shall forthwith cancel such permit, and such permittee shall not again be granted a permit under this act.

SEC. 5. That on establishing at any time within two years from the date of the permit to the satisfaction of the Secretary of the Interior that underground waters in sufficient quantity to produce at a profit agricultural crops other than native grasses upon not less than twenty acres of land has been discovered and developed and rendered available for such use within the limits of the land embraced in any permit the said permittee shall be entitled to a patent for one-fourth of the land embraced in the permit, such area to be selected by the permittee in compact form according to the legal subdivisions of the public land surveys if the land be surveyed, or to be surveyed at his expense under rules and regulations established by the Secretary of the Interior if located on unsurveyed land.

SEC. 6. That the remaining area within the limits of the land embraced in any such permit shall thereafter be subject to entry and disposal only under "An Act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and amendments thereto, known as the one-hundred-and-sixty-acre homestead act.

SEC. 7. That the receipts obtained from the sale of lands under the provisions of section 6 hereof shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress approved June 17, 1902, known as the reclamation act.

SEC. 8. That all entries made and patents issued under the provisions of this act shall be subject to and contain a reservation to the United States of all the

coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entrymen or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this act with reference to the disposition, occupancy, and use of the surface of the land.

SEC. 9. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act.

Approved, October 22, 1919.

RIPPY v. SNOWDEN.

Decided January 12, 1920.

HOMESTEAD APPLICATION—SEGREGATIVE EFFECT.

A homestead application filed, for land subject thereto, accompanied by the required showing and payment, has the segregative effect of an entry, and when allowed *all* rights thereunder relate back to date the application was filed.

Vogelsang, *First Assistant Secretary*:

Hillery S. Rippey has appealed from a decision of the Commissioner of the General Land Office dated May 21, 1919, rejecting his

application to make an additional entry under the stock-raising homestead act for W. $\frac{1}{2}$, Sec. 9, T. 33 S., R. 55 W., 6th P. M., Pueblo, Colorado, land district.

The application and petition for designation were filed September 4, 1917, at which date his application (033164), filed May 12, 1917, to make entry under the enlarged homestead act for E. $\frac{1}{2}$, Sec. 9, said township, had not been allowed. The latter application was for a second entry under the act of September 5, 1914 (38 Stat., 712), and was not allowed until October 20, 1919.

All of said Sec. 9 was designated under the stock-raising act, on Rippy's petition, May 11, 1918, effective June 10, 1918.

It was because Rippy's application under the enlarged homestead act had not been allowed on September 4, 1917, that the application in question was rejected. On March 28, 1919, the local officers inadvertently allowed the application of Yvetta M. Snowden, filed August 1, 1918, for said W. $\frac{1}{2}$, Sec. 9, as additional to her entry under the enlarged homestead act, made September 1, 1916, for lots 3 and 4, S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, Sec. 4, said township. The designation under the stock-raising act of the land embraced in Snowden's original entry became effective December 20, 1918.

While Rippy had no original entry of record when the application in question was filed, he had on file an application which segregated the land as completely as an entry, since it was later determined that he was, on the date of its filing, qualified to make a second entry. Under such circumstances, *all* rights under the entry relate back to the date the application was filed, and it must be held that he was qualified to make an additional stock-raising entry on September 4, 1917. To hold otherwise would be to render his status and his rights dependent upon the delay incident to the transmission to and consideration by the Commissioner of the General Land Office of his application for second entry. In Charles C. Conrad (39 L. D., 432), the Department held, in substance, that an application to enter is an entry when accompanied by the required showing and payment, if the land is subject thereto; and it is believed that the principle announced in the Conrad case is entirely pertinent here.

Accordingly, the decision appealed from is reversed and the conflicting applications will be adjudicated by the Commissioner of the General Land Office in accordance with the provisions of section 8 of the stock-raising homestead act.

EDWARD CHRISTOPHERSON.

Decided January 15, 1920.

TOWNSITE SETTLER—ACT OF MARCH 16, 1912—PREFERENCE RIGHT.

The preference right accorded by the act of March 16, 1912, to certain settlers does not contemplate residence, but actual occupation in good faith for town-site purposes; and the operation of a warehouse is occupation within the meaning of that act.

VOGELSAANG, *First Assistant Secretary:*

Edward Christopherson has appealed from a decision of the Commissioner of the General Land Office, dated May 12, 1919, holding for cancellation his town lot entry for lot 6 of block 32 in the townsite of Port Angeles, Washington.

Said townsite was created in 1863 under the act now embodied in sections 2380 and 2381, Revised Statutes. On February 25, 1864, the local officers were directed to reserve from sale all of urban block 32 in said townsite. The block was designated "U. S. Reserve" on the diagram sent for use in connection with the sale of lots. On May 15, 1893, an Executive order was issued reserving the entire block "for future needs of the Custom Service of the United States." On January 30, 1902, with consent of the Secretary of the Treasury, this Department granted permission to the Secretary of Agriculture to erect a storm-warning tower on lot 1 in said block, and reserved the lot for said purpose. By act of March 16, 1912 (37 Stat., 74), it was provided:

That the Secretary of the Interior be, and he is hereby, authorized and directed to cause the reappraisal at their actual cash value of blocks numbered 32 and 53, and the west 450 feet of suburban lot numbered 26 in the Government town site of Port Angeles, or any subdivisions thereof, in the State of Washington, and all of said lands, not required for the use of the Government, so reappraised to be subject to sale at not less than the reappraised price, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided, however,* That any settler who, prior to January 1, 1910, was in actual occupation of any portion or subdivision of such lands in good faith for town-site purposes shall be entitled to a patent for the lands so occupied and to own the buildings and improvements thereon upon payment to the Government of the appraised value of the land, not taking into consideration the value of any buildings and improvements thereon: *And provided further,* That the right of any such actual settler must be exercised within ninety days after the reappraisal herein provided for shall have been approved by the Secretary of the Interior: *And provided further,* That any such settler not exercising the right herein granted shall have the right for a period of thirty days after the expiration of said ninety days to remove his buildings from said premises occupied by him.

By Executive order of December 12, 1912, as modified by Executive order of April 21, 1913, there were reserved for the use of the

Treasury Department lots 6 to 15, inclusive, and for the use of the Agricultural Department, lots 1, 16, and 17 in said block 32.

It was provided by the act of April 4, 1918 (40 Stat., 502):

That all lots in block 32, in the city of Port Angeles, State of Washington, now reserved for Government purposes under an Act entitled "An Act providing for the reappraisal and sale of certain lands in the town site of Port Angeles, Washington, and for other purposes," approved March 16, 1912, except lots 1, 8, 9, 10, 16, and 17, shall be disposed of under and pursuant to the provisions of said act of March 16, 1912, and the Secretary of the Interior is hereby directed to proceed at once to carry out the provisions of this Act.

On October 11, 1918, within ninety days after the approval of the reappraisal directed by the act of March 16, 1912, *supra*, Christopherson applied to purchase lot 6 of said block 32, alleging that he had settled upon said lot prior to January 1, 1910. After due notice, final proof was submitted December 20, 1918, and final certificate issued three days later, upon payment of the appraised price, \$500. In his proof Christopherson testified:

I purchased the building on said lot in 1907 and have occupied it as a warehouse ever since. I never used the building as a residence.

The decision appealed from held, in effect, that one who did not reside upon the lot sought to be purchased was not entitled to a preference right of purchase.

The regulations under said act of March 16, 1912, approved by the Department May 31, 1913, prescribed that preference-right claimants must show—

the applicant's exclusive possession and occupation in good faith for townsite purposes prior to January 1, 1910.

Neither said regulations nor the act construed thereby required one who claimed the right to purchase a lot should show that he resided thereon. Such preference right was limited by the act to "any settler who, prior to January 1, 1910, was in actual occupation * * * in good faith for townsite purposes." Hence, the only question to be determined is whether the operation of a warehouse was a townsite purpose. And the Department is of opinion that the question should be answered in the affirmative. The act is of a remedial character, and should be construed liberally. Had Congress intended that the preference right to purchase should be limited to those who had been prior to January 1, 1910, actually residing on the land, such intention would doubtless have been expressed in language different from that used.

The decision appealed from is reversed, and patent will issue in the absence of objection not now appearing.

FRED B. ROGERS.*Decided January 15, 1920.***SOLDIERS' ADDITIONAL—HONORABLE DISCHARGE—SUBSEQUENT DESERTION.**

A soldier, honorably discharged, who reenlists and later terminates that military service by desertion, is not deemed to be "honorably discharged" within the meaning of section 2304 of the Revised Statutes, hence no right under section 2307 can be based upon his service.

DEPARTMENTAL DECISION DISTINGUISHED.

Leroy Moore (40 L. D., 461), distinguished.

VOGELANG, *First Assistant Secretary:*

February 18, 1919, Fred B. Rogers filed application to enter, under section 2307, Revised Statutes, the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, T. 32 N., R. 63 W., 6th P. M., 80 acres, Douglas, Wyoming, land district. This application is based on an assignment of 40 acres of the alleged 80-acre right of John W. Moore, and the assignment of 40 acres of the alleged 80-acre right of Edward M. Pierce.

The right of Moore is based on the military service of John W. Moore in Company F, 11th Regiment, Wisconsin Infantry, from October 10, 1861, to January 5, 1865, and on homestead entry No. 3053, made by John W. Moore at Fort Dodge, Iowa, February 2, 1871, for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 20, T. 89 N., R. 30 W., 5th P. M., 80 acres, which was canceled on relinquishment November 6, 1871. This right was sold by Emma Moore at Manson, Iowa, December 14, 1918; and no objection to the legality and sufficiency of this right is made by the Commissioner.

The alleged right of Pierce is based on military service of Edward M. Pierce in Company B, 89th Regiment, New York Infantry, from November 22, 1861, to October 9, 1862, and on a homestead entry later made by Edward M. Pierce and abandoned.

June 12, 1919, the Adjutant General of the United States Army reported that this soldier was discharged from his military service in the 89th Regiment, New York Infantry, October 9, 1862, on surgeon's certificate of disability, wherein it was stated that the soldier "is unable to march, can not stand the slightest fatigue and is continually on the sick list"; also that he was a little over 16 years of age and wholly incapable of performing the duties of a soldier. No other military service was alleged by the applicant. June 27, 1919, the Commissioner of Pensions advised the Commissioner of the General Land Office that in addition to the military service above mentioned it was shown by the records of the Pension Bureau that said soldier, Edward M. Pierce, died September 17, 1907; that the claim for pension of Matilda Pierce as his widow, under the act of April 19, 1908, was rejected July 24, 1908, on the ground that said soldier deserted from his last contract of service during the Civil War in Company

G, 1st New York Veteran Volunteer Cavalry, and was never honorably discharged therefrom.

Further call was made upon the Adjutant General July 19, 1919, inviting attention to the above information received from the Commissioner of Pensions, and July 24, 1919, the Adjutant General reported that Edward M. Pierce, Company G, 1st Regiment, New York Veteran Cavalry, was mustered into the service for three years October 10, 1863, and deserted as a private on March 18, 1865.

August 5, 1919, the Commissioner of the General Land Office held that the soldier, Edward M. Pierce, having deserted from his last enlistment, is therefore not shown to have been honorably discharged, and rejected the application under consideration "for the reason that no soldiers' additional right exists in the name of Edward M. Pierce, and the assignment of his widow does not convey any such right."

From this decision appeal has been taken to the Department.

It has been held by the Department that the right of an enlisted man, who was honorably discharged, to an additional entry under section 2306 of the Revised Statutes, is not affected by the fact that he deserted from a prior enlistment (see case of Leroy Moore, 40 L. D., 461), and it is argued in support of this appeal that Pierce, having once been honorably discharged, is entitled to an additional entry, notwithstanding the fact that he deserted from his second enlistment. No such holding has ever been made by the Department, and upon careful consideration of the question presented the Department is of the opinion that the right to additional entry must be based upon an honorable discharge, terminating the military service of the soldier. It is logical and reasonable that the second faithful service with honorable discharge may condone fault in connection with an earlier service, but no such holding can be made where default occurred in the second and last service of the soldier, thus terminating his military service without honorable discharge.

The decision appealed from is affirmed.

JAMES MORRIS.

Decided January 20, 1920.

WITHDRAWAL—SETTLEMENT—ASSERTION OF CLAIM WITHIN THREE MONTHS.

While a withdrawal under the act of June 25, 1910, reserves the land from settlement and entry by all except those coming within the proviso thereto, it is not such an "adverse claim" as will defeat an application by one who has maintained settlement to date of filing, even though more than three months have elapsed from the date such settlement right might have been made of record in the form of an entry.

VOGELSANG, First Assistant Secretary:

The appeal of James Morris from a decision of the Commissioner of the General Land Office, dated July 19, 1919, presents for adjudi-

cation the question whether a withdrawal under the act of June 25, 1910 (36 Stat., 847), is an adverse claim sufficient to defeat the application of one who had settled on the land long prior to the withdrawal and had continued to reside on the land but had failed to make application for entry within three months from the filing of the plat of survey in the local office.

The plat of survey of T. 5 S., R. 10 E., N. M. M., was filed in the Roswell, New Mexico, land office on January 10, 1918. Prior thereto, by Executive order of April 28, 1917, Public Water Reserve No. 50 was created, embracing all lands lying within one-fourth mile of Red Lake, in said township. The withdrawal was modified by Executive order of October 3, 1918, to embrace SE. $\frac{1}{4}$, Sec. 22, SW. $\frac{1}{4}$, Sec. 23, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 26, and N. $\frac{1}{2}$ N.E. $\frac{1}{4}$, Sec. 27, said township.

On January 11, 1918, said Morris applied (042766) to make entry under the enlarged homestead act for SE. $\frac{1}{4}$, Sec. 22, and SW. $\frac{1}{4}$, Sec. 23, said township, alleging that he had resided on the land since September 9, 1909. On the same day he also applied (042767) to make an additional entry under the stock-raising homestead act for NW. $\frac{1}{4}$, Sec. 26, and NE. $\frac{1}{4}$, Sec. 27, said township. The local officers rejected application 042766 because the land was embraced in said public water reserve and because it had not been designated as subject to entry under the enlarged homestead act. The application for additional entry (042767) was rejected because the land described therein was partially within said public water reserve and because applicant had no original entry as the basis for an additional.

Under date of February 20, 1918, the United States commissioner before whom Morris executed his applications forwarded to the Commissioner of the General Land Office the notice which Morris had received from the local officers rejecting application 042766, and inquired if Morris's settlement prior to withdrawal was not protected. The Commissioner of the General Land Office answered the inquiry by stating that Morris should file an affidavit as to his settlement. Such an affidavit was filed in the local office on March 20, 1918, whereupon the local officers forwarded all the papers to the General Land Office. No action thereon was taken, and on October 18, 1918, Morris filed a new application (044675), describing SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 23, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, said township, alleging settlement on the land since 1909. Said application was accompanied by a letter signed by Morris, as follows:

Find inclosed check for \$16, for application for 160. Please return amount due on previous application for 320, and 320 additional, \$44.

The letter was treated as a withdrawal of the two prior applications, and the moneys tendered therewith were returned to applicant.

The local officers rejected application 044675 for conflict with said public water reserve, and the Commissioner of the General Land Office, in the decision appealed from, after setting forth the provisions of the act under which the public water reserve was created, held that the withdrawal operated as an adverse claim and attached upon applicant's failure to assert his settlement right within three months from the filing of the plat of survey.

After field investigation, a special agent of the General Land Office reported under date of March 31, 1919, that Morris had resided continuously on the land described in application 044675 since September 9, 1909.

The act of June 25, 1910, *supra*, under which the conflicting water reserve was created, provides:

That there shall be excepted from the force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made.

The Department has never sanctioned the theory on which the affirmance of the action of the local officers was based. In *Moore v. Northern Pacific Ry. Co. et al.* (43 L. D., 173), it was said (p. 174):

In this connection, the Department deems it proper to advert to the impression, apparently widespread in the minds of public-land claimants and their counsel, that a homestead settler upon public lands forfeits the right thereto acquired by settlement, unless he files homestead application for the land within three months from the date of settlement, or, where the tract is unsurveyed, within three months from the date of the filing of a plat of survey in the local office. This is not the law. The preference right conferred upon a settler by section 3 of the act of May 14, 1880 (21 Stat., 140), is an extension to homestead settlements of the provisions of section 5 of the act of March 3, 1843 (5 Stat., 620). This right was long ago defined by the Supreme Court of the United States, in the case of *Johnson v. Towsley* (13 Wall., 72), as a preference right, which, as to a subsequent settler who asserts his right, is waived by the first settler who has neglected to do so within the time specified in the law. * * *

While a settler may lose his preference, over other settlers, by failure to comply with the requirements of the act of May 14, 1880, *supra*, his right to the land acquired by settlement thereon, was not created by that act but has been recognized by this Department and the courts from the beginning of the Government.

A withdrawal under said act of June 25, 1910, reserves the land from settlement and entry thereafter by all except those who come within the proviso heretofore quoted, but it is not such an "adverse claim," within the meaning of the decisions of the courts and the Department, as will defeat an application by one whose settlement

has been maintained until the date of his application, even though more than three months have elapsed from the date such settlement right might have been made of record in the form of an entry. In this connection, see *State of South Dakota v. Thomas* (35 L. D., 171) and *Wilson v. State of New Mexico* (45 L. D., 582).

However, even if the law were as held in the decision appealed from, it could properly be held that Morris did assert his claim in apt time. The local officers failed to advise him as to the extent he was entitled to make entry under his settlement, and there was no action taken on his informal appeal during the almost seven months it was on file in the General Land Office. Acting on such advice as was available to him, Morris filed the application now in question, which it would have been proper to treat as an amended application.

Applicant's allegation of prior settlement having been verified by a field investigation, no good reason exists why his application should not be allowed. It is so ordered, the decision appealed from being reversed.

HELEN G. RANKIN.

Decided January 20, 1920.

WITHDRAWAL—ACT OF JUNE 25, 1910.

As there was ample power in the Executive to make withdrawal or reservation of public lands for public use prior to the passage of the act of June 25, 1910, such withdrawals theretofore made were not revoked or made ineffective by that act.

WITHDRAWAL—COAL ENTRY.

As coal is not a "metalliferous mineral," the provision of the act of June 25, 1910, as amended August 24, 1912, that lands withdrawn thereunder "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," does not authorize the allowance of a coal entry for land so withdrawn.

WITHDRAWAL—NATIONAL FORESTS.

While the act of June 4, 1897, provides that mineral lands in any forest reservation shall continue to be open to location and entry under the mining laws, yet this does not prevent withdrawal or reservation from any and all form of private appropriation, and devotion of the land to public use.

VOGELANG, *First Assistant Secretary:*

This is an appeal by Helen G. Rankin from decision of March 14, 1919, by the Commissioner of the General Land Office affirming the action of the local officers and holding for rejection her coal declaratory statement filed at the Yakima, Washington, land office October 8, 1918, for the SW. $\frac{1}{4}$, Sec. 28, T. 19 N., R. 16 E., W. M., because of conflict with an existing withdrawal for a ranger station.

The withdrawal in question was made by the Commissioner's letter of October 22, 1908, approved by the Department on the same date, which withdrew said tract "from appropriation and use of all kinds under public-land laws subject to prior valid adverse claims for use as an administrative site" in the Rainier National Forest.

It is urged in support of the appeal that the said withdrawal was without authority of law and that even if lawfully made, it does not prevent coal entry thereof, as mineral lands, including coal, within any forest reserve are subject to entry under the mining laws. It is further stated:

That the said tract of land described in and covered by the application herein referred to is entirely separate and isolated from the Rainier National Forest and constitutes a tract of 160 acres situate about two miles from the boundary of said reserve proper and is used for a ranger's station. That the administration of said forest reserve can be as properly and as conveniently exercised without as with said land herein referred to, and the said tract can and should be eliminated from said forest reserve.

The Department of Agriculture has reported to this Department with reference to this claim that said tract is necessary as an administrative site and that about \$1,500 have been expended by the Government in improving it for that purpose.

This withdrawal was made prior to the date of the act of June 25, 1910 (36 Stat., 847), but there was ample power in the Executive to make withdrawal or reservation of public lands for public use prior to said act and withdrawals theretofore made were not revoked or made ineffective by that act. Furthermore, such power extended to mineral as well as nonmineral lands. See *United States v. Midwest Oil Company* (236 U. S., 459) and *United States v. Hodges et al.* (218 Fed. Rep., 87). In the latter case it was said:

However, if the withdrawal, when made in 1908, was a nullity for want of authority, such authority was expressly conferred upon the President by act June 25, 1910, c. 421, 36 Stat., 847 (Comp. St. 1913, Sec. 4523). And the continuous recognition and maintenance of the withdrawal by the Departments administering the public domain as the representatives of the President, and presumably by his direction, in legal effect rendered it valid by renewal or ratification on and after the date of said act, even as though then expressly renewed or made.

But even if this reservation were considered as effective only under the terms and restrictions specified in the said act of June 25, 1910, as amended by the act of August 24, 1912 (37 Stat., 497), the land would not be subject to coal entry, as that act, as amended, does not allow coal entry of lands so withdrawn, but provides—

that all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals.

Coal is not a metalliferous mineral and therefore does not come within the exception mentioned. While the act of June 4, 1897 (30

Stat., 36), provides that any mineral lands in any forest reservation shall continue to be open to location and entry under the mining laws, yet this did not prevent withdrawal or reservation from all and any form of private appropriation, and devotion of the land to public use. In other words, it is not the forest reservation proper which excludes this land from entry under the coal-land law, but the further withdrawal and reservation for definite use by the Government for an administrative site. A distinction between these two classes of reservations has been clearly recognized by the Department. Thus in 36 L. D., 314, it was held that the prohibition contained in the act of March 4, 1907 (34 Stat., 1256, 1271), against further creation or enlargement of forest reservations in certain States, except by act of Congress—

should not be enlarged by construction to include a prohibition against the exercise of the recognized power of the Executive to set apart portions of the public land for a public use.

Likewise it was held in 35 L. D., 262, that the provisions of the act of June 4, 1897 (30 Stat., 11, 35, 36), against inclusion of mineral lands in forest reservations and providing that such lands should continue to be subject to exploration and entry under the mining laws, did not prevent reservation of a tract therein for an administrative site if at the time of such reservation the tract was not of known mineral character, and could properly be retained for that purpose even though mineral therein be later discovered. Since the date of that decision the position of the Government has been strengthened by statutory authority contained in the act of June 25, 1910, *supra*, in so far as lands containing other than metalliferous minerals may be concerned; and also by the decision in the Midwest Oil Company case, *supra*, at least as regards withdrawals made prior to said act.

The decision appealed from is held to be correct and is accordingly affirmed.

KNIGHT PLACER MINING ASSOCIATION v. HARDIN.

Decided January 21, 1920.

KIOWA, COMANCHE, APACHE AND WICHITA LANDS—ACT OF JULY 17, 1914.

The act of July 17, 1914, providing for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals, has no application to lands within the former Kiowa, Comanche, Apache and Wichita reservation, which have been at all times since opened to entry subject to disposition exclusively under non-mineral laws.

VOGELSANG, *First Assistant Secretary*:

This is an appeal by the Knight Placer Mining Association from the decision of the Commissioner of the General Land Office of April

12, 1919, dismissing its protest against the issuance of patent on cash purchase 08388 of J. G. Hardin under the provisions of section 17 of the act of June 30, 1913 (38 Stat., 77, 93), for lot 5, Sec. 15, lots 1 and 2, Sec. 22, and lots 1, 2, and 3, Sec. 23, T. 5 S., R. 13 W., I. M., Guthrie land district, Oklahoma.

The tracts described are a part of the area ceded to the United States by the agreement by and between the United States and the Kiowa, Comanche and Apache Indians which agreement was amended, ratified and confirmed by the act of June 6, 1900 (31 Stat., 672), and constitute also a portion of the 480,000 acres of grazing land set apart for the common use of said Indian tribes pursuant to the provisions of Article III, section 6, of said act.

By the provisions of the act of June 5, 1906 (34 Stat., 213), that portion of the act of June 6, 1900, *supra*, directing the setting apart of 480,000 acres of the ceded area for the common use of said Indian tribes as grazing land was repealed and the area was directed to be opened to settlement by proclamation of the President and disposed of upon sealed bids or at public auction at the discretion of the Secretary of the Interior to the highest bidder under the provisions of the homestead law, after allotments had been made therefrom to certain Indians.

By the provisions of the act of June 30, 1913, *supra*, under which the purchase herein was made, the Secretary of the Interior was authorized:

* * * to sell upon such terms and under such rules and regulations as he may prescribe, the unused, unallotted, unreserved, and such portions of the school and agency lands that are no longer needed for administration purposes, in the Kiowa, Comanche, Apache, and Wichita Tribes of Indians in Oklahoma, the proceeds therefrom, less \$1.25 per acre, to be deposited to the credit of said Indians in the United States Treasury, to draw until further provided by Congress four per centum interest, and to be known as the Kiowa Agency Hospital fund, to be used only for maintenance of said hospital.

The purchase was made December 9, 1913, at which time a payment of one-fourth of the purchase money and the commissions was made. August 12, 1918, the remainder of the purchase money due on the entry together with the interest was paid and cash certificate thereupon issued.

The protest, which was filed February 21, 1919, charged in substance and effect that the tracts hereinbefore described are mineral in character and that the surface formation thereof is identical with the formation of the nearby lands upon which mining companies have developed valuable deposits of oil and gas. The decision of the Commissioner here complained of dismissed the protest on the ground that the said lands are subject to disposition only in the manner authorized by the act under which the purchase was made

and hence that the entry is not subject to contest on the charge that the lands in question are mineral in character.

The appeal challenges the correctness of the decision on the grounds (1) that the said act of June 6, 1900, extended the provisions of the mining laws over the entire area ceded by the agreement ratified by the act, and (2) that the lands here in controversy are, if valuable on account of oil and gas deposits, subject to the provisions of the act of July 17, 1914 (38 Stat., 509).

By Article XI, section 6, of said act of June 6, 1900, it is provided:

That should any of said lands allotted to said Indians, or opened to settlement under this Act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this Act, and the mineral laws of the United States are hereby extended over said lands.

Construing this provision the Department in *Acme Cement and Plaster Company* (31 L. D., 125, 128), said:

A consideration of the entire act and of the policy of the Government in dealing with Indian allotments and with mineral deposits in public lands requires that the mineral provision be read as if referring to the lands which were to be "allotted to said Indians, or opened to settlement under this act."

And in the instructions of April 9, 1903 (32 L. D., 95), having reference to the sections reserved for school purposes of the lands ceded under the agreement ratified by said act, it is said:

By that act only the lands which were to be allotted to the Indians or to be opened to settlement thereunder (*Acme Cement & Plaster Co.*, 31 L. D., 125; *Instructions*, id., 154) were made subject to the mining laws and to mineral exploration and entry. The act did not extend the mining laws generally to the lands ceded by that agreement, as was done by the earlier act with respect to the lands ceded by the *Wichita* agreement, but only to the lands which were to be allotted to the Indians or to be opened to settlement under the act. Sections 16 and 36, 13 and 33, reserved for school and other purposes for the benefit of the Territory and future State of Oklahoma, were not lands to be allotted to Indians or to be opened to settlement any more than were the four hundred and eighty thousand acres set aside for the common use of the Indians as grazing lands.

In paragraph 38 of the instructions of October 19, 1906 (35 L. D., 239, 246), issued under the act of June 5, 1906, *supra*, providing for the opening of said pasture lands to disposition, it is declared that—

Neither the nonmineral, nor the nonsaline affidavit will be required of applicants who enter these lands, but all other affidavits required of homestead applicants must be presented with the applications to enter.

And in *Benjamin F. Robinson* (35 L. D., 421), involving a tract within the pasture reservation opened to settlement and sale under the act last mentioned it is said:

Robinson claims that the lands applied for by him contain valuable deposits of building stone and are therefore subject to entry under the provisions of August 4, 1892 (27 Stat., 348), which authorizes the entry of land chiefly

valuable for building stone under the placer mining laws, and that there is nothing in the act of June 5, 1906, that takes these lands out of the provisions of said act of 1892 or that requires that they be disposed of under the homestead laws.

This question was carefully considered when the regulations of October 19, 1906, were in process of preparation and it was then decided that the provisions of the act of 1906 excluded these lands from the provisions of the mineral laws and therefore it was provided that neither the nonmineral nor nonsaline affidavit would be required of applicants who entered these lands. Upon further consideration the Department is satisfied that the correct conclusion was then reached. The act of 1906 specifically provides that all these lands shall be disposed of under the provisions of the homestead laws at not less than \$5.00 per acre, payments to be made in installments. These provisions all controvert the theory that it was intended that any of said lands should be subject to entry under mineral laws.

The decision of your office, affirming that of the local officers rejecting this application for the reason that "these lands are only subject to entry under the act of June 5, 1906," is affirmed.

The latest reported case that the Department finds bearing upon the disposability of the said pasture lands under laws other than those specifically relating thereto is Ethel E. Huston (43 L. D., 531), wherein, after reference to section 17 of the said act of June 30, 1913, under which the purchase here in question was made, it was said:

This act clearly contemplates that all of the unused, unallotted and unreserved lands within the limits of the reservation named should be sold, with a view to providing hospital funds for the benefit of the Indians, and should thereafter be subject to no form of disposition other than that therein authorized or prescribed.

The decisions of the Department, therefore, are uniformly to the effect that there is no authority for the disposition of any of said pasture lands under the provisions of the mining law or otherwise than as directed by the acts hereinbefore cited.

Nor is the Department impressed by appellant's contention that said lands are affected by the provisions of the act of July 17, 1914 (38 Stat., 509). That act, as shown by the caption thereof, was one "To provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas or asphaltic minerals." The act was remedial in character and was clearly intended to apply only to lands of the class therein named, which, in the absence of the legislation enacted would not have been subject to disposition in any part under the agricultural or any other nonmineral law. The land here in question is not of that class but in accordance with the repeated and uniform rulings of the Department has been at all times since opened to entry subject to disposition exclusively under nonmineral laws. For the reasons stated the decision appealed from is affirmed.

**INSTRUCTIONS RELATIVE TO PAYMENTS FOR LANDS WITHIN
FORMER FORT PECK INDIAN RESERVATION, MONTANA.**

[Circular No. 667.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D C., January 23, 1920.

REGISTER AND RECEIVER,
GLASGOW, MONTANA:

The act of December 11, 1919 (Public No. 97), provides—

That any person who has made homestead entry under the provisions of the act of Congress approved May 30, 1908 (Thirty-fifth Statutes at Large, page 558), entitled "An Act for the survey and allotment of lands now embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and the sale and disposal of all the surplus lands after allotment," may obtain an extension of time for one year from the anniversary of the date of entry last preceding the passage of this act within which to pay the one-half of the installment then due or such part of any preceding installment, where payment has not been yet made and where an extension of time therefor is not authorized by the act of Congress approved March 2, 1917 (Thirty-ninth Statutes at Large, page 994), by paying interest at the rate of 5 per centum per annum on the sums to be extended from the maturity of the unpaid installments to the expiration of the period of extension, the interest to be paid to the receiver of the land office for the district in which the lands are situated, within such time as may be prescribed for that purpose by the Secretary of the Interior: *Provided*, That the one-half of any installment which becomes due within one year from the passage of this act and for which an extension of time for payment is not authorized by the said act of March 2, 1917, may also be extended for a period of one year by paying interest thereon in advance at the said rate: *Provided further*, That any payment so extended may thereafter be extended for a period of one year in like manner: *And provided further*, That if commutation proof is submitted, all the unpaid payments must be made at that time.

SEC. 2. That moneys paid as interest provided for herein shall be deposited in the Treasury to the credit of the Fort Peck Indians, the same as moneys realized from the sale of the lands.

SEC. 3. That the failure of an entryman to make any payment that may be due, unless the same be extended, or to make any payment extended either under the provisions hereof or under the provisions of the said act of March 2, 1917, at or before the time to which such payment has been extended, shall forfeit the entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited.

1. The one-half of installment payments which became due prior to December 11, 1919, which have not been paid and for which extensions of time for payments are not authorized by the act of March 2, 1917 (39 Stat., 994), circular No. 544 (46 L. D., 75), may be extended for one year from the anniversary of the date of entry last preceding December 11, 1919, under the act of that date, upon the payment of interest at the rate of 5 per centum per annum.

2. The one-half of installment payments, other than extended payments, which become due on the anniversary of the date of entry next occurring after December 10, 1919, for which extensions of time for payments are not authorized by the said act of March 2, 1917, may be extended for a period of one year, under the said act of December 11, 1919, upon the payment of interest in advance at the said rate.

3. The one-half of installment payments, extended for one year from the anniversary of the date of entry last preceding December 11, 1919, in conformity with paragraph 1 hereof, which will become due between the dates December 11, 1919, and December 10, 1920, both dates inclusive, may, at the expiration of the period of the extension, be further extended for a period of one year, under the said act of December 11, 1919, upon the payment of interest in advance at the said rate. At the expiration of the period of such further extension, which will occur between the dates December 11, 1920, and December 10, 1921, both dates inclusive, the amount so extended must be paid.

4. The one-half of installment payments, extended for one year from the anniversary of the date of the entry next occurring after December 10, 1919, in conformity with paragraph 2 hereof, which will become due between the dates December 11, 1920, and December 10, 1921, both dates inclusive, may, at the expiration of the period of the extension, be again extended for a period of one year, under the said act of December 11, 1919, upon the payment of interest in advance at the said rate. At the expiration of the period of such further extension, which will occur between the dates December 11, 1921, and December 10, 1922, both dates inclusive, the amounts so extended must be paid.

5. Three-year proof may be submitted prior to the completion of the payments, by showing due compliance with the law in the matter of residence, cultivation, and improvements, the procedure in such case to be as stated in paragraph 7 of circular No. 544, above cited. If commutation proof is submitted, all the unpaid amounts must be paid at that time.

6. Section 1 of the said act of December 11, 1919, provides that the interest payments required by that act shall be paid—

within such time as may be prescribed for that purpose by the Secretary of the Interior,

and section 3 of the act provides:

That the failure of an entryman to make any payment that may be due, unless the same be extended, or to make any payment extended either under the provisions hereof or under the provisions of said act of March 2, 1917, at or before the time to which such payment has been extended, shall forfeit the

entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited.

7. You are directed to serve notice on all entrymen who are in default in the matter of payments, either of principal or interest, that if the required sums, as herein provided and as provided in circular No. 544, above referred to, are not paid on or before June 1, 1920, you will report their entries to this office for cancellation.

8. Hereafter entrymen must make the required payments either of principal or interest at the time the payments become due. If such payments are not made you will serve notice on the entrymen, advising them of the defaults, and that in the event of their failure to make the payments within 30 days from receipt of notice you will report their entries to this office for cancellation.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSONG,
First Assistant Secretary.

GILBERT v. VALLIER.

Decided February 12, 1920.

APPLICATION TO CONTEST—CORROBORATING AFFIDAVIT.

Where the corroborating witness to an affidavit of contest alleges that he has personal knowledge of the facts alleged in the affidavit, and that "the statements therein made are true," such facts need not be repeated, if the witness sets forth a statement of how and why he knows them to be true.

DEPARTMENTAL DECISIONS DISTINGUISHED.

Preskey v. Swanson (46 L. D., 215) and *Bolton v. Inman* (46 L. D., 234), cited and distinguished.

LANE, Secretary:

George A. Vallier has appealed from a decision of the Commissioner of the General Land Office, dated July 15, 1919, overruling his motion to dismiss the contest of Jesse Gilbert against his homestead entry, made September 18, 1917, for E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 23, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 24, T. 8 N., R. 18 W., S. B. M., Los Angeles, California, land district.

Commutation proof on said entry was submitted before the local officers on March 24, 1919, and final cash certificate issued the same day.

On April 1, 1919, Jesse Gilbert filed an application to contest the entry, alleging that entryman—

never at any time entered on said land in good faith, and was at all times after filing thereon under agreement and pay of Tony Bautiste to acquire title and turn the said land to him, and that said claimant has never resided on said land since September 1, 1918. That George A. Vallier is not in the naval or military service of the United States.

The corroboration of the affidavit by F. E. Cook reads as follows:

That he is acquainted with the tract described in the above affidavit, and knows from personal knowledge and observation that the statements therein made are true. That I have lived adjoining to said property during all the times herein mentioned and am familiar with conditions thereon.

Formal answer, denying the charges, was served and filed on May 1, 1919, and four days later a motion to dismiss the contest was filed, in which it was contended that the contest affidavit was not corroborated in accordance with Rule of Practice 3 as amended September 23, 1915 (44 L. D., 365). The motion was denied by the local officers, and on appeal their action was sustained by the decision appealed from.

Said Rule 3 requires that the statements in an application to contest—

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

Where, as here, the corroborating witness alleges that he has personal knowledge of the facts alleged in the affidavit of the contestant, and that "the statements therein made are true," such facts need not be repeated, if the witness sets forth a statement of how and why he knows the statements to be true.

In *Bolton v. Inman* (46 L. D., 234), the corroborating witnesses, after alleging that—

they are acquainted with the tract described in the above affidavit and know from personal knowledge and observation that the statements therein made are true,

set forth a statement of alleged facts which, if proven, would not have warranted the cancellation of the entry. It was accordingly held that the charges of Bolton were not properly corroborated.

In *Preskey v. Swanson* (46 L. D., 215), the corroborating witness did not allege that he had personal knowledge of the facts alleged by Preskey, and the contest was dismissed for want of proper corroboration of the charges.

However, even if the affidavit of Gilbert had not been properly corroborated, a motion to dismiss, not filed concurrently with the answer by which issue was joined, comes too late.

The decision appealed from is affirmed.

LEE ROY CHAPMAN.

Decided February 17, 1920.

STOCK-RAISING HOMESTEAD—DESIGNATION—ACT OF DECEMBER 29, 1916.

The distance of land from markets, schools, and railroads can not be taken into consideration in determining whether the surface thereof "is chiefly valuable for grazing and raising forage crops," and such land subject to designation under the provisions of the stock-raising homestead act of December 29, 1916.

VOGELSANG, First Assistant Secretary:

Lee Roy Chapman has appealed from a decision of the Commissioner of the General Land Office, dated May 14, 1919, rejecting his application (037909) to make entry under the stock-raising homestead act of December 29, 1916 (39 Stat., 862), for lot 21, Sec. 6, lots 2, 8, 9, 11, 12, and 13, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 7, T. 22 N., R. 15 E., M. M., Lewistown, Montana, land district, as additional to his perfected entry under the enlarged homestead act for lots 13, 14, and 22, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 6, lots 1 and 10, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 7, said township.

The Director of the Geological Survey refused to recommend the designation of the land, and the rejection of the application followed.

The area involved is one in which cultivable lands are regarded as agricultural lands suitable for grain production under dry-farming methods, and the presence of 80 acres of such land in a reasonably compact area, or the equivalent thereof in farming value of a greater aggregate acreage in scattered tracts, is regarded as sufficient to render a tract unsuitable for designation under the stock-raising act.

In the final proof on his patented entry, submitted December 4, 1917, Chapman stated that 200 of the 320 acres are cultivable, and that he had 113 acres in cultivation.

According to the field report of a representative of the Geological Survey who examined the land on August 27, 1918, the patented entry and the subdivisions applied for contain 291 acres of cultivable land, 240 acres of which are in one compact body. At the time of field examination, 86 acres were under cultivation. The cultivable land is reported to have a sandy loam soil, which on the nontilled portion supports a very good growth of vegetation, composed principally of grama grass, indicating a soil that should be well adapted to the production of dry-farm crops if properly tilled. On lands very similar in character, located 3 miles west, a crop report shows that an average yield of 16 bushels of wheat per acre was grown during the years 1914 to 1917, inclusive.

In his appeal the applicant contends that there should be taken into consideration the inconvenience of being $7\frac{1}{2}$ miles from the nearest school, $7\frac{1}{2}$ miles from the nearest mail route, and $24\frac{1}{2}$ miles

from town, as well as the fact that the roads are so bad that it takes a good team to pull an empty wagon.

In authorizing the designation of land as subject to entry under the stock-raising homestead act, Congress limited such designations to lands the surface of which is, in the opinion of the Secretary of the Interior, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that 640 acres are reasonably required for the support of a family. The distance of land from markets, schools, and railroads can not, therefore, be taken into consideration in determining whether the surface of a tract of land is chiefly valuable for grazing and raising forage crops. While to-day a tract may be many miles from a railroad and the conveniences that usually are found in towns established along a railroad, it can not be foretold how much time will elapse before such conditions will be improved. Land which is valuable for its gold deposits is not subject to nonmineral classification because far removed from a railroad, and, until Congress provides otherwise, land which is suitable for the production of cereal crops by any method of cultivation can not be classified as most valuable for grazing and raising forage crops merely because a market for such crops is not conveniently located.

The cultivable lands here involved are considered as too good in quality and too great in area to permit the designation thereof as stock raising. The decision appealed from is accordingly affirmed.

REGULATIONS FOR THE SALE OF LANDS IN FORMER CHEYENNE RIVER AND STANDING ROCK INDIAN RESERVATIONS, NORTH AND SOUTH DAKOTA.

[Circular No. 670.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 27, 1920.

The act of Congress approved May 29, 1908 (35 Stat., 460), providing for the disposal of a portion of the surplus and unallotted lands in the former Cheyenne River and Standing Rock Indian Reservations, North and South Dakota, provides in Section 4:

That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act. And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for cash without regard to the prescribed price thereof fixed under the provisions of this

Act, under such rules and regulations as the Secretary of the Interior may prescribe.

Under authority of said proviso, it is directed that all lands affected thereby, which have been subject to homestead entry for a period of seven years, to which there are no valid existing rights, and which are not reserved or withdrawn for any purpose at the date of sale, be offered for sale at public outcry, at not less than their appraised values, under the supervision of the Superintendent of Opening and Sale of Indian Reservations, the lands in the Lemmon, South Dakota, land district to be offered for sale at Lemmon, commencing May 27, 1920, and those in the Timber Lake, South Dakota, land district, at Timber Lake, commencing June 1, 1920.

Purchasers may pay all cash for the lands at the time of purchase or one-third down and the balance in two equal annual installments due one and two years from the date of purchase, interest to be paid on the deferred installments at the rate of five per centum per annum.

The lands will be listed for sale in tracts embracing the northeast, northwest, southeast and southwest quarters of sections, unless parts of such subdivisions are not subject to sale, in which event all contiguous lands subject to sale in such quarter-sections will be listed for sale as separate tracts. Offerings may be made in smaller parcels if deemed advisable in the judgment of the Superintendent.

Bids may be made in person or by agent, but will not be received through the mail. Purchasers will not be required to furnish proof as to their age, citizenship or otherwise or as to the character or condition of the lands.

The required purchase money must be paid to the receiver of the proper land office before 4.30 o'clock p. m. on the next business day following the date of sale. Any purchaser who fails to make such payment will forfeit all rights to the land purchased, which will be reoffered for sale, and the defaulting purchaser will not thereafter be permitted to bid for or purchase any other lands at the sale.

The Superintendent of the sale is hereby authorized to prescribe such rules therefor, not in conflict herewith, as the exigencies may require and he may at any time suspend or indefinitely postpone the sale or adjourn it to such time or place as he may deem advisable, and he may reject any or all bids which, in his opinion, are less than the actual cash value at which any of the lands offered should be sold.

All persons are warned against entering into any agreement, combination or conspiracy which will prevent any of said lands from selling advantageously, and all persons so offending will be prosecuted criminally under section 59 of the Criminal Code, which reads:

Whoever, before or at the time of the public sale of any of the lands of the United States, shall bargain, contract, or agree, or attempt to bargain, con-

tract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof; or whoever by intimidation, combination, or unfair management shall hinder or prevent, or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale shall be fined not more than one thousand dollars or imprisoned not more than two years, or both.

CLAY TALLMAN,
Commissioner.

Approved:

FRANKLIN K. LANE,
Secretary.

**ISSUANCE OF PATENTS FOR LANDS EMBRACED IN TOWNSHIPS
THE SURVEYS OF WHICH HAVE BEEN SUSPENDED IN CON-
TEMPLATION OF RESURVEYS.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 1, 1920.

TO CHIEFS OF DIVISIONS OF
THE GENERAL LAND OFFICE:

By a circular of this office promulgated under date of December 28, 1914 (No. 369), it was directed that, where an entry had been made of lands in a township the survey and plat of which had been subsequently suspended, pending a resurvey, and where the entryman had, prior to such suspension, fully earned title to said land, patent would be granted, notwithstanding such suspension; but that, in all other cases, final certificate only would issue, endorsed in manner so as to refer to the pendency of a resurvey, patent to be delayed to await completion of such resurvey.

Following further and recent consideration of the subject matter of said instruction, it has been determined that the actual and certain prejudice resulting to entrymen of such lands from long-delayed issuance of patents is more to be avoided than are such apprehended or real difficulties as may arise from abrogation of the practice described by the above-mentioned circular.

Said circular 369 is, therefore, now and hereby canceled and vacated. In all cases now pending, or hereafter presented, in which an entry has been made pursuant to a recognized public-land survey, and plat thereof, suspension of such survey shall not be permitted to delay procedure by the entryman for the perfection of his said entry, nor the issuance to him of a patent, whenever and as soon as he has

otherwise established his right to such patent. In all such cases, any patent so issued will describe the granted land in accordance with the plat of survey pursuant to which entry was made.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

STOCK-RAISING HOMESTEADS—AMENDMENT OF CIRCULAR 523.

[Circular No. 673.]

DEPARTMENT OF INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 15, 1920.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

Circular No. 523 of January 27, 1917 (45 L. D., 625), as amended and reprinted July 30, 1919 (47 L. D., 227), is amended by substituting for the fourth and fifth subparagraphs of paragraph 6 the following:

An additional entry (under any section of the act) can be made only as additional to a pending or perfected entry, not to an unallowed application; however, exception is made where suspension of the original filing has been due only to the necessity of passing upon the right of applicant to make a second entry and the application therefor was otherwise allowable at the time the additional application was filed. In all other cases you will reject applications for additional entries where the applications for original entry are not allowable at the time of filing.

When the land involved is designated and subject to entry under the stock-raising act, and it is therefore possible to embrace the entire area desired under that act, one who thereafter elects to make an entry under other homestead laws and an additional stock-raising entry will not be granted a reduction in the requirements of cultivation in connection with the original entry, but will be held to strict compliance with the requirements of the law under which the original entry was made.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

RUTH MORROW.

Decided March 15, 1920.

SECOND ENTRY—ACT OF SEPTEMBER 5, 1914.

In support of an application for second entry under the act of September 5, 1914, one is not required to demonstrate the existence of obstacles such as would amount to an absolute impossibility of holding and perfecting his former entry; it is sufficient if the excuse be such as would govern the mind of a well-disposed person acting in good faith and without speculative intent.

VOGELSANG, *First Assistant Secretary*:

Ruth Morrow has appealed from decision by the General Land Office dated November 12, 1919, rejecting her homestead application for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 24, T. 31 N., R. 27 E., N. M. M., Clayton, New Mexico, land district.

The application was filed June 5, 1919, for entry under the provisions of the stock-raising homestead law together with petition for designation of the land as of the character subject to entry thereunder. The application was also supported by a corroborated affidavit with a view to showing grounds for restoration of her homestead right and allowance of second entry under the provisions of the act of September 5, 1914 (38 Stat., 712).

It appears that the applicant on March 12, 1917, made homestead entry for N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, T. 31 N., R. 28 E., N. M. M., which was on March 30, 1918, canceled on her relinquishment thereof.

In her application for second entry she states that she did not establish residence on the land embraced in her former entry for the reason that she engaged in the Y. W. C. A. work for the Government during the war at Camp Cody, New Mexico, and relinquished the entry because she expected to be so engaged for a long time; that the land was fenced on all sides with four wires, which fencing was of the value of possibly \$250 or \$300; that she received for the improvements a note for the sum of \$400.

Upon this showing, the Commissioner held that the right of second entry could not be accorded under the act of September 5, 1914, *supra*. That act reads as follows:

That any person otherwise duly qualified to make entry or entries of public lands under the homestead or desert-land laws, who has heretofore made or may hereafter make entry under said laws, and who, through no fault of his own, may have lost, forfeited or abandoned the same, or who may hereafter lose, forfeit, or abandon same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry or entries had never 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.

Said act, being remedial in character, should be liberally construed and applied. The Department has uniformly held to the view that an applicant under this law is not required to demonstrate the existence of obstacles such as would amount to a complete and absolute impossibility of holding and perfecting his former entry. It is sufficient if the excuse be such as would govern the mind of a well-disposed person acting in good faith and without speculative intent.

In the instant case so far as shown, the claimant had the free choice and privilege of performing residence upon her homestead entry. She was untrammelled and not physically prevented from complying with the residence requirements of law. In one sense then the abandonment was not "because of matters beyond her control." But this is the narrow sense and not in the broad spirit which seems to have actuated this applicant. She responded to the nobler sentiments at a time when patriotic service of that nature was of great importance to the Government. Her behavior was not such a "fault" as is contemplated by the statute. There is no indication of speculation in this case and the applicant should not be denied the reinstatement of her homestead right.

The decision appealed from is reversed.

ALLOTMENT APPLICATIONS BY MARRIED WOMEN.

[Circular No. 675.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1920.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

On February 12, 1920, the Department directed that the closing paragraph of the departmental letter of April 15, 1918 (46 L. D., 344), which approved the regulations of April 15, 1918, governing Indian allotments on the public land be entirely eliminated and that the following paragraph be added to the regulations on page 7 under the heading "Indian Wives" (46 L. D., 349):

An Indian woman married to an Indian man, who has himself received an allotment on the public domain or is entitled to one, is not thereby deprived of the right to file an application in her own name, provided she is otherwise entitled.

The effect of this amendment of the circular is to allow married Indian women who have received certificates from the Commissioner of Indian Affairs that they are entitled as Indians to allotments on

the public domain the same rights in respect to allotments in severalty under the fourth section of the act of February 8, 1887 (24 Stat., 388), as amended, as are allowed single women regardless of the age of such women.

Each married Indian woman applicant will, however, be required to conform to the rules as to settlement laid down on pages 5 and 6 of the circular (46 L. D., 348), and must satisfy this office by evidence submitted in the form of an affidavit by her, corroborated by the affidavits of at least two persons having knowledge of the facts, that she has used or occupied the land for at least two years in such manner as will indicate that she has taken the land in good faith with the intention of making use of the same, for some clearly beneficial purpose, as is required of other adult applicants.

The applications for minor children must continue to be filed by the father, if he is living with his family, or if not the mother, if she has applied for herself, can apply for such living minor children under her care and protection as were living at the time she filed her own application. In default of any adverse claims you will reinstate on your records any and all applications by married Indian women, whose applications have been rejected for the sole reason that they were made by married women whose husbands were entitled to allotments on the public domain, wherever your attention is directed to such and you will immediately advise this office by special letter of your action in each instance.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

**REGULATIONS GOVERNING THE DISPOSITION OF APPLICATIONS
FILED UNDER THE PROVISIONS OF PUBLIC RESOLUTION
NO. 29.**

[Circular No. 673.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 31, 1920.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Public Resolution No. 29, giving to discharged soldiers, sailors, and marines a preferred right of homestead entry, approved February 14, 1920, provides:

That hereafter, for the period of two years following the passage of this Act, on the opening of public or Indian lands to entry, or the restoration to entry of

public lands theretofore withdrawn from entry, such opening or restoration shall, in the order therefor, provide for a period of not less than sixty days before the general opening of such lands to disposal in which officers, soldiers, sailors, or marines who have served in the Army or Navy of the United States in the war with Germany and been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have a preferred right of entry under the homestead or desert-land laws, if qualified thereunder, except as against prior existing valid settlement rights and as against preference rights conferred by existing laws or equitable claims subject to allowance and confirmation: *Provided*, That the rights and benefits conferred by this act shall not extend to any person who, having been drafted for service under the provisions of the Selective Service Act, shall have refused to render such service or to wear the uniform of such service of the United States.

Sec. 2. That the Secretary of the Interior is hereby authorized to make any and all regulations necessary to carry into full force and effect the provisions hereof.

DURATION OF PREFERENCE RIGHT PERIOD.

SECTION 1. Public or Indian lands opened to entry or restored from withdrawals or reservations after February 14, 1920, and prior to February 15, 1922, are subject to the provisions of the public resolution. The time provided therein for filing homestead and desert-land applications by those entitled to exercise the privileges conferred thereby will begin and terminate as provided hereinafter, unless otherwise directed in the order opening or restoring the lands. Where such period begins prior to February 15, 1922, it will continue for the time prescribed, even though such period extends after February 15, 1922.

PERSONS ENTITLED TO THE BENEFITS OF THE PUBLIC RESOLUTION.

SEC. 2. (a) The words "officers, soldiers, sailors, or marines," as employed in the public resolution, are generic terms and embrace privates, seamen, sailors, nurses, and all other persons, male or female, who by enlistment or otherwise were regularly enrolled in the Army, Navy, or Marine Corps of the United States during the war with Germany, and who could not voluntarily terminate such service, but does not include civilian employees, nor officers, nurses, or members of other organizations not so enrolled in the Army or Navy. Persons entitled to the foregoing privileges will be referred to hereinafter generally as soldiers.

(b) A person now in the active service of the United States Army, Navy, or Marine Corps is not entitled to the privileges of the public resolution unless he can show an honorable discharge or separation from a previous service in the Army, Navy, or Marine Corps subsequent to April 6, 1917. Whenever such person can show an honorable discharge or separation from such service he may avail himself

of the benefits of the public resolution. Persons who were honorably discharged or separated from service in the United States Army, Navy, or Marine Corps after April 6, 1917, and who by reenlistment or otherwise are now engaged in such service, may exercise the privileges conferred by the public resolution, but must, if they make entry, comply in all particulars with the applicable law and regulations.

(c) An alien soldier who served in the United States Army, Navy, or Marine Corps, during the war with Germany, and was honorably discharged, is given the status of a declarant by the act of May 9, 1918 (40 Stat., 542), and if otherwise qualified, may exercise the privileges conferred by the public resolution, and may make an original homestead entry or desert-land declaration, but must, before proving his title under either act, complete his citizenship.

(d) A minor soldier, if otherwise within the provisions of the public resolution, may, under the act approved August 31, 1918 (40 Stat., 955), make either a homestead or desert-land entry, and during his minority, or until he reaches the age of 21 years, may verify his homestead or desert-land application before any officer, at any place, authorized to administer oaths under the laws of the State within which the land applied for is situated. Among officers so recognized may be mentioned notaries public and clerks of courts of record in this country, and consular and diplomatic officers in foreign countries. In connection, however, with public-land entries made by minor soldiers, attention is directed to the restrictive provisions attaching to such entries by public resolution approved September 13, 1918 (40 Stat., 960), and departmental instructions thereunder of October 9, 1918, Circular 622 (46 L. D., 451).

QUALIFICATION OF SOLDIERS.

SEC. 3. The public resolution provides that the privileges thereunder may be exercised only by those qualified to make a homestead entry or desert-land declaration. A soldier who at date of application is the owner of more than 160 acres of land in any State or Territory of the United States, can not make an original homestead entry. The ownership of land is no bar to making a desert-land declaration, but the soldier at the time of filing such declaration must be a resident of the State in which the land is situated. If the soldier at the time his application is filed is not the owner of more than 160 acres of land in any State or Territory, has not made homestead entry or desert-land declaration, nor taken by assignment a desert-land entry, nor acquired agricultural lands from the Government, he may make either an original homestead entry or desert-land declaration, or both, within the limitations fixed by law, if the land applied for is subject to the entry sought. If he has made a homestead or

desert-land entry, or has acquired from the Government title to agricultural lands, he should, before filing his application, consult Suggestions to Homesteaders, Circular No. 541, and Statutes and Regulations governing entries under the desert-land laws, Circular No. 474, both of which may be obtained by request from the Commissioner of the General Land Office.

SHOWING REQUIRED TO ENTITLE THE SOLDIER TO THE PREFERENCE PROVIDED.

SEC. 4. The soldier must show his qualifications to make the entry sought, and in addition thereto, either as a part of his application or by an accompanying statement sworn to before an officer qualified to verify homestead or desert-land applications, that he served in the United States Army, Navy, or Marine Corps on or after April 6, 1917; the approximate period of such service; the unit or units in which such service was performed; that he was honorably separated or discharged from such service or placed in the Regular Army or Naval Reserve, and the date thereof, and that he did not refuse to perform such service or wear the uniform thereof. He should attach to his application a copy of his honorable discharge or separation, or the order placing him in the Regular Army or Naval Reserve, as the case may be, certified as correct by an officer with a seal, but he will not be required to file the original order of discharge or transfer. A minor soldier must show, in addition to the above, that he was under 21 years of age at the date of the execution of his application.

SOLDIERS' DECLARATORY STATEMENT NOT EFFECTIVE—ENTRY MUST BE MADE.

SEC. 5. Rights extended by the public resolution can not be supported by soldiers' declaratory statement under the homestead law, but must be exercised through an application to make homestead entry.

EXECUTION AND PRESENTATION OF APPLICATIONS.

SEC. 6. To avail himself of the privileges conferred by the public resolution, the soldier, unless he be a minor, must, if not within, go to the land district in which the land is situated, and he should personally examine the land applied for. He must execute his application, whether it be under the homestead or desert-land laws, before either the register or receiver of the local land office, or before a United States Commissioner, or a judge or clerk of a court of record in the county in which the land is located, or before one of such officers in the land district and nearest or most accessible to the land.

When so executed, the application may be presented to the land office in person, by mail, or otherwise. A minor soldier may execute his application in the manner provided in paragraph (d), section 2, hereof.

SOLDIER MUST MAKE ENTRY UNDER THE LAW APPLICABLE.

SEC. 7. Where under the law or order of restoration issued pursuant to the provisions of the act of September 30, 1913 (38 Stat., 113), the lands are restored to entry only under the provisions of either the homestead law or the desert-land law, applications by soldiers must be restricted to the applicable law, but where under the law or order of restoration entries may be made under either or both of such laws for lands properly subject thereto, a soldier may file an application under the homestead law and one under the desert-land law, if he does not by such applications include more land than he may lawfully acquire under the agricultural laws, provided he is qualified to make the entry sought, and the lands embraced in such applications are lawfully subject thereto, but he will not be permitted to file under both acts for the same tract.

PAYMENTS.

SEC. 8. The soldier must make the payments required of other persons under the law, pursuant to which his application is filed or entry is made.

COMPLIANCE WITH LAW AFTER ENTRY.

SEC. 9. The soldier must comply with the provisions of the desert-land law in the same manner and make the expenditures on the land and the payments required of other entrymen under that law. Where entry is made under the homestead law, the soldier may, under the provisions of the act approved February 25, 1919 (40 Stat., 1161), extending the provisions of section 2305, Revised Statutes, to service in the United States Army, Navy, or Marine Corps, in connection with the operations on the Mexican border, or in the war with Germany, receive credit for such service, not exceeding two years, in proving his claim. He must establish residence within the time and during at least the first year of his entry reside on the land and otherwise comply with the law in the manner required of other persons. He may at any time after the first year of his entry submit his proof, when he can show that the period of his compliance with the law after establishing residence and his military service equal 36 months. In applying credit for military service under the

general or enlarged provisions of the homestead law, the following rule will be observed:

A soldier with 19 months or more military service will be required to reside on the land at least 7 months during the first entry year; with more than 12 and less than 19 months, he must reside on the land 7 months during the first year and such part of the second year as, added to his excess over 12 months' service, will equal 7 months, and must cultivate one-sixteenth of the area the second year; with 7 and not more than 12 months, he must reside upon the land 7 months during each of the first and second years, and cultivate one-sixteenth of the area the second year; with 90 days and less than 7 months, he must reside upon the land 7 months during each year for the first and second years, and such part of the third year as, added to his service, will equal 7 months, and cultivate one-sixteenth of the area the second year and one-eighth the third year; and with less than 90 days' service, will receive no credit therefor in lieu of residence and cultivation. If he delay the submission of proof beyond the period of residence required, the cultivation necessary for the years elapsing before the submission of proof must be shown. He may apply for and receive a reduction in the area to be cultivated, in the same manner and under the conditions required of other applicants. Where the entry is made under the stock-raising provisions of the homestead law, the above rule with respect to residence will be applicable, but the soldier must make the improvements on the land required of other persons under that law, and show in lieu of cultivation that he actually used the land for raising stock and forage crops during the period that he was required to reside on the land. He must show, in any entry under the homestead laws, that he had a habitable house on the land at the date of submitting proof.

LANDS AFFECTED BY THE PUBLIC RESOLUTION.

SEC. 10. The public resolution affects only lands that may be entered under the homestead or desert-land acts, and does not extend the provisions of either of said laws to areas not otherwise subject thereto. It applies in all cases where such lands become subject to entry, (a) by the filing of township plats of survey or resurvey, or (b) where Indian lands are opened to entry, or (c) where public lands are restored from withdrawals or reservation, or (d) where lands are embraced in relinquishments which do not become effective upon being filed in the proper local land office, but upon which action by the Commissioner or Secretary is necessary before the lands affected are restored to disposition, or (e) where titles are recovered through actions in the courts. It does not apply to lands that were

open to entry on the date of its approval, nor to lands embraced in entries canceled by contests, or by reason of expiration of the statutory period, nor to lands embraced in entries or selections where under the law such lands become subject to entry upon the filing of proper relinquishments thereof in the local land office. Where, however, entries made under the provisions of the public resolution are relinquished before the expiration of the preference-right period accorded to soldiers, the lands affected thereby may be entered only by soldiers during such preference-right period.

CLASSES OF HOMESTEAD AND DESERT-LAND ENTRIES ALLOWABLE.

SEC. 11. The public resolution applies to all classes of homestead entries, whether under the 160, 320, or 640-acre provisions, and homestead and desert-land entries whether the entire estate is sought or whether the minerals are reserved to the United States. A soldier's homestead application under the enlarged, the stock-raising, or other special provisions of the law, will be governed by the regulations applicable thereto, and if by drawing, in case of simultaneous applications, or by time of filing such application is accorded priority, it will be disposed of accordingly.

UNSURVEYED LANDS.

SEC. 12. The public resolution will not prevent settlement on unsurveyed lands otherwise subject thereto prior to the filing of the township plat of survey, and where settlements are so made by qualified persons and maintained in the manner required by law, the rights secured thereby will not be subordinated, upon the restoration of the lands, to preferences asserted under the public resolution, but, from the date of the filing of the township plat of survey and until the preference period provided for soldiers has expired, settlements on the lands affected will confer no rights whatsoever.

RIGHTS THAT MAY DEFEAT SOLDIER'S APPLICATION.

SEC. 13. The rights conferred by the public resolution are subject to existing valid settlement rights and preference rights under existing laws, or equitable claims that are subject to allowance and confirmation. Without attempting to enumerate all the valid claims and existing preference rights that might defeat a soldier's application, the following may be mentioned:

(a) Settlement made by a qualified person at a time when the land was lawfully subject thereto, and maintained in the manner required

by law to date of such application. The soldier may avoid conflict with such settlers' claims by carefully examining the land before filing his application.

(b) The preference rights granted under the provisions of the act of August 18, 1894 (28 Stat., 394), to the States of Washington, Idaho, Montana, North Dakota, South Dakota, Wyoming, and Utah upon admission into the Union, and subsequently extended to the States of New Mexico and Arizona by sections 11 and 29 of the enabling act of June 20, 1910 (36 Stat., 565, 575). Where the States mentioned applied for the survey of public lands within their respective limits, and complied with the requirements of said act, the preference rights accorded by said act, if exercised within the 60 days provided, will defeat a soldier's application. The period within which the State must apply in order to protect its preference will begin with the date of the order of restoration of lands withdrawn or in reservation and surveyed during the time of withdrawal or reservation, and from the date of the filing of the township plat of survey, where the lands were not so withdrawn or reserved.

(c) The preference right granted the States of North Dakota, South Dakota, Montana, Idaho, and Washington by the act of March 3, 1893 (27 Stat., 592), will not defeat soldiers' applications during the preference-right period extended by the public resolution. Under the act of March 3, 1893, the rights therein granted attach only when the lands shall have become subject to appropriation under all of the applicable public-land laws, while the preferences granted soldiers by the public resolution are effective for a period of at least 60 days *before* such lands shall become subject to appropriation by others. Therefore, the provisions of the aforesaid act of March 3, 1893, will not prevent the allowance of applications by soldiers during the period hereinafter fixed for filing such preference-right applications, but upon the restoration of the land to entry generally, the rights of the several States to lands not then appropriated will attach, and for the period of 60 days thereafter will be superior to the claims of all other applicants, including soldiers.

(d) The act of June 11, 1906 (34 Stat., 233). Lands restored under the provisions of the said act of June 11, 1906, are under the terms of such act subject to preference rights as follows:

(1) For a period of 60 days by settlers prior to January 1, 1906, who shall not have abandoned such settlement prior to application;

(2) For a like period by persons, if qualified to make homestead entry, upon whose applications the lands were examined and listed.

The foregoing preferences are granted in the order named, and the 60-day period begins on the date the list and order of restoration reach the local land office.

(e) Preference rights extended certain Carey Act entrymen under the act approved February 14, 1920, Public No. 140. The rights granted settlers under the provisions of Public No. 140, are not absolute, but are conditioned upon the recognition of such rights by the Secretary of the Interior in the order restoring such lands to the public domain. Where the order restoring Carey Act lands does not recognize the preference rights of settlers, nor provide for the exercise thereof, soldiers' applications will be governed by paragraph (a), section 14 hereof.

ORDER APPLICABLE TO LANDS OPENED OR RESTORED SUBJECT TO THE PROVISIONS OF THE PUBLIC RESOLUTION.

SEC. 14. It is ordered and directed that hereafter, and until February 15, 1922, when any surveyed lands within the provisions of the public resolution are opened or restored to disposition under the authority of the Department, such lands, unless otherwise provided in the order of restoration, shall become subject to appropriation under the laws applicable thereto, in the following manner, and not otherwise:

(a) Lands not affected by the preference rights conferred by the acts of August 18, 1894 (28 Stat., 394), or June 11, 1906 (34 Stat., 233), or February 14, 1920 (Pub. No. 140), will be subject to entry by soldiers under the homestead and desert-land laws, where both of said laws are applicable, or under the homestead law only, as the case may be, for a period of 63 days, beginning with the date of the filing of the township plat, in case of survey or resurvey, and with the sixty-third day from and after the order of restoration, in all other cases, and thereafter to disposition under all of the public-land laws applicable thereto. For the period of 20 days prior to the restoration or opening of such lands to soldiers' entry, and for a like period prior to the date such lands become subject to entry generally, soldiers in the first instance, and any qualified applicants in the second, may execute and file their applications, and all such applications presented within such 20-day periods, together with those offered at 9 o'clock a. m., standard time, on the dates such lands become subject to appropriation under such applications, shall be treated as filed simultaneously.

(b) Where the lands are subject to the preference rights conferred by the acts of August 18, 1894 (28 Stat., 394), or June 11, 1906 (34 Stat., 233), and where in the order restoring Carey Act lands preference rights of settlers are recognized under the provisions of the act approved February 14, 1920 (Public No. 140), the lands not appropriated under such dominant preference rights will become subject to entry by soldiers under the provisions of both the

homestead and desert-land laws, or the homestead laws only, at 9 o'clock a. m., standard time, on the first office day after the termination of such preference-right periods, and to entry under all the applicable public-land laws at 9 o'clock a. m., standard time, on the sixty-third day from and after such first office day. Soldiers' applications may be filed at any time during such preference-right periods, and will be held subject to such superior preference rights. If the controlling preference right be exercised within the time prescribed, applications of soldiers in conflict therewith will be rejected. If such preference rights be not so exercised, the applications by soldiers filed during such preference-right periods, together with those filed at 9 o'clock a. m., standard time, on the first office day following the termination of such periods, will be treated as filed simultaneously.

DISPOSITION OF APPLICATIONS.

SEC. 15. (a) Applications treated as filed simultaneously will be rejected where they conflict with superior claims; otherwise they will be disposed of in the manner required by Circular 324, approved May 22, 1914 (43 L. D., 254).

(b) Soldiers' applications and those of other qualified persons filed after 9 o'clock a. m., standard time, on the dates the lands become subject to such applications, will be disposed of in the order filed.

RESTORATION OF LANDS TO GENERAL DISPOSITION.

SEC. 16 (a) While the special privileges extended by the public resolution may be exercised by soldiers of the war with Germany only, when the lands shall have been restored to disposition generally, under the applicable public-land laws, soldiers of any war may proceed on terms of equality with other qualified persons. Those who served for 90 days or more in the United States Army, Navy, or Marine Corps during the Civil War, Spanish-American War, or Philippine Insurrection, and were honorably discharged, may initiate claims under the homestead law by filing declaratory statements, either in person or by agent. Those who served in the United States Army, Navy, or Marine Corps for 90 days or more in connection with the operations on the Mexican border or during the war with Germany, and were honorably discharged, may file declaratory statements in person, but *not* by agent. The soldiers who make entry after restoration of the land to general disposition may apply such military service in lieu of residence in proving claims under the homestead laws, to the extent indicated in section 9 hereof.

(b) Where the lands are affected by the provisions of the act of March 3, 1893 (27 Stat., 592), the applications of soldiers and other persons will be held subject to the rights of the State for a period of 60 days from and including the date of such general restoration.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

DANIEL JEROME, JR.

Decided April 5, 1920.

TURTLE MOUNTAIN INDIANS—ACT OF APRIL 21, 1904.

An Indian who avails himself of the privileges of the general homestead law and receives patent thereunder necessarily acts in the capacity of a citizen; and as he thus separates himself from the tribe, he is not entitled thereafter to also make selection under the Turtle Mountain act of April 21, 1904.

VOGELSANG, *First Assistant Secretary:*

Daniel Jerome, jr., appealed from decision of the Commissioner of the General Land Office, dated August 20, 1918, holding for rejection his selection of the NW. $\frac{1}{4}$, Sec. 25, T. 161 N., R. 71 W., Minot, North Dakota, made under the Turtle Mountain act of April 21, 1904 (33 Stat., 189, 194).

The selection was made October 4, 1916, and the action of the Commissioner in holding the same for rejection was for the reason that Daniel Jerome, jr., having previously entered a tract of land under the regular homestead law and received patent therefor as a citizen, was not entitled thereafter to also make selection under the Turtle Mountain act.

It is an established rule that an Indian who has received an allotment out of tribal or reservation lands may, as a citizen by virtue of such allotment, make homestead entry of public lands. This is for the reason that allotment in severalty of reservation lands is simply a division of tribal property among those entitled and is in no sense an entry of public lands. In instructions of June 8, 1918 (46 L. D., 405), it was held that under the terms of the act of April 21, 1904, *supra*, which provide that members of the Turtle Mountain band who are unable to secure land upon their reservation may take land on the public domain, an Indian of that band who satisfies his allotment right by taking public land is to be treated the same

as if he had received land on his reservation, and that he may thereafter make regular homestead entry as a citizen.

But the situation presented by the case of Daniel Jerome, jr., is radically different. Prior to his selection of land on the public domain under the Turtle Mountain act he had made a regular homestead entry and received patent for the land entered. He could do this only on the theory that he had separated himself from his tribe and become a citizen. An Indian, as such, is not permitted to take lands on the public domain under the general homestead law. This can be done only under what are known as the Indian homestead laws and in availing himself of the privilege of these laws he acts in the capacity of an Indian as distinguished from a citizen. An Indian availing himself of the privileges of the general homestead law necessarily acts in the capacity of a citizen. As was said in the case of Feeley *v.* Hensley (27 L. D., 502, 504):

It must be presumed that he was and is an Indian born within the territorial limits of the United States and one who had at the time of filing his declaratory statement and of making his entry, taken up his residence separate and apart from any tribe of Indians therein, and had adopted the habits of civilized life, as his citizenship could apparently be derived from no other source. These conditions brought him within the pale of citizenship, where he has voluntarily placed himself. (24 Stat., 388, 390, Sec. 6, act of February 8, 1887.) * * * The homestead privilege was conferred upon native-born Indians who have severed tribal relations and abandoned savage for civilized life. (Turner *v.* Holliday, 22 L. D., 215.) The Indian entryman did not attempt to secure an allotment to him of nonreservation lands, whereby he would become a citizen, but relied upon his citizenship as one who had separated from his tribe and had adopted the habits of civilized life. By his voluntary act, his declaration of citizenship under oath, and his accepting the conditions imposed by law upon other citizens, in filing his declaratory statement and making homestead entry for the tract in question, he acknowledged that he laid no further claim to the guardianship of his person by the United States. That relationship ceasing, all obligations on the part of the Government toward him, as an Indian, except such as are enjoyed by citizens in common, are canceled. The protection afforded by Congress and by this Department to the Indians while in a state of dependency ceases when the state of pupilage or wardship of the latter no longer exists. (See the case of Miami Indians, 25 L. D., 426, 430.)

The act of April 21, 1904, *supra*, in permitting members of the Turtle Mountain band of Indians to take lands on the public domain, in instances where they are unable to secure lands on their reservation, granted a privilege to the Indians as such. On the other hand, a person though of the blood of that band in availing himself of the provisions of the general homestead law does not act in the capacity of an Indian but as one who has abandoned his tribal relations and adopted the habits of the white man, when he becomes entitled to the rights and privileges of citizenship, among which is the right to make homestead entry. Furthermore, it was only an individual

privilege that was granted by the Turtle Mountain act to those Indians who could not secure lands on their reservation. It was in no sense a tribal right and no particular lands were ever held in reservation for the purpose of satisfying that provision of the act. If the privilege is not exercised while the Indian is qualified it necessarily becomes forfeited. It is well settled that even in the case of strictly tribal lands in which each member of the tribe has an inherent interest, a member may nevertheless disqualify himself and his right to share in such lands be lost by change of status. The question involved in the instructions of June 8, 1918, *supra*, was as to the right of an Indian to make homestead entry *after* selection under the Turtle Mountain act and consequent citizenship, and did not involve the question of the right of an Indian to make selection *after* he becomes a citizen by separating from his tribe and the exercise of the privileges of citizenship by making homestead entry. The above is true of the cases of Frank Bergeron (30 L. D., 375) and Francis Frazier (42 L. D., 192), cited in support of the appeal. It was found in the case of Hattie Fisher Hall (43 L. D., 471), a Pine Ridge Sioux Indian, also cited in support of the appeal, that she made entry under the general homestead law as a citizen of the United States. The only question involved under the appeal from decision holding her homestead entry for cancellation was as to whether she was the proprietor of more than 160 acres at the date of entry. She was also an applicant for an Indian allotment on the reservation of her tribe, but it was not approved at the time she made homestead entry nor until after she had submitted final proof. It was held that she was not disqualified under the homestead law, as it was conceded that her right to an allotment was merely *in futuro* at the time she made homestead entry. The question of her qualification to take an Indian allotment was not directly involved in the matter of determining her right to make entry under the general homestead law.

It appears that one Elzear Parisien, after having made homestead entry as a citizen and received patent thereon, also made selection as a Turtle Mountain Indian under the act of April 21, 1904, *supra*, on which fee patent issued. The Department on June 27, 1916, requested the Attorney General to institute suit for the cancellation of the fee patent issued on the Turtle Mountain selection, with the result that on May 25, 1917, final decree was rendered by the United States District Court of North Dakota, canceling the patent. The controlling facts in that case were the same as in the present one of Daniel Jerome, jr.

Reference is made in the appeal to a proposed reinstatement for the benefit of his heirs of a filing made by Daniel Jerome, sr., deceased, covering the land in question. It appears that Daniel Jerome, sr., made Indian homestead entry for said land under the

act of July 4, 1884 (23 Stat., 76, 96), but the same was never completed by issuance of patent, although he appears to have resided upon the land for many years, and it was found that he was disqualified by reason of having previously made entry under the general homestead law as a citizen. It is apparent, however, that these matters are not pertinent to the present case, which directly involves the determination of the qualifications of Daniel Jerome, jr., under the Turtle Mountain act.

The Commissioner's decision herein, rejecting the latter's selection under said act, is affirmed.

STATE OF UTAH (ON PETITION).

Decided April 5, 1920.

SCHOOL GRANT—STATE OF UTAH.

Land embraced in subsisting entries at the date of the granting act and at the time of the admission of the State of Utah into the Union is excepted from the grant of lands in place, and the subsequent cancellation of such entries does not cause the grant to attach; but the land becomes a part of the public domain subject to disposition as other public lands.

CONFLICTING DECISIONS OVERRULED AND MODIFIED.

Decision in the case of *Law v. Utah* (29 L. D., 623), overruled; decision in the case of *Barnhurst v. State of Utah* (30 L. D., 314), modified.

VOGELSANG, *First Assistant Secretary*:

The State of Utah has filed petition for exercise of the supervisory authority of the Department and for reconsideration of decisions of November 10, 1916, and February 16, 1917 [not reported], which upheld the decision of the Commissioner of the General Land Office dated February 18, 1916, wherein it was held that the N. $\frac{1}{2}$ of Sec. 2, T. 5 S., R. 23 E., Salt Lake Meridian, did not pass to the State under its school grant because the land was embraced in subsisting entries at date of the grant and at the time of admission of the State into the Union, and that the subsequent cancellation of the entries did not cause the grant to attach.

In declining to recognize the claim of the State to the land in question the decision of the Department in the case of *Andrew J. Billan* (36 L. D., 334) was followed. The State urges that the case referred to, which was an Oklahoma case, is not applicable to the State of Utah and that as to its grant the true rule is to be found in the case of *Law v. State of Utah* (29 L. D., 623) wherein it was held, syllabus:

The grant of school lands to the State of Utah became operative on the admission of the State into the Union; and where at such date a portion of a school section is embraced within a subsisting timber-culture entry, made prior to the date of the granting act, the State takes title to such land subject

only to the entryman's right to perfect title under his entry, and if said entry is subsequently canceled the title of the State becomes complete as of the date of admission, to the exclusion of any preference right on the part of a contestant who secures such cancellation.

In the Billan case, *supra*, it was held, syllabus:

A homestead entry of record at the date of the act of June 16, 1906, excepts the land covered thereby from the provisions of section 8 of that act, reserving sections 13 for the benefit of the future State of Oklahoma, and upon the cancellation thereof the reservation declared by that section does not attach, but the land becomes public domain subject to disposition as other public land.

It will be observed that the two decisions are in direct conflict unless the language used in the respective grants is so divergent as to justify the different conclusions reached. But upon examination of the respective grants it is found that the language used in the Utah grant instead of being more favorable affords weaker foundation for the contention of the State than that contained in the Oklahoma grant. The Oklahoma grant contains no words of restriction whatever but granted sections 13 in place without any expressed exception, and yet it was held that it was not the intention of Congress that the grant should operate as to lands appropriated by entry; that the grant could be extended only to unappropriated lands, and the fact that land appropriated by homestead entry might subsequently be restored to the public domain did not, in the absence of express direction, subject it to the grant.

The Utah grant was restricted, as to such of the sections specified, as had not been "sold or otherwise disposed of by or under the authority of any act of Congress" and where said sections or any part thereof had been sold or otherwise disposed of, other lands equivalent thereto were granted and made subject to selection as idemnity.

In the case of *Barnhurst v. State of Utah* (30 L. D., 314), it was held that land embraced in a desert-land entry existing at date of admission of the State, when its grant became effective, was "sold or otherwise disposed of" within the meaning of the granting act, and served to defeat the grant "to the extent at least that the right of the State, if any, under the school grant, would be subject to his prior right under his desert filing." This decision conceded too much in suggesting that the grant might attach to the land involved therein upon cancellation of the desert-land entry. Clearly, lands which had been "sold or otherwise disposed of" were excepted from the grant of lands in place, and could not fall within the grant upon return. Such loss could be made good only by selection of other lands as idemnity therefor, as expressly provided.

These decisions in the cases of *Law* and *Barnhurst*, *supra*, appear to have failed to mark the distinction between claims on the one hand of the kind there involved where the lands were excepted from

the grant by existing entries, and on the other hand those claims based upon settlement initiated prior to survey. With reference to the latter, it is provided in section 2275, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), which was extended to Utah by act of May 3, 1902 (32 Stat., 188), that where settlements with a view to preemption or homestead are made before survey in the field on school sections, those sections shall be subject to the claims of such settlers, and other lands may be selected by the State in lieu thereof. It has been uniformly held with respect to this class of claims in conflict with school grants that the grant is held subject to such settlement, and that the State may claim the land in place in case the settler fails to carry his settlement to completion, or the State may select other land to satisfy any loss occasioned by such settlement claim.

After mature consideration, it is believed that the rule announced in the Billan case is correct and therefore the decisions heretofore rendered in the instant case are adhered to. It follows that the said decision in the case of *Law v. Utah* should be and it is hereby overruled and the decision in the case of *Barnhurst* is modified to meet the views herein expressed.

The State requested further opportunity to file brief or submit oral argument in support of its contention, which request was granted by letter of November 15, 1919, but no action in that regard has been taken by the State. In view thereof and the consideration which has been given the brief theretofore filed, it is deemed unnecessary to further delay action in the premises. The petition is accordingly denied.

INSTRUCTIONS.

April 9, 1920.

SCHOOL LANDS RESERVED FOR POWER SITES—ACT OF FEBRUARY 28, 1891.

A withdrawal of public lands for power-site purposes under the provisions of the act of June 25, 1910, is a reservation within the meaning of the act of February 28, 1891, amending sections 2275 and 2276, Revised Statutes.

VOGELSANG, First Assistant Secretary:

The surveyor general for the State of California has asked advice from your office [Commissioner of the General Land Office] and you have requested instructions from the Department as to whether the State may surrender its title to certain described lands in a specified school section 36, within Power Site Reserve No. 217 created October 28, 1911, in exchange for public lands of the United States.

Under the provisions of the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276, Revised Statutes, "other lands are * * * appropriated * * * and granted * * * and may be selected * * * where sections 16 and 36 * * * are included within any Indian, military or other reservation." (See *State of California on review*, 28 L. D., 57; *State of California v. Deseret Water, Oil and Irrigation Company*, 243 U. S., 415.)

The precise question is whether a withdrawal for power-site purposes comes within the meaning of "reservation" as that term is used in the statute cited. In other words, is there any difference in principle between an Indian or military reservation established by Executive order or a withdrawal or reservation made by the same authority pursuant to section 24 of the act of March 3, 1891 (26 Stat., 1095), providing for the establishment of forest reserves and withdrawals or reservations "for water-power sites * * * or other public purposes" established pursuant to the act of June 25, 1910 (36 Stat., 847).

In the opinion of the Department there is none. From an early period in the history of the Government it has been the practice of the President, either by express Congressional sanction or through his implied power as Executive, to make withdrawals and reservations of the public land for military uses and for Indian purposes or for governmental uses rendered necessary for the proper discharge of the functions committed to the executive branch of the Government in its various departments. (*Grisar v. McDowell*, 6 Wall., 363, 381.)

In 1891 Congress empowered the President from time to time to set apart and reserve public land bearing forests "as public reservations" and directed him to declare by public proclamation "the establishment of such reservations and the limits thereof." This enactment marked the inauguration of a new policy in regard to the conservation and use of the public domain for the permanent good of the whole people. The passage of the act of June 25, 1910, *supra*, was but another step in this policy. Under this statute the President is authorized at any time in his discretion to withdraw from settlement, location, sale or entry, any of the public lands of the United States including Alaska and reserve the same for water-power sites, irrigation, classification, or other public purposes to be specified in the orders of withdrawal, such withdrawal to remain in force until revoked by him or by an act of Congress. Further legislation declaratory of the same policy is found in section 10 of the stock-raising homestead act of December 29, 1916 (39 Stat., 862), which authorizes the withdrawal and reservation under the act of June 25, 1910, *supra*, of lands containing water holes or other bodies of water needed or

used by the public for watering purposes; also lands necessary to insure access to these watering places and lands, to be designated as stock driveways, needed for use in the movement of stock to summer and winter ranges or to shipping points.

The scope of the word "reservation" as used in the act of February 28, 1891, *supra*, was first considered by the Department in the case of the State of Wyoming, decided June 4, 1898 (27 L. D., 35), wherein it was stated:

The words "or other reservation" here used, when considered in the light of existing conditions, include and manifestly were intended to include every reservation (other than Indian or military) or withdrawals of lands for a public purpose, without respect to whether they should be temporary or permanent in character, and irrespective of the purpose for which such reservation or withdrawal was made. In other words, after specifically providing for Indian and military reservations, these words provide generally for all other reservations made by the United States for public purposes. The words "or are otherwise disposed of by the United States," following the words "other reservations," demonstrate that the latter were not employed in a restricted sense, but rather in their extended and broadened sense.

It perhaps should be noted in passing that the use in the foregoing excerpt of the qualifying words "temporary or permanent" as applied to reservation manifestly had regard to the distinction which was observed between tentative or preliminary withdrawals for examination, with a view to the creation of a reservation and the definite and ultimate reservation itself. The right to indemnity or to invoke the exchange provisions of the act under discussion was made to depend not upon the nature of the withdrawal or reservation as temporary or permanent but upon its character, whether for a *public purpose* or for *governmental uses*.

In another case decided in 1903, State of California (32 L. D., 346), the Department took a more restricted view of the word, saying:

These temporary withdrawals, made preliminary to the establishment of a forest reserve, are, from the very nature of things, largely in excess of the amount which may be finally set apart as a forest reservation, and examination thereof is made as fast as is possible with the force available for the purpose. The withdrawal made October 14, 1902, your office letter reports, includes, approximately, 100 townships or 2,304,000 acres. While lands so withdrawn are not subject to disposition under the general land laws, yet they are not within a "reservation" within the meaning of that term as employed in the act of February 28, 1891, *supra*; nor are they within a "reservation" within the meaning of the term as there employed until reserved by the proclamation finally establishing the forest reservation.

The act of 1891 provides indemnity where the school sections so granted "are mineral land or are included within any Indian, military, or other reservation." Indian and military reservations include lands specifically appropriated to a particular use, and the words "other reservation" as employed in the act of 1891 must signify a reservation of like character to those specifically enumerated. Mere temporary or preliminary withdrawals of lands with a view to their investigation and examination to determine what part, if any, should be

included within a forest reservation, can not be construed as placing such lands within a reservation of like character to an Indian or military reservation.

A number of the decisions and opinions bearing upon the question are collated in decision of the Department dated May 28, 1918, in the case of the State of New Mexico (46 L. D., 396), where it was held that certain lands in a school section 2, temporarily withdrawn for Indian purposes, were acceptable as base under section 2275, Revised Statutes, as amended, although it had not been determined at the time the indemnity selections were filed whether the base lands would be permanently reserved for Indian purposes. But it is shown in that case that the lands were definitely reserved at the date of the decision.

In the case of *United States v. Midwest Oil Company* (236 U. S., 459), the argument of the company was against the validity of certain so-called temporary petroleum withdrawals made by the President prior to the passage of the act of June 25, 1910, *supra*. In discussing this contention the Supreme Court said:

When analyzed this proposition, in effect, seeks to make a distinction between a Reservation and a Withdrawal—between a Reservation for a purpose, not provided for by existing legislation, and a Withdrawal made in aid of future legislation. It would mean that a Permanent Reservation for a purpose designated by the President, but not provided for by a statute, would be valid, while a merely Temporary Withdrawal to enable Congress to legislate in the public interest would be invalid. It is only necessary to point out that, as the greater includes the less, the power to make permanent reservations includes power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest and in both the effect on the intending settler or miner is the same.

But the question need not be left solely to inference, since the validity of withdrawal orders, in aid of legislation, has been expressly recognized in a series of cases involving a number of such orders, made between 1850 and 1862. *Dubuque & Pac. R. R. v. Litchfield*, 23 How., 66; *Wolcott v. Des Moines Co.*, 5 Wall., 681; *Wolsey v. Chapman*, 101 U. S., 755; *Litchfield v. Webster County*, 101 U. S., 773; *Bullard v. Des Moines &c. R. R.*, 122 U. S., 167.

In the nomenclature and administration of the public-land laws a distinction is often observed between a "withdrawal" and a "reservation." The word withdrawal has generally been used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from settlement, sale or entry under the general land laws in aid of administration or because of some exigency or emergency, to prevent fraud, to correct surveys or boundaries or in order that they may be presently or ultimately applied to some designated public use or disposed of in some special way. The terms are often used interchangeably, but unquestionably

many withdrawals have been made which could not properly be defined as reservations within the meaning of the act of February 28, 1891, *supra*. For instance, in the administration of the grants of public lands made to aid in the construction of railroads, Executive withdrawals are or were made either in advance of the definite location of the line or route of the road and for the purpose of preserving the land for the satisfaction of the grant or after such definite location and for the purpose of properly advising the local officers and others that the lands falling to the grant as well as those remaining to the United States have been identified, signifying that the granted lands have passed to the railroad company and the lands remaining to the United States are to be disposed of only at double the minimum price. Manifestly this is not a reservation of the lands in the true sense of that word.

It seems clear, however, in view of what has been said that in the great majority of cases in practical operation and effect a withdrawal and a reservation of public lands are identical. The question naturally arises then what is the criterion by which we may judge whether a withdrawal or reservation is within the meaning of that term as used in section 2275, Revised Statutes.

In the opinion of the Department the true test is whether the lands have been set aside in the interest of the public, that is, dedicated to some special use or designated for some particular purpose as for example where the withdrawal or reservation is in pursuance of a policy declared by Congress as one for which the public lands may be used. This obviously comprehends reservations under the act of 1910.

The Department does not wish to be understood as saying, however, that a withdrawal for mere purposes of classification or for irrigation would constitute a reservation within the meaning of the act of February 28, 1891. Such a withdrawal is in most cases manifestly in aid of administration and not a reservation of public lands for the use of the United States.

The purpose for which power-site withdrawals are made is not necessarily the construction and operation of power plants by the Government itself. The real purpose is to enable the Government to protect the public interests in connection with hydroelectric development in this country. The precise manner in which this is to be accomplished depends upon the future determination of Congress, where the matter is now under consideration. But the act of 1910 specifically authorizes the reservation of lands for this purpose, and the Department is fully convinced that such a reservation when made comes clearly within the meaning of that term as used in section 2275, Reserved Statutes, as amended by the act of February 28, 1891.

STATE OF LOUISIANA ET AL.

Decided April 12, 1920.

SWAMP-LAND GRANT—TITLE.

Only upon approval by the Secretary of the Interior under the act of March 2, 1849, granting swamp and overflowed lands to Louisiana, or the issuance of patent under the general swamp act of September 28, 1850, does the fee simple title vest in the State; prior thereto its title is inchoate and imperfect both in law and in equity.

SWAMP-LAND GRANT—MINERAL LANDS—PETROLEUM WITHDRAWAL.

Lands embraced within a petroleum withdrawal are thereby impressed with a *prima facie* mineral character; and the burden is upon the State to overcome this or suffer the rejection of its claim thereto under the swamp-land grant, which does not embrace mineral lands.

VOGELSANG, *First Assistant Secretary*:

The State of Louisiana has appealed from a decision of the Commissioner of the General Land Office, dated February 20, 1919, granting the State sixty days within which to show that the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 33, T. 12 N., R. 11 W., L. M., Baton Rouge, Louisiana, land district, claimed as swamp land is not mineral in character or to appeal or suffer rejection as to said tract of its swamp-land selection list. It appears that the State on March 21, 1919, prior to its appeal herein, filed an application for a mineral hearing but in connection therewith submitted no nonmineral showing.

Furthermore, the State asks that the case 07382, Baton Rouge, involving lots 2 and 3, Sec. 5, of the above township, be reopened so that whatever decision is here rendered may apply to that matter also. Those tracts were considered in departmental instructions of May 25, 1918 (46 L. D., 389), wherein the conclusion was reached that if the claimed swamp lands were ascertained to be mineral in character patent must be denied. On June 28, 1918, the Commissioner allowed the State and its transferee John M. Nabors, to file a showing that the land was nonmineral, and to apply for a hearing. The showing was made and a hearing asked for and had in April, 1919. The record in the proceedings is apparently still in the district land office. On April 28, 1919, the appeal now pending was filed and on September 2, 1919, the Commissioner directed the suspension of action in the matter of the hearing until further advised by him.

All the tracts above described were included within the out-boundaries of Petroleum Withdrawal 48, Louisiana No. 2, created by presidential order of May 22, 1916. No Executive action has been taken modifying or revoking said withdrawal.

The State in its appeal broadly contends that the departmental opinion of May 25, 1918, *supra*, is not soundly reasoned and is not

well founded because the Supreme Court of the United States has held that the swamp-land acts constituted present grants. A brief on behalf of the State and of its transferee, John M. Nabors, has been filed. Therein it is urged in substance that the grant to the State was one *in praesenti*, importing an immediate transfer of interest, not a promise of a transfer in the future; that the fee simple title of swamp lands vested in the State at the date of the grant; that such lands were not *public lands* subject to or included in the withdrawal order; that vested rights can not be interfered with by the Executive and that the subsequent discovery of mineral does not affect such rights; that there is no exception of mineral lands in the grant and the swamp lands even if mineral in character will pass thereunder as was held by the Attorney General in his opinion of September 11, 1916, in the Ferry Lake case. It is conceded that in many cases language has been used implying that the swamp-land grant is a grant *in praesenti*. However, only upon approval by the Secretary of the Interior under the act of March 2, 1849 (9 Stat., 352), or the issuance of patent under the statute of September 28, 1850 (9 Stat., 519), does the fee simple title vest in the State. The law in terms so expressly declares. Prior thereto the State's title is inchoate and imperfect both in law and in equity. *Little v. Williams* (231 U. S., 335, 340). The Supreme Court in the case of *Michigan Land and Lumber Company v. Rust* (168 U. S., 589, 592, 593), where the swamp-land grant was involved, said:

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the Government. It is true a patent is not always necessary for the transfer of the legal title. * * * wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent, *Bagnell v. Broderick*, 13 Pet., 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the Land Department is not lost.

It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius v. Kessel*, 128 U. S., 456; *Orchard v. Alexander*, 157 U. S., 372, 383; *Parsons v. Venzke*, 164 U. S., 89. In other words, the power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed.

The injunction suit of *Brown v. Hitchcock* (173 U. S., 473, 476), involved swamp lands in Oregon. The State's list had been approved by the Secretary of the Interior and that approval revoked by his successor in office. The court said:

In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the State, the legal title remained in the United States.

Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department.

See also *Niles v. Cedar Point Club* (175 U. S., 300, 309), where the court expressly stated that as the land had never been patented to the State of Ohio no fee had ever passed.

The swamp-land grant contained no express exception of military or Indian reservations. It is thought nevertheless that such lands do not pass under or fall within the grant. In the case of *State of Louisiana v. Garfield*, Secretary of the Interior (211 U. S., 70), the Fort Sabine Military Reservation lands were involved.

In 1871, the military reservation having been abandoned Congress ordered the lands to be sold for cash. The State listed the lands as swamp in character under the act of 1849, and the Secretary of the Interior had approved the listing on December 10, 1895. On June 6, 1904, that approval was vacated by his successor. The United States Supreme Court said (page 77)—

The approval proceeded upon a manifest mistake of law; that upon the abandonment of the military reservation the land fell within the terms of the grant of 1849. Therefore, it was void upon its face.

In the case of *Oregon v. Hitchcock* (202 U. S., 60, 70), the following language was used:

Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department.

In addition to the foregoing authorities the decisions in the cases of *Little v. Williams* (231 U. S., 335), and *Chapman & Dewey Lumber Co. v. St. Francis Levee District* (232 U. S., 186), clearly establish that only by patent or approval by the Secretary does the legal or fee simple title to swamp lands vest in the State and that prior thereto the State's claim is inchoate and incomplete.

Certain acts of Congress also point to this same conclusion. By the act of March 2, 1855 (10 Stat., 634), the President was to cause patents to be issued to the purchasers and locators of public lands claimed as swamp even where the State prior thereto had sold the tracts, the State to receive the purchase money or indemnity for such lands. The act of March 3, 1857 (11 Stat., 251), confirmed only those selections of swamp lands which remained vacant, unappropriated and unsettled, and continued in force the above act of 1855, and extended it "to all entries and locations of lands claimed as swamp

made since its passage." See also sections 2483 and 2484, Revised Statutes. The acts of February 23, 1875 (18 Stat., 334), and March 3, 1877 (19 Stat., 395), applicable to Missouri swamp selections in terms saved and excepted preemption and homestead claims. The Department is aware that certain courts have held that the saving provisions of the above laws are inoperative because repugnant to the grant or are applicable only to swamp selections improvidently made to include nonswamp land. Whatever the legal effect of the provisions above set forth may be they clearly express the purpose and intent of Congress with respect to the lands and apparently are wholly inconsistent with the view that a complete vested right accrued to the State as of the date of the grant. In the light of the more recent decisions of the Supreme Court it may well be that such provisions are not without legal import and effect.

The lands involved in the present appeal, as before stated, are within the limits of the petroleum withdrawal. They are thereby impressed with a *prima facie* mineral character. *Washburn v. Lane* (258 Fed., 524). This is so although one of the purposes of the withdrawal has been accomplished in the passage of the general leasing act of February 25, 1920 (Public No. 146). Deposits of oil and gas are now subject to disposition only in the form and manner provided in that act. This Department has no power or authority to pass title to oil and gas lands except in the manner prescribed by Congress.

In the case of the State of Florida (47 L. D., 92), decided March 20, 1919, by this Department, a swamp-land selection in conflict with a phosphate withdrawal was involved. It was there held (syllabus):

The claim of a State to land under its swamp-land grant is incomplete and inchoate, and does not become perfect, as of the date of the act, until patent is issued conveying the fee simple title; and until so patented the Land Department has jurisdiction to investigate and determine both the swamp and overflowed condition of the land as well as its mineral character.

In the same case upon rehearing the Department found no reason for changing its views as expressed in the decision on appeal (47 L. D., 93, 95).

The Commissioner of the General Land Office in the Ferry Lake case early expressed his opinion to the effect that mineral lands did not pass under the swamp-land grant. In the case of Sabine Islands selected by the State as swamp, this Department caused a careful field investigation to be made which resulted in a nonmineral report as to such lands before the selection list was approved. With all due deference to the expression contained in the opinion dated September 11, 1916, of the Acting Attorney General concerning Ferry Lake lands, this Department, with which rests the jurisdiction and

duty of determining in the first instance what lands are to be patented or approved under the swamp-land grant, is not persuaded that lands mineral in character are included in such grant. The position taken in the Department upon this question has been uniformly consistent since it first arose. The soundness of the argument and contention of counsel is not conceded. The State must bear the burden of making out a case to overcome the *prima facie* mineral character of the land where the same is included in petroleum withdrawal or suffer the final rejection of its swamp-land claim.

The Commissioner's action in ordering the hearing is sustained. The decisions called in question by the appeal are affirmed.

WATER-RIGHT CONTRACTS AND REGULATIONS OF OCTOBER 4, 1917, CANCELED—EFFECTIVE DECEMBER 1, 1920.

ADMINISTRATIVE ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 23, 1920.

In pursuance of the provisions of the act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, it is hereby ordered that all existing contracts for temporary water service from Federal irrigation projects, made under sections 11 and 12 of the act of August 10, 1917 (40 Stat., 273), and the regulations of October 4, 1917 (46 L. D., 213), promulgated by the Department of the Interior, are hereby canceled, effective December 1, 1920; and that no irrigation water will be furnished after said date for any of the lands under public notice, described in any such contract, except under a water-right application.

JOHN BARTON PAYNE.

GEORGE G. VANCE.

Decided April 29, 1920.

ENLARGED HOMESTEAD—ADDITIONAL—LIMIT OF LENGTH.

The provisions of the enlarged homestead acts limiting the length of entries thereunder to one and one-half miles applies only to original entries; and one who seeks to enter lands contiguous to his original entry and is unable to apply for a tract in more compact form will not be limited as to the length of the combined areas.

CONFLICTING DECISION OVERRULED—CONTRARY REGULATIONS AMENDED.

Decision in the case of William M. Taggart (41 L. D., 282), overruled; and all regulations not in harmony herewith amended.

VOGELSANG, First Assistant Secretary:

Final certificate was issued on February 15, 1918, to George F. Vance under his homestead entry for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, and W. $\frac{1}{2}$

NW. $\frac{1}{4}$, Sec. 13, T. 9 N., R. 46 E., W. M., Walla Walla, Washington, land district, and on June 10, 1918, said Vance made an additional entry under the enlarged homestead act for lot 5,, Sec. 1, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 2 NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11, and lots 1 and 2, Sec. 12, said township (158.25 acres).

By decision dated July 17, 1919, the Commissioner of the General Land Office required entryman to show cause why his additional entry should not be canceled as to lot 5, Sec. 1, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 2, so as to reduce the combined length of the two entries to one and one-half miles. Entryman has appealed, alleging that he was unable in making his additional entry to include tracts forming a more compact body because no other subdivisions were subject to entry.

The lands involved lie on a bend in the Snake River, the two subdivisions as to which the entry was held for cancellation being on the north end of the tract, beginning one and one-half miles from the southern extremity of the land originally entered.

Section 1 of the act of February 19, 1909 (35 Stat., 639), provides:

That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this act * * * 320 acres, or less, of nonmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length.

Section 3 of said act, relative to the allowance of additional entries, was amended by the act of March 3, 1915 (38 Stat., 956), so that an additional entry for lands contiguous to the original entry can be made either before or after proof on the original entry.

By the act of July 3, 1916 (39 Stat., 344), Congress added a seventh section to the act, providing for the allowance of additional entries for land not contiguous to the tract originally entered after submission of proof on the original entry. Said section provides that where the land embraced in the additional entry is located not exceeding 20 miles from the land embraced in the original entry, no residence shall be required on such additional entry if the entryman is residing on his former entry.

The regulations which were issued immediately after the enlarged homestead act was approved provided (37 L. D., 547):

Lands entered under this act must be in a reasonably compact form, and in no event exceed one and one-half miles in length.

The provision as to length has been incorporated in all regulations since issued, and was adhered to in the case of William M. Taggart (41 L. D., 282).

When Vance made the entry in question he was qualified to make an additional entry for 160 acres under either said section 3 or 7.

If the present rule as to the limit of the combined entries is enforced, entryman would be at liberty to relinquish the additional entry and make a second entry under section 7 for 160 acres of designated land in any of the States where the enlarged homestead act is operative. In such case, the combined length of the two entries would not be computed, even if they cornered on each other.

The Department is of opinion that Congress did not intend that one who could only secure 160 acres adjoining his original entry in such form that the combined length of the entries would exceed one and one-half miles should be relegated to the making of an entry for noncontiguous lands, burdened with the necessity of continuing to reside on the original entry if within 20 miles or of actually residing on the land entered.

The decision in the case cited was rendered prior to any amendment of the enlarged homestead act, and the interpretation therein placed on section 3 of the act is believed to be not in harmony with later legislation by Congress.

After mature consideration, the conclusion has been reached that the limitation of one and one-half miles when applied to an original homestead entry and an additional entry for contiguous land is not warranted by the act as amended.

Therefore the limitation of one and one-half miles in extreme length will be applied only to original entries under the act; and one who makes an additional entry for contiguous land and is unable to make entry in more compact form will not be limited as to the length of his combined entries.

The decision in the case cited will no longer be followed, and all regulations not in harmony herewith are hereby amended.

The decision appealed from is reversed, and the entry will remain intact subject to compliance with the law under which it was made.

B. F. NYSEWANDER.

Decided June 12, 1919.

SURVEY—JURISDICTION—PRIVATE LANDS—STATE OF TEXAS.

AS the United States is without jurisdiction over the vacant and unappropriated private lands within the State of Texas, it has no duty to perform in the matter of surveys, determinations, or adjustments necessary to define the rights of any parties in interest; they must be performed by the State, or such tribunals as may have authority therefrom.

VOGELSANG, First Assistant Secretary:

B. F. Nysewander applied to the Commissioner of the General Land Office to have certain private land claims in Texas identified and surveyed. July 10, 1918, the Commissioner finally rejected said

applications, returned all papers to the applicant and refused to grant a right of appeal, holding that the General Land Office "had no jurisdiction either of the parties or of the subject matter."

Said applicant thereupon informally appealed to the Secretary of the Interior.

The controlling feature appears to be a contract between the people of Texas and the United States, entered into when Texas became a State.

March 1, 1845, the Congress of the United States passed the following resolution, proposing that the Republic of Texas become a State in the American Union:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of the Union.

2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following *guarantees*, to wit: *First*, Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second*. Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States. *Third*, * * * (A provision for the formation of new States, not exceeding four, by the consent of said State) * * *

3. * * * (Contains an alternative provision for the admission of Texas by negotiation; not the method adopted.)

The Republic of Texas accepted said proposition by resolution of its Congress, dated July 4, 1845, and adopted a constitution which was ratified by the people of Texas in October, 1845. An ordinance appended to the said constitution provided:

Whereas, the Congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the President of the United States on the first day of March, 1845; and whereas the President of the United States has submitted to Texas

the first and second sections of said resolution, as the basis upon which Texas may be admitted as one of the States of the said Union; and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows:

(Here follow Secs. 1 and 2 of the Resolution of March 1, 1845.)

Now in order to manifest the assent of the people of this Republic as required in the above recited portions of the said resolutions; we, the deputies of the people of Texas in convention assembled in their name and by their authority, do ordain and declare that we assent to and accept the proposals, conditions and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.

December 29, 1845, the Congress of the United States passed a resolution admitting Texas as a State, and mentioning its resolution of March 1, 1845, consenting to the admission "which consent of Congress was given upon certain conditions specified in the first and second sections of said resolution;" and referring to the action of Texas saying:

Whereas the people of the Republic of Texas, by deputies in convention assembled, with the consent of the existing Government did adopt a constitution and erect a State with a republican form of Government and in the name of the people of Texas, and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolutions: * * * therefore * * * the State of Texas shall be one, and is hereby declared to be one, of the United States of America and admitted into the Union on an equal footing with the original States in all respects whatever.

It will thus be seen that the United States Government made an offer to the Republic of Texas, which offer was specifically accepted by Texas, and the acceptance was recognized and approved by the United States, and Texas became a State upon "guarantee" made by the United States that Texas "shall also retain all the vacant and unappropriated lands lying within its limits."

Every ingredient of a complete and legitimate contract resulted from said negotiations and acts. As a State Texas then had an inherent right to enact laws relative to locating, caring for, and disposing of vacant and unappropriated lands within its borders. This would include private land claims undoubtedly. It became the sovereign authority relative to such titles. And private land claimants should therefore look to Texas for such procedure and legislation as may be necessary to establish their titles.

It has been held the United States has no power to grant lands which it has previously granted to a State. *Mobile Transp. Co. v. Mobile*, 30 So. Rep., 645; *Goodtitle v. Kibbe*, 9 How. (U. S.), 471.

"A party to a contract can not pronounce its own deed invalid though such party be a sovereign State." *Fletcher v. Peck*, 6 Cranch (U. S.), 87.

The Circuit Court of Appeals of the Ninth Circuit, in a decision relative to the irrigation of public lands of the United States, said:

* * * By the Act June 12, 1906, c. 3288, 34 Stat., 259 (U. S. Comp. St. Supp. 1909, p. 603), the provisions of the reclamation act were extended so as to include and apply to the State of Texas, *where there never has been any public lands of the United States*, but where such streams as the Pecos and the Rio Grande, rising in New Mexico, a territory of the United States, and flowing into Texas, have become important factors in the irrigation and reclamation of the arid lands of that State.

(*Burley v. United States et al.*, 179 Fed. Rep., 1, 13.)

The next question is, are private land claims to be governed by the same authority as public lands? In the United States, they are. Act of July 4, 1836, sections 448 to 453, Revised Statutes. Texas has taken jurisdiction over the private land claims within that State. The constitution adopted by Texas and submitted to the United States for approval provided, section 1:

There shall be one general land office in the State which shall be at the seat of government, where all titles which have heretofore emanated, or may hereafter emanate from government, shall be registered, and the legislature may establish from time to time such subordinate offices as they may deem requisite.

By act of the Texas legislature, of February 11, 1860 (General Laws 1860, p. 109, Chap. 78), Texas gave certain district courts power to investigate any claim for land against the State having its origin prior to December 19, 1836, and to confirm or reject such claims, and provided that the act should continue in force for three years. The Supreme Court of the State of Texas has held that the State took the same power over lands as the Republic had. *Warren v. Shuman* (5 Tex., 441). It has also held: "The State does not surrender the domination and control of the public domain until final and complete title has been established." *Hart v. Gibbons* (14 Tex., 213). And in another case: "The Government of the State has the right in all cases of land claims, where the fee to the land remains in the Government, to establish, alter, and modify such regulations from time to time, as may be deemed necessary in maturing an imperfect into a perfect title." *Hosner v. DeYoung* (1 Tex., 764).

The Supreme Court of Texas has said: "The legislature of the State has the power to dispose of the unappropriated lands within the State." *Victoria v. Victoria County* (100 Tex., 438).

Some consideration of the nature of the interests referred to by the expression "private land claims," used by the applicant, may be of value:

"A private land grant is a grant by public authority vesting title to public land in a natural person." *Words and Phrases*, Vol. 6, p. 5574, U. S. Land Assn. *et al. v. Knight* (24 Pac., 818-828).

A private land claim is an interest, equity, or color of title to land theretofore Government domain, in which the title is in some way defective.

Vast areas of lands have been granted by Spain, Mexico, and the Republic of Texas to induce settlement, to reward soldiers, etc. Some of the grants were "floating," that is, the grantee has the right to locate and take a certain amount of land in a given valley, colony, or pueblo, and until his selection is finally made and the specified land claim is surveyed and definitely set apart to him, his right is called a private land claim and not a vested right. So, too, if a person is to receive certain lands upon condition that he shall reside thereon a given time, make improvements of a specified kind or value, or perform other conditions imposed, his right is a private land claim until he has complied with the conditions and his title has been perfected. In such numerous like cases, it is evident that the Government, which has title to the public lands, has an interest in settling such private claims. If any such claim is valid, title should be perfected in the claimant, and, if not, the Government is entitled to the lands free from the claim. And the Government that owns and controls the public lands has, therefore, generally provided laws and means of determining and disposing of such claims. The Congress of the United States has enacted laws recognizing and confirming private land claims and has provided means of determining the validity of such claims. The Congress of the Republic of Texas and the legislature of the State of Texas have both passed upon such claims directly and have provided courts and tribunals to dispose of such claims with reference to lands in Texas. And the United States has never assumed nor exercised jurisdiction over private land claims in Texas; on the contrary, the United States has persistently refused to do so on the theory that it has no jurisdiction over such lands in Texas.

The Supreme Court of the United States, impliedly at least, has recognized the right of the State of Texas to enact a law relative to private land claims in that State. In a case from Texas involving a private land claim that had been decided adversely to the claimant, under Texas law, Mr. Justice Brewer said, in part:

* * * The suits originally brought by Ruggles were authorized by special statute, to wit, the act of the legislature passed February 11, 1860. That act expired by its own limitations in 1865, and, as the Supreme Court of the State held, the District Court had thereafter no power to set aside the decree of January 8, 1862, or to enter the decree of March 13, 1872. The construction of the State statute and the power which it gave to the District Court of Webb County, and the length of time for the exercise of that power, are matters arising under State law, and the decision of the Supreme Court of the State is conclusive upon us and presents no question arising under the Federal Constitution.

(*O'Connor v. Texas*, 202 U. S., 501, 509.)

And for more than seventy years Texas has governed and disposed of its own public lands and the private land claims in that State, with the consent and approval of the United States.

The applicant seeks to defeat the terms and effect of the solemn compact between the United States and Texas, faithfully recognized and adhered to by both parties for all these years.

The reasons assigned why he should prevail, briefly analyzed, follow:

He alleges that an act passed by Congress the day Texas was admitted into the Union, which provided that the general laws of the United States should be extended over Texas, had the effect of annulling the agreement with Texas that it should retain its lands, and he claims that the United States has the right, and it is its duty, to survey private land claims in Texas, by reason of the extension of the land laws of the United States over Texas by that act. It is inconceivable that the United States would solemnly "guarantee" that Texas should retain its lands, by direct specific act and promise of its highest legislative authority, and would intend that a general law enacted on the same day should have a contrary effect. No such breach of good faith can be imputed to Congress. Its acts must be construed together and so construed the general land laws of the United States would not apply to Texas because it would be inconsistent with the aforesaid agreement with Texas for the United States to assume to legislate with reference to lands in that State. Then, too, a law which refers specifically to a subject should control, even though another law, general in its terms, might possibly appear to be broad enough to apply to the same subject matter. And the interpretation of the legislation acted upon by all people for more than the ordinary lifetime of man, should settle the question, especially as vast property interests have thereby become vested.

It is suggested that, even if the United States has permitted Texas to retain title to her public lands, and the United States can not now claim a proprietary interest therein, nor in private land claims in Texas, that nevertheless the general laws of the United States relative to surveying private land grants should apply to lands in Texas. The officers of the United States have never assumed to survey, manage, nor dispose of lands in the State of Texas. And it can not be reasonably contended that they have authority to survey such lands, unless the United States has some interest therein. For a right to survey and give effect thereto implies right to take possession, increase, or decrease the area claimed, establish lines and boundaries, and give muniments of title, etc., a very far-reaching result and entirely inconsistent with the idea that Texas should

retain its lands and dispose of them to pay its debts, and as said State might direct. The greater right must include the lesser, and all acts reasonably necessary to exercise the greater. Therefore, since Texas is clearly empowered to enact laws relative to land titles, including both public lands of the State and private property, it is necessarily an incident of such sovereign right that it may provide for surveys and other evidences of title of all such lands in that State.

No authority is given the Congress of the United States to cause private lands in the State to be surveyed where the United States has and claims no interest therein.

It is urged that where a nation receives domain by conquest or treaty, the same title in public lands as was held by the former sovereignty passes to the new authority, and that since Spain, Mexico, and the Republic of Texas exercised jurisdiction over public lands within that area, now covered by the State of Texas, including private land claims, the United States should do so likewise. The answer is, the United States agreed that Texas should retain such jurisdiction, and a general principle or custom can not set aside a formal binding agreement. Then, too, the United States commissioners at a conference in Queretaro, on May 26, 1848, signed a protocol to the treaty of Guadalupe Hidalgo providing:

2d. The American Government by suppressing the Xth article of the treaty of Guadalupe did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

Conformably to the law of the United States, legitimate title to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2d March, 1836.

And it has been held by the Supreme Court of the United States: "It is a well established principle of international law that the inhabitants of a country are protected in their property rights notwithstanding a transfer of sovereignty." *Barker v. Harvey* (181 U. S., 481).

It has been held: "And where territory has been ceded to the United States prior grants of public lands by the ceding government have invariably been respected." *Hardy v. DeLeon* (5 Tex., 211); *McMicken v. U. S.* (97 U. S., 204); *U. S. v. Clamorgan* (101 U. S., 822).

So it is clear that the United States is bound by contract to permit Texas to retain her public lands, and by treaty and international law is compelled to recognize that *private rights* preserve the legal value which they possess. Thus, whether a claim to lands is public or

private, the United States has nothing whatever to do with it as a proprietary interest in Texas.

The claimant says that when the Republic of Texas accepted the offer of the United States to become a State in the American Union, on July 4, 1845, the Republic immediately ceased to exist, and that the United States became vested with sovereignty in that area, and with proprietary interest in the public lands, and that the State was not created until December 29, 1845, and that therefore the United States took and retained title to the public lands therein, because there was no grant from the Republic of Texas to the State of Texas, nor from the United States to the State of Texas, the agreement between the United States and the Republic of Texas merely providing that the State should retain lands within its limits, and that in fact it had no lands to retain. It is an impossible theory, of course, because the Republic of Texas continued to exist and exercise governmental functions until the agreement was acted upon and Texas became a State and took over the rights of the Republic, reduced by the powers granted to the United States. There was no period when there was no local government in Texas, nor was there a time when the United States ousted the local sovereignty. It is clear that when the United States agreed that Texas should retain its vacant and unappropriated lands, it was recognized and admitted that the State of Texas should take the title of the Republic of Texas in and to such lands.

The applicant claims that the act of Congress passed June 2, 1862, providing that the United States should cause to be surveyed "all claims or grants of lands in any of the States or Territories of the United States derived from a foreign country or government," should apply to Texas. The reasoning on the last point should also apply to this contention and similar claims made by applicant as to the effect of numerous other general laws enacted by Congress relating to the public lands of the United States. Congress clearly intended all legislation with reference to lands to apply to those over which it had jurisdiction and none other. Such laws related to the public lands of the United States and were not intended to relate to the public lands of Texas, nor those private land claims in which Texas had an interest and in which the United States had no rights. Then, too, a general law of this kind should not be held to apply to lands in Texas theretofore the subject of specific legislation inconsistent therewith. And the act of 1862 was not in effect when Texas became a State and was repealed in 1871, the law now in force on the subject merely providing "every private land claim" may be surveyed by the Government of the United States at the expense of the claimant, and manifestly refers only to land claims in those States where

the United States has jurisdiction over the public lands, and some right to dispose of them in case the private land claims prove invalid.

It is claimed that the attempt made by Texas to secede from the Union in some way destroyed the agreement that Texas should have the public lands within its borders and that they therefore reverted to the United States. This reasoning can not be accepted. There can be no reverter to one who never had title. No provision for forfeiture was in the agreement with Texas, nor was any ever declared nor even sought.

The applicant advanced a theory that the sovereignty in the soil of the land in Texas vested in the United States by virtue of a treaty, once under consideration between the Republic of Texas and the Government of the United States. It is said that the treaty provided that Texas should give its public lands to the United States and the United States should pay debts theretofore incurred by the Republic of Texas. Those arguments fall when it is remembered that the treaty referred to was never ratified, and the alternative method of admitting Texas as a State, by direct resolution of Congress, was the means adopted to accomplish the result sought by the treaty. And whereas the treaty under consideration would have given the public lands of Texas to the United States in consideration for the payment of her debts, the plan finally adopted was directly the contrary and gave to Texas her public lands, she to pay her own debts.

The idea is presented that, since Texas reserved its lands with which to pay its debts and failed to do so, the lands "reverted" to the United States, since this Government was morally bound to pay the debts of Texas and did so. Of course the United States was not bound morally nor legally to pay the debts of Texas and did not pay them for that reason, but did pay them because Texas ceded to the United States an area of land, now included principally within the States of New Mexico and Colorado. And had this settlement not been made, and even were it conceded that the United States was morally bound to pay the debts of Texas, the lands of Texas could not have "reverted" to the United States automatically upon her failure to pay said debts, in the absence of any agreement, law, judicial or other formal action relative thereto.

Some right to have the United States act on behalf of the applicant appears to be predicated on the act of Congress of 1807, prohibiting settlement on lands—

ceded or secured to the United States by any treaty made with a foreign nation, or by a cession from any State to the United States.

It is sufficient answer to this claim that the lands in Texas "retained" by that State do not come within the terms of said act, since they were never "ceded or secured to the United States."

From the foregoing it appears that the United States has no jurisdiction over the subject matter involved, and consequently no duty to perform in the premises, and that if surveys, determinations, or adjustments are necessary to define the rights of any parties in interest, they must be performed or made by the State of Texas, or such tribunals as may have authority from the State to act. The application is therefore denied.

COOS BAY WAGON ROAD LANDS—SALE OF TIMBER.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 26, 1919.

THE HONORABLE THE SECRETARY OF THE INTERIOR:

The act of Congress, approved February 26, 1919 (40 Stat., 1179), authorized the reconveyance to the United States by the Southern Oregon Company, of all its right, title, and interest in and to certain lands situated in Coos and Douglas counties, in the State of Oregon and embraced within the limits of the grant made by the United States to the State of Oregon, by the act of March 3, 1869 (15 Stat., 340), commonly known as the Coos Bay Wagon Road grant.

Section three of the act of February 26, 1919, provides that the lands reconveyed thereunder shall be classified and disposed of in the manner provided by the act of June 9, 1916 (39 Stat., 218), for the classification and disposition of the Oregon and California Railroad grant lands.

The lands reconveyed to the United States by the Southern Oregon Company under the act of February 26, 1919, have been classified in the field as required by section three of said act, in the same manner as the revested Oregon and California Railroad grant lands were classified under section two of the act of June 9, 1916.

Section four of the act of June 9, 1916, provides for the manner of disposal of the timber on the revested Oregon and California Railroad grant lands, classified under section two of said act as timber lands, and under section three of the act of February 26, 1919, the timber on the reconveyed Coos Bay Wagon Road grant lands classified as timber lands, shall be disposed of in the same manner.

Under date of September 6, 1917, I transmitted for your approval regulations prescribing the method to be followed for the sale of the

timber on isolated tracts of the revested Oregon and California Railroad grant lands, classified as timber lands. Said regulations were approved by you under date of September 15, 1917 (46 L. D., 447).

I have the honor to recommend that the aforesaid regulations be extended to cover the sale of the timber on isolated tracts of the reconveyed Coos Bay Wagon Road grant lands, classified as timber lands.

C. M. BRUCE,
Acting Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

OFFERINGS AT PUBLIC SALE—SECTION 2455, R. S.—ACT OF
MARCH 28, 1912.

[Circular No. 684.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 16, 1920.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

The sale of isolated tracts of public land is authorized by section 2455 of the Revised Statutes, as amended by the act of June 27, 1906 (34 Stat., 517); tracts which are mountainous or too rough for cultivation, though not isolated, may be sold under the first proviso to the act of March 28, 1912 (37 Stat., 77), see page 387; special provisions as to lands in western Nebraska are found in the act of March 2, 1907 (34 Stat., 1224).

The present instructions constitute a revision of those of January 11, 1915 (43 L. D., 485, Circular No. 371), the paragraphs changed being those numbered 2, 5, 6, 7, 9, 11, 15, and 17; paragraph 18 is added.

GENERAL REGULATIONS.

1. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated.

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon,

if any; whether the land is occupied, and if so, the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased under section 2455, Revised Statutes, or the amendments thereto, isolated tracts the area of which, when added to the area now applied for, will exceed approximately 160 acres; and that he is a citizen of the United States, or has declared his intention to become such. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

These provisions are modified, however, in the class of cases referred to in paragraph 5(b).

3. The affidavits of applicants to have isolated tracts ordered into market and of their corroborating witnesses may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the applications are situated.

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

5. (a) No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands the area of which, when added to the area applied for, shall exceed approximately 160 acres.

(b) Where one or more tracts, each not exceeding 120 acres in area, are entirely surrounded by land owned by the applicant and have been isolated for five or more years, an offering may be allowed without regard to the limitations as to extent of purchases by the applicant, set forth in paragraphs 2 and 5 (a), provided the lands sought are not valuable for farming but are chiefly valuable for grazing or for special use in connection with the adjoining lands. Applicants under this subparagraph must furnish proof of ownership of the land surrounding that applied for; also detailed evidence as to the character of the land applied for, particularly with respect to its comparative values for farming, grazing, and special use in connection with the adjoining lands, which evidence must consist of an affidavit by the applicant corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts. In other respects these cases are governed by the general regulations.

6. No tract exceeding approximately 160 acres in area will be ordered into the market. An application may include several incon-
tiguous tracts provided their aggregate area does not exceed 160
acres. Each tract will be offered separately and certificates will be
issued under different numbers unless they are bought by the same
person.

7. No tract of land will be deemed isolated and ordered into the
market unless, at the time application is filed, the said tract has been
subject to homestead entry for at least two years after the surround-
ing lands have been entered, except in cases where some extraordinary
reason is advanced, sufficient, in the opinion of the Commissioner of
the General Land Office, to warrant waiving this restriction.

8. The local officers will, on receipt of applications, note same upon
the tract books of their office, and if the applications are not prop-
erly executed or not corroborated they will reject the same, subject
to the right of appeal. Applications found to be properly executed
and corroborated will be disposed of as follows:

(a) If the applicant does not show himself qualified, or if the tract
appears not to be subject to disposition under the provisions of para-
graph 7, or if all the land is appropriated, the local officers will reject
the application subject to the usual right of appeal; if part of the
tract is appropriated, they will reject the application as to that
part, and, in the absence of an appeal after the usual notice, they will
eliminate the description thereof from the application and take fur-
ther action as though it had never been included therein. Where
an appeal is filed, the Commissioner of the General Land Office, if he
decides to order into market a part, or all, of the lands, will call
upon the local officers and the chief of field division for the reports
as next provided for, concerning the value of the land.

(b) If all of the land applied for is vacant and not withdrawn or
otherwise reserved from such disposition and the status of the sur-
rounding lands is such that a sale might properly be ordered under
paragraph 7, the local officers, after noting the application on their
records, will promptly forward the same to the chief of field division
for report as to the value of the land and any objection he may wish
to interpose to the sale, and the register will make proper notations
on his schedule of serial numbers in the event the application is not
returned in time to be forwarded with the returns for the month in
which it is filed. Upon receipt of the application from the chief of
field division, with his report thereon, the local officers will attach
their report as to the status of the land and that surrounding, the
value of the land applied for, if they have any knowledge concerning
the same, and any objection to the sale known to them, and forward
the papers to the General Land Office with the returns for the current
month.

9. An application for sale will not segregate the land from entry or other disposal, for such lands may be entered at any time before the receipt in the local land office of the letter authorizing the sale and its notation of record. If any or all of the land applied for be entered or filed upon while the application for sale is in the hands of the chief of field division, the local officers will so advise him; if all the land be thus entered or filed upon they will request the return of the application for forwarding to the General Land Office.

If all of the land applied for be entered or filed upon at any time prior to receipt of a letter from the General Land Office authorizing an offering, the local officers will at once close the case on their records, notify the applicant of their action, and promptly report the facts to said office, where the matter will be closed on its records without letter; similarly, a case will be closed in part and like notice and report will be sent if an entry or filing be made for part of the land involved.

10. Upon receipt of letter authorizing the sale the local officers will at once examine the records to see whether the tract, or any part thereof, has been entered. If the examination of the record shows that all of the tract has been entered or filed upon, the local officers will not promulgate the letter authorizing the sale, but will report the facts to the General Land Office, whereupon the letter authorizing the sale will be revoked. If a part of the land has been entered, they will so report and note on the tract book, opposite such portion of the tract as is found to be clear, that sale has been authorized, giving the date of the letter. Thereupon the land will be considered segregated for the purpose of sale. The minimum price set by the order for sale should also be noted on the records. In the event no sale is had the price so noted will be effective as to any subsequent application for offering, filed within three years after the date of the report of the chief of field division.

The local officers will prepare a notice for publication on the form hereinafter given, describing the land found to be unentered, and fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice, and for the affidavit of the publisher to be filed in the local land office prior to the date of the sale. The register will also designate a newspaper as published nearest to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the receiver he must issue receipt therefor and immediately return the money to

the applicant by his official check, with instructions to arrange for the publication of the notice as hereinbefore provided.

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

11. Notice must be published for 30 days preceding the date set for the sale, and a sufficient time should elapse between the date of last publication and the date of sale, to enable the affidavit of the publisher to be filed in the local land office. The notice must be published in the paper designated by the register as nearest the land described in the application. If this be a daily paper, the publication must be inserted in 30 consecutive issues; if daily except Sunday, in 26; if weekly, in 5; and if semiweekly, in 9 consecutive issues. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The applicant must file in the local land office, prior to the date fixed for the sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by a copy of the notice published.

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

When all persons present shall have ceased bidding, the local officers will, in the usual manner, declare the sale closed, announcing the name of the highest bidder; the highest bid will be accepted and the offerer thereof (or his principal) will be declared the purchaser, provided he immediately pay to the receiver the amount of the bid; in the absence of such payment the officers will at once proceed with the sale, excluding bids by him, and starting with the highest bid not withdrawn. The accepted bidder must, within 10 days after the sale, furnish evidence that he is a citizen of the United States or has declared his intention to become such; also, a nonmineral affidavit or (in the States where that is sufficient) a nonsaline affidavit. Upon the filing of these papers the local officers will issue final certificate.

13. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre; but a minimum price will be set by the letter ordering the sale, based upon the report of the chief of field division. Should any of the lands offered be not sold, the same will not be regarded as subject to private entry unless located in the

State of Missouri (act of March 2, 1889, 25 Stat., 854), but may again be offered for sale in the manner herein provided.

14. After each offering where the lands offered are *not* sold, the local officers will close the case on their records and report by letter to the General Land Office. No report by letter will be made when the offering results in a sale; but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication and the register's certificate of posting. In all cases where no sale is had the land will, in the absence of other objections, become subject to entry or filing at once without action by this office.

ACT OF MARCH 28, 1912 (37 STAT., 77).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-four hundred and fifty-five of the Revised Statutes of the United States be amended to read as follows:

"Sec. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents an acre, any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided*, That any legal subdivisions of the public land, not exceeding one quarter section, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of said commissioner, be ordered into the market and sold pursuant to this act upon the application of any person who owns lands or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this act: *Provided further*, That this act shall not defeat any vested right which has already attached under any pending entry or location."

REGULATIONS UNDER FIRST PROVISIO TO ACT OF MARCH 28, 1912.

15. The first proviso to the act copied above authorizes the sale of legal subdivisions not exceeding one quarter section, the greater part of which is mountainous or too rough for cultivation, upon the application of any person who owns or holds a valid entry of lands adjoining such tract and regardless of the fact that such tract may not be actually isolated by the entry or other disposition of surrounding lands. Applications will be disposed of by you in accordance with the "General Regulations," except paragraph 7, which is not applicable. Applications may be made upon the form provided (4-008b) and printed herein, properly modified as necessitated by the terms of the proviso. In addition the applicant or appli-

cants must furnish proof of his or their ownership of the whole title to adjoining land, or that he holds a valid entry embracing adjoining land, in connection with which entry he has met the requirements of the law; also detailed evidence as to the character of the land applied for, the extent to which it is cultivable, and the conditions which render the greater portion unfit for cultivation; also a description of any and all lands theretofore applied for under the proviso or purchased under section 2455 or the amendments thereto. This evidence must consist of an affidavit by the claimant, corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts.

No person will be allowed more than one application under this proviso except that two or more applications may be allowed to the same person if all the lands sought adjoin the same body of land owned by the applicant or included in his pending entry. An application will be rejected in all cases where the applicant has purchased under section 2455, or the amendments thereto, an area which, when added to the area applied for, shall exceed approximately 160 acres.

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

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

ISOLATED TRACTS OF COAL LAND.

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

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

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

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

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

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

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

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

TRACTS CONTAINING PHOSPHATE, ETC.

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

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

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

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

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

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

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

The purchaser's consent to the reservation of the minerals in the land to the United States will not be required, but the cash certificate and patent will contain, respectively, the provisions specified in paragraph 6 of the circular of March 20, 1915 (44 L. D., 32, 34).

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

(Form 4-008b.)

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

_____, 19__

To the COMMISSIONER OF THE GENERAL LAND OFFICE:

_____, whose post-office address is _____, respectfully requests that the _____ of section _____, township _____, range _____, be ordered into market and sold under Sec. 2455, Revised Statutes, at public auction, the same having been subject to homestead entry for at least two years after the surrounding lands were entered, filed upon, or sold by the Government.

Applicant states that he is a _____ (here state whether native-born or naturalized citizen of the United States, or has declared his intention to become a citizen, as the case may be); that this land contains no salines, coal, or other minerals, and no stone except _____; that there is no timber thereon except _____ trees of the _____ species, ranging from _____ inches to _____ feet in diameter, and aggregating about _____ feet stumpage measure, of the estimated value of \$_____; that the land is not occupied except by _____ of _____ post office, who occupies and uses it for the purpose of _____, but does not claim the right of occupancy under any of the public-land laws; that the land is chiefly valuable for _____, and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of _____, and not for speculative purposes; that he has not heretofore purchased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 160 acres. The lands heretofore purchased by him under said act are described as follows: _____

If this request is granted, applicant agrees to have notice published at his expense in the newspaper designated by the register.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tract above described? If so, describe the land by section, township, and range.

Answer. _____

Question 2. To what use do you intend to put the isolated tract above described should you purchase same?

Answer. _____

Question 3. If you are not the owner of adjoining land, do you intend to reside upon or cultivate the isolated tract?

Answer. _____

Question 4. Have you been requested by anyone to apply for the ordering of the tract into market? If so, by whom?

Answer. _____

Question 5. Are you acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than yourself in making said application?

Answer. _____

Question 6. Do you intend to appear at the sale of said tract if ordered, and bid for same?

Answer. _____

Question 7. Have you any agreement or understanding, expressed or implied, with any other person or persons that you are to bid upon or purchase the land for them or in their behalf, or have you agreed to absent yourself from the sale or refrain from bidding so that they may acquire title to the land?

Answer. -----

(Sign here with full christian name.)

We are personally acquainted with the above-named applicant and the land described by him, and the statements hereinbefore made are true to the best of our knowledge and belief.

(Sign here with full christian name.)

(Sign here with full christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses in my presence before affiants affixed their signatures thereto; that I verily believe affiants to be credible persons and the identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me at my office, at -----, this ----- day of -----, 19--

(Official designation of officer.)

(Form 4-348.)

ISOLATED TRACT—PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

-----,
-----, 19--

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of Sec. 2455, Revised Statutes, pursuant to the application of -----, Serial No. -----, we will offer at public sale, to the highest bidder, but at not less than \$----- per acre, at ----- o'clock -- m., on the ----- day of ----- next, at this office, the following tract of land: -----

The sale will not be kept open, but will be declared closed when those present at the hour named have ceased bidding. The person making the highest bid will be required to immediately pay to the receiver the amount thereof.

Any persons claiming adversely the above-described land are advised to file their claim or objections on or before the time designated for sale.

Register.

Receiver.

CLAIMS FOR DAMAGES—ACT OF MARCH 3, 1915, AND SUBSEQUENT ACTS—RECLAMATION.**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,
RECLAMATION SERVICE,
Washington, D. C., May 7, 1920.

TO ALL PROJECT OFFICERS AND DISTRICT COUNSEL:

1. The sundry civil appropriation act of March 3, 1915 (38 Stat., 859), and subsequent appropriation acts, authorize the settlement of claims for damages to property in the following language:

* * * payment of damages caused to the owners of lands or private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works, and which may be compromised by agreement between the claimant and the Secretary of the Interior; * * *

2. The language of this provision is broad enough to include all damages to private property growing out of any authorized operations of the United States Reclamation Service. The fact that the negligence of an officer, agent, or employee of the Government contributed to the injury of the property does not invalidate a claim for damages provided such negligence relates to the performance of the duty of the officer, agent, or employee, as distinguished from an act of wantonness or carelessness committed in a purely personal capacity (see 21 Comp. Dec., 255). The only class of claims which may not be compromised under this provision is that resulting from an accident growing out of an act of God, the public enemy, or the act of some person in his private capacity. This authority will not be invoked to compromise any claim which would not be a legal claim against a private irrigation concern under similar circumstances.

3. A claimant for damages should make full written statement regarding the claim (Manual, p. 249), which must be submitted to the water users' association or irrigation district (C. L., 551). If the matter is of unusual importance, or unusually complicated, the project manager in his discretion may have a formal hearing with a stenographic report which should become part of the record. After action by the association or district, the project manager should consider and decide the case. If he can not allow the claim as presented and the claimant refuses to accept his views, he should make a formal decision reciting the essential facts and giving reasons for his decision. This should be in the form of a letter to the claimant which will be readily understandable without reference to other papers and should contain only the important details (Manual, p. 196). It should, however, embody findings of fact and conclusions of law in

order that the claimant may be fully advised of the grounds upon which rejection is made or allowance of claim authorized. The District Counsel should be consulted in the preparation of such decision. In case of appeal, copy of the decision with the evidence of service on the claimant and copy of all papers in the case must be forwarded to the Chief Engineer for transmittal to this office with his comments. The appeal will be considered and acted upon by the Director in accordance with the provisions of the Manual, p. 190, subject to further appeal to the Secretary in case of an adverse decision.

4. The irrigation district or water users' association should be furnished with copy of decision and copy should be served on the claimant by registered mail with demand for return receipt, also advising him of his right to appeal as provided in paragraph 2, page 196 of the Manual.

5. Claims allowed under the law will be settled by contract in the prescribed form, executed by the project manager subject to approval by the Director.

MORRIS BIEN,
Acting Director.

Approved:

JOHN BARTON PAYNE,
Secretary.

SWITZER v. MOUNT.

Decided May 8, 1920.

ADDITIONAL STOCK-RAISING HOMESTEAD ENTRY—RESIDENCE—CONTEST.

Where one makes an additional entry of land contiguous to his existing homestead entry, under the provisions of the act of December 29, 1916, residence may be maintained upon the land embraced in either entry; hence in any contest thereafter initiated on ground of abandonment an allegation of failure of entryman to reside upon the land embraced in his original entry is insufficient.

VOGELSANG, *First Assistant Secretary:*

March 14, 1916, Charles H. Mount made homestead entry 020828 under the provisions of the act of February 19, 1909 (35 Stat., 639), for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 4, and S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 5, T. 30 S., R. 51 W., 6th P. M., Lamar, Colorado, land district, in connection with which the area required to be cultivated was reduced to 5 acres.

November 22, 1917, Mount filed additional application 024943 under the act of December 29, 1916 (39 Stat., 862), for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 32, T. 29 N., R. 51 W., and lots 2, 3, and 4, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 4,

and lots 1 and 2, Sec. 5, T. 30 S., R. 51 W. The tracts having been designated under the latter act, the additional application was allowed January 14, 1919.

Lizzie A. Switzer filed contest affidavit May 5, 1919, against the original entry charging, in substance, that Mount abandoned the land on or about June 7, 1918, declaring that it was not his intention to return thereto; that he had not cultivated any portion of the land and his defaults were not due to military or naval employment.

The local officers denied the application to contest and on appeal the Commissioner of the General Land Office by decision of July 11, 1919, concurred in such action on the ground that the affidavit of contest was insufficient in that the alleged defaults were not directed against both the original and additional entries, the latter having been allowed prior to initiation of the contest proceedings. From the decision of the Commissioner the contestant appealed to the Department.

It is contended upon this proceeding that the contest affidavit was filed prior to the expiration of six months after allowance of the additional entry and, therefore, the additional entry was not subject to attack at the date contestant filed her affidavit of contest. For this reason contestant urges that averment in the contest affidavit of entryman's failure to reside upon the land embraced in the additional entry was not necessary. This contention is without merit.

The Department has consistently held that compliance with law in connection with either the original or additional entry is sufficient in cases of this character. Contestee's privilege to reside upon the land embraced in either the original or additional entry is one created by law and in this case, the additional entry having been made prior to initiation of the contest proceedings, it was necessary for the contestant to aver that entryman's default extended to both entries. Whether contestee was residing on the lands covered by either the original or additional entry and met the requirements of law in other respects was not a fact peculiarly within the knowledge of the defendant such as he, after joinder of issue, could only assert by way of defense. Mount having the right to meet the requirements of law by residence upon any of the tracts covered by his two entries therefore allowed, the averment that contestee had not cured his defaults by residence upon the lands covered by the additional entry was necessary and this regardless of the fact that the contest was instituted merely as against the original entry.

The conclusion reached by decision below is correct, and irrespective of the fact that contestant has shown herself qualified to make entry under the homestead laws, the decision must be and is hereby affirmed.

McKENNA v. SEYMOUR (ON PETITION).

Decided May 10, 1920.

COAL-LAND LOCATION—PREFERENCE RIGHT—OPENING AND IMPROVING A MINE.

In order to obtain a preference right under the coal-land laws by opening and improving a mine, it is essential that the claimant operate under a definite design looking to actual production of coal; that the excavation be of a substantial character; and that the deposit disclosed be of such value as to warrant the conclusion that the land is coal in character.

DEPARTMENTAL DECISION DISTINGUISHED.

Andrew L. Scofield *et al.* (41 L. D., 176), cited and distinguished.

VOGELSAANG, *First Assistant Secretary*:

This is a petition for the exercise of supervisory authority filed on behalf of James H. McKenna in the matter of his coal declaratory statement for NW. $\frac{1}{4}$, Sec. 10, T. 57 N., R. 84 W., 6th P. M., Buffalo, Wyoming, land district.

By order entered May 25, 1917, the petition was entertained and direction given as to its service on the opposite party. Evidence of the required service has been filed and counsel for Caro A. Seymour has filed brief in reply to the petition.

The tract described was, with other lands, on January 15, 1907, withdrawn from all entry or disposition. It was restored to entry on October 10, 1907, having been classified as coal land at \$30 per acre. It was reclassified August 24, 1910, the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ at \$165 per acre and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ at \$170 per acre.

McKenna's coal declaratory statement was filed October 23, 1907. He alleged therein possession commencing January 28, 1907, and the opening and improving of a mine of coal which consisted of an open cut and drift 30 feet long, exposing a 17-foot vein of coal.

On December 4, 1907, Caro A. Seymour filed her application to purchase the tract under the coal-land laws, against which McKenna filed a protest claiming a preference right of entry by reason of having opened and improved a coal mine and having filed his coal declaratory statement.

A hearing on the protest was held July 13, 1908. From the testimony then introduced the local officers found that the protest had been sustained and recommended the rejection of the Seymour application. Their decision was affirmed on appeal by the Commissioner of the General Land Office on July 24, 1911. Upon further appeal, the Department on March 5, 1913, found and held that the excavation made on the land by McKenna at the time Seymour filed her application to purchase was a mere prospect and did not disclose merchantable coal. It was held under these facts that the requirements of the coal-land laws, conferring a preference right to purchase upon

one who opens and improves a mine of coal upon the public domain, had not been met, and the protest was dismissed. A motion for rehearing was denied August 19, 1916.

It now appears that under date of September 26, 1916, the Commissioner of the General Land Office closed the case as to McKenna and directed that Seymour be allowed to proceed with her application. Registered notice of this action was receipted for by the attorney for Seymour on November 13, 1916. By letter of August 4, 1917, the register of the Buffalo office reported that Seymour had taken no action.

It appears from the testimony submitted at the hearing that during the summer of 1907 the husband of Caro A. Seymour caused an investigation to be made of the field in which the land in question is situated, by means of a drill, which disclosed valuable deposits of coal at several places and that one of the holes sunk upon the land here in question showed 20 feet of merchantable coal at a depth of 70 feet below the surface.

McKenna testified that about September 15, 1907, after being informed that the land was coal in character, he began to investigate and discovered on the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ a streak of what appeared to be coal dust, in which he immediately commenced to excavate with a pick and shovel, using a wheelbarrow to take away the dirt; that thereafter he employed a horse and scraper in the work and had the assistance of another man for several days; that he used considerable dynamite in blasting away the rocks; that on October 23, 1907, when he filed his coal declaratory statement, he had by these means constructed an open cut 10 feet wide and about 40 feet in length, which disclosed an 8-foot vein of good coal; that thereafter he extended the cut until at the date of hearing, on July 13, 1908, it was 60 feet in length, and had gone 7 feet under cover, the quality of the coal improving as work progressed; that during the winter of 1907-1908 he obtained fuel from this excavation for his domestic purposes. McKenna further testified, relative to his possession of the tract, that he had resided thereon with his family continuously since the spring of 1907, during which time he had continued to extend the excavation. This testimony was substantially corroborated by Alexander Sharp, who assisted McKenna in the work.

The fact that McKenna had made an excavation of some character upon the land during the fall of 1907 was not seriously disputed by Seymour, testimony adduced in her behalf being directed mainly to the contention that the coal disclosed was not of merchantable quality, even at the date of hearing. In this connection, one of the witnesses for the contestee testified that the coal disclosed in the face of the cut was so soft it could be gouged out with a stick,

while another witness testified that the vein was interstratified with bands of shale in such a manner as to render it not workable.

The Department in its decision of March 5, 1913, cited the case of Andrew L. Scofield *et al.* (41 L. D., 176), but upon further consideration of said case, in connection with the one under consideration, it is believed that the two cases, and the decisions cited in the Scofield case, can be distinguished. In the Scofield case objection was not found to the extent and value of the excavations or to the character of the coal disclosed thereby, but to the purpose for which said excavations were designed, namely, for prospecting, and not for the purpose of removing coal. This situation is indicated by the following quotation from said case:

The purposes for which the tunnels were driven were shown by the testimony of Chezum, a witness for the defendants. He testified:

"All our work you will understand was in the nature of prospecting * * * to determine the extent of that field, because at that time when we went in there we did not know whether that coal was of commercial quality or not, and it required a great deal of prospecting work to ascertain if it would even justify the payment of the Government price."

And he responded as follows to the questions propounded:

Q. Was there any understanding between you and Mr. Cunningham or anybody else connected with these entries at the time that you were driving these tunnels that they would be ultimately used for mining coal off of any other than the Tenino entry or the adjoining entries? A. No, sir; in fact, really, that work was not done with view of mining coal.

Q. It was just prospecting? A. It was just prospecting.

In the case of McDonald *v.* Crawford, unreported, decided by the Department March 16, 1907, and cited in the Scofield case, it was found and held as follows:

The evidence shows that McDonald and another man in his employ went upon the land November 8, 1904, to prospect the same for coal. They observed four outcrops of coal thereon, and with a sharp stick or board, found upon the land, they disclosed upon one of the outcrops a bed of coal four feet thick. No work of any other kind was done on the land by McDonald, or any one for him, until December 7, 1904. Nor did McDonald remain in actual possession in the interval, nor was he in possession thereof by agent. He left the land and did not return to it until after Crawford had filed his application for purchase. McDonald's act of merely clearing the face or surface of one outcrop to determine the depth of the bed of coal was not the opening and improving of a mine of coal within the terms and meaning of the statute.

In this case, therefore, it was held that a mine of coal had not been opened and improved, because the work was not done in a substantial and workmanlike manner, and because actual possession of the premises was not maintained.

In the case of Ghost *v.* the United States (168 Fed., 841), also cited in the Scofield case, the court held that a mine of coal had not

been opened and improved, not because the work was not of a substantial character, for it was shown that 200 or 300 feet of shafts and tunnels had been constructed, or because such improvements were not designed for the actual production of coal, but because of the character of the deposit disclosed. In this connection the court in stating the case said:

* * * As exposed in the original workings, the outcropping vein had a total thickness of four feet, less than half of it being good coal and the balance waste. What was thus exposed was not sufficient to make the land of practical value for coal mining, and Ghost continued the development work in the belief or hope that as the vein was followed into the earth it would improve sufficiently to make the mining of it profitable. But in this he was disappointed, for the development work done by him demonstrated that the vein did not improve, and he permitted his declaratory statement to expire by limitation, without purchasing the land. * * *

In view of the foregoing, it would appear that at least three elements must concur to constitute the opening and improving of a mine of coal: "The claimant must operate under a definite design looking to the actual production of coal; the excavation must be of a substantial character, and the deposit disclosed must be of such value as to warrant the conclusion that the land is coal in character. ✓

After a further consideration of all the facts and circumstances in this case, the Department finds that on October 23, 1907, when McKenna filed his coal declaratory statement, he had constructed in good faith for the purpose of removing coal a substantial excavation, which disclosed a valuable vein of coal, and under these facts it is held that a mine of coal was thus opened and improved within the contemplation of section 2348 of the Revised Statutes.

To this effect was the departmental decision of May 1, 1920 (unreported), in the analogous case of Edmond M. Ryan, involving a coal-land entry (Montrose 08567), wherein it was also held that patent should issue to entryman.

The departmental decisions of March 5, 1913, and August 19, 1916, are, therefore, hereby vacated, the decision of the Commissioner of July 24, 1911, is affirmed, and McKenna will be allowed to purchase the tract at \$30 per acre.

INSTRUCTIONS.

APPLICATION TO AMEND SCHOOL INDEMNITY SELECTIONS—INTERVENING
WITHDRAWAL.

WASHINGTON, D. C., May 20, 1920,

VOGELSANG, *First Assistant Secretary*:

The Department has considered your [Commissioner of the General Land Office] request of February 11, 1918, for instructions as to

the rule to be followed respecting applications to amend school indemnity selections by the substitution of new bases, where the original bases are defective or no longer available and there has been an intervening withdrawal of the selected land for forestry purposes. You refer to departmental decisions in the case of the State of California (39 L. D., 158) ; State of California *et al.* (40 L. D., 301) ; and Fred A. Kribs (43 L. D., 146).

The first case cited involved a withdrawal of the selected land under a proclamation (35 Stat., 2158) that excepted from its force and effect all lands embraced, at its date, in any lawful entry, filing, selection, or settlement, but providing that such exception should not continue to apply to any particular tract unless the entryman, settler, or claimant continued to comply with the law under which the entry, filing, or settlement was made. Obviously this proviso related to those claims as to which something remained to be done by the claimant at the date of the withdrawal. In construing *this withdrawal*, the Department held (syllabus) :

Where a State makes indemnity selection in lieu of school sections returned as mineral at the time of survey, and is unable to establish the mineral character of the base lands, it should be permitted, inasmuch as the selections were *prima facie* valid when made, to assign other valid bases to support the selections, notwithstanding the selected lands may have since been included within a national forest.

No question was raised as to the character of the selected land.

The second case cited (40 L. D., 301), involved a school indemnity selection of a tract subsequently classified as mineral and placed in petroleum reserve by Executive order. The principle announced in the former case had no application, not only because the Department was dealing with an unlawful filing (i. e., a selection of mineral land), but the preceding withdrawals excepted from their force and effect only such lands as might be clear listed as nonmineral.

The Kribs case, *supra*, involved a forest lieu selection upon a base that had been finally determined to be *bad*. This decision is in harmony with the principle announced in *Robinson v. Lundrigan* (227 U. S., 173).

It will be seen, therefore, that there is no conflict in the decisions referred to in your letter, and you are directed to follow the cases of State of California (39 L. D., 158) and State of California *et al.* (45 L. D., 644) as to selections made upon valid bases which become unavailable through no fault of the selector; provided, the selected land is of the character subject to such filing and is not otherwise appropriated or reserved. A forest withdrawal, like the one involved in the case in 39 L. D., 158, excepting from its force and effect lawful entries, filings, and selections is not a reservation that will preclude the amendment of a selection upon a valid base which has become

unavailable through no fault of the selector. Where the base is defective when tendered or has been adjudged to be bad, as in the Kribs case, *supra*, the rule of the Kribs case applies.

EXTENSION OF TIME FOR PAYMENTS—COLVILLE INDIAN LANDS.

INSTRUCTIONS.

[Circular No. 698.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 26, 1920.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES,
SPOKANE AND WATERVILLE, WASHINGTON:

Your attention is directed to Public Resolution No. 33, approved March 19, 1920 (41 Stat., 535), which reads as follows:

That the joint resolution entitled "Joint resolution providing additional time for the payment of purchase money under homestead entries within the former Colville Indian Reservation, Washington," approved March 11, 1918, be, and the same is hereby, amended to read as follows:

That the Secretary of the Interior is hereby authorized in his discretion, to extend for a period of one year the time for the payment of any annual installment due, or hereafter to become due, of the purchase prices for lands sold under the Act of Congress approved March 22, 1906 (Thirty-fourth Statutes, page 80), entitled "An Act to authorize the sale and disposition of surplus or unallotted lands of the diminished Colville Indian Reservation, in the State of Washington, and for other purposes," and any payment so extended may annually thereafter be extended for a period of one year in the same manner: *Provided*, That the last payment and all other payments must be made within a period not exceeding one year after the last payment becomes due by the terms of the Act under which the treaty was made: *Provided further*, That any and all payments must be made when due unless the entryman applies for an extension and pays interest for one year in advance at 5 per centum per annum upon the amount due as herein provided, and patent shall be withheld until full and final payment of the purchase price is made in accordance with the provisions hereof: *And provided further*, That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended as herein provided shall forfeit the entry and the same shall be canceled and any and all payments theretofore made shall be forfeited.

The only material change made by the said public resolution in the act of March 11, 1918, is that the public resolution permits the same installments of purchase money to be extended from year to year upon the payment of interest in advance at the rate of 5 per centum per annum, subject to the condition "that the last payment and all other payments must be made within a period not exceeding

one year after the last payment becomes due by the terms of the Act under which the entry was made," while the act of March 11, 1918, did not permit any installment to be extended more than once or for more than one year.

You will promptly serve notice on all persons whose payments are in arrears that they will be allowed thirty days from receipt of notice within which to pay the sums due, without interest, or to secure extensions of time for the payments by paying interest thereon at the rate of 5 per centum per annum from the dates when the payments become due to the next anniversaries of the dates of the entries occurring after such notice, and that in the event of their failure to take such action within the time allowed, you will report their entries to this office for cancellation.

Amounts paid as interest should be noted on the receipts and abstracts of moneys received, with the fact that they were paid in conformity with the said public resolution.

Final certificate and patent will not issue under any entry until the full payment has been made.

After extensions of time for payments on account of military or naval service, further extensions may be granted under the said Public Resolution No. 33 and in the granting of such further extensions you will observe the direction given in Circular No. 647 dated June 9, 1919, that the period of military or naval service should not be considered a part of the time originally allowed for the completion of the payments.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

LARSON v. PARRISH.

Decided June 4, 1920.

HOMESTEAD ENTRY—RELINQUISHMENT—WIFE'S CONSENT.

Unless coming within the provisions of the act of October 22, 1914, the wife of a homestead entryman takes nothing by the final certificate which issues on the husband's entry. He may thereafter demand patent in his own name; sell the land and make good equitable title to it without the wife's consent, or relinquish the perfected claim to the Government.

VOGELSANG, *First Assistant Secretary:*

This case comes here upon the appeal of Luella C. Parrish from a decision of the Commissioner of the General Land Office, September

5, 1919, denying her application to enter under the homestead law the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 4 N., R. 12 E., W. M., Vancouver land district, Washington.

It appears that one George E. Larson made homestead entry of the land above described June 12, 1914, and final certificate issued to him March 31, 1917, on commutation proof. Thereafter, and on May 17, 1917, he relinquished said entry and two days later, May 19, 1917, the said Luella C. Parrish filed homestead application for the land. Subsequently, on August 3, 1917, Sarah Larson, wife of George E. Larson, filed a petition, and on December 6, 1917, a supplemental petition, urging her rights as a deserted wife to enter said land, charging a conspiracy between her husband and the said Luella C. Parrish to deprive her of her interest therein, and on February 25, 1918, she filed her homestead application therefor. Mrs. Larson's application was protested by Mrs. Parrish March 28, 1918, in which protest it was asserted that Mrs. Larson had not been deserted by her husband, but that she had deserted him; that the wife was not living on the land; that protestant filed her application in good faith; and that she at no time entered into any agreement with George E. Larson or any other person to deprive Mrs. Larson of her rights.

A hearing was ordered by the Commissioner of the General Land Office, which was had, whereat the following pertinent and controlling facts were established:

The said George E. Larson and Sarah Larson were married September 8, 1910. After establishing residence on the land in controversy about September 17, 1914, George E. Larson went to Portland, Oregon, to work at his trade of painter. From time to time thereafter he returned to the homestead and prior to his departure therefrom, on or about March 12, 1917, he offered to sell his homestead rights to his wife, but no sale was effected, and she followed him to Portland one week later, March 19, 1917. She has never gone back to the land and was not living thereon March 31, 1917, when final proof was filed, nor on May 17, 1917, when relinquishment was filed.

There is testimony that George E. Larson instituted suit for divorce against his wife, who contested the action, and was awarded a decree of separation and an allowance of \$30 per month. The court in that action found that George E. Larson had deserted his wife about March 15, 1917. There was further testimony tending to show abandonment, weakened by the admitted fact that after the decree of separation Mrs. Larson rented a home in Portland, where she established her residence with \$300 worth of furniture previously purchased by her husband, where she was residing at date of hearing. There was also testimony tending to show that George E. Larson sold said Parrish his homestead rights and household

furnishings in consideration of \$25 cash and two notes aggregating \$675, but inasmuch as the disposition of this case must rest on legal grounds disassociated from and not influenced by any question of the equities of either Mrs. Larson or Mrs. Parrish, further statement in this behalf would not be found helpful. For the purposes of this case, though not satisfactorily shown, it may be admitted that Mrs. Larson was deserted by her husband on or about March 15, 1917, and that the alleged sale of homestead rights and household furnishings to Mrs. Parrish was fictitious.

Mrs. Larson took nothing by the final certificate which issued to her husband. He could have sold the land and made good title to it or he could relinquish it back to the Government without her leave, unless she was protected by the act of October 22, 1914 (38 Stat., 766), entitled "An Act To provide for issuing patents for public lands claimed under the homestead laws by deserted wives," which reads, in part, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which persons have regularly initiated claims to public lands as settlers thereon under the provisions of the homestead laws and the wife of such homestead settler or entryman, while residing upon the homestead claim and prior to submission of final proof of residence, cultivation, and improvement as prescribed by law, has been abandoned and deserted by her husband for a period of more than one year, the deserted wife shall, upon establishing the fact of such abandonment or desertion to the satisfaction of the Secretary of the Interior, be entitled to submit proof upon such claim and obtain patent therefor in her name in the form, manner, and subject to the conditions prescribed in section twenty-two hundred and ninety-one of the Revised Statutes of the United States and acts supplemental thereto and amendatory thereof: *Provided,* That in such cases the wife shall be required to show residence upon, cultivation, and improvement of the homestead by herself for such time as when, added to the time during which her husband prior to desertion had complied with the law, would aggregate the full amount of residence, improvement, and cultivation required by law. * * *

There is no room for difference of opinion that, under the proven and admitted facts of this case, Mrs. Larson is not entitled to relief under any provision of this statute. Larson, the husband, had initiated a claim under the homestead laws as a settler on the land in controversy, and Mrs. Larson was the wife of such settler. It may be, too, that the wife was abandoned and deserted by the husband, but such abandonment or desertion, if shown, was not for a period of more than one year "while residing upon the homestead claim," and "prior to submission of final proof." Moreover, if the fact of desertion for more than one year while residing upon the homestead claim and prior to the submission of final proof were shown, the statute only gives the deserted wife the right to "submit proof upon such claim" showing "residence upon, cultivation, and improvement of

the homestead by herself" as supplemental to the husband's incomplete residence and cultivation, while in this case the husband had already submitted satisfactory proof and received a final certificate which entitled him to a patent. By the plain provisions of the homestead law he might have presented this final certificate to the Commissioner of the General Land Office and demanded a patent in his own name, or he might have sold the land and made good equitable title to it without his wife's consent, and the patent when issued upon such final certificate would have carried an indefeasible title. Obviously he could, without his wife's consent, relinquish this perfected claim to the Government. Whatever the circumstances inducing the relinquishment, Mrs. Larson is without remedy under the statute. She initiated no valid claim in her own right under any law, and since the relinquishment restored the land to the public domain, and it was not thereafter in the occupancy of Mrs. Larson, it was subject to entry by the first qualified applicant. The question whether Luella C. Parrish is so qualified is one for the further consideration of the Commissioner of the General Land Office.

The decision appealed from is reversed and remanded for proceedings not inconsistent with this decision.

LARSON v. PARRISH.

Motion for rehearing of departmental decision of June 4, 1920, 47 L. D., 401, denied by First Assistant Secretary Vogelsang, August 3, 1920.

WATER FOR MISCELLANEOUS PURPOSES—RECLAMATION PROJECTS—ACT OF FEBRUARY 25, 1920.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
RECLAMATION SERVICE,
Washington, D. C., June 9, 1920.

TO CHIEF ENGINEER AND ALL FIELD OFFICES:

1. Your attention is invited to the act of Congress approved February 25, 1920 (41 Stat., 451), which reads as follows:

AN ACT for furnishing water supply for miscellaneous purposes in connection with reclamation projects.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior

in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided*, That the approval of such contract by the water users' association or associations shall have first been obtained: *Provided*, That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: *Provided further*, That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further*, That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied.

2. A water supply under this act may be furnished to a person or a corporation, and the supply may be temporary or permanent. The place of residence of the applicant is immaterial. Water will not be furnished hereunder in any case where it may legally be supplied under other provisions of law.

3. Requests for a water supply should be made in writing and be filed with the Project Manager. The amount and details of the delivery of the water desired should be fully described, and facts should be given showing that there is no practicable source of water supply for the purpose except from the project system, and that the delivery of the water desired is not detrimental to the rights of any prior appropriator.

4. The furnishing of a water supply under this act shall be evidenced by a contract which shall, among other things, contain a provision covering the first three provisos of the act and shall show whether the supply is temporary or permanent. If the supply is temporary the contract shall provide for termination upon notice of either party, the length of such notice to depend upon circumstances, and shall contain the important provisions of our standard water rental form of contract.

5. The price to be paid by a contractor under this act for a water supply temporary or permanent, and the terms of payment thereof, shall be stated in the contract, and shall be determined as follows with a view of returning a profit to the project, viz:

(a) If the supply be temporary the charge per acre-foot shall be in the form of an annual rental, and shall be computed upon a basis of 50 per cent above a proper proportionate share of the estimated annual cost of operation and maintenance, and shall be payable annually in advance.

(b) If the supply be permanent the charge per acre-foot shall be in the form of a construction charge computed upon a basis of 50 per cent above a proper proportionate share of the estimated cost of construction, plus an annual operation and maintenance charge of 25

per cent above a proper proportionate share of the estimated annual cost of operation and maintenance. Payment for a permanent right shall be made in full at the time of purchase, or in annual installments over a short period of years with interest at the legal State rate upon all deferred payments. The operation and maintenance charge under a permanent right shall be paid annually in advance.

When payments become due and remain unpaid the same penalties shall be applied as are provided in the reclamation extension act of August 13, 1914 (38 Stat., 686).

6. The clause "water users' association or associations," as used in the act, is regarded as embracing irrigation districts organized under State laws. Contracts made under this act must be approved by the proper official or officials of such associations or districts, where the same exist. The approval of any such association or district must be shown by a certified copy of the resolution passed by its Board of Directors, attached to the contract.

7. The contract should be prepared by the District Counsel, executed by the Project Manager acting in behalf of the United States, subject to the approval of the Director, and forwarded to the Chief Engineer for transmittal to the Washington office with recommendation. It should be accompanied by a statement from the Project Manager giving all necessary facts to show that it comes within the terms of the act.

8. This act does not apply to Indian projects being constructed by the Reclamation Service.

A. P. DAVIS, *Director.*

Approved:

JOHN BARTON PAYNE,
Secretary of the Interior.

HARRIS v. MILLER.

Decided June 16, 1920.

HOMESTEAD ENTRY—SETTLEMENT—QUALIFICATIONS.

If a *bona fide* settler possesses the necessary qualifications at the time of initiation of his homestead claim, the subsequent ownership of more than 160 acres of land prior to time of making record entry does not invalidate such settlement claim.

CASE CITED AND DISTINGUISHED—CONFLICTING DECISIONS OVERRULED.

Case of *Gourley v. Countryman* (27 L. D., 702), distinguished; cases of *Brown v. Cagle* (30 L. D., 8), and *Case v. Kupferschmidt* (30 L. D., 9), overruled in so far as in conflict.

VOGELSANG, *First Assistant Secretary*:

Alice J. Harris has appealed from the decision of October 31, 1918, by the Commissioner of the General Land Office declining to order a hearing on her contest affidavit against the homestead entry of Henry M. Miller but allowing amendment thereof by proper corroboration and thus permitting the contest to proceed upon that condition. Harris contends that sufficient affidavits have been furnished to justify a hearing without further amendment or completion.

It appears that the township plat embracing the land here involved was filed in the local land office January 29, 1918. Within twenty days prior to the filing of the plat and on January 9, 1918, Henry M. Miller filed homestead application for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22, T. 14 S., R. 18 W., accompanied by his affidavit alleging that he settled on the land applied for about twenty years prior thereto, had a house on the land and had lived there about twenty years; that the entire tract was under fence made by the applicant, and that he had used the land for pasturage and hay; that he had a stable, corrals, and garden thereon. He also alleged that it was largely through his instrumentality that a survey was made.

On the same day Alice J. Harris filed her homestead application for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, Sec. 22, S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 15, said township, alleging settlement thereon from and after June 6, 1917. She also filed stock-raising homestead application for adjoining land in connection with the other application.

Upon the filing of the plat of survey the local officers rejected the application of Harris for the reason that Miller's affidavit alleged settlement prior to that alleged by Harris and Miller's application was placed of record as an entry. Harris did not appeal from the rejection of her application but on March 6, 1918, within the appeal period, she filed application to contest the entry of Miller alleging that Miller had not resided on the land for at least four years last past and that none of his family had resided upon the land during that time. This affidavit was corroborated by two witnesses who stated that they had been upon the land during the last four years and personally knew the premises and that neither Henry M. Miller nor his family had resided upon the land for the last four years. The local officers rejected the application for the reason that the alleged facts, if proven, were not sufficient to secure cancellation of the entry as continuation of residence by a settler is not necessary after the full period of residence required by the law has been performed, at least where there has been no abandonment; also because no allegation was made that absence from the land was not due to employment in the Army, Navy, or Marine Corps, etc.

On March 23, 1918, Harris filed a new affidavit containing the allegation made in the first affidavit and also alleging that Miller has totally abandoned said land during the past two years, also alleging that the abandonment was not due to any military, naval, or marine service. This affidavit was corroborated by two witnesses substantially as made in the first affidavit but containing no averment which would amount to an allegation of abandonment. The local officers issued notice for a hearing but a motion was made to dismiss the contest which was later granted by the local office. Prior thereto, however, the contestant filed a still further supplemental affidavit alleging that Miller held excess ownership of land. This affidavit appears, however, to have been made upon information and belief and not upon personal knowledge and the corroboration by one witness is upon information and belief.

Harris appealed from the action of the local office in dismissing the contest without a hearing and the Commissioner in the decision appealed from, while holding that the allegations had not been properly corroborated, held that the contestant should be allowed to file an amended affidavit making such charges as she deemed justifiable and have the same properly corroborated. In the course of his decision he stated that the holding of the local officers was error wherein they stated that after five years' residence and cultivation by Miller no further residence would be required; that the proper rule is that as against an adverse claimant such settlement and residence must be continued until the time of entry.

A contest should not be allowed unless the allegations are such that if proven would result in cancellation of the entry attacked, and any such allegations must be corroborated by at least one witness upon actual knowledge of the facts alleged, especially where the allegations of the contestant are made upon information and belief.

There are two features embraced in the charges made in this case. The first is with reference to the character of the settlement claim of Miller. The real substance of this is that he has not resided upon the land within the four years just prior to the contest. This might be true and still afford no ground for contest. At the time Miller made entry he alleged residence on the land for twenty years. If during sixteen years of that time Miller complied with the law as to residence, improvements, and agricultural use of the land, it was not necessary that he continue actual residence thereon. Discontinuance of residence does not necessarily amount to abandonment of a settlement claim, where good residence for the required time has been completed.

It is indicated in the record that Miller had improvements on the land, including fencing and buildings, and was in possession

thereof through a tenant, which afforded ample notice to any adverse claimant.

While the supplemental affidavit alleged abandonment for at least two years next prior to the contest, that charge is not sufficiently specific, and is insufficient.

The other charge of disqualification of Miller to make entry on account of alleged excess ownership of lands was not corroborated by witness professing to have personal knowledge of the fact alleged. The charge itself is somewhat obscure as to whether the contestant claimed personal knowledge of the alleged fact, but taken altogether it is understood to have been made upon information and belief and to apply as of the date of the application to enter.

The original homestead law of May 20, 1862 (12 Stat., 392), defining the qualifications necessary for making homestead entry, as carried into the Revised Statutes, section 2289, did not contain any provision precluding the ownership of lands in any amount, except in case of adjoining farm entry. This section was amended by the act of March 3, 1891 (26 Stat., 1095, 1098), so as to provide that:

But no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law.

A homestead right may be initiated either by entry, as provided by sections 2289 and 2290, Revised Statutes, or by settlement under section 3 of the act of May 14, 1880 (21 Stat., 140).

In the case of *St. Paul, Minneapolis and Manitoba Railway Company v. Donohue* (210 U. S., 21, 30-31), the Supreme Court said:

It was not until May 14, 1880 (c. 89, 21 Stat. 141), that a homestead entry was permitted to be made upon unsurveyed public land. The statute which operated this important change moreover modified the homestead law in an important particular. Thus, for the first time, both as to the surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the Land Office.

* * * * *

Both under the preemption law and under the homestead law, after the act of 1880, the rights of the settler were initiated by settlement. * * *

It has long been a well-settled rule that if an entryman possessed the necessary qualifications at time of making homestead entry, such entry is not invalidated by purchase of any amount of land by the entryman after the date of the entry. It would seem to follow logically that a qualified settler, having initiated his homestead claim, should not thereafter and prior to the time of making record entry be debarred from becoming the owner of lands in excess of 160 acres. Any other rule, would be a needless handicap to enterprise, as illus-

trated in this case, where the claim could not be placed of record until twenty years after settlement.

There are some departmental decisions appearing to state a contrary rule, and to the effect that the necessary qualifications of the applicant for entry are to be determined as of the date of his application rather than the date of the initiation of his claim by settlement. Thus, in the case of *Gourley v. Countryman* (27 L. D., 702) it was held that the priority of a settlement right is forfeited where the settler subsequently, through the acquired ownership of other land, becomes disqualified as a claimant under the homestead law. But that case was controlled by the particular language of a special law pertaining to homestead entries in Oklahoma and did not involve interpretation of the act of 1891, *supra*. However, that decision has been applied as holding generally that the qualifications of an applicant are to be determined as of the date of the application to enter and not as of the date of settlement upon which the preference right of entry is claimed. It was so applied in the cases of *Brown v. Cagle* and *Case v. Kupferschmidt* (30 L. D., 8-9), wherein it was held that settlement rights of an unmarried woman are lost by marriage subsequent to settlement and prior to entry. The effect of these two latter decisions was relieved by the act of June 6, 1900 (31 Stat., 633), providing that subsequent marriage in such case should not be a bar to entry.

These decisions, however questionable they may be as authority for the rule under consideration, appear to have been relied upon and given general application, so that the rule has become established to require a showing of qualifications as of date of application to enter.

Under this rule the benefits of a prior settlement of long standing would be lost in case of a later settlement by a qualified claimant where the prior settler became the owner of more than 160 acres prior to entry. In other words, the settler must maintain his original qualifications until he files application to enter, otherwise his settlement is jeopardized and becomes subject to adverse claim by one who is qualified. As above indicated, it is believed that this rule fails to give proper effect to the rights accorded settlers under the act of May 14, 1880, *supra*. Therefore, it will not be followed in this nor other similar cases.

Accordingly, it is held that the charge of excessive ownership of land, without indicating that such alleged ownership arose prior to and existed at the time of the initiation of the settlement of the contestee, does not afford any proper ground for contest. The contest is therefore dismissed and the decision appealed from is modified accordingly.

HARRIS v. MILLER.

Motion for rehearing of departmental decision of June 16, 1920, 47 L. D., 406, denied by First Assistant Secretary Vogelsang, August 11, 1920.

DISPOSITION OF LANDS FORMERLY WITHIN THE OREGON AND CALIFORNIA RAILROAD GRANT AND COOS BAY WAGON ROAD GRANT.**INSTRUCTIONS.**

[Circular No. 705.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 22, 1920.

Sec. 1. The act of Congress approved June 4, 1920 (41 Stat., 758), regulating the disposition of lands formerly embraced in the grants to the Oregon and California Railroad Company and the Coos Bay Wagon Road Company, amends prior statutory provisions with respect to said lands, as follows:

(a) Authorizes the sale of timber on lands withdrawn as power sites.

(b) Protects the preference rights of settlers on lands withdrawn as power sites.

(c) Authorizes the exchange of Coos Bay Wagon Road lands for lands in private ownership.

(d) Requires applicants for the right of exchange to pay a filing fee.

SALE OF TIMBER ON POWER SITES.

Sec. 2. Section 1 of the act authorizes the Secretary of the Interior, in the administration of the acts of June 9, 1916, and February 26, 1919, in his discretion, to sell the timber on lands classified and withdrawn as power sites, in the manner and at such times as provided for the sale of timber from lands classified as timber lands, with due regard to the preference rights of settlers and claimants accorded by said acts. The instructions, therefore, of September 15, 1917 (46 L. D., 447), governing the sale of timber on isolated tracts of Oregon and California lands, classified as timber lands (extended by instructions approved September 26, 1919, 47 L. D., 381, to Coos Bay Wagon Road lands), will now be equally applicable to lands classified and withdrawn as power sites, under either of said acts.

PROTECTION OF PREFERENCE RIGHTS.

Sec. 3. Under the proviso to section 1 of the act, if a valid claim for a preferred right of entry under section 5 of the act of June 9, 1916, or a preference right of purchase or entry under section 3 of the act of February 26, 1919, is shown to exist, for lands classified and withdrawn as power-site lands, it may be exercised therefor under the conditions specified under section 2 of the act, which provides for the disposition of lands, thus entered or sold, for water-power purposes, upon the compensation of the owner of the land for actual damages sustained by the loss of his improvements thereon, such condition to be expressly stated in the patent.

Applications for the exercise of the preferred right of entry on lands withdrawn for power-site purposes that have been suspended on account of such withdrawal, will be taken up for adjudication without delay.

EXCHANGE OF WAGON-ROAD LANDS.

Sec. 4. The provisions of the act of May 31, 1918 (40 Stat., 593), authorizing the exchange of lands formerly embraced in the grant to the Oregon and California Railroad Company, for lands in private ownership, as amended by section 4 of this act, are extended by section 3 thereof, to the lands embraced in the Coos Bay Wagon Road Grant and reconveyed under the act of February 26, 1919; the regulations, therefore, of July 17, 1918 (46 L. D., 424), will govern the procedure in proposals for exchange of the wagon-road lands.

FILING FEES.

Sec. 5. The act of May 31, 1918, is so amended by section 4 of the present act as to require applicants for the right of exchange to pay a filing fee of \$1 each, to the register and receiver for each 160 acres, or fraction thereof, embraced in proposed selections, whether now pending or hereafter tendered.

In pursuance of this authority, receivers will state an account to all proponents for the right of exchange whose applications are now pending, advising such parties that the payment of such fees is a prerequisite to the further consideration of the proposed exchange, and hereafter such fees shall be paid at the time the application for exchange is filed in the district land office.

CLAY TALLMAN,
Commissioner.

Approved:

S. G. HOPKINS,
Assistant Secretary.

**GOVERNMENT TOWNSITES ON RECLAMATION PROJECTS—ACT OF
OCTOBER 31, 1919.**

[Circular No. 705½.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 23, 1920.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

Your attention is invited to the act of Congress, which took effect October 31, 1919 (41 Stat., 326), entitled "An Act Granting lands for school purposes in Government townsites on reclamation projects," which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be and he is hereby authorized, upon application by the proper officers of a school district located wholly or in part within the boundaries of a project of the United States Reclamation Service, to issue patent conveying to such district such unappropriated undisposed of lands, not exceeding six acres in area, within any Government reclamation townsite situated within such school district as, in the opinion of the Secretary of the Interior, are necessary for use by said district for school buildings and grounds: Provided, That if any land so conveyed cease entirely to be used for school purposes, title thereto shall revert to and revest in the United States.

Received by the President, October 20, 1919.

At any time after the approval of the survey of any Government reclamation townsite and the subdivision thereof into town lots, with appropriate reservations for public purposes, a school district, in order to obtain title under said act, should file, through its proper officers, its application for patent to the unreserved, unappropriated, undisposed of lands it may desire, not exceeding 6 acres in area, therein specifically describing the same by lot and block numbers, as delineated and designated on the approved townsite plat; submit sufficient and satisfactory reasons showing that the area applied for is needed for its use; that the land is unappropriated and subject to disposition under the act, in order that the Land Department may be fully advised that there is no adverse claim for the land applied for; and therewith furnish the certificate of the Superintendent of Public Instruction, or other officer performing such function, having jurisdiction over the county in which the townsite is situate, showing that the district is a duly organized district under the laws of the State and entitled to hold real estate in its corporate name.

The applicant must also procure and file with the application, at the time of the filing of the same or as early as practicable after the filing of such application, a statement by the project manager of the Reclamation Service having charge of the project in which the land is located, showing that the disposal of the land applied for will not

in any manner interfere with said project, such statement having been previously approved by the Director of the Reclamation Service.

There is no limit to the number of applications which may be filed by a qualified school district, the only limitation being that the total acreage which may be patented to such a district shall not exceed 6 acres in area within any government reclamation townsite situated within such school district. Whenever, therefore, more than one application is filed by the same applicant, such applicant should refer by serial number, to all previous applications filed by it.

The application and proof must be filed in the district land office wherein the land applied for is situate, and if the officers thereof find the same sufficient under these regulations, and if the Reclamation Service makes favorable report upon the said application, the register will issue certificate entry, the same to provide:

That if any land so conveyed cease entirely to be used for school purposes title thereto shall revert to and revest in the United States.

CLAY TALLMAN,
Commissioner.

MORRIS BIEN,
Acting Director Reclamation Service.

Approved:

S. G. HOPKINS,
Assistant Secretary.

PROCLAMATION—EXTENSION OF TIME FOR PAYMENTS ON CROW INDIAN LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 23, 1920.

REGISTER AND RECEIVER,
BILLINGS, MONTANA:

The President's proclamation issued May 5, 1920, for the extension of time for payments by purchasers and entrymen under proclamation of September 28, 1914 (38 Stat., 2029), and under proclamation of April 6, 1917 (40 Stat., 1653), of lands in the ceded portion of the Crow Indian Reservation in Montana, provides as follows:

* * * it is hereby ordered and directed that additional time for the payment of sums now due and unpaid be allowed until the 1921 anniversaries of the dates of the sales and entries to all such purchasers and entrymen who, within sixty days from receipt of notice to be given them by the Register and Receiver of the district land office, make payment to the Receiver of such land

office of interest on the amounts in arrears, from the dates when the amounts became due, to the said anniversaries, at the rate of five per centum per annum. The said officers will promptly serve notice on all such purchasers and entrymen of the extension of time for payments herein authorized, and that if such extension is not secured within sixty days from receipt of notice, by the payment of interest as herein provided, or if within such time payment is not made, without interest, of all sums in arrears, the said purchases and entries will be reported by them to the General Land Office for cancellation.

Pursuant to the said proclamation the following regulations are prescribed:

1. The said proclamation of September 28, 1914 (38 Stat., 2029), provided that one-third of the price of the land must be paid when entry or purchase is made; in the case of a purchase, the balance of the price must be paid in two equal payments, one year and two years thereafter, and, in the case of an entry, in two equal payments, three years and four years thereafter, unless paid sooner. The said proclamation of April 6, 1917 (40 Stat., 1653), provides that one-fifth of the purchase price of the land must be paid on the day following the sale; the balance of the price must be paid in four equal annual installments in one, two, three, and four years after the date of sale, unless paid sooner. Under the present proclamation an extension of time to the 1921 anniversaries of the dates of the sales and entries may be secured on all purchases and entries made under the provisions of the said two previous proclamations.

2. The proclamation provides that within sixty days from receipt of notice, to be given by you immediately, the purchasers and entrymen, who are in default in any payment or payments, may make payments to the receiver of interest on the amounts in arrears, from the date when the amounts became due to the 1921 anniversaries, to which dates the time for payments is extended. On or before the expiration of the sixty-day period any purchaser or entryman who is in default in any payment or payments must either pay the amounts due in full, without interest, or pay the interest as prescribed above. Should he fail to do one of these things, his entry will be canceled without further notice.

3. The time for no payment can be extended to a date after the 1921 anniversaries.

4. Proof may be submitted any time before such anniversaries, provided the requirements of the law as to payments are complied with. If commutation proof be submitted, payments of the price of the land in full must be made.

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

6. You will forward copies of these instructions to all purchasers and entrymen who are affected hereby, advising them that, in order to secure the benefits of this proclamation, they must comply with its requirements as herein explained.

CLAY TALLMAN,
Commissioner.

Approved:

S. G. HOPKINS,
Assistant Secretary.

**SALE OF ISOLATED TRACTS—FORT BERTHOLD INDIAN RESERVA-
TION.**

INSTRUCTIONS.

[Circular No. 706.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 28, 1920.

REGISTER AND RECEIVER,
MINOT, NORTH DAKOTA:

Your attention is directed to the act of Congress approved May 10, 1920 (41 Stat., 595), entitled "An Act For the sale of isolated tracts in the former Fort Berthold Indian Reservation, North Dakota." Said act reads as follows:

That the provisions of section 2455 of the Revised Statutes of the United States as amended by the Act of March 28, 1912 (Thirty-seventh Statutes at Large, page 77), relating to the sale at public auction of isolated tracts of the public domain, be, and the same are hereby, extended and made applicable to lands within the portion of the Fort Berthold Indian Reservation, North Dakota, opened under the Act of June 1, 1910 (Thirty-sixth Statutes at Large, page 455): *Provided*, That the provisions of this Act shall not apply to lands which are not subject to homestead entry: *Provided further*, That purchasers of land under this Act shall pay for the lands not less than the price fixed in the law opening such lands to homestead entry.

The Fort Berthold Indian lands subject to sale under said act are only those which have been opened under the act of June 1, 1910 (36 Stat., 455), to homestead entry. Any application for sale, under said act, of Fort Berthold Indian lands not subject to homestead entry should be rejected.

Applications to purchase these lands as isolated tracts and sales thereof as such tracts will be governed by the general regulations governing the offering at public sale of public lands under said section 2455, as amended by said act of March 28, 1912, except that the minimum price of the lands will be the appraised price under the act of June 1, 1910. See instructions of April 16, 1920 (Circular No. 684).

The lands affected by said act of June 1, 1910 (36 Stat., 455), were opened to entry under regulations of June 29, 1911 (40 L. D., 154).

In cases where the applications show the lands to be rough and mountainous, you will refer the applications to the chief of field division for report as to the character of the land involved.

CLAY TALLMAN,
Commissioner.

Approved:

S. G. HOPKINS,
Assistant Secretary.

GENERAL RECLAMATION CIRCULAR AMENDED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
RECLAMATION SERVICE,
Washington, D. C., July 1, 1920.

TO CHIEF ENGINEER AND ALL FIELD OFFICES:

In view of the instructions in 43 L. D., page 339, it is recommended that paragraphs 41 and 76 of the General Reclamation Circular, approved May 18, 1916 (45 L. D., 385-445), be amended as follows:

Paragraph 41 down to the word "If" in line 15 to read:

41. Assignments under this act are expressly made "subject to the limitations, charges, terms, and conditions of the reclamation act" and inasmuch as the law limits the right of entry to one farm unit, and forbids the holding of more than one farm unit prior to payment of all construction or building and betterment charges, each assignor must present a showing in the form of an affidavit to the effect that the assignment is an absolute sale, divesting him of all interest in the premises assigned, and each assignee must present a showing in the form of an affidavit that he does not own or hold and is not claiming any other farm unit or entry under the reclamation law or a tract of private land receiving water from a Federal reclamation project upon which all installments of construction or building and betterment charges have not been paid in full.

Affidavit of assignee in paragraph 41 down to the word "that" in line 14, to read:

-----, of -----, being duly sworn, deposes and says that ----- he is the assignee of ----- under the act of June 23, 1910 (36 Stat., 592), for farm unit -----, or the ----- section -----, township -----, range -----, ----- meridian; that ----- he is a duly qualified assignee for the reason that ----- he is over 21 years of age, that ----- he does not own or hold, and is not claiming any other farm unit or entry under the reclamation act of June 17, 1902 (32 Stat., 388), or acts amendatory thereof or supplemental thereto, or one or more parcels of

private land up to the limit of single ownership fixed for the project receiving water from the project system upon which payment in full of all installments of construction or building and betterment charges has not been made;

Paragraph 76 down to the word "Holders" in line 21 to read:

76. Lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the reclamation law. However, the landowner must be an actual *bona fide* resident on the land or occupant thereof residing in the neighborhood at the time of making water-right application. The Secretary of the Interior has fixed a limit of residence in the neighborhood at a maximum of 50 miles. This limit of distance may be varied depending on local conditions. After water-right application has been made and accepted (which constitutes a water-right contract), the applicant is not required to continue his residence on the land or in the neighborhood. A landowner may, however, hold rights to the use of water for more than one tract of patented land in the prescribed neighborhood at one time, provided that the aggregate area of such tracts upon which the construction charge has not been fully paid does not exceed the maximum limit established by the Secretary of the Interior nor the limit of 160 acres fixed by the reclamation law, on which water will be furnished. The Secretary has decided that the area which may be held by any one landowner after the construction charges have been fully paid may exceed 160 acres. (43 L. D. 339-341.) Water will not be furnished on a tract of patented land and a tract of unpatented land in the same ownership unless the water charges have been paid in full on one of the tracts. In other words, water will not be furnished on a tract of private land, regardless of the area and a tract of unpatented land in the same ownership at the same time unless all water charges on one of the tracts have been paid in full. A landowner who has made contract for the use of water in connection with 160 acres of irrigable land and sold the same, together with the water right, can make other and successive contracts for other irrigable lands owned or acquired by him.

MORRIS BIEN,
Acting Director.

CLAY TALLMAN,
Commissioner of the General Land Office.

Approved:

JOHN BARTON PAYNE,
Secretary.

OREGON AND CALIFORNIA LANDS—SALE OF ISOLATED TRACTS.

[Circular No. 709.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 7, 1920.

TO THE LOCAL LAND OFFICERS AT VANCOUVER, WASHINGTON; PORTLAND, ROSEBURG, AND LAKEVIEW, OREGON:

Your attention is called to the act of Congress approved May 25, 1920 (41 Stat., 622), to authorize the Secretary of the Interior to

dispose, at public sale, of certain isolated and fractional tracts of land formerly embraced in the grant to the Oregon and California Railroad Company, which reads as follows:

That the provisions of section 2455, Revised Statutes, be, and the same are hereby, extended to class three of the lands formerly embraced by what are known as the Oregon and California railroad grants, title to which was re-vested in the United States under the provisions of the Act approved June 9, 1916 (Thirty-ninth Statutes at Large, page 218) : *Provided*, That no sales hereunder shall be made for less than \$2.50 per acre, and the appraised value of the timber on the land, nor until such lands shall have been subject to homestead entry for a period of two years: *Provided further*, That the proceeds of such sales shall be applied in the manner prescribed in said Act of June 9, 1916 (Thirty-ninth Statutes at Large, page 218).

The provisions of section 2455, Revised Statutes, thus extended to these lands, are those found in said section at the date of this act, which include the amendment of March 28, 1912 (37 Stat., 77), authorizing the sale of "rough and mountainous" tracts under certain conditions. Circular No. 684, dated April 16, 1920 (47 L. D., 382), which contains the latest regulations issued under said section as thus amended, will, therefore, be your guide in the administration of this act, in so far as applicable thereto.

The special provisions of the present act, which you must carefully observe and which are not found in said circular No. 684, are as follows:

(1) The act applies only to lands formerly embraced in the Oregon and California Railroad grant that were re-vested in the United States by the Act of June 9, 1916 (39 Stat., 218), that have been classified as agricultural, and restored to entry.

(2) No sale shall be made for less than \$2.50 per acre, and the appraised value of the timber on the land, nor until such land shall have been subject to homestead entry for a period of two years immediately preceding the application for sale.

(3) The proceeds of the sale shall be deposited in the Treasury of the United States to the credit of the "Oregon and California Land Grant Fund."

CLAY TALLMAN,
Commissioner.

Approved:

S. G. HOPKINS,
Acting Secretary.

MOTIONS FOR THE EXERCISE OF SUPERVISORY POWER.

ADMINISTRATIVE ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., July 8, 1920.

The filing of motions for the exercise of the supervisory power of the Secretary of the Interior, under Rule 85 of Practice, does not act

as a supersedeas of the final decisions theretofore rendered. The bureau officers will not permit oral or written notice of such action to suspend or otherwise delay execution. Attorneys in the office of the Solicitor, to whom such motions are assigned for consideration, will not withdraw the records in the cases affected from the General Land Office or other bureaus, except on the express order of the Solicitor, Board of Appeals, or First Assistant Attorney.

S. G. HOPKINS,
Acting Secretary.

**ENTRIES IN ALASKA—RESTORATION OF SHORE SPACES—ACT OF
JUNE 5, 1920—INSTRUCTIONS.**

[Circular No. 714.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 28, 1920.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES IN ALASKA:

The acts of May 14, 1898, and March 3, 1903, limited to 160 rods (one-half mile) the length of a nonmineral entry along the shore of any navigable water (80 rods in case of entry of a site for trade or manufacture) and prescribed that along such shore a space of at least 80 rods should be reserved from entry between all such claims.

The act of June 5, 1920 (41 Stat., 1059), provides:

That the provisions of the act of May 14, 1898 (Thirtieth Statutes at Large, page 409), extending the homestead laws to Alaska, and of the Act of March 3, 1903 (Thirty-second Statutes at Large, page 1028), amendatory thereof, in so far as they reserve from sale and entry a space of at least eighty rods in width between tracts sold or entered under the provisions thereof along the shore of any navigable water, and provide that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, shall not apply to lands classified and listed by the Secretary of Agriculture for entry under the act of June 11, 1906 (Thirty-fourth Statutes, page 233), and that the Secretary of the Interior may upon application to enter or otherwise in his discretion restore to entry and disposition such reserved spaces and may waive the restriction that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water as to such lands as he shall determine are not necessary for harborage uses and purposes.

LANDS WITHIN FORESTS.

2. This act abolishes all the above-mentioned restrictions so far as concerns lands within national forests. An application for homestead entry for lands which have been listed as agricultural in character under the act of June 11, 1906, will be allowed, if otherwise

regular, without any regard whatsoever to the relation of the tract involved to a body of navigable water, unless wharf or landing privileges thereon shall have been granted, or application therefor be pending.

LANDS OUTSIDE OF FORESTS.

3. As to lands outside of national forests the limitations mentioned still exist, the laws establishing them being in full force and effect; moreover tracts covered by wharf or landing privileges, or by applications therefor, are not subject to appropriation. No rights under the public-land laws can be secured, in conflict with the restrictions above set forth, either by settlement or filing of location notice or by application for entry, unless and until the shore space involved shall have been restored, or the waiver as to excessive length shall have been ordered, as provided by said act of June 5, 1920, except as hereinafter stated.

4. Under the law it will not be practicable to make any general restoration of lands along certain streams or certain parts of the coast line, since the making of each entry and the location of each claim (if the lands on either side thereof are unappropriated) creates a new reserved space which is not covered by a previous restoration. Restorations of reserved spaces will be made by the Secretary of the Interior pursuant to investigation by the Field Service of this office either on his own initiative or following petitions for restoration.

RESTORATION.

5. The act authorizes restorations upon "application to enter or otherwise" within the discretion of the Secretary of the Interior, and in its administration action will be taken as follows:

(a) Applications to enter will be entertained as the basis for an order of restoration only in cases where the applicant sets up some equitable claim to the land accruing prior to the passage of the act; in which case the application should be accompanied by a sworn corroborated statement as to the facts upon which the alleged claim is founded, in addition to the showing required in section 6 hereof; if the land is unsurveyed, in lieu of the formal application to enter, the claimant should file a certified copy of the location notice filed in the local recording office.

(b) Petitions for restoration will be entertained when presented in accordance with the procedure provided in section 6 hereof; a restoration resulting from such a petition will not give the petitioner a preference right to enter or select the land.

(c) Restoration may also be made by the Department on its own motion, where, after field investigation, it is found that such action is authorized by the statute and required by public interest.

(d) Lands found necessary for harborage uses, or other public purposes, will be excluded from orders of restoration, and included within an appropriate order of withdrawal under the act of June 25, 1910 (36 Stat., 847).

PETITIONS FOR RESTORATION.

6. *Surveyed Lands.*—Any person or persons desiring, may file a petition in duplicate for restoration of any shore space involved, or for waiver of the restriction as to length of the claim, or a petition covering both questions if this be required. Therein must be given a description of the land sought by legal subdivisions, a full statement as to the pending claims on each side of said tract bordering along the water in question, and all essential facts set forth as to the availability of the land sought for harbor purposes, and, if the water be a stream, all facts must be stated as to its width, depth, and navigability, and the use which is ordinarily made thereof.

This petition must be executed before the register or receiver or some officer in Alaska authorized to administer oaths and having an official seal, and must be corroborated by the affidavits of at least two witnesses, similarly executed. One copy thereof will be at once referred by the local office to the chief of field division for investigation; the second copy, together with all other papers filed, will be transmitted to the General Land Office with the regular monthly returns. The report by the chief of field division will be forwarded by him to this office direct.

Unsurveyed Lands.—Any person or persons may file in the district land office a petition, in duplicate, for the restoration of shore-space reservations unsurveyed in whole or in part, and in said petition describe the lands as accurately as possible according to existing regulations, tying the description to known monuments, towns, or natural objects wherever practicable. The petition will be disposed of as above directed for surveyed lands.

PREFERENTIAL RIGHT OF SOLDIERS.

7. Public Resolution No. 29, approved February 14, 1920 (41 Stat., 434), provides that for two years following that date officers, soldiers, sailors, and marines who served in the war with Germany and were honorably discharged, or placed in the Regular Army or Naval Reserve shall have a preferred right of entry under the homestead or desert-land laws for sixty days before the general opening of lands

to disposal, where lands are opened to entry, or lands theretofore withdrawn are restored to entry, except as against prior existing valid settlement rights and as against preference rights conferred by existing laws or equitable claims subject to allowance and confirmation. Therefore, until February 15, 1922, all restorations of reserved shore spaces will be made subject to such preference right, regardless of the question whether they have been made pursuant to petitions for restoration, or on the motion of the Department. Each order for restoration will make provision for preserving such preference; but such right will not be recognized in the case of restorations made upon application to enter, or location notice.

The soldier must assert his preferential right by filing his application within the sixty-day period which will be accorded soldiers by each order of restoration, if the land be surveyed and subject to homestead application. If the land be unsurveyed, he must, within that time, file in the local recording office a location of his homestead.

The public resolution has no applicability to cases where relief sought under the act of June 5, 1920, relates merely to the right to a filing extending more than 160 rods along a shore line.

ROADWAYS.

8. The act of June 5, 1920, does not modify that clause in the act of May 4, 1898, which provides that a roadway, 60 feet in width, as nearly parallel to the shore line of navigable waters as may be practicable, shall be reserved for the use of the public as a highway.

CLAY TALLMAN,
Commissioner.

Approved:
S. G. HOPKINS,
Assistant Secretary.

OIL SHALE REGULATIONS—ACT OF FEBRUARY 25, 1920
(41 STAT., 437).

[Circular No. 671.¹]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 11, 1920.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES.

SIRS: Section 21 of the act of Congress approved February 25, 1920, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," authorizes the Secretary of the Interior to lease any deposits of oil shale belonging to the United States, and the surface of such lands as may be necessary for the extraction and reduction of the minerals leased. The following rules and regulations will govern the issuance of such leases:

1. *Qualifications of applicants.*—Pursuant to section 1 of said act, leases may be made to (a) a citizen of the United States; (b) an association of such citizens; (c) a corporation organized under the laws of the United States, or of any State or Territory thereof; or (d) a municipality.

2. *Lands and deposits to which applicable.*—The lease may include such deposits and the surface of so much of the land containing same, or of land adjacent thereto, as may be required for the extraction and reduction of the leased minerals, the aggregate area not to exceed 5,120 acres.

Such leases may not include lands or deposits in (a) national parks, (b) forest reserves created under the act of March 1, 1911 (36 Stat., 961), known as the Appalachian forest reserve act, (c) lands in military or naval reservations, (d) Indian reservations, or (e) ceded or restored Indian lands, the proceeds from the disposition of which are credited to the Indians.

All permits or leases for the exploration for or development of oil shale deposits under this act within the limits of national forests or other reservations, or withdrawals to which this act is applicable, shall be subject to and contain such conditions, stipulations and reservations as the Secretary of the Interior shall deem necessary for the protection of such forests, reservations, or withdrawals, and the uses and purposes for which created.

3. *Form and contents of application.*—Applications for leases must be under oath, and should be filed in the proper district land office, addressed to the Commissioner of the General Land Office. No specific form of application is required, and no blanks will be furnished, but it should cover in substance the following points:

(a) Applicant's name and address.

¹ Reprint as amended March 27, 1920.

(b) Proof of citizenship of applicant, by affidavit of such fact if native born; if naturalized, by a certified copy of a certificate thereof in the form provided for use in public land matters, unless such copy is on file. If the applicant is an association, each member thereof must show his qualifications as above stated; if a corporation, a certified copy of the articles of incorporation must be filed, together with a showing as to the residence and citizenship of its stockholders; if a municipality a showing of (1) the law or charter and procedure taken by which it has become a legal body corporate; (2) that the taking of a permit or lease is authorized under such law or charter; and (3) that the action proposed has been duly authorized by the governing body of such municipality.

(c) A statement that the applicant has no lease under the provisions of this section, nor any other application for lease thereunder pending, and that he does not hold interests in such leases or applications which, with the land applied for, will exceed 5,120 acres.

(d) Description of land for which the lease is desired, by legal subdivisions if surveyed, and by metes and bounds if unsurveyed, in which latter case the description should be connected to some corner of the public land surveys where practicable, or to some permanent landmark. If the land is unsurveyed, the applicant, after he has been awarded the right to a lease, but before the issuance thereof, will be required to deposit with the United States surveyor general of the State where the land is located the estimated cost of making a survey of the lands, any balance remaining after the work is completed to be returned. This survey will be an extension of the public land surveys over the tract applied for, the leased land to be conformed to legal subdivisions of such survey when made.

(e) Evidence that the land is valuable for its oil shale content, except so much thereof as is necessary for the extraction and reduction of the leased minerals, with a statement as accurate as may be of the character and extent and mode of occurrence of the oil-shale deposits in the lands applied for.

(f) Proposed method, so far as determined, as to the process of mining and reduction to be adopted, the diligence with which such operations will be carried on, and the contemplated investment in reduction works and development, and the capital available therefor.

(g) The application shall be accompanied by a notice for publication, in duplicate, prepared for the signature of the register, in substantially the following form:

Serial No. —.

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT _____,
_____ 19—.

NOTICE OF APPLICATION FOR OIL SHALE LEASE.

Notice is hereby given that in pursuance of the act of Congress, approved February, 25, 1920, _____ whose post-office address is _____ has made application for oil shale lease covering the following described lands: _____.

Any and all persons claiming adversely any of the above described lands are required to file their claims in this office on or before _____, otherwise their claims will be disregarded in the granting of such lease.

_____, Register.

The register will fix the time within which adverse or conflicting claims may be filed at not less than 30, nor more than 40 days from first publication.

4. *Disposition of application.*—(a) The application will be given the current serial number by the register and receiver, noted on their records, and the notice for publication will be signed by the register.

(b) One copy of the signed notice will be delivered to the applicant, who will cause the same to be published in a newspaper to be designated by the register, of general circulation, and best adapted to give the widest publicity, in the county where the land is situated. If the land is in two or more counties, notice must be published in each. Notice must also be posted in the local land office during the period of publication.

(c) At the expiration of the period of publication the application, together with evidence of publication and posting in said office, should be promptly transmitted by the register and receiver to the Commissioner of the General Land Office with a statement of the status of the land involved as to conflicts, withdrawals, protests, and any other matters that may be necessary to determine the availability of the land or deposits therein for lease.

5. *Action on application.*—As the area and form of lands leased hereunder is entirely discretionary with the Secretary of the Interior, if the area applied for is considered too large, or the form unsatisfactory, or in case of conflicting applications, the application may be held for rejection, but the applicant given an opportunity to amend his application in conformity with requirements. Should the application be found satisfactory by the Commissioner of the General Land Office, he will submit it to the Secretary of the Interior with a recommendation that a lease for the described lands be awarded the applicant. If the right to a lease be granted, the applicant will be required, within 30 days from notice, to pay the rental of 50 cents per acre for the first year, which the receiver will carry in his unearned account, until the lease is acted upon, and to furnish a lease duly executed on his part, which lease will be substantially in the following form:

6. *Form of lease*—

Serial No. ———.

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT ———.

OIL SHALE LEASE.

Date—Parties.—This indenture of lease entered into in triplicate this — day of ———, 192—, by and between the United States of America, acting in this behalf by the Secretary of the Interior, party of the first part, hereinafter called the lessor, and ———, party of the second part, hereinafter called the lessee, under and pursuant to the act of Congress approved February 25, 1920, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," witnesseth:

1. *Purposes.*—That the lessor in consideration of the rents and royalties to be paid, and the covenants to be observed as hereinafter set forth, does hereby grant and lease to the lessee the right and privilege to mine and dispose of all the oil shale or the products thereof that may be mined under the terms of this lease from the following described lands ———, containing ——— acres, together with the right to construct thereon all such works as may be necessary or convenient for the reduction of such shale and the preparation of its oil or other contents for market.

2. *Subject to limitations of act.*—It is expressly understood that this lease is granted subject in all respects to the conditions, limitations, and provisions of the act under which this lease is made, which act, so far as it relates to oil shale, is hereby made a part hereof to the same extent as if incorporated herein.

3. *Rights reserved.*—The lessor expressly reserves the right to grant, upon such terms as the Secretary may determine to be just, such easements or rights of way, including easements in tunnels, upon, through, or in the lands leased, as may be necessary to the working thereof, or of other lands containing coal, oil, oil shale, phosphate, gas, or sodium, and the treatment or shipment of any of the products of such lands by, or under authority of the United States, its lessee or permittee, and for other public purposes.

4. The lessee, in consideration of the lease of the rights and privileges aforesaid, hereby covenants and agrees as follows:

(a) *Investment.*—To invest in mining operations, reduction plants, or other equipment for the mining and reduction of the minerals leased, as follows: That is to say [*Here give detailed description of proposed reduction plant and other equipment or works*], upon the lands included herein the sum of ——— dollars, of which sum not less than one-fifth be expended during the year succeeding the execution of this instrument, and a like sum each year for the succeeding four years, unless such amount may be sooner invested.

(b) *Bond.*—To furnish within thirty days' after signature of the lease, a bond in the sum of one-half the amount to be expended each year, conditioned upon the expenditure of such sum within said period, and submit annually at the expiration of each year for the said period an itemized statement as to the amount and character of the expenditure during said year.

(c) *Annual rentals.*—To pay as an annual rental, for each acre or part thereof covered by this lease, the sum of fifty cents per acre each year during the life of this lease, all such annual payments of rental to be paid in advance to the receiver of the proper local land office on the anniversary of the date hereof, and to be credited to the first royalties becoming due hereunder during the year for which rental was paid, unless during any of the first five years of the existence of the lease the lessor waives the payment of royalty or rental.

(d) *Royalty.*—To pay to such receiver a royalty of ——— per centum of the market value of the commercially extractable crude oil content, and other primary products of all shale mined and sold or reduced, unless the Secretary of the Interior waives the payment of such royalty during any or all of the first five years of the lease. The lessee agrees to make and keep a record of, by methods and practices satisfactory to the lessor, all necessary gagings, measurements, or analyses of all shale mined and sold or reduced, and all products manufactured therefrom by the lessee, to afford an adequate basis for computing and ascertaining the amount and grade of the crude and other primary products on the basis of which such royalty is to be paid; the decision of the Secretary of the Interior as to the market value of such products on which the royalty is computed shall be conclusive. The royalty must be paid on the last day of March, June, September, and December, each payment to cover the royalty on all production during the preceding three months.

(e) *Reports.*—To keep accurate account of the amount and value of the production under the lease, and to make a report on the last day of March, June, September, and December of the amount and value of the production during the preceding three months; also the amount invested in the property, the cost of operation, contracts in force as to disposal of proceeds, and depreciation of the property used in working the leased land; the books, records, property leased, and reduction works to be subject to inspection at any time by an accredited agent of the lessor.

(f) *Sublease.*—Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, or any of the rights and privileges herein granted without the written consent of the lessor being first had and obtained.

(g) *Diligence.*—To proceed diligently to develop and mine the oil shale upon the leased lands, and extract therefrom the oil and other valuable contents by the most approved methods, and in such a manner as to utilize all of the shale that can be successfully mined, leaving no available mineral abandoned where the mining is being conducted.

(h) *Regulations.*—To comply with such regulations as have been adopted by the Secretary of the Interior and were in force at date of this lease relative to (1) the safety and welfare of the workmen; (2) the prevention of undue waste; and (3) the exercise of reasonable diligence, skill, and care in the con-

duct of mining operations, which are made a part hereof as fully as if incorporated in this lease; it is also agreed that the workday shall not exceed eight hours for underground workers, except in cases of emergency, prompt report of which must be made to the lessor; that no boy under sixteen years of age, nor any girl or woman shall be employed in any mine below the surface; that the workmen shall have absolute freedom to purchase their supplies wherever they may desire; that wages shall be paid twice each month in lawful money of the United States.

(i) *Interest in leases.*—To observe faithfully the provisions of section twenty-seven of the act, defining the interest or interests that may be taken, held, or exercised under leases authorized by the act.

5. *Prevention of monopoly.*—The lessor reserves full power and authority to carry out by order, and to enforce all the provisions of section thirty of the act, to insure the sale of the production of such lands to the United States and to the public at reasonable prices, and for the prevention of monopoly, and the lessee hereby covenants and agrees to comply with any such reasonable order issued in pursuance hereof.

6. *Relinquishment.*—The lessee, upon consent in writing of the lessor, may make a written relinquishment of all rights under the lease, and thereupon be relieved of all future obligations hereunder, or he may with like consent surrender any legal subdivisions of the area included herein, upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mines or productive works, or permanent improvements on the lands covered by such relinquishment.

7. *Purchase of improvements.*—On the termination of this lease pursuant to the last preceding section, the lessor, his agent, licensee, or lessee, shall have the exclusive right, at the lessor's election, to purchase at any time within six months, at the appraised value thereof, all buildings, machinery, equipment and tools, or other personalty placed by the lessee in or on the land leased hereunder, save and except underground improvements, machinery, equipment, or structures, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to be paid for said buildings, machinery, equipment, and tools to be purchased as aforesaid, shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party hereto, and the third by the two so designated), the valuation of the three or a majority of them to be conclusive; that pending such election to purchase within said period of six months, none of said buildings or other property shall be removed from their normal position; that if such valuation be not requested, or the lessor shall affirmatively elect not to purchase within said period of six months, the lessee shall have the privilege of removing said buildings and other property, except said underground equipment and structures as aforesaid.

8. *Forfeiture.*—If the lessee shall make default in the performance of any of the terms, covenants, and stipulations of this lease, and such default shall continue after written notice thereof by the Secretary of the Interior or his authorized representative, the lessor may, by appropriate proceedings, have this lease forfeited and canceled in a court of competent jurisdiction, but this provision shall not be construed as depriving the lessor of any legal or equitable remedy which the lessor would otherwise have. A waiver of any particular cause for forfeiture shall not affect the right to proceed against the lessee for any other cause of forfeiture, or for the same cause occurring at any other time.

9. *Heirs and successors.*—It is further agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

10. *Readjustment of royalties.*—The lessor shall have the right to readjust and fix the royalties payable hereunder at the end of twenty years from the date of this lease, and to so readjust at the end of each succeeding period of twenty years, but the lessee may, if dissatisfied with the royalties imposed, relinquish and surrender this lease in the manner provided in sections 6 and 7 hereof.

11. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior shall be admitted to any share or part of this lease, or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat., 1109), relating to contracts, enter into and form a part of this lease, so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA.

By _____ [L. s.]
Secretary of Interior.

Witnesses:

_____ [L. s.]

7. *Preferred right to a lease.*—Under a proviso of section 21 of the act, a person having a valid claim to oil shale deposits under existing law, prior to January 1, 1919, shall, upon the relinquishment of such claim or claims, be entitled to a lease for not exceeding 5,120 acres, provided "that no claimant for a lease, who has been guilty of any fraud or who had knowledge or reasonable ground to know of any fraud, or who has not acted honestly and in good faith, shall be entitled" to such lease.

The beneficiaries of this proviso are those persons or their grantors, who, in the honest belief that the mining laws were applicable to oil shale deposits, have proceeded in absolute good faith to make mineral locations, lode or placer, of shale deposits, and who have, in all respects, fully complied with the provisions and requirements of such laws, including discovery.

The same form of procedure in making applications for lease should be followed as in other cases, except that, in addition to the points referred to in section 3 of any ordinary application, an application for a preference right lease should be accompanied by a full and detailed showing under oath, duly corroborated, of the facts on which the applicant claims a preferred right, together with copies of the location notices, abstracts of title, and such other evidence as may be deemed necessary to establish the claimant's preferred right and entire absence of fraud. Claimants of such preferred rights to leases should present same promptly; otherwise the lands may be leased to others, in which case any preference rights under this proviso will be deemed to have lapsed.

FEEES AND COMMISSIONS.

Under the authority of section 38 of the act, the following fees and commissions are prescribed for transactions under the act:

(a) For receiving and acting on each application for a permit, lease, or other right filed in the district land office in accordance with these regulations, there shall be paid a fee of two dollars (\$2) for every 160 acres, or fraction thereof, in such application, but such fee in no case to be less than ten dollars (\$10), the same to be paid by the applicant and considered as earned when paid, and

to be credited in equal parts on the compensation of the register and receiver within the limitations provided by law.

(b) A commission of one per cent (1%) of all moneys received in each receiver's office to be equally divided between the register and receiver; such commission will not be collected from the applicant, lessee or permittee, in addition to the moneys otherwise provided to be paid.

(c) It should be understood that the commission here provided for will not affect the disposition of the proceeds arising from operations under the act as provided in section 35 thereof; also that such commission will be credited on compensation of registers and receivers only to the extent of the limitation provided by law for maximum compensation of such officers.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved: March 11, 1920.

ALEXANDER T. VOGELSANG,
Acting Secretary.

[Public—No. 146—66th Congress.]

[S. 2775.]

An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, 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, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further*, That 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.

[Sections 2 to 8, inclusive, relate to coal.]

[Sections 9 to 12, inclusive, relate to phosphates.]

[Sections 13 to 20, inclusive, relate to oil and gas.]

OIL SHALE.

Sec. 21. That the Secretary of the Interior is hereby authorized to lease to any person or corporation qualified under this act any deposits of oil shale belonging to the United States and the surface of so much of the public lands containing such deposits or land adjacent thereto, as may be required for the extraction and reduction of the leased minerals, under such rules and regulations, not inconsistent with this act, as he may prescribe; that no lease hereunder shall exceed five thousand one hundred and twenty acres of land, to be described by the legal subdivisions of the public-land surveys, or if unsurveyed, to be surveyed by the United States, at the expense of the applicant, in accordance with regulations to be prescribed by

the Secretary of the Interior. Leases may be for indeterminate periods, upon such conditions as may be imposed by the Secretary of the Interior, including covenants relative to methods of mining, prevention of waste, and productive development. For the privilege of mining, extracting, and disposing of the oil or other minerals covered by a lease under this section the lessee shall pay to the United States such royalties as shall be specified in the lease and an annual rental, payable at the beginning of each year, at the rate of 50 cents per acre per annum, for the lands included in the lease, the rental paid for any one year to be credited against the royalties accruing for that year; such royalties to be subject to readjustment at the end of each twenty-year period by the Secretary of the Interior: *Provided*, That for the purpose of encouraging the production of petroleum products from shales the Secretary may, in his discretion, waive the payment of any royalty and rental during the first five years of any lease: *Provided*, That any person having a valid claim to such minerals under existing laws on January 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease under the provisions of this section for such area of the land relinquished as shall not exceed the maximum area authorized by this section to be leased to an individual or corporation: *Provided, however*, That no claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section: *Provided further*, That not more than one lease shall be granted under this section to any one person, association, or corporation.

[Section 22 relates to Alaska oil claims.]

[Sections 23 to 25, inclusive, relate to sodium.]

GENERAL PROVISIONS APPLICABLE TO COAL, PHOSPHATE, SODIUM, OIL,
OIL SHALE, AND GAS LEASES.

SEC. 26. That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this act appropriate provisions for its cancellation by him.

SEC. 27. That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State; no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field; no corporation shall hold any interest as a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this act, or which, together with

any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this act. Any interests held in violation of this act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property, or some part thereof, is located, except that any ownership or interest forbidden in this act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition: *Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this act, or the transportation of coal: *Provided further*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same: *And provided further*, That if any of the lands or deposits leased under the provisions of this act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of, or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of the amounts of lands provided in this act, the lease thereof shall be forfeited by appropriate court proceedings.

SEC. 28. That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipeline purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination ac-

cept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

SEC. 29. That any permit, lease, occupation, or use permitted under this act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And, provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 30. That no lease issued under the authority of this act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to

the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

SEC. 31. That any lease issued under the provisions of this act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this act, of the lease, or of the general regulations promulgated under this act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

SEC. 33. That all statements, representations, or reports required by the Secretary of the Interior under this act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require.

SEC. 34. That the provisions of this act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits.

SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the

provisions of this act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

SEC. 36. That all royalty accruing to the United States under any oil or gas lease or permit under this act on demand of the Secretary of the Interior shall be paid in oil or gas.

Upon granting any oil or gas lease under this act, and from time to time thereafter during said lease, the Secretary of the Interior shall, except whenever in his judgment it is desirable to retain the same for the use of the United States, offer for sale for such period as he may determine, upon notice and advertisement on sealed bids or at public auction, all royalty oil and gas accruing or reserved to the United States under such lease. Such advertisement and sale shall reserve to the Secretary of the Interior the right to reject all bids whenever within his judgment the interest of the United States demands; and in cases where no satisfactory bid is received or where the accepted bidder fails to complete the purchase, or where the Secretary of the Interior shall determine that it is unwise in the public interest to accept the offer of the highest bidder, the Secretary of the Interior, within his discretion, may readvertise such royalty for sale, or sell at private sale at not less than the market price for such period, or accept the value thereof from the lessee: *Provided, however,* That pending the making of a permanent contract for the sale of any royalty oil or gas as herein provided, the Secretary of the Interior may sell the current product at private sale, at not less than the market price: *And provided further,* That any royalty oil or gas may be sold at not less than the market price at private sale to any department or agency of the United States.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at date of 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.

SEC. 38. That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land offices on account of business transacted under the provisions of this act.

Approved, February 25, 1920.

**OIL AND GAS REGULATIONS—ACT OF FEBRUARY 25, 1920
(41 STAT., 437).**

[Circular No. 672.1]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 11, 1920.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES.

SIRS: Under the authority of the act of Congress approved February 25, 1920, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," the following rules and regulations are prescribed for the administration of the provisions of said act relative to oil and gas:

1.—OIL AND GAS PERMIT.

Section 13 of the act authorizes the Secretary of the Interior to grant a qualified applicant the exclusive right to prospect for oil or gas for the period of two years, unless extended, and under authority thereof the following rules and regulations will govern the issuance of such permits:

1. **QUALIFICATIONS OF APPLICANTS.**—Pursuant to section 1 of the act, permits may be issued to (a) a citizen of the United States; (b) an association of such citizens; (c) a corporation organized under the laws of the United States or of any State or Territory thereof; or (d) a municipality.

2. **LANDS TO WHICH APPLICABLE.**—The permit thus issued may include not more than 2,560 acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field, the lands applied for to be taken in a reasonably compact form, by legal subdivisions if surveyed, and in an approximately square or rectangular tract if unsurveyed, the length of which must not exceed two and one-half times its width. Incontiguous tracts within a limited radius may be included in a permit when conditions are such that, because of prior disposals, a reasonable area of contiguous land can not be procured.

Such permits may not include land or deposits in (a) national parks; (b) forests created under the act of March 1, 1911 (36 Stat., 961), known as the Appalachian Forest Reserve act; (c) lands in military or naval reservations; or (d) Indian reservations. The application of the act to ceded Indian lands depends on the laws controlling their disposition.

All permits or leases for the exploration for or development of oil or gas deposits under this act within the limits of national forests or other reservations or withdrawals to which this act is applicable shall be subject to and contain such conditions, stipulations, and

¹ Reprint as amended to October 20, 1920.

reservations as the Secretary of the Interior shall deem necessary for the protection of such forests, reservations, or withdrawals, and the uses and purposes for which created.

The boundaries of the geological structures of producing oil or gas fields will be determined by the United States Geological Survey, under the supervision of the Secretary of the Interior, and maps or diagrams showing same will be placed on file in local United States land offices.

It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant.

3. PERMITS OR LEASES FOR OTHER MATERIALS.—The granting of a permit or lease for the development or production of oil or gas will not preclude other permits or leases of the same land for the mining of other minerals, under this act, with suitable stipulations for such joint operation, to the end that the full development of the mineral resources may be secured, nor will it necessarily preclude the allowance of applicable entries, locations, or selections of the lands included therein with a reservation of the mineral deposits to the United States.

4. FORM AND CONTENTS OF APPLICATION.—Applications for permits should be filed in the proper district land office, addressed to the Commissioner of the General Land Office, be suspended for 30 days to enable preference-right claims to be presented before action, and after due notation then forwarded for his consideration, with a full report as to status and conflicts. No specific form of application is required, and no blanks will be furnished, but it should cover, in substance, the following points, and be under oath:

(a) Applicant's name and address.

(b) Proof of citizenship of applicant, by affidavit of such fact, if native born; or if naturalized, by a certified copy of the certificate of naturalization on the form provided for use in public-land matters, unless such a copy is already on file; if a corporation, by certified copy of the articles of incorporation, and a showing as to the residence and citizenship of its stockholders; if a municipality a showing of (1) the law or charter and procedure taken by which it has become a legal body corporate; (2) that the taking of a permit or lease is authorized under such law or charter; and (3) that the action proposed has been duly authorized by the governing body of such municipality.

(c) A statement that the applicant is not the holder of more than two other subsisting permits in the same State, nor of any permit in the same geologic structure, together with a statement of any other applications for permits in the same State, in which the applicant is directly or indirectly interested, fully disclosing the nature and extent of such interests. In this connection attention is directed to the limitations and exceptions of section 27 of the act.

(d) Description of the land for which the permit is desired, by legal subdivisions if surveyed, and by metes and bounds if unsurveyed, in which latter case, if deemed necessary, a survey sufficient more fully to identify the land may be required before the permit is granted. In order to properly identify unsurveyed lands, great

care should be taken, and if practicable the metes and bounds description should be connected by course and distance with some corner of the public land surveys.

(e) A statement that to the best of applicant's knowledge and belief the land applied for is not within any known geological structure of a producing oil or gas field.

(f) Three references as to applicant's reputation and business standing.

(g) If the applicant is claiming a preference right as explained in the next succeeding section of these regulations, he should set up fully the facts upon which such preference right is based, together with a true copy of the posted notice.

(h) The applicant must furnish a bond, with qualified corporate surety, in the sum of \$1,000, conditioned against the failure of the permittee to repair promptly, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation. The penalty of the bond may be increased by the Secretary of the Interior when conditions warrant, particularly in relief cases. This bond may be filed with the application, which will expedite action thereon, or within 10 days after receipt of notice by the applicant that the permit will be granted when the bond is filed.

Additional bonds, or a bond with additional obligations therein, will be required in special cases where a permit embraces reserved deposits in lands theretofore entered or patented with a reservation of the oil and gas to the United States, together with a right to prospect for, mine, and remove the same pursuant to the act of July 17, 1914 (38 Stat., 509), or where the lands constitute a portion of a reclamation project.

A revenue stamp must be attached to the bond at the rate of 1 cent on each \$1 or fractional part thereof of premium paid.

The following form of bond is prescribed for use in ordinary cases in connection with applications for permit:

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

U. S. Land Office _____
Serial Number _____

Bond of oil and gas permittee.

[Act of Feb. 25, 1920 (Public No. 146).]

Know all men by these presents, That we, _____, of the county of _____, in the State of _____, as principal, and _____ of the county of _____, in the State of _____, as surety, are held and firmly bound unto the United States of America in the sum of _____ dollars, lawful money of the United States to be paid to the United States, for which payment, well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators or successors, and assigns, jointly and severally by these presents.

Signed with our hands and sealed with our seals this _____ day of _____ in the year of our Lord one thousand nine hundred and _____.

The condition of the foregoing obligation is such that, whereas the said principal has made application under the act of February 25, 1920 (Public No. 146), for a permit to prospect for oil and gas for two years upon the following described lands _____; and whereas said permit, if granted, will be on condition that all operations shall be conducted in accordance with approved

methods; that all proper precautions shall be exercised to prevent waste of oil or gas developed in the lands, or the entrance of water through wells drilled by, or on behalf of, the principal to the oil sands or oil-bearing strata to the destruction of the oil deposits.

Now therefore, if said principal shall promptly repair any damage that may result to the oil strata or deposits resulting from improper methods of operation, or from failure to comply fully with the aforesaid conditions of said permit, then the above obligation is to be void and of no effect; otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of—

Name and address of witness:

Principal. [L. S.]

Surety. [L. S.]

In lieu of corporate surety, the applicant may deposit United States bonds of the par value of not less than \$1,000, pursuant to section 1320 of the act of February 24, 1919 (see Treasury Circular No. 154, of June 30, 1919). When United States bonds are submitted as security in lieu of corporate surety same should be accompanied with a bond and power of sale duly executed by the applicant in substantially the following form:

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

U. S. Land Office _____
Serial No. _____

Bond of oil and gas permittee where United States bonds are accepted in lieu of surety or sureties, and power of attorney.

[Act of Feb. 25, 1920 (Public No. 146).]

Know all men by these presents, That _____ of _____, State of _____, as obligor, is held and firmly bound unto the United States of America in the sum of \$1,000, lawful money of the United States, to be paid to the United States, for which payment, well and truly to be made, binds himself, his heirs, executors, administrators, and assigns by these presents.

The condition of the foregoing obligation is such that whereas the said obligor has made application under the act of February 25, 1920 (Public No. 146), for a permit to prospect for oil and gas for two years upon the following-described land: _____; and

Whereas said permit, if granted, will be on condition that all operations shall be conducted in accordance with approved methods; that all proper precautions shall be exercised to prevent waste of oil or gas developed in the lands, or the entrance of water through wells drilled by or on behalf of the obligor to the oil sands or oil-bearing strata to the destruction of the oil deposits.

Now, therefore, if said obligor shall promptly repair any damage that may result to the oil strata or deposits resulting from improper methods of operation, or through failure to comply fully with the aforesaid conditions of said permit, then the above obligation is to be void and of no effect: otherwise to remain in full force and virtue.

The above-bounden obligor, in order the more fully to secure the United States in the payment of the aforesaid mentioned sum, hereby pledges as security therefor bonds of the United States in the principal sum of \$1,000, which said bonds are numbered serially and are in the denominations and amounts and are otherwise more particularly described as follows:

_____ bonds of \$_____ bearing _____ per cent interest with _____ coupons attached to each, numbered _____, which said bonds have this day been deposited with the Secretary of the Interior and his receipt taken therefor.

That the said obligor does hereby constitute and appoint the Secretary of the Interior as his attorney, for him and in his name to collect or to sell, assign and transfer the said United States bonds above described and deposited by the obligor as aforesaid, pursuant to authority conferred by section 1320, of the revenue act of 1918, approved February 24, 1919, as security for the faithful performance of, any and all of the conditions or stipulations as hereinbefore set out, and it is agreed that, in case of any default in the performance of the conditions and stipulations of such undertaking the said attorney shall have full power to collect said bonds or any part thereof, or to sell, assign, and transfer said bonds or any part thereof without notice, at public or private sale, free from any equity of redemption or without appraisal or valuation, notice and right to redeem being waived, and to apply proceeds of such sale or collection in whole or in part to the satisfaction of any damages, or deficiencies arising by reason of such default, as said attorney may deem best. The interest accruing upon said United States bonds deposited as above stated, in the absence of any default in the performance of any of the conditions or stipulations of the bond, shall be paid to said obligor. The said obligor hereby for himself, his heirs, executors, administrators, and assigns ratifies and confirms whatever his said attorney shall do by virtue of these presents.

In witness whereof I have hereunto set my hand and seal this _____ day of _____ 19—.

[L. S.]
Signature.

Before me, the undersigned, a notary public within and for the county of _____, in the State of _____, personally appeared _____ and duly acknowledged the execution of the foregoing bond and power of attorney.

Witness my hand and notarial seal this _____ day of _____, 19—.

[Notarial Seal.]

5. PREFERENCE RIGHT, HOW SECURED.—A preference right over others to a permit may be obtained, under section 13 of the act, by—

(a) Erecting upon the land desired, subsequent to the approval of the act, a monument not less than 4 feet high, at some conspicuous place thereon, of such a size as to be visible to anyone who may be interested. The monument may be of iron, stone, or durable wood, not less than 4 inches square or in diameter, and must be firmly embedded in the ground.

(b) Posting on or near said monument a notice stating that an application for permit will be made within 30 days after date of posting said notice, the notice to give the date and hour of posting, to be signed by the applicant, and give such a general description of the land to be covered by the permit, by reference to courses and distances from such monument and other natural objects and permanent monuments, as will reasonably identify the land. The area, approximately, must also be stated, and the notice must be so protected as to prevent its destruction by the elements. The preference right will exist for 30 days after the date of posting such notice, and if no application is filed within that time, the land will be subjected to any other application for permit or to other disposal.

(c) In cases of conflict between a preference right application and one filed without any claim of preference, the priority of the initiation of the claim will govern; for example, the filing of a proper application in the land office prior to the posting of notice by another, as aforesaid, will give a prior right.

6. FORM AND REQUIREMENTS OF PERMIT.—A permit will confer upon the recipient the exclusive right to prospect for oil or gas upon the lands embraced therein, provided he complies with the terms thereof, which permit will be, in form and substance, substantially as follows:

THE UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR.

General Land Office.

U. S. Land Office _____
Serial Number _____

Know all men by these presents, That the Secretary of the Interior, under and by virtue of the act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," approved February 25, 1920, has granted and does hereby grant a permit to _____ granting _____ the exclusive right for _____ years from date hereof to prospect for oil or gas, but for no other purpose, the following described lands: _____, upon the express conditions following:

1. To mark each of the corners of the claim within 90 days from date hereof with substantial monuments so that the boundaries can be readily traced on the ground, and post in a conspicuous place, upon the lands covered hereby, a notice that such a permit has been granted, and a description of the lands covered by this permit.

2. Within six months (two years in Alaska) from date hereof to install upon some portion of the lands a substantial and adequate drilling outfit and to commence actual drilling operations.

3. Within one year (three years in Alaska) from date hereof to drill one or more wells, not less than 6 inches in diameter to a depth of at least 500 feet each, unless valuable deposits of oil or gas shall be sooner discovered.

4. Within two years (four years in Alaska) from date hereof to drill one or more wells to a depth of at least 2,000 feet, unless valuable deposits of oil or gas shall be sooner discovered.

5. Not to drill any well within 200 feet of any of the outer boundaries of the lands covered by this permit unless the adjoining lands have been patented or the title thereto otherwise vested in private owners.

6. To carry on all operations hereunder in accordance with approved methods and practice; to use all reasonable precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by permittees to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits, and to carry out, at the expense of the permittee, all reasonable orders of the Secretary of the Interior relative to prevention of waste and preservation of property, and to comply with such regulations as may be issued by the Secretary of the Interior as to methods of operation.

7. To furnish and maintain during the period of this permit a bond with qualified corporate surety in the sum of \$_____, conditioned against the failure of the permittee to repair promptly, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation.

8. That as to any lands covered by this permit embraced at the date hereof in any entry or patent with a reservation of the oil and gas deposits to the United States pursuant to the act of July 17, 1914 (38 Stat., 509), or the act of December 29, 1916 (39 Stat., 862), permittee shall reimburse such entrymen or patentee for all damage to crops and improvements caused by drilling or other prospecting operations.

9. That this permit is granted upon the express condition that the right is reserved to the Secretary of the Interior to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands covered thereby, as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in the act under which this permit is granted.

10. This permit is granted on the express condition that if any of the land covered thereby is embraced in a forest, reclamation, power, or other withdrawal, or is segregated for any particular purpose operations under this permit shall be so conducted as not to interfere with the administration and use of the land for the purpose for which withdrawn or segregated to a greater extent than may be determined by the Secretary of the Interior to be necessary for the most beneficial use of the land.

11. The granting of this permit shall not preclude the allowance of entry, location, or selection of any of the lands included therein, where such entry, selection, or location is made with a reservation of the mineral deposits to the United States.

12. That until this permittee shall apply for a lease of one-quarter or more of the area included herein, he shall pay to the United States 20 per cent of the gross value of all oil or gas secured by him from the lands and sold or otherwise disposed of, or held by him for sale or other disposition.

13. The Secretary of the Interior reserves the right and authority to cancel this instrument for failure of the permittee to comply with any of the conditions enumerated herein or to exercise due diligence in the work of development.

14. Valid rights existing at the date of this permit will not be affected thereby.

Dated this _____ day of _____, 19—.

Secretary of the Interior.

7. **EXTENSION OF LIFE OF PERMIT.**—If for any good reason the permittee is unable, with the exercise of diligence, to test the land within two years, application for extension for not to exceed two years may be filed within the life of the permit, and must be accompanied by a showing under oath, corroborated, as to the causes that make such extension necessary, and as to what efforts have been made to comply with the condition of the permit; ordinarily no extension will be granted in the absence of the minimum amount of drilling required by the permit. This application should be addressed to the Secretary of the Interior, and be filed either in the district land office or in the General Land Office. This privilege is not applicable to Alaska.

8. **REWARD FOR DISCOVERY.**—Upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in the permit, within the period of the permit or extension thereof, the permittee is entitled (a) to a lease of one-fourth of the land included in the permit, on a royalty of 5 per cent, or for at least 160 acres if there be that area in the permit; (b) to a preference right to a lease for the remainder of the land covered by his permit at such royalty as may be fixed by the Secretary of the Interior, not less than 12½ per cent in amount or value of the production, nor more than the royalties fixed for leases under section 18 of the act (sec. 19, par. c, of these regulations), except that on that portion of the average production exceeding 200 barrels per day per well for the calendar month, the royalties shall be 33½ per cent for oil of 30 degrees Baume or over and 25 per cent for oil of less than 30 degrees Baume.

9. **PENALTY FOR DEFAULT.**—The permit will be subject to cancellation by the Secretary of the Interior for failure of the permittee to comply with any of the conditions enumerated therein or to exercise due diligence in the work of development.

In the absence of discovery of oil or gas within the period of the permit or extension thereof, the permit will thereupon terminate and the lands or deposits will automatically revert to their original status, but the land will continue segregated pending action by the Land Department on any application for extension that is timely filed.

10. **PERMITS IN ALASKA.**—The foregoing rules and regulations generally will apply to permits in Alaska, under section 13 of the act, but with some modifications, viz:

(a) A person, association, or corporation is authorized to hold five permits at one time in said territory, but only one permit in the geologic structure of any one producing oil field; hence subdivision c of section 4 of these regulations should be modified accordingly in making application for permits for lands in Alaska under section 13 of the act.¹

¹ See amendment of this paragraph on page 613.

(b) The preference right treated under section 5 of these regulations extends for a period of six months after the erection of monument and posting of notice provided for therein, and the period for marking of the corners is extended to one year after the granting of the permit.

(c) The time for exploratory work in Alaska is four years, instead of two, and there is no provision for extension of such period. The various items necessary in this exploratory work are set forth in the form of permit herein provided, the Alaskan period being included in parentheses, after the period prescribed in the States.

11. PERMITS FOR RESERVED DEPOSITS.—The deposits of oil and gas in all lands for which a patent has issued with a reservation of the oil and gas to the United States, under the act of July 17, 1914 (38 Stat., 509), subject to the preference right, if any, explained in the next succeeding section hereof, may be included in a permit under the provisions of this act, conditioned upon the permittee filing with the Secretary of the Interior a satisfactory bond or undertaking as security for the payment of all damages to crops and improvements on such lands by reason of prospecting, as required by the said act. (See G. L. O. Circular No. 393, 44 L. D., 32.)

12. PREFERENCE RIGHT OF OWNER OF SURFACE.—Under section 20 of the act a preference right to a prospecting permit is given to an entryman or owner of land not claimed under any railroad grant, under the following conditions: (1) The entry must have been made prior to February 25, 1920; (2) the entry must have been bona fide under and pursuant to the act under which made; (3) the entry must have been made without a reservation of the oil and gas, for land unwithdrawn, not classified as oil and gas land, and not known to be valuable for its oil or gas deposits, at date of entry; (4) in case the entry is patented, it must have been with a reservation of the oil and gas to the Government; if the entry is not patented, the entryman must waive all right *under the entry* to the oil and gas in the land; (5) if the entry has been assigned or transferred, such assignment or transfer must have been prior to January 1, 1918.

(a) Should an application for permit for entered or patented lands *with a reservation* of the oil and gas content to the United States be filed by a person other than the entryman or owner of the land, the applicant will be required to serve *personal notice* of such application upon the owner or owners of the land so entered or patented, with a warning therein that if said owner desires to exercise his preference right, if any, to a permit, he must file within 30 days his application therefor in the proper local land office. The applicant must furnish evidence of the service of notice on the owner and evidence that the party served is the owner of the land involved, either by his affidavit, duly corroborated, or by certificate of the officer in whose office transfers of real property are to be recorded.

(b) The preference-right applicant must show that he is entitled under the section above outlined, together with his qualifications, to hold a permit as previously set forth in these regulations, and if such an application be filed, the Secretary of the Interior will award the permit to the party entitled thereto.

(c) If the land, either withdrawn or unwithdrawn, is covered by an unpatented nonmineral entry *without a reservation* of the oil

and gas content to the Government, a prospecting permit may not be granted so long as the entry subsists without such reservation. In cases where applications for prospecting permits are filed by persons other than the entrymen for land in this status such applications will be referred to the United States Geological Survey for classification as to the prospective oil value of the land affected. If the Geological Survey shall conclude and report that the land embraced in such a nonmineral entry is without prospective oil or gas value, the application for permit will be rejected as to such land; but if the Geological Survey shall report that the land has a prospective oil or gas value and offers a favorable opportunity for prospecting operations, then the General Land Office will direct the proper local officers to serve notice on the nonmineral entryman to the effect that said land has been reported as valuable for its oil or gas content, and that the said entryman will be allowed fifteen (15) days within which (1) to file in the local office his consent to a reservation to the Government of the oil and gas content of the land embraced in his entry and in which to exercise his preference right, if any, to a prospecting permit for said land by filing a proper application therefor, or (2) to show cause, if any there be, why he should not consent to the mineral reservation, failing in either of which his entry will be canceled without further notice. The local office will thereupon report the action taken to the commissioner, whereupon (1) if the nonmineral entryman shall have failed to take any action, order of cancellation of the nonmineral entry will be made and action taken on the prospecting permit accordingly; (2) if consent to the reservation shall have been filed, a prospecting permit will be granted to the entryman or the former applicant, as the case may be, for the reserved mineral deposits; (3) if the nonmineral entryman shall submit a showing why the entry should not be impressed with a reservation of the mineral to the Government, such showing will be referred to the Geological Survey for consideration and report. If upon the receipt of such report the department shall conclude that the land is without mineral value, the application for prospecting permit will be rejected; but if the department shall conclude that, notwithstanding the showing made by the entryman, the land has a prospective oil and gas value, such action will be taken as the facts may warrant.

From the above it will be seen that it is desirable on the part of any applicant for a prospecting permit for land already embraced in a nonmineral entry without a reservation of the mineral, and likewise desirable on the part of any nonmineral entryman who is contending that the land is nonmineral in character, to submit with their respective applications or showings as complete and accurate geological data as may be procurable, preferably the reports and opinions of qualified experts.

(d) In case of conflict between a preference-right claim under section 20 of the act and one claimed by virtue of section 18 or 19, the issue will be determined on the basis of priority.

(e) Claimants under this section of the act may combine their holdings for the purpose of making joint application for a permit, provided the aggregate area does not exceed 2,560 acres and that all the lands for which application is made are within an area of 6 miles square or within the same township.

(f) The right of a permittee under a preference-right permit to a lease after discovery is governed by other provisions of the act, as set forth in section 8 of these regulations.

12 $\frac{1}{2}$. ASSIGNMENT OF PERMITS.—Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior. Mere rights to receive a permit are not assignable.

II.—OIL AND GAS LEASES.

13. DESIGNATION AND OFFER OF LANDS FOR LEASE.—Pursuant to the provisions of section 17 of the act, the unappropriated deposits of oil or gas situated within known geologic structures of producing oil or gas fields, and the lands containing same, will be divided into leasing blocks or tracts in areas not exceeding 640 acres each, and not exceeding in length two and one-half times their width, and offered for lease at a stated royalty by competitive bidding to the highest responsible bidder having the qualifications prescribed by section 15, paragraph (a) hereof.

14. NOTICE OF LEASE OFFER.—Notice of the offer of lands for lease will be given by publication in a newspaper of general circulation in the county in which the lands or deposits are situated for a period of 30 days; such notice will state the day and hour on which the offering will be made at public auction at the United States land office of the district in which the lands are situated, to the qualified bidder offering the highest bonus for the lease at the stated rental and royalty. Copy of the notice will be posted in said local office during the period of publication. This notice will be published at the expense of the Government. All bidders at any such auction are warned against violation of the provisions of section 59 of the United States Criminal Code, approved March 4, 1909, prohibiting unlawful combination or intimidation of bidders.

15. AUCTION OF LEASE.—At the time fixed in the notice, the register or receiver will, by public auction, offer the land for lease on the terms and conditions as to payments of royalties and rents fixed in the notice, to the qualified bidder of the highest amount offered as a bonus for the privilege of leasing the land. The successful bidder must deposit with the receiver on the date of the sale, certified check on a solvent bank, or cash, for one-fifth of the amount bid by him, which payment the receiver will credit to "Trust funds—Unearned moneys." At the time of such payment the successful bidder will also file the requisite showing of his qualifications to receive a lease, which shall include the following:

(a) Proof of citizenship of applicant; by affidavit of such fact, if native born, or if naturalized, by certified copy of the certificate of naturalization, on the form provided for use in public land matters, unless such copy is already on file; if a corporation, by certified copy of the articles of incorporation and a showing as to the residence and citizenship of its stockholders.

(b) The affidavit of the bidder or the affidavit of one of the officers of a corporate bidder that the bidder does not hold another lease in the geologic structure of the same producing oil or gas field, nor more than two leases, or a lease and a permit, in the State,

except under sections 18, 18a, 19, and 22 of the act; and also that the acceptance of the lease by such successful bidder will not be in violation of the provisions of section 27 of the act relative to excess holdings by individuals or corporations.

The register and receiver will thereupon transmit such showing, together with a report of the proceedings had at the auction, by special letter to the Commissioner of the General Land Office.

16. **AWARD OF LEASE.**—On receipt of the report of the auction from the register and receiver, the Secretary of the Interior will take action thereon, and either award the lease to the successful bidder or reject same, notice of which will be forthwith transmitted to the bidder through the local office. If the lease shall be awarded, the notice will be accompanied by copies of leases for execution by the lessee, who shall, within 30 days from receipt of such notice, execute said lease in triplicate, and pay to the receiver the balance of the bonus bid by him, together with the first year's rental, and also cause to be filed in the Land Office the bond required by section 2 (a) of the lease; in lieu of such bond, Liberty bonds will be taken at par in the amount of the bond, as provided in the act of February 24, 1919 (40 Stat., 1148). If the bid be rejected, the receiver will return by his official check the deposit made at the auction. In case of the award of a lease and failure on the part of the bidder to execute same, and otherwise comply with the applicable regulations, the deposit made will be considered forfeited and disposed of as other receipts under this act.

17. **FORM OF LEASE.**—The lease referred to in the preceding sections will be in form and substance substantially as follows:

U. S. Land Office _____
Serial No. _____

DEPARTMENT OF THE INTERIOR.

Lease of oil and gas lands under the act of February 25, 1920.

Date—Parties.—This indenture of lease entered into, in triplicate, this _____ day of _____ A. D., 19____, by and between the United States of America, acting in this behalf by the Secretary of the Interior, party of the first part, hereinafter called the lessor, and _____ of _____, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved February 25, 1920, Public No. 146, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," hereinafter referred to as the act, which is made a part hereof, witnesseth:

SECTION 1. Purposes.—That the lessor in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following described tracts of land situated in the county of _____, State of _____, and more particularly described as follows: _____ containing _____ acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof, for a period of 20 years, with the preferential right in the lessee to renew this lease for successive periods of 10 years, upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods.

SEC. 2. In consideration of the foregoing, the lessee hereby agrees:

(a) **Bond.**—To furnish a bond with approved corporate surety in the penal sum of \$5,000, conditioned upon compliance with the terms of the lease.

(b) *Commence drilling.*—The lessee agrees, within three months from delivery of executed lease, to proceed with reasonable diligence to install on the leased ground a standard or other efficient drilling outfit and equipment, and to commence drilling at least one well, and to continue such drilling with reasonable diligence to production, or to a point where the well is demonstrated unsuccessful, and thereafter to continue drilling with reasonable diligence at least one well at a time until the lessee shall have drilled wells equal in number to the number of 40-acre tracts embraced in the leased premises, unless the lessor shall, for any reason deemed sufficient, consent in writing to the drilling of a less number of wells; the lessee further agrees to drill all necessary wells fairly to offset the wells of others on adjoining land or deposits not the property of the United States.

(c) *Royalty and rents.*—To pay the lessor in advance, beginning with the date of the execution of this lease, a rental of \$1 per acre per annum during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, and, in addition to such rental, a royalty of — per cent of the value of oil or gas produced from the land leased herein (except oil or gas used for production purposes on said lands or unavoidably lost), or, on demand of the lessor, — per cent of the oil or gas produced (except oil or gas used for production purposes on said lands, or unavoidably lost), in which case credit for rent shall be on the basis of the current field price of oil, the royalty, when paid in value, to be due and payable monthly on the 15th of each month following the month in which produced, to the receiver of public moneys of the proper land district; and when paid in kind, to be delivered in the field where produced at such times, and in such manner as may be required by the lessor; such royalties, whether in value or kind, shall be subject to reduction whenever the average daily production of any oil well shall not exceed 10 barrels per day, if in the judgment of the lessor the wells can not be successfully operated upon the royalties fixed herein.

(d) *Sales contract.*—To file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas produced hereunder, except for production purposes on the land leased, and, in the event the United States shall elect to take its royalties in money instead of in oil or gas, not to sell or otherwise dispose of the products of the land leased, except in accordance with a sales contract or other method first approved by the Secretary of the Interior.

(e) *Monthly statement.*—To furnish monthly statements in detail in such form as may be prescribed by the lessor, showing the amount, quality, and value of all oil and gas produced and saved during the preceding calendar month as the basis for computing the royalty due the lessor. The leased premises, and all wells, improvements, machinery, and fixtures thereon or connected therewith, and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized officer of the department.

(f) *Plats and reports.*—To furnish annually and at such times as the Secretary shall require, in the manner and form prescribed by the Secretary of the Interior, a plat showing all development work and improvements on the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, accompanied by a report in detail as to the stockholders, investment, depreciation, and cost of operation, together with a statement as to the amount and grade of oil and gas produced and sold, and the amount received therefor, by operations hereunder.

(g) *Log of wells.*—To keep a log in the form prescribed by the Secretary of all the wells drilled by the lessee, showing the strata and character of the ground passed through by the drill, which log, or copy thereof, shall be furnished to said lessor on demand.

(h) *Diligence—Prevention of waste—Health and safety of workmen.*—To exercise reasonable diligence in drilling and operating wells for the oil and gas on the lands covered hereby while such products can be secured in paying quantities, unless consent to suspend operations temporarily is granted by the Secretary of the Interior; to carry on all operations hereunder in a good and workmanlike manner, in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug

securely any well before abandoning the same so as to effectually shut off all water from the oil or gas bearing strata; not to drill any well within 200 feet of any of the outer boundaries of the lands covered hereby unless the adjoining lands have been patented or the title thereto otherwise vested in private owners; to conduct all mining, drilling, and related productive operations subject to the inspection of the lessor; to carry out at expense of the lessee all reasonable orders and requirements of lessor relative to prevention of waste and preservation of the property and the health and safety of workmen, and on failure so to do the lessor shall have the right to enter on the property to repair damage or prevent waste at lessee's cost; to abide by and conform to regulations in force at the time the lease is granted covering the matters referred to in this paragraph: *Provided*, That lessee shall not be held responsible for delays of casualties occasioned by causes beyond lessee's control.

(i) *Taxes and wages—Freedom of purchase.*—To pay when due all taxes lawfully assessed and levied under the laws of the State upon improvements, oil, and gas produced from the lands hereunder, or other rights, property, or assets of the lessee; to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(j) *Reserved deposits.*—To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(k) *Excess holdings.*—To observe faithfully the provisions of section 27 of the act defining the interest or interests that may be taken, held, or exercised under leases authorized by said act.

(l) *Assignment of lease.*—Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained.

(m) *Deliver premises in case of forfeiture.*—To deliver up the premises leased, with all permanent improvements thereon, in good order and condition in case of forfeiture of this lease.

SEC. 3. The lessor expressly reserves:

(a) *Rights reserved—Easements and rights of way.*—The right to permit for joint or several use such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in said act, and the treatment and shipment of products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes.

(b) *Disposition of surface.*—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereinafter enacted in so far as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein.

(c) *Pipe lines to convey at reasonable rates.*—The right to require the lessee, his assignee, or beneficiary, if owner, or operator of, or owner of a controlling interest in any pipe line, or any company operating the same which may be operated accessible to the oil derived from lands under such lease, to accept and convey at reasonable rates and without discriminating the oil of the Government or of any citizen or company, not the owner of any pipe line, operating a lease or purchasing oil or gas under the provisions of this act.

(d) *Monopoly and fair prices.*—Full power and authority to carry out and enforce all the provisions of section 30 of the act, to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices to prevent monopoly and to safeguard the public welfare.

(e) *Helium.*—Pursuant to section 1 of the act, the lessor reserves the right to take all helium from any gas produced under this lease, but the lessee shall not be required to extract and save the helium for the lessor; in case the lessor elects to take the helium, the lessee shall deliver all gas containing same, or portion thereof desired, to the lessor in the manner required by the lessor, for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof; provided, that the lessee shall not, as a result of the operation in this section provided

for, suffer a diminution in value of the gas from which the helium has been extracted, or loss otherwise, for which the lessee is not reasonably compensated, save for the value of the helium extracted; the lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

SEC. 4. *Surrender and termination of lease.*—The lessee may, on consent of the Secretary of the Interior first had and obtained in writing, surrender and terminate this lease upon the payment of all rents, royalties, and other obligations due and payable to the lessor, and upon payment of all wages and moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property; upon like consent had and obtained the lessee may surrender any legal subdivisions of the area included herein.

SEC. 5. *Purchase of materials, etc., on termination of lease.*—Upon the expiration of this lease, or the earlier termination thereof pursuant to the last preceding section, the lessor or another lessee may, if the lessor shall so elect within six months from the termination of the lease, purchase all materials, tools, machinery, appliances, structures, and equipment placed in or upon the land by the lessee, and in use thereon as a necessary or useful part of an operating or producing plant, on the payment to the lessee of such sum as may be fixed as a reasonable price therefor by a board of three appraisers, one of whom shall be chosen by the lessor, one by the lessee, and the other by the two so chosen; pending such election all equipment shall remain in normal position. If the lessor, or another lessee, shall not, within six months, elect to purchase all or any part of such materials, tools, machinery, appliances, structures, and equipment, the lessee shall have the right at any time, within 90 days, to remove from the premises all the materials, tools, machinery, appliances, structures, and equipment which the lessor shall not have elected to purchase, save and except casing in wells and other equipment or apparatus necessary for the preservation of the well or wells.

SEC. 6. *Judicial proceedings in case of default.*—If the lessee shall fail to comply with the provisions of the act or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at the date hereof, and such default shall continue after service of written notice thereof by the lessor, then the lessor may institute appropriate judicial proceedings for the forfeiture and cancellation of this lease in accordance with the provisions of section 31 of said act; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

SEC. 7. *Heirs and successors in interest.*—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon and every benefit hereof shall inure to the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

SEC. 8. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to Congress or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat., 1109), relating to contracts enter into and form a part of this lease so far as the same may be applicable.

In witness whereof

THE UNITED STATES OF AMERICA,

By _____ [L. S.]

Witness:

_____ [L. S.]
_____ [L. S.]
_____ [L. S.]

Bond required under paragraph 2a of the lease should be in substantially the following form:

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

U. S. Land Office _____

Serial Number _____

Bond of oil and gas lessee.

[Act of Feb. 25, 1920 (Public No. 146).]

Know all men by these presents, That we, _____, of the county of _____, in the State of _____, as principal, and _____ of the county of _____, in the State of _____, as surety, are held and firmly bound unto the United States of America in the sum of _____ dollars, lawful money of the United States, for the use and benefit of the United States and of any entryman or patentee of any portion of the land covered by the hereinafter described lease heretofore entered or patented with a reservation of the oil and gas deposits to the United States, to be paid to the United States, for which payment, well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, successors, and assigns, jointly and severally by these presents.

Signed with our hands and sealed with our seals this _____ day of _____, in the year of our Lord one thousand nine hundred and _____.

The condition of the foregoing obligation is such that—

Whereas the said principal, by instrument dated _____, has been granted the exclusive right to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following described lands _____, under and pursuant to the provisions of the act approved February 25, 1920 (Public No. 146); and

Whereas the said principal has by such instrument entered into certain covenants and agreements set forth therein, under which operations are to be conducted:

Now, therefore, if said principal shall faithfully comply with all the provisions of the above described lease, then the above obligation is to be void and of no effect, otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of—

Name and address of witness:

[L. S.]

Principal.

[L. S.]

Surety.

Where Government bonds are deposited as security in lieu of a surety bond, in compliance with paragraph 2 (a) of the lease form, same should be accompanied with a combined bond and power of attorney to sell, duly executed by the lessee, along the same general lines as the form set out in paragraph 4 (h) of these regulations with suitable changes made in the condition of the bond to correspond with the condition in the lease bond, form for which is above set out.

III.—RELIEF MEASURES.

Sections 18, 19, and 22 of the act provide for the "relief," so called, of certain defined claimants of oil and gas lands, who at date of the act had not perfected their claims under the preexisting mining laws, and are prevented from doing so by withdrawal of the land or by this act.

18. CONDITIONS FOR RELIEF UNDER SECTION 18:

(a) That the land claimed must have been included in the Executive order of withdrawal of September 27, 1909, and must have remained so withdrawn.

(b) That the claim must have been initiated under the placer mining laws prior to July 3, 1910, and claimed and possessed continuously from that time.

(c) That no claimant who has acquired any interest in the land since September 1, 1919, from another claimant who, on that date or since that time, was, or is claiming or holding, more than the maximum allowed a claimant under section 18 of the act, may secure a lease under section 18, or any interest therein. This limitation does not, however, apply to an exchange of an interest in such lands made prior to January 1, 1920, which did not increase or reduce the area or acreage held or claimed, in excess of the maximum by either party to the exchange.

(d) That claimant or predecessors must have drilled an oil or gas well on the land to discovery.

(e) That all conflicting claims asserted prior to July 1, 1919, must have been disposed of, as provided in section 28 hereof or otherwise.

(f) That no claimant who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

(g) That claimant must, on or before August 25, 1920, file a relinquishment to the United States of all right, title, and interest in and to the land, together with an application for a lease. This relinquishment may be in the form of an unconditional quitclaim deed, duly executed and acknowledged, but not recorded, and when filed will be held for such action as the facts and the law in the case warrant and require.

(h) That claimant must pay for one-eighth of the value at the time of production of all oil and gas produced prior to date of filing relinquishment and application for relief, exclusive of oil and gas used on the land for production purposes, or unavoidably lost.

19. RELIEF THAT MAY BE GRANTED UNDER SECTION 18:

(a) *Lands not in naval petroleum reserves.*—A qualified claimant, upon complying with the provisions of the act and these regulations, will be entitled to a 20-year lease from the United States, commencing and effective as of the date of filing relinquishment and application for relief, substantially in the form prescribed in section 17 hereof, at a royalty to be fixed by the Secretary of the Interior, but not less than $12\frac{3}{4}$ per cent of all oil and gas produced exclusive of that used for production purposes on the claim, or unavoidably lost. There is, however, a limitation placed by the act upon the acreage that may be included in such lease. If the geologic oil or gas structure of the producing field in which the claim is situated does not exceed 640 acres in area the lease may include the entire area if covered by the claim; but if the area of such structure exceeds 640 acres the act provides that not more than one-half of the area, same to be selected by the claimant but in no case to exceed 3,200 acres, may be leased to any one claimant.

(b) *Lands in naval petroleum reserves.*—If the land claimed is within a naval petroleum reserve the claimant will be entitled to lease only the producing wells on the claim, together with an area of land sufficient for the operation of such wells, upon a royalty to be fixed by the Secretary of the Interior, but not less than $12\frac{1}{2}$ per cent of the production, except that used for production purposes on the claim or unavoidably lost. The act forbids the drilling of any wells in lands subject to this provision within 660 feet of the leased wells without the consent of the lessee. It further provides that the President may, in his discretion, lease the remainder or any part of the claim on which such wells have been drilled, and in the event of such leasing the claimant shall have a preference to such lease. The President may also permit the lessee of any well to drill additional wells within the limited area of 660 feet upon such terms and conditions as he may prescribe. These terms and conditions can not be prescribed here, but will be determined on the merits in each separate case.

(c) *Royalties.*—The royalties payable under leases granted pursuant to section 18 of the act are cumulative, and are hereby determined and prescribed as follows:

For all oil produced of 30° Baumé or over upon each claim on which the wells average not exceeding 20 barrels per day per well for the calendar month, $12\frac{1}{2}$ per cent; upon each claim on which the wells average more than 20 barrels and not more than 50 barrels per day per well for the calendar month, $16\frac{2}{3}$ per cent; upon each claim on which the wells average more than 50 barrels and not more than 100 barrels per day per well for the calendar month, 20 per cent; upon each claim on which the wells average more than 100 barrels per day per well for the calendar month, 25 per cent.

For all oil produced of less than 30° Baumé upon each claim on which the wells average not exceeding 20 barrels per day per well for the calendar month, $12\frac{1}{2}$ per cent; upon each claim on which the wells average more than 20 barrels and not more than 50 barrels per day per well for the calendar month, $14\frac{2}{7}$ per cent; upon each claim on which the wells average more than 50 barrels and not more than 100 barrels per day per well for the calendar month, $16\frac{2}{3}$ per cent; upon each claim on which the wells average more than 100 barrels per day per well for the calendar month, 20 per cent.

Only wells which have a commercial production during at least a part of the month shall be considered in ascertaining the average production herein, and the Secretary of the Interior shall determine what are commercially productive wells under this provision.

The royalties on gas produced, if any, will be fixed and determined in each lease.

20. CONDITIONS FOR RELIEF UNDER SECTION 19:

A. *For permit.*—(a) That the land must not be in a naval petroleum reserve.

(b) The applicant or his predecessor in interest must have been an occupant or claimant of the land on or before October 1, 1919, under a claim initiated under the placer mining laws, when the land was not withdrawn, provided that a transferee of such a claim subsequent to October 1, 1919, will not be permitted to hold permits under section 19 of the act to exceed 2,560 acres in the same geologic structure, nor for more than three times that area in the same State.

(c) That claimant, by himself or predecessor in interest, must have performed all acts under the preexisting laws necessary to valid locations, except to make discovery.

(d) That prior to February 25, 1920, claimant must have performed work or expended on or for the benefit of such locations an amount equal in the aggregate to \$250 for each location.

(e) That no claimant who has been guilty of any fraud or who had knowledge, or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

(f) That claimant must, on or before August 25, 1920, file a relinquishment to the United States of all right, title, and interest in and to the land, together with an application for a permit. This relinquishment may be in the form of an unconditional quit-claim deed, duly executed and acknowledged, but not recorded, and when filed will be held for such action as the facts and the law in the case warrant and require.

B. *For lease.*—The conditions necessary to obtaining a lease under section 19 of the act are identical with those outlined in paragraphs (a), (b), (e), and (f), for permits, together with the following additional conditions:

(a) That claimant must have made a discovery of oil or gas on or before February 25, 1920.

(b) That claimant must not be entitled to relief on the land in question under section 18 of the act.

(c) That claimant must pay for one-eighth of the past production up to date of filing application for relief, exclusive of that used on the land for production purposes or unavoidably lost.

21. RELIEF THAT MAY BE GRANTED UNDER SECTION 19:

(a) A claimant qualified under the above conditions relating to permits, upon complying with the provisions of the act and these regulations, will be entitled to a prospecting permit upon the same terms, conditions, and limitations as to acreage, as other permits provided for in the act, substantially in form prescribed in section 6 hereof.

(b) A claimant qualified under the above conditions relating to leases is entitled to a 20-year lease from the United States, effective from date of filing application for relief, substantially in the form prescribed in section 17 hereof, the royalty to be fixed by the Secretary of the Interior, but such royalty may not be less than 12½ per cent of all oil and gas produced exclusive of that used for production purposes on the land or unavoidably lost. In the event the land is in the geologic structure of proven territory at the time of granting the permit under this section, the royalty required under the lease based thereon shall not be less than 12½ per cent, but if at the time the permit is granted the land is not in proven territory the amount of royalty will be governed by the general terms of the act as set out in section 14 thereof.

22. ALASKA CLAIMS—CONDITIONS FOR RELIEF UNDER SECTION 22:

A. *For permit.*—(a) That claimant must have been an occupant or claimant of the land on February 25, 1920, under a claim initiated under the placer mining laws by claimant or predecessors prior to November 3, 1910, the date of the Executive order withdrawing all

public lands in Alaska containing petroleum deposits, including those in national forests.

(b) That claimant must have performed all acts prior to November 3, 1910, under the then existing laws necessary to valid locations except to make discovery.

(c) That claimant, (1) prior to November 3, 1910, must have made substantial improvements for the discovery of oil or gas on or for each location, or (2) prior to February 25, 1920, expended not less than \$250 in improvements on or for the benefit of each location.

(d) That claimant must on or before February 25, 1921, or within six months after final denial or withdrawal of application for patent, file a relinquishment to the United States of all right, title, and interest in and to the land. This relinquishment must be in the form of an unconditional quitclaim deed, duly executed and acknowledged, but not recorded, and when filed will be held for such action as the facts and the law in the case warrant and require.

In addition to the above, the conditions outlined in paragraph (e) of section 20 hereof are applicable to relief in Alaska.

B. *For lease.*—The conditions necessary to obtaining a lease under section 22 of the act are identical with those outlined in the paragraphs relating to permits in Alaska together with the following additional conditions:

(a) That claimant or predecessors must have drilled an oil or gas well on the land to discovery.

(b) That claimant must pay for one-eighth of the past production exclusive of that used on the land for production purposes or unavoidably lost.

23. ALASKA CLAIMS—RELIEF THAT MAY BE GRANTED UNDER SECTION 22:

(a) A claimant qualified under the above conditions relating to permits, upon complying with the conditions of the act and these regulations will be entitled to prospecting permits under the same terms and conditions as other permits in Alaska provided for in section 13 of the act, substantially in the form prescribed in section 6 hereof.

(b) A claimant qualified under the above conditions relating to leases is entitled to a lease substantially in the form prescribed in section 17 hereof, the rental and royalty to be fixed by the Secretary of the Interior and specified in the lease, subject to readjustment at the end of each 20-year period of the lease.

(c) Only five permits or leases in the aggregate may be held at any one time by any claimant, and not more than 1,280 acres may be included in one permit under section 22 of the act.

23½. ROYALTIES AND RENTALS ON OIL AND GAS LEASES IN ALASKA.—The royalties and rentals payable under oil and gas leases granted in Alaska pursuant to sections 14 and 22 of the act of February 25, 1920 (Public No. 146), are hereby determined and prescribed as follows:

(a) For leases granted under section 22 of the act, the royalty shall be: (1) For the first five years from and after the date of the lease, no royalty, except in the case of leases whereon the producing wells yield an average of 100 barrels or more per well per day for the calendar month, in which event the royalty shall be 5 per cent

of all oil produced; (2) for the second period of five years from and after the date of each lease under section 22 of the act the royalty upon all leases shall be 5 per cent; (3) for the succeeding 10 years the royalty upon all leases under section 22 of the act shall be 10 per cent of all oil produced.

(b) Upon leases granted in Alaska under section 14 of the act, the permittee who discovers oil will be entitled to a lease for one-fourth of the area of the permit without payment of royalty for the first five years succeeding the date of the lease and thereafter shall pay a royalty of 5 per cent upon all oil produced. On the remaining lands included within the area of the permit, the permittee will be given a preference right to a lease without payment of royalty for the first five years succeeding the date of the lease, except in the case of leases whereon the producing wells yield an average of 100 barrels or more per well per day for the calendar month, in which event the royalty shall be 5 per cent; for the second five years, the lessee will be required to pay a royalty of 5 per cent upon all oil produced, and for the succeeding 10 years, a royalty of 10 per cent upon all oil produced.

(c) No royalty will be charged in any case upon leases wherein the wells upon the lands average less than 10 barrels per well per day for the calendar month.

(d) No rental upon any oil or gas lease in Alaska will be charged during the first five years succeeding the date of the lease. After the expiration of the first five years succeeding the date of the lease, a rental of 10 cents per acre per annum will be charged on all leases, payable in advance: *Provided*, That the rentals so paid for any one year shall be credited upon the royalties accruing for that year.

(e) The royalties on gas produced, if any, will be fixed and determined in each lease.

24. BENEFICIARIES UNDER LEASES OR PERMITS.—All leases or permits under sections 18, 19, and 22 shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject to the same limitations as to area and acreage as is provided for claimant, but such persons will not necessarily be made parties to Government leases, and may assert their rights in the courts. Disputes of this character are not to be confused with adverse claims based upon independent title, hereinafter referred to. (See sec. 28 hereof.)

24½. WHO MAY APPLY.—All proper parties to a claim for relief under section 18, 19, or 22 of the act should join in the application, but, if for any sufficient reason that is impracticable, any person claiming a fractional or undivided interest in such claim may make application for a lease or permit, stating the nature and extent of his interest, and the reasons for nonjoinder of his co-owner or co-owners. In cases where two or more applications are made for the same claim or part of a claim, leases or permits will be granted to one or more of the claimants, as the law and facts shall warrant and as shall be deemed just.

25. FORM AND CONTENTS OF APPLICATION.—No set forms of application for a lease under section 18, 19, or 22, or a permit under section 19 or 22 of the act can be prescribed because the facts and circumstances pertaining to claims for relief are so varied. Applications for such leases or permits must be made under oath and the

supporting documents and papers certified or under oath so far as practicable. The application, with all the accompanying papers, should be filed in the United States land office of the district in which the land is situated. Applications and supporting papers need not be executed in duplicate, but one complete copy of each application and supporting papers (except abstract of title) should be filed with the application, which copy will be transmitted by the register and receiver to the Chief of Field Division and notation to that effect made on the original. The application should contain full information as to the facts upon which the applicant relies for relief, covering the following points and such additional matters as may, from the peculiar facts in the case, be material in the establishment of his claim under the law:

(a) Date of application for lease or permit.

(b) Applicant's name, post-office address and citizenship.

(c) *Description of land.*—The land for which the application is made must be described by legal subdivisions of section, township, and range, if surveyed; if not surveyed, then by metes and bounds and courses and distances from some permanent monument. If the application is for a lease of unsurveyed land, the applicant, after he has been awarded the right to a lease, but before issuance thereof, will be required to deposit with the United States surveyor general of the State in which the land is situated the estimated cost of making a survey of the land, the balance, if any, after the survey is completed to be returned.

(d) *Origin and basis of applicant's claim for relief.*—The applicant must bring his claim clearly within all the requirements of the act as specifically pointed out in sections 18, 20, and 22 of these regulations. Every application must be supported by a duly certified abstract of title to the land brought up to the date of filing the application. In the event an abstract of title is already on file in the Land Department, a supplemental abstract extending over the period or periods not covered by the former may be furnished, and if furnished will be considered in connection with the abstract already on file. If any fraud has been committed in connection therewith, then a full affirmative showing must be made by the applicant to the effect that he has not been a party to such fraud, and that he has not been guilty of any fraud or had knowledge of fraud or reasonable grounds to know of any fraud in connection with his claim. If an application for patent has been filed, a brief résumé of the actions taken thereon should be stated. If the land is or has been involved in litigation in the courts to which the United States is a party, the status or result of such litigation should be furnished.

(e) *Particulars as to conflicting claims or interests.*—All conflicting or disputed claims, if any, to the land or production therefrom, specifying the character and extent of such interests, must be shown.

(f) *Discovery.*—Before a lease may be awarded under the relief sections of the act it must be satisfactorily shown that the applicant or his predecessors have drilled a well to a substantial and certain discovery of oil or gas in a producing stratum on the land covered by the location under which the applicant is asserting his claim.

(g) *Wells, improvements, and production.*—With each application for a lease under section 18, 19, or 22 of the act there must be filed a complete and detailed statement showing the number, depth, condi-

tion, and present daily production of all wells drilled on the land by the applicant and his predecessors in interest, and the nature and extent of all other improvements placed thereon by them.

With each application for a permit under section 19 or 22 of the act, a description of the work performed and improvements made upon or for the benefit of the location by the applicant and his predecessors must be filed, together with an itemized statement of the cost thereof. If the application is made under section 22, the date the work was performed or the improvements made must also be shown.

In either case applicant must show the position of all wells and improvements by courses and distances from the nearest corner of the public land survey, if the land is surveyed; if not surveyed, then from a corner of the claim. This may be shown by means of a diagram.

(h) *Amount and value of past production.*—Claimant must furnish a complete detailed statement, by months, of all past production from the land, up to the date of filing the application and relinquishment, showing (1) the grade and total quantity of oil and gas produced; (2) the amount sold or otherwise disposed of, to whom sold, and the selling price or other consideration received therefor; (3) a statement of the grade and amount of any and all such production held in storage, when produced, and the value at time of production; and (4) the amount consumed for production purposes on the land, or unavoidably lost.

Copies of any and all contracts under which oil or gas produced from the land has been or is being sold or otherwise disposed of must be furnished.

(i) *Inspection of records.*—The agreement on the part of the applicant to permit the inspection of any and all books, records, and accounts having any bearing on the data or information required by the application and to furnish copies or abstracts of such books, records, or accounts, on demand.

(j) *Interest in other leases and permits.*—The applicant will also furnish a complete statement of all lands for which he has filed application for lease or permit under sections 18, 19, and 22 of the act, and of such lands as are included in other applications in which he has any direct or indirect interest, together with a full disclosure of such interest by stock ownership or otherwise. If the applicant is a corporation, a certified copy of its articles of incorporation must be furnished, and a full disclosure made of the ownership of its stock, whether such stock is owned, held, or controlled directly or indirectly by any other person or corporation, who or which is an applicant for or a holder of a lease under said sections, and, in the event of such ownership, a description of the legal subdivisions of all the lands affected thereby is required. Lists of stockholders need not necessarily be filed in the local land offices, but may be filed directly with the Commissioner of the General Land Office, where they will be kept confidential except for Government purposes. In the event the lands so affected are not surveyed they may be described by the usual method of courses and distances and acreage.

(k) *Limitation of area.*—Applications for lease under section 18 of the act should disclose all other applications in which the appli-

cant is directly or indirectly interested, for lease under said section for lands (describing same) in the same geologic structure; and applications under section 22 of the act should show all other applications for leases or permits under said section. The boundaries of the geologic structures of the various producing fields will be determined and announced by the United States Geological Survey under supervision of the Secretary of the Interior, and such information will be placed on file in all United States land offices.

(l) *Interests of beneficiaries.*—In applications for lease the nature and extent of the interests of all beneficiaries thereof by virtue of operating contracts or otherwise, not covered by paragraph 25 (j), must be disclosed, together with a full showing of all their interests in other leases or applications for leases under this act. If the beneficiary is a corporation or joint-stock company, a full disclosure must be made of the ownership of its stock and the residence and citizenship of its stockholders.

26. **PAYMENT OF ROYALTY ON PAST PRODUCTION.**—The application must be accompanied by a certified check in the amount of one-eighth of the gross value of all oil and gas produced and sold or held in storage, as per the statement required in paragraph 25 (h). All such sums will be held by the receiver in his account of "Trust funds—Unearned moneys" to await instructions as to their disposition. In lieu of the certified check herein required, the applicant may be permitted to deposit a bond by approved surety company in an amount not less than one-eighth of the estimated gross value of all oil and gas produced and sold or held in storage, securing the payment to the United States within 30 days from the award of the lease of the cash value of the past production due the United States under this act. In cases where the proceeds, or part thereof, of such past production have been deposited in escrow, pursuant to operating agreements under the act of August 25, 1914 (38 Stat., 708), or where in suits brought by the Government affecting such lands the proceeds of production, or part thereof, have been impounded in the custody of receivers, a formal tender may be made of the funds so held in escrow or impounded to the extent available or in the amount necessary, as the case may be, in lieu of such cash payment. In such cases the interest accumulating on such escrowed or impounded moneys after the tender is made will go to the Government.

Liberty bonds will be accepted at original cost in payment of royalty on past production in such proportion as the escrowed or impounded moneys have been invested therein.

Operating contracts made under the provisions of the act of August 25, 1914, supra, and in operation at the time of such tender, will not be terminated until the entire transaction of granting a lease and payment of royalty on past production shall have been consummated; nor will the Department of Justice be requested to dismiss any suits involving the land affected until the application for a lease has been adjudicated and approved; whereupon, after the suit has been dismissed and the impounded money tendered paid over to the Government, the lease will be executed and delivered.

27. **PUBLICATION OF NOTICE.**—Immediately upon the filing of an application for a lease or permit under section 18, 19, or 22 of the act, the register and receiver will cause to be published, at the expense

of the applicant, in a newspaper designated by the register, published in the vicinity of the land and most likely to give notice to the general public, a notice of the said application in substantially the following form:

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

Notice is hereby given that _____, of _____, has applied for an oil and gas _____ under section _____ of the act of February 25, 1920 (Public No. 146), for _____ section _____, township _____ of range _____, _____ meridian, _____ county, State of _____. Any and all persons having adverse or conflicting claims to said land are hereby notified that a full statement, under oath, of such claim should be filed in this office showing a superior right to a permit or lease under said act or a valid existing adverse or conflicting claim to the land or the minerals therein under the public-land laws, on or before _____; otherwise such claim may be disregarded in granting the permit or lease applied for.

_____, 19____.
Register.

The register and receiver will fix a date in the notice on or before which adverse or conflicting claims may be asserted, which date should be not less than 30 nor more than 40 days after the date of first publication of the notice.

Such notice will be published in the regular issue and not in any supplement of the newspaper, once each week for a period of five consecutive weeks if in a weekly paper, or if in a daily paper for a period of 30 days. The register and receiver will post a copy of said notice in a conspicuous place in their office during the period of publication.

Upon the applicant's furnishing satisfactory proof of such publication, but not earlier than the day following that set in the published notice on or before which adverse or conflicting claims were to be filed, the register and receiver will transmit by special letter all papers in the case, including any adverse or conflicting claims that may have been filed, together with proof of posting said notice in their office, to the Commissioner of the General Land Office.

28. ADVERSE OR CONFLICTING CLAIMS—PROCEDURE.—In case of adverse or conflicting claims for leases under section 18, 19, or 22, or permits under section 19 or 22, the Secretary of the Interior is clothed with authority to grant leases or permits, as the case may be, to one or more of them, as shall be deemed just.

(a) To have their claims considered in connection with the awarding of leases or permits it will be necessary for adverse claimants to make full showing (1) of a superior right to a lease or permit under this act, or (2) a superior right under some other public-land law. If the former, the conflicting claimant must make out a complete case in his own behalf as required by these regulations on or before August 25, 1920.

(b) Upon receipt of the application and showing of an adverse claimant the Commissioner of the General Land Office will consider same. If, in his judgment, the adverse claimant has failed to make a prima facie case showing that he is entitled to a lease or permit, as the case may be, for at least part of the land, his application will

be rejected, subject to appeal to the Secretary of the Interior. But if the adverse claimant makes out a prima facie case the commissioner will take such course as may be advisable under the circumstances of each particular case to settle and adjust the rights of the respective parties, and may, if deemed necessary, order a formal hearing to settle disputed questions of fact. In the absence of appeal to the Secretary of the Interior from the final order or decision of the Commissioner same shall be conclusive.

29. COMPROMISES UNDER SECTION 18A.—No special procedure will be outlined under this section. Any request for a compromise or settlement under this section which may be filed in the Land Department will be transmitted to the President with such report as may be deemed advisable under the circumstances of the particular case. In case the land is in a naval petroleum reserve the Navy Department will be consulted before making such report.

IV.—RIGHTS OF WAY FOR PIPE LINES.

30. Section 28 of the act grants to any applicant having the qualifications outlined in section 1 of these regulations rights of way through public lands of the United States, including national forests, for pipe-line purposes for the transportation of oil or natural gas, on condition that the pipe lines for which rights of way are granted shall be operated and maintained as common carriers. The grant carries with it the right to the use of the ground actually occupied by the pipe line, and 25 feet on each side thereof for the purpose of construction, maintenance, and operation of the pipe line. Applicants for rights of way under this act will be governed by the regulations set forth in circular of June 6, 1908 (36 L. D., 567), in so far as applicable, appropriate changes being made in the forms therein prescribed to make them applicable to right-of-way cases arising under the act of February 25, 1920 (public No. 146), for pipe lines to be constructed, maintained, and operated as common carriers. Failure on the part of grantee to fulfill the conditions imposed by the act shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is situated.

V.—FEES AND COMMISSIONS.

31. Under the authority of section 38 of the act, the following fees and commissions are prescribed for transactions under the act:

(a) For receiving and acting on each application for a permit, lease, or other right filed in the district land office in accordance with these regulations, there shall be paid a fee of \$2 for each 160 acres, or fraction thereof, in such application, but such fee in no case to be less than \$10, the same to be paid by the applicant and considered as earned when paid, and to be credited in equal parts on the compensation of the register and receiver within the limitations provided by law.

(b) A commission of 1 per cent on all moneys received in each receiver's office, to be equally divided between the register and receiver; such commission will not be collected from the applicant,

lessee, or permittee in addition to the moneys otherwise provided to be paid.

It should be understood that the commission here provided for will not affect the disposition of the proceeds arising from operations under the act as provided in section 35 thereof; also that such commission will be credited on compensation of registers and receivers only to the extent of the limitation provided by law for maximum compensation of such officers.

VI.—REPEALING AND SAVING CLAUSES.

32. Section 37 of the act provides that hereafter the deposits of coal, phosphate, sodium, oil, oil shale, and gas, referred to and described therein, may be disposed of only in the manner provided in the act "except as to valid claims existent at date of 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.

Stated negatively under this section of the act the following classes of oil or gas placer locations, so called, notwithstanding absence of fraud and full compliance with law in other respects, may not proceed to patent, viz:

(a) Any location made after withdrawal of the land.

(b) Any location made before withdrawal of the land, but not perfected by discovery at date of withdrawal, which does not come within the protective proviso of section 2 of the act of June 25, 1910 (36 Stat., 847); that is to say, any claimant who, at date of withdrawal, was not a bona fide occupant or claimant in diligent prosecution of work leading to discovery of oil or gas, and who has not continued in such diligent prosecution to discovery.

(c) Any location on lands not withdrawn, on which, at the date of the act, the claimant had not made discovery or was not in diligent prosecution of work leading to discovery, and does not continue such work with diligence to discovery.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

JOHN BARTON PAYNE,
Secretary.

APPENDIX.

DIGEST OF DECISIONS AND OPINIONS IN CONNECTION WITH THE ADMINISTRATION OF THE ACT OF FEBRU- ARY 25, 1920, AS APPLIED TO OIL AND GAS.

Permits for lands in Government reclamation projects.

In the case of permits issued for lands within reclamation withdrawals the following additional conditions will be included in the permit:

7. (b) To reimburse damage sustained by any reclamation homestead entryman pursuant to the requirements of paragraph 8 hereof: (c) To pay any damage caused to any reclamation project or the water supply thereof by failure to comply fully with the requirements of paragraph 9 hereof.

8. That as to any lands covered by this permit which are also embraced in any reclamation homestead entry with a reservation of the oil and gas to the United States, permittee shall reimburse the entryman for all damage to crops or improvements caused by such drilling or other operations, such damage to include reimbursement of the entryman by the permittee of all reclamation charges for construction, operation, and maintenance for the portion of the land used and occupied by the permittee during the period of such use and occupation.

9. That as to any lands covered by this permit within the area of any Government reclamation project or in proximity thereto the permittee shall erect such dikes and embankments or take such other precautions as may be necessary, as required by the project manager, effectively to impound any flow of refuse oil, salt water, or oil from wells drilled, to prevent any injury to lands susceptible of irrigation under such project or injury to the water supply thereof.

In such case the following form of bond will be required:

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

U. S. Land Office _____.

Serial number _____.

Bond of oil and gas permittee.

[Act of Feb. 25, 1920 (Public No. 146).]

Know all men by these presents, That _____ of _____ State of _____ as principal, and _____ of _____ State of _____, as surety, are held and firmly bound unto the United States of America, for the use and benefit of the United States and of any reclamation homestead entryman on any of the hereinafter described lands embraced in that certain prospecting permit hereinafter referred to, in the sum of \$5,000, lawful money of the United States, for which payment, well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, successors, and assigns jointly and severally by these presents.

Signed with our hands and sealed with our seals this _____ day of _____, 19____.

The condition of the foregoing obligation is such that, whereas the said principal has been granted under the act of February 25, 1920, Public No. 146,

a permit (Serial No. —) to prospect for oil and gas for two years, upon the following described lands:

on condition that the permittee shall (a) repair promptly, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation; (b) reimburse any homestead entryman of land covered by said permit for all damage to crops and improvements caused by drilling or other operation by the permittee, such damage to include reimbursement of the entryman by the permittee of all reclamation charges for construction, operation and maintenance for the portion of the land used and occupied by the permittee during the period of such use and occupation by the permittee; and (c) erect such dikes and embankments or take such other precautions as may be necessary, as required by the project manager, effectively to impound any flow of refuse oil, salt water, or oil from wells drilled, to prevent any injury to lands susceptible of irrigation under any government irrigation project or injury to the water supply thereof.

Now, therefore, if said principal shall promptly and in all respects comply with said conditions, then the above obligation shall be void and of no effect; otherwise and in default of full and complete compliance therewith the said obligations shall remain in full force and effect.

Signed, sealed and delivered in the presence of:

(Name and address of witnesses.)

_____	_____	[L. s.]
_____	Principal.	
_____	_____	[L. s.]
_____	Surety.	

Permits for deposits reserved under act of July 17, 1914 (38 Stat., 509).

In the case of permits issued for deposits of oil or gas reserved to the United States under the provisions of the act of July 17, 1914 (38 Stat., 509), the following additional condition will be included in paragraph 7 thereof:

(b) To reimburse any entryman or owner of any portion of said lands heretofore entered with a reservation of the oil and gas deposits to the United States made pursuant to the act of July 17, 1914 (38 Stat., 509), for any damage to the crops and improvements of such entryman or owner resulting from drilling or other prospecting operations.

In such case the following form of bond will be required:

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

U. S. Land Office _____
Serial number _____

Bond of oil and gas permittee.

[Act of Feb. 25, 1920, Public No. 146.]

Know all men by these presents, That _____, of _____, State of _____ as principal, and _____, of _____, State of _____, as surety, are held and firmly bound unto the United States of America, for the use and benefit of the United States, and of any entryman or owner of any of the hereinafter described lands embraced in that certain prospecting permit hereinafter referred to, in the sum of \$1,000 lawful money of the United States, for which payment, well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, successors, and assigns, jointly and severally by these presents.

Signed with our hands and sealed with our seals this _____ day of _____, 19____.

The condition of the foregoing obligation is such that, whereas the said principal has been granted under the act of February 25, 1920, Public No. 146, a permit (Serial number _____) to prospect for oil and gas for two years upon

the following lands: _____ on condition that the permittee shall (a) repair promptly, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation; (b) reimburse any entryman or owner of any portion of said lands heretofore entered with a reservation of the oil and gas deposits to the United States made pursuant to the act of July 17, 1914 (38 Stat., 509), for any damage to the crops and improvements of such entryman or owner resulting from drilling or other prospecting operations.

Now, therefore, if said principal shall promptly and in all respects comply with said conditions, then the above obligation shall be void and of no effect; otherwise and in default of full and complete compliance therewith the said obligations shall remain in full force and effect.

Signed, sealed, and delivered in the presence of:

(Name and address of witness.)

_____ [L. S.]
Principal.

_____ [L. S.]
Surety.

Attorneys in fact.

In making applications for lease or permit corporations may act by attorneys in fact. Individuals and associations of individuals should execute their own papers.

Limitation of holdings.

A corporation (except under the relief sections) may not have an interest in more than three leases, either directly as a lessee, or indirectly as a stockholder in a corporate lessee. An individual may hold stock in any number of corporations holding leases provided his stock interests do not represent a greater acreage than 2,560 in the same producing structure, or 7,680 acres in the same State.

Alien ownership.

Aliens may not have any direct holding of lease under the oil-leasing act, but may be stockholders in American corporations holding leases, provided the laws of their country do not deny like privilege to American citizens. 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.

Conflicting preference rights under sections 19 and 20.

The preference right attaches to the claim first initiated and legally maintained. A locator of a mining claim who has complied with all the provisions of section 19 of the act will be entitled to a preference right over a homestead entryman whose entry was made after the location, the homesteader, however, being entitled to hold the surface right. If the homestead entry was made prior to the date of the placer location, the homestead claimant will have the superior right, except in the case of a stock-raising homestead, wherein all minerals are reserved to the United States.

Permit for unwithdrawn land covered by agricultural entry.

No permit will be granted until entryman has elected to take patent with reservation of oil and gas to the United States. If such a waiver is filed, entryman may then exercise his preference right, if any, to permit for lands covered by such entry.

Preference rights under section 20.

Preference rights under section 20 exists in cases where entry was made prior to February 25, 1920, for unwithdrawn or unclassified lands, without any reservation of the minerals by the United States, and thereafter the claimant files a waiver of his right under the entry to the oil or gas. No preference right exists where land is covered by stock-raising entry, nor where entry is made subject to the act of July 17, 1914, with oil and gas reservations.

Assignability of permits.

Assignment of a mere right to a permit will not be recognized, but after permit is granted it may be assigned upon consent of the Secretary of the Interior first had and obtained.

Incontiguous tracts.

Incontiguous tracts within a limited radius may be included in a permit where conditions are such that, because of prior disposals, a reasonable area of contiguous land can not be procured.

Pending application for permit, land designated as oil structure.

Where after application under section 13 for a permit and before permit is granted the land is designated as within the structure of a producing oil or gas field, permit can not be allowed.

Preference right under section 20.

A permit to prospect will be granted an applicant entitled thereto under section 20 of the act, notwithstanding the land is part of a producing oil structure, but only one permit may be granted in the same structure to the same applicant.

Carey Act segregation as affected by leasing law.

The lands in a Carey Act segregation come under the provisions of section 2 of the oil and gas regulations, and permits and leases may be granted for such lands, subject to such stipulations and requirements as the Government may impose for the protection of the reclamation project, to the end that the best development of the lands, both for mineral and agricultural purposes, may be accomplished.

Neither the State nor its contractor would be entitled to any preference right under section 20 of the act, and whether a Carey Act entryman would have such a right would depend upon the conditions affecting his entry being such as to bring him within the provisions of section 20.

Office practice—Conflicting applications.

The issuance of a permit should be deferred, where all is regular and the applicant appears entitled to the permit, until the conflicting applicants have been notified that their applications have been rejected, because subsequent in time, subject to the right to show cause or to appeal within 15 days from receipt of notice.

Posting notice by agent.

Under the law, the action of an agent in posting notice is the action of his principal, but the application for permit may not be executed by agent, unless applicant is a corporation.

Permits of corporations as affected by stockholders' permits.

The maximum number of permits to a corporation under section 13 of the act is not limited by permits of individual stockholders, but

a corporation may not have an interest in more than three permits in same State, nor in more than one in the same geologic structure, directly or indirectly. An individual may hold a direct interest in not more than three permits and his total interest as permittee and stockholder may not exceed an aggregate of 7,680 acres in the same State, or 2,560 acres in the same geologic structure.

Preference right permits to qualified assignees.

Section 19 of the act of February 25, 1920, is construed to permit qualified assignees since October 1, 1919, to secure preference right permits, but no such transferee will be permitted to hold permits exceeding 2,560 acres for such lands in the same geologic structure, nor more than three times that area in the same State.

Permits in Alaska.

The same rule applies in Alaska as in the States; that is, not more than one permit in same structure.

Rights under "paper locations."

Arguments have been presented in favor of a construction of section 37 of the leasing act, that would have the result of validating so-called "paper locations" of placer mining claims, and assuring the ultimate right to absolute patent to such claims in case of discovery. Such locations consist merely of setting stakes to indicate the boundaries, posting a notice, and perhaps filing that notice in a proper recording office. It is understood that practically all the public domain having known possible prospective value for oil, is covered by such locations. It is not believed that Congress had any such intention or that the language of the act justifies any such conclusion.

Under the express requirements of the mining laws and the decisions of the courts covering a long period of years, *discovery of mineral* has been the sole basis for the location of a mining claim. Without such discovery, the mere posting of notices and marking the boundaries creates no right whatever.

The mining law gives the right to any citizen to explore the public domain for the purpose of finding mineral; hence, the courts have protected a citizen in actual, physical possession of a prospective claim on the public domain, while he is engaged in diligent prosecution of work leading to the discovery of mineral, but this is as far as the courts have gone. As applied to oil lands, this rule was well stated by the Supreme Court of California, in the case of *McLemore v. Express Oil Company* (158 Calif., 559), in the following language:

But where the location is incomplete no question of assessment work is involved. What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean any attempted holding, by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view.

These propositions of law were reiterated by the United States Supreme Court as recently as March 15, 1920, in the case of *Cole v. Ralph*.

From the foregoing it will be seen that no rights whatever could be obtained by mere staking and posting unless such act was followed

up with diligent and continuous work leading to discovery. Section 37 of the new leasing act excepts from the operation of that act "valid claims existent at date of 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." Obviously a *valid* claim under the former law is one that the courts and the Land Department will protect and respect as against the claims of others. The mere staking and posting of notices do not constitute such a claim, and the regulations so hold.

Any other view as to the construction of section 37 is inconsistent with the provisions of other sections of the leasing law. Section 19 provides for relief, so-called, for those persons who initiated claims on the public domain at a time when the lands were not withdrawn or classified, and who, at the date of the act, had not perfected such claims by discovery, and it further provides that where such a claimant had expended an amount equal in the aggregate to \$250 toward the development of his claim, such claimant, if in good faith and the claim was initiated prior to October 1, 1919, would be entitled to a prospector's permit for the area embraced in his claim.

The provisions of the relief sections (18, 18a, 19, and 22), were the subject of extended consideration by the committees of Congress, and it is clear that the provisions of section 19 are just as far as Congress intended to go in the protection of claims and locations of the class here under discussion. To construe the act as validating mere "paper locations" would be placing Congress and this department in the position of saying that one who had expended \$250 on his claim would be entitled only to a prospecting permit, while one who had only a stake and notice would be left with the privilege for an indefinite time of ultimately getting absolute title. It is further argued that under the act claimant has the option of taking a relief permit under section 19 or standing on his "paper location" under section 37. One might as logically argue that claims for relief under section 18, over which there has been so much controversy, may now go to absolute patent by virtue of section 37. Congress never contemplated any such anomalous situation.

If the view urged in these arguments were adopted there would be little use for a leasing act for oil lands outside the withdrawn areas, and perhaps for lands within such areas. The purpose and policy sought to be accomplished by this important legislation would be largely negated, and the States and the Reclamation Service would be deprived of funds they are counting on for development purposes. Moreover, there is no practical necessity for the construction urged to protect any legitimate interest. The new law is liberal in the extreme in giving all good-faith claimants, who have made any material expenditures on the ground, fair and reasonable opportunity to transmute such claims into permits and leases under the new law under far more practical working conditions than existed under the former laws.

Oil-land leases—Stock-raising homesteads.

The question has arisen as to whether or not the provisions of section 20 of the leasing act are applicable to lands covered by stock-raising homestead entries.

Section 20 is one of the so-called relief sections of the law, all of which sections are based upon alleged equities of the persons to whom a preference right to a permit or lease is accorded. It was designed to recognize the equities of persons who had gone upon the public domain and made homestead entries under the 160 or 320 acre homestead law, neither of which contains any reservation of minerals, upon the theory and under the belief that they were obtaining an unrestricted title to the land. Because of a *subsequent* withdrawal or classification of the land as mineral after the allowance of their entries, and after they had spent their time and money upon the land, they were under the necessity of either losing the land entirely or accepting a patent under the provisions of the act of July 17, 1914, reserving the oil and gas deposits in the land to the United States. No such equity or reason exists in the case of entries under the 160 or 320 acre homestead law made upon lands *therefore* withdrawn or classified as mineral, because the entryman knew at the time he made the entry that the mineral was known and reserved to the United States, and the most he could obtain was a patent expressly excluding the oil and gas deposits. This is true of all stock-raising homestead entries; for by the terms of the act itself all minerals within the land are expressly reserved to the United States, together with the right to enter upon the lands, mine and remove the same.

Lands within stock-raising homestead entries need not be withdrawn or classified for the purpose of preventing disposition of minerals under the agricultural land laws, because the minerals are reserved in the law itself. It is, therefore, clear that Congress, when it used in section 20 of the leasing act, the words "lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry," had in mind only the entries under the 160 or 320 acre homestead law, which contains no reservation or classification of mineral, and where *subsequently*, by reason of a withdrawal or classification, the entryman was, as stated above, under the necessity of accepting a restricted patent. Any other construction of the statute would involve the disregarding of the language "and not withdrawn or classified as mineral at the time of entry."

The regulations specifically state that the preference right under section 20 of the act exists only where the land was entered prior to withdrawal or classification, and *subsequent* to entry was withdrawn or classified as oil or gas bearing in character. This clearly could have no application to entries under the stock-raising homestead law, where all minerals are reserved and where no withdrawal or classification is necessary.

Preferential rights of agricultural claimants.

Whatever preferential rights homesteaders or other agricultural entrymen as such may have to oil permits or leases must be found in section 20 of the act. While this section is not as clear and specific in some respects as might be desired, it is apparent that the class of entrymen or patentees on which Congress intended by this section to confer a preference right is those who made their entries when the land was *not withdrawn or classified* as mineral, and who were therefore permitted to make their entries without any reservation of the mineral to the Government, but were or will be compelled

to take a patent with the reservation because of a withdrawal or classification of the land, or because in the meantime the land has become of known mineral character, before submission of final proof. It is also apparent that this section is in the nature of a relief provision, designed to take care of those who found themselves in the situation above described at the time the act was passed, and not intended to provide generally for the disposition of mineral rights under the homestead law in the future.

With these general propositions in mind, the following specific statements may be made:

1. If the land was withdrawn or classified *at the time of entry* so that the entry was made with a reservation of the mineral, there is no preference right. Conversely, to entitle the homesteader to a preference right the entry must have been properly made *without a reservation* of the mineral.

2. There can be no preference right on an entry allowed after February 25, 1920. See section 12 of the regulations.

3. There can be no preference right on a stock-raising entry under the act of December 29, 1916, for under that act all entries are made with a reservation of the mineral.

4. If the homestead entry was made without reservation of the mineral, but after the lands were of known mineral character, and for the purpose of acquiring mineral rights, there is no preference right to a permit because (a) such an entry should have been made with a reservation of the mineral and the requisite nonmineral affidavit on which the entry was procured was fraudulent, and (b) the entry is not "of lands bona fide entered as agricultural."

5. But where one has an original entry under the 160 or 320 acre law and an additional entry under the stock-raising (640-acre) law, the entryman will have the same rights under the original as he would have had had he not made the additional.

6. Where one has an entry without a reservation of the mineral, nobody (not even the entryman himself) may acquire a permit or lease for the mineral so long as the entry stands in that shape.

7. But if the entryman in the case last above mentioned files a waiver of the mineral rights in the land, then he may exercise his preference right, if he has any, and if not, others may file application for a mineral permit or lease.

8. The "reservation" of the mineral above referred to is pursuant to section 2 of the act of July 17, 1914 (38 Stat., 509), which provides that the mineral occupant shall pay any damage caused to the agricultural claimant.

9. Where a patented entry, or one on which final certificate has issued, has been sold or transferred, the transferee would have the same rights as the entryman, provided he acquired the land before January 1, 1918; but if he acquired it after that date, there would be no preference right in anybody.

10. A patentee, or entryman with final certificate, with a reservation of the mineral to the Government, who has a preference right can not withhold the land from development indefinitely. Section 12 of the regulations provides that if anybody else applies for a permit on the land, the preference-right man shall be given notice and allowed 30 days within which to exercise his preference and apply for a permit himself; otherwise he will be out.

11. The preference-right claimant must be qualified to take a permit under the law the same as anybody else; for instance, an alien transferee of patented land could not get a permit or lease; one who has already received the limit of permits allowed could not get a permit.

12. The matter of whether the agricultural entry on which a preference right to a permit is predicated is within or without a known producing structure cuts no figure in connection with the preference rights here under consideration, provided that only one permit may be granted to the same structure.

13. In case of conflict between a preference-right claimant under sections 18 and 19 and one under section 20 the one would prevail whose rights were prior in their lawful inception.

Conflicts between nonmineral claims and oil placers.

When an otherwise valid oil placer location is perfected by discovery the land is not subject to other appropriation so long as the

mining claim is maintained, and should it be entered or applied for under some other law prior to the filing of an application for patent by the mining claimant the burden of protecting his claim by contest will rest upon him. This is necessarily so, as the land is not segregated from record entry by a mere mining location of which the land department has no record.

An oil placer location, perfected by discovery, laid over land embraced in a prior, valid, subsisting homestead entry, is ineffective so long as the homestead stands. (Prior to the act of July 17, 1914, the mineral claimant could contest the homestead and cause its cancellation; under that act the homesteader may retain surface rights and the mineral is automatically withdrawn; and under the leasing act the homesteader might have a preference right to a permit for the mineral.) A stock-raising homestead is an exception to this rule, for all minerals are reserved therefrom, and the oil deposits could have been located under the placer law up to February 25, 1920.

A mere "paper" oil placer location (that is, one without a discovery) will not prevent a homestead entry for the land, but where the claimant of a "paper location" is on the ground in diligent prosecution of work leading to discovery at the time the land is homesteaded, he may by contest defeat the homestead entry.

The allowance (after Feb. 25, 1920) of a homestead entry on land covered by valid rights to relief permits or leases under sections 18 or 19, is entirely within the discretion of the Secretary of the Interior.

Reservation of mineral—When required.

Where a homestead entry (not under the grazing act) is made without a reservation of the oil to the Government and the land is withdrawn or classified as oil land before completed final proof is submitted, the entryman must take patent with a reservation of the oil, unless he can procure a reclassification of the land by the department or a removal of the withdrawal, or unless he can show at a hearing (the burden of proof being on him) that the land was not of a known mineral character at date of final proof.

But where, in the case last stated, the withdrawal or classification as mineral was not made until after final proof was submitted, the entryman will be entitled to a patent without a reservation, unless the Government can show (the burden of proof being on the Government), at a hearing if necessary, that the land was of known mineral character at the date of final proof. If the Government can show this, the result will be the same regardless of whether there has been a withdrawal or classification.

Interests under drilling contracts.

A drilling contract carrying with it a right in the proceeds, or in the land itself, will be considered an interest in the lease, and when it comes time to grant a lease such drilling contractor will have to show himself qualified to take a lease. In all cases where the drilling is performed under contract the nature and terms of the contract must be disclosed before lease is granted.

As to permits, the situation is different. If a contractor desires to be recognized by the department in connection with a permit, it will be necessary for him to file his contract for approval; but if he

so desires he may explore the land under contract with the permittee and bring his contract to the attention of the department only when and if he wishes to be recognized as being interested in such lease as may be applied for.

Discovery on adjoining claims.

In case of two claims that adjoin, it is necessary to have discovery on each claim to secure lease for both under section 18. If the discovery is only on one claim, the lease must be confined to the limits of the claim containing the discovery.

Right of assignees to a lease under section 18.

Good faith locators or their grantees, whose right to a lease is governed by the provisions of section 18 of the act, may transfer their interests to contractors, assignees, or lessees who were in undisputed possession prior to July 1, 1919; and such owners may then jointly apply for a lease for their aggregate holdings or they may make a division of the area and each seek a separate lease for his individual holdings.

Discovery applicable to all parts of location.

A discovery on any part of a placer claim used as a basis for relief under section 18, 19, or 22 of the act will be deemed applicable to every part thereof for leasing purposes.

Only citizens may obtain permits or leases.

The oil and gas leasing bill provides for the issuance of prospecting permits and leases to citizens of the United States, associations of such citizens, corporations organized under the laws of the United States or of any State or Territory thereof, or municipalities. It follows from this that no one but a citizen can obtain a lease or permit, but aliens may be stockholders in some cases.

Citizenship of agent immaterial.

A notice of a prospecting permit may be posted by an agent or attorney in fact in the name of his principal. The citizenship of such agent is immaterial.

Oil claims antedating leasing act.

Oil placer claims for unwithdrawn and unclassified lands upon which discovery was made prior to the enactment of the mineral leasing law are not, in the absence of fraud, affected thereby so long as the claimant complies with the law. If discovery was not made, the claimant in order to protect his right to a patent, must have been engaged in diligent work leading to a discovery at the date of the act and must be able to show that he has continued such work to discovery.

Preference right of State grantee.

To entitle the grantee of a State to a preference right under section 20 of the mineral leasing law, the selection must have been approved and transferred by the State prior to January 1, 1918.

When the mineral leasing act took effect.

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

The act of February 25, 1920, supra, section 13, authorizes the Secretary of the Interior, under such rules as he may prescribe, to grant to qualified persons a prospecting permit "upon not to exceed 2,560 acres of land," and allows would-be applicants to initiate a preference right, good for 30 days, by posting notice upon the ground. This statute and the rules and regulations promulgated thereunder do not, however, confer upon such locators a right to obtain a prospecting permit for the entire acreage described in any notice of location. The statute simply fixes the maximum amount which may be embraced in a single permit, 2,560 acres.

Paragraph 2 of the regulations approved March 11, 1920, states that the granting of such a permit "is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or its entirety, as the facts may be deemed to warrant."

Subject to the foregoing, the following rule is announced for the guidance of the officers of the Interior Department and of parties in interest in the disposition of conflicts and controversies arising out of locations and applications made or filed during the day of February 25, 1920:

All locations made or applications filed, pursuant to section 13 of the act of February 25, 1920, at any time during the day of February 25, 1920, will be held, treated, and regarded as simultaneous, and in case of conflict of location and application, in whole or in part, between two or more qualified applicants, all such applicants will be allowed 30 days from notice within which to compromise their differences by division of lands or otherwise, in default of which this department will make such division or disposition as the facts may warrant.

Limitations under section 27.

It will be noted that section 27 seems to apply to two classes of interests, namely, those held directly from the Government and those held indirectly through ownership of stock in corporations. As to leases held directly, there does not seem to be much doubt that the same person or corporation may not at the same time have more than three leases in any one State, or more than one lease within the geologic structure of the same producing oil or gas field.

The section further provides that "no corporation shall hold any interest as a stockholder of another corporation in more than such number of leases." This language, taken in conjunction with the language preceding it, seems to hold that a corporation may not have an interest in more than three leases, either directly as a lessee, or indirectly as a stockholder in a corporate lessee. True, the next clause provides that "no person or corporation shall take or hold any interest or interests as a member of an association or associations, or as a stockholder of a corporation or corporations," in which the aggregate leasehold interests exceed an amount equivalent to the maximum number of acres allowed to one lessee. It is clear that as to a corporation the clause last quoted is inconsistent with the clause first quoted, and as the clause first quoted is more restrictive as to a corporation than the following clause, it is considered that the former controls. But this leaves an individual with the right to hold three leases directly, and, at the same time, to have a stock interest in corporations having leases, provided his direct and indirect holdings

do not exceed the maximum for one person, namely, not exceeding 2,560 acres in the same structure or 7,680 in the same State. It follows also that a person may hold stock in any number of corporations holding leases provided his stock interests do not represent a greater acreage than that above stated.

While under the regulations substantially the same restrictions apply to permits as apply to leases, the number of leases one has will not necessarily limit the number of permits he may have, but when a permit ripens into a lease, then the restrictions as to leases apply to both.

Bond with preference right application.

In the case of a preference right application under section 19, the bond may be filed therewith, or deferred until permit is authorized.

Articles of incorporation.

Under section 25 of the regulations, a certified copy of the articles of incorporation should be filed with the original application, but an uncertified copy is sufficient to accompany the duplicate.

Rights of association in geologic structure.

An association may hold only one permit in the same geologic structure, and the interest of a member of different associations may aggregate 2,560 acres in the same structure.

Ceded Ute Indian lands subject to leasing act.

By departmental decision of August 9, 1920, it was held that the oil and gas deposits contained in that portion of the Ute Indian Reservation in the State of Colorado formerly occupied by the Uncompahgre and White River Utes, ceded to the United States by the confederated bands of Ute Indians by the treaty of March 2, 1868, as amended, accepted, and ratified by the act of June 15, 1880 (21 Stat., 199), and opened to disposal under the provisions of the act of July 28, 1882 (22 Stat., 178), are subject to disposal under the mineral leasing act.

Uintah ceded Indian lands subject to leasing act.

The Uintah Indian lands opened to sale and entry by act of May 27, 1902 (32 Stat., 263), are subject to the operation of the leasing act of February 25, 1920.

Procedure in relation to agricultural claims in conflict with permits or leases, or subject to preferential rights.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 6, 1920.

*Registers and Receivers,
United States Land Offices.*

GENTLEMEN: Instructions have been requested from several local offices as to the proper procedure to take in connection with non-mineral applications or selections filed for lands embraced in applications for prospecting permits or leases, or which may be subject to preference rights, under the leasing act of February 25, 1920.

A prospecting permit is granted in contemplation of a future lease for a part or all of the same land in case of discovery; hence

as to subsequent nonmineral entries, with a reservation of the oil or gas to the United States, the lands embraced in a prospecting permit should be treated the same as if embraced in an oil or gas lease, with a reservation to the United States of the right "to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in extracting or removing the deposits therein," pursuant to section 29 of the leasing act. As the placing of such a reservation in a lease is made discretionary with the Secretary, it necessarily follows that any disposition of the surface of lands embraced in permits or leases is by the act left entirely discretionary with the Land Department, to be determined on the facts of each particular case.

The so-called relief sections of the act (18, 18(a), 19, and 22) recognize equitable rights in the owners and occupants of claims initiated under the general mining laws and accord to them a preference right which may be exercised by applying within the time and in the manner prescribed by said sections for oil or gas leases or permits. These prior rights or claims, if asserted within the time accorded the claimants by the statute, are superior, both in time and right, to nonmineral applications or selections having their inception subsequent to the leasing act. It is apparent also that the allowance of nonmineral appropriation of the surface of vacant lands in producing structures will interfere with the leasing of such lands by competitive bidding under section 17 of the leasing act.

You are therefore directed:

LANDS OUTSIDE PRODUCING STRUCTURES.

(1) In all cases of applications to make nonmineral entries or selections of lands *outside* of areas which have been designated by the department as within the geologic structures of producing oil or gas fields, and which lands are also embraced in applications for prospecting permits or in permits granted, such nonmineral applications should be received, noted on your records, suspended, and transmitted to the Commissioner of the General Land Office for instructions. If in any case such nonmineral entry or selection shall be allowed by you on instructions from the Commissioner, the same will be with a reservation of the oil or gas to the United States, and subject to the rights of the permittee or lessee, as the case may be, to use so much of the surface of such land as is necessary in extracting and removing the mineral deposits, without compensation to the nonmineral entryman for such use, in accordance with section 29 of the leasing act.

LANDS IN PRODUCING STRUCTURES.

(2) You will reject all applications to enter, file upon, or select under the nonmineral land laws, lands which have been or shall be designated by the department as being *within* the known geologic structures of producing oil or gas fields, pending consideration by the department of the agricultural character and value of such lands and a determination as to whether the surface of the land is of agricultural character and value and may be disposed of without detriment to the public interest.

CONFLICTS WITH PREFERENCE RIGHTS.

(3) All homestead entries or other nonmineral filings or selections *allowed* prior to receipt of these instructions and subsequent to February 24, 1920, which are found to be in conflict with preference rights timely asserted under the remedial provisions of the act of February 25, 1920, shall be suspended pending the consideration of the application for the permit or lease, and the parties in interest so advised. If the permit or lease be allowed or granted, such homestead entry or other allowed nonmineral application or selection will be canceled if the lands are within designated geologic structures of producing oil or gas fields. If outside of such designations, the agricultural entries, applications, or selections will be allowed to stand or will be canceled in the discretion of the department, as provided in section 1 hereof.

LIABILITY FOR DAMAGES.

(4) Your attention is drawn to the distinction which exists under the law with respect to the rights of permittees and lessees of mineral deposits in cases where the nonmineral entry or selection is allowed subsequent to the application for permit or lease or subsequent to February 25, 1920, in conflict with rights recognized by sections 18, 18(a), 19, and 22 of the leasing act, and those cases where the nonmineral entry, filing, or selection with a reservation of the mineral (either at time of entry or later) under the acts of July 17, 1914 (36 Stat., 509), or December 29, 1916 (39 Stat., 862), precedes the permit, lease, or mineral right, for in the latter case the nonmineral claimant is entitled to be reimbursed for all damages to crops and improvements by reason of the operations of the permittee or lessee, as provided in those acts, while in the former the respective rights of the mineral and surface claimants are governed by section 29 of the leasing act.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved October 6, 1920.

JOHN BARTON PAYNE,
Secretary.

[PUBLIC—No. 146—66TH CONGRESS.]

[S. 2775.]

AN ACT To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, 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, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided,* That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further,* That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further,* That 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.

[Sections 2 to 8, inclusive, relate to coal.]

[Sections 9 to 12, inclusive, relate to phosphates.]

OIL AND GAS.

SEC. 13. That the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of

not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified. The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby: *Provided*, That in the Territory of Alaska prospecting permits not more than five in number may be granted to any qualified applicant for periods not exceeding four years, actual drilling operations shall begin within two years from date of permit, and oil and gas wells shall be drilled to a depth of not less than five hundred feet, unless valuable deposits of oil or gas shall be sooner discovered, within three years from date of the permit and to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered, within four years from date of permit: *Provided further*, That in said Territory the applicant shall have a preference right over others to a permit for land identified by temporary monuments and notice posted on or near the same for six months following such marking and posting, and upon receiving a permit he shall mark the corners of the tract described in the permit upon the ground with substantial monuments within one year after receiving such permit.

SEC. 14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: *Provided*, That the permittee shall be

granted a lease for as much as one hundred and sixty acres of said lands, if there be that number of acres within the permit. The area to be selected by the permittee shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public-land surveys; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposits made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of \$1 per acre, the rental paid for any one year to be credited against the royalties as they accrue for that year, with the right of renewal as prescribed in section 17 hereof. The permittee shall also be entitled to a preference right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount or value of the production, and under such other conditions as are fixed for oil or gas leases in this act, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe: *Provided*, That the Secretary shall have the right to reject any or all bids.

SEC. 15. That until the permittee shall apply for lease to the one quarter of the permit area heretofore provided for he shall pay to the United States 20 per centum of the gross value of all oil or gas secured by him from the lands embraced within his permit and sold or otherwise disposed of or held by him for sale or other disposition.

SEC. 16. That all permits and leases of lands containing oil or gas, made or issued under the provisions of this act, shall be subject to the condition that no wells shall be drilled within two hundred feet of any of the outer boundaries of the lands so permitted or leased, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners, and to the further condition that the permittee or lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by him to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits. Violations of the provisions of this section shall constitute grounds for the forfeiture of the permit or lease, to be enforced through appropriate proceedings in courts of competent jurisdiction.

SEC. 17. That all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same, not subject to preferential lease, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations to qualified applicants in areas not exceeding six hundred and forty acres and in tracts which shall not exceed in length two and one-half times their width, such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, which shall not be less than 12½

per centum in amount or value of the production, and the payment in advance of a rental of not less than \$1 per acre per annum thereafter during the continuance of the lease, the rental paid for any one year to be credited against the royalties as they accrue for that year. Leases shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods. Whenever the average daily production of any oil well shall not exceed ten barrels per day, the Secretary of the Interior is authorized to reduce the royalty on future production when in his judgment the wells can not be successfully operated upon the royalty fixed in the lease. The provisions of this paragraph shall apply to all oil and gas leases made under this act.

SEC. 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the preexisting placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than $12\frac{1}{2}$ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided*, That not more than one-half of the area, but in no case to exceed three thousand two hundred acres, within the geologic oil or gas structure of a producing oil or gas field shall be leased to any one claimant under the provision of this section when the area of such geologic oil structure exceeds six hundred and forty acres. Any claimant or his successor, subject to this limitation, shall, however, have the right to select and receive the lease as in this section provided for that portion of his claim or claims equal to, but not in excess of, said one-half of the area of such geologic oil structure, but not more than three thousand two hundred acres.

All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the execution of such lease shall be fixed by the Secretary of the Interior under appropriate rules and regulations: *Provided, however*, That as to all like claims situate within any naval petroleum reserve the producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof, upon the terms and payment of royalties for past and future production as herein provided for in the leasing of claims. No wells shall be drilled in the land

subject to this provision within six hundred and sixty feet of any such leased well without the consent of the lessee: *Provided, however,* That the President may, in his discretion, lease the remainder or any part of any such claim upon which such wells have been drilled, and in the event of such leasing said claimant or his successor shall have a preference right to such lease: *And provided further,* That he may permit the drilling of additional wells by the claimant or his successor within the limited area of six hundred and sixty feet theretofore provided for upon such terms and conditions as he may prescribe.

No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: *Provided,* That no claimant acquiring an interest in such lands since September 1, 1919, from a claimant on or since said date claiming or holding more than the maximum allowed claimant under this section shall secure a lease thereon or any interest therein, but the inhibition of this proviso shall not apply to an exchange of any interest in such lands made prior to the 1st day of January, 1920, which did not increase or reduce the area or acreage held or claimed in excess of said maximum by either party to the exchange: *Provided further,* That no lease or leases under this section shall be granted, nor shall any interest therein inure, to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for.

Sec. 18a. That whenever the validity of any gas or petroleum placer claim under preexisting law to land embraced in the Executive order of withdrawal issued September 27, 1909, has been or may hereafter be drawn in question on behalf of the United States in any departmental or judicial proceedings, the President is hereby authorized at any time within twelve months after the approval of this Act to direct the compromise and settlement of any such controversy upon such terms and conditions as may be agreed upon, to be carried out by an exchange or division of land or division of the proceeds of operation.

SEC. 19. That any person who on October 1, 1919, was a bona fide occupant or claimant of oil or gas lands under a claim initiated while such lands were not withdrawn from oil or gas location and entry, and who had previously performed all acts under then existing laws necessary to valid locations thereof except to make discovery and upon which discovery had not been made prior to the passage of this act, and who has performed work or expended on or for the benefit of such locations an amount equal in the aggregate of \$250 for each location if application therefor shall be made within six months from the passage of this act shall be entitled to prospecting permits thereon upon the same terms and conditions, and limitations as to acreage, as other permits provided for in this act, or where any such person has heretofore made such discovery, he shall be entitled to a lease thereon under such terms as the Secretary of the Interior may prescribe unless otherwise provided for in section 18 hereof: *Provided*, That where such prospecting permit is granted upon lands within any known geologic structure of a producing oil or gas field, the royalty to be fixed in any lease thereafter granted thereon or any portion thereof shall be not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided, however*, That the provisions of this section shall not apply to lands reserved for the use of the Navy: *Provided, however*, That no claimant for a permit or lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

All permits or leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear.

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.

[Section 21 relates to oil shale.]

ALASKA OIL PROVISIO.

SEC. 22. That any bona fide occupant or claimant of oil or gas bearing lands in the Territory of Alaska, who, or whose predecessors in interest, prior to withdrawal had complied otherwise with the requirements of the mining laws, but had made no discovery of oil or gas in wells and who prior to withdrawal had made substantial

improvements for the discovery of oil or gas on or for each location or had prior to the passage of this act expended not less than \$250 in improvements on or for each location shall be entitled, upon relinquishment or surrender to the United States within one year from the date of this act, or within six months after final denial or withdrawal of application for patent, to a prospecting permit or permits, lease or leases, under this act covering such lands, not exceeding five permits or leases in number and not exceeding an aggregate of one thousand two hundred and eighty acres in each: *Provided*, That leases in Alaska under this act whether as a result of prospecting permits or otherwise shall be upon such rental and royalties as shall be fixed by the Secretary of the Interior and specified in the lease, and be subject to readjustment at the end of each twenty-year period of the lease: *Provided further*, That for the purpose of encouraging the production of petroleum products in Alaska the Secretary may, in his discretion, waive the payment of any rental or royalty not exceeding the first five years of any lease.

No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

[Sections 23, 24, and 25 relate to sodium.]

GENERAL PROVISIONS APPLICABLE TO COAL, PHOSPHATE, SODIUM, OIL,
OIL SHALE, AND GAS LEASES.

SEC. 26. That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this act appropriate provision for its cancellation by him.

SEC. 27. That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State; no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field; no corporation shall hold any interest as a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this act. Any interests held in violation of this act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in

the United States district court for the district in which the property, or some part thereof, is located, except that any ownership or interest forbidden in this act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition: *Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22, or to prevent any number of lessees under the provisions of this act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this act, or the transportation of coal: *Provided further*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same: *And provided further*, That if any of the lands or deposits leased under the provisions of this act shall be subleased, trustee, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of, or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or seiling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this act, the lease thereof shall be forfeited by appropriate court proceedings.

Sec. 28. That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipeline purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in

which the property, or some part thereof, is located in an appropriate proceeding.

SEC. 29. That any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 30. That no lease issued under the authority of this act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

SEC. 31. That any lease issued under the provisions of this act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located, whenever the lessee fails to comply with any of the provisions of this act, of the lease, or of the general

regulations promulgated under this act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act: *Provided*, That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

SEC. 33. That all statements, representations, or reports required by the Secretary of the Interior under this act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require.

SEC. 34. That the provisions of this act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits.

SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production $52\frac{1}{2}$ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress, known as the reclamation act, approved June 17, 1902, and for past production 20 per centum, and for future production $37\frac{1}{2}$ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

SEC. 36. That all royalty accruing to the United States under any oil or gas lease or permit under this act on demand of the Secretary of the Interior shall be paid in oil or gas.

Upon granting any oil or gas lease under this act, and from time to time thereafter during said lease, the Secretary of the Interior shall, except whenever in his judgment it is desirable to retain the same for the use of the United States, offer for sale for such period as he may determine, upon notice and advertisement on sealed bids or at public auction, all royalty oil and gas accruing or reserved to

the United States under such lease. Such advertisement and sale shall reserve to the Secretary of the Interior the right to reject all bids whenever within his judgment the interest of the United States demands; and in cases where no satisfactory bid is received or where the accepted bidder fails to complete the purchase, or where the Secretary of the Interior shall determine that it is unwise in the public interest to accept the offer of the highest bidder, the Secretary of the Interior, within his discretion, may readvertise such royalty for sale, or sell at private sale at not less than the market price for such period, or accept the value thereof from the lessee: *Provided, however,* That pending the making of a permanent contract for the sale of any royalty, oil or gas as herein provided, the Secretary of the Interior may sell the current product at private sale, at not less than the market price: *And provided further,* That any royalty oil or gas may be sold at not less than the market price at private sale to any department or agency of the United States.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at date of 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.

SEC. 38. That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land offices on account of business transacted under the provisions of this act.

Approved, February 25, 1920.

COAL LAND LAWS AND REGULATIONS—ACT OF FEBRUARY 25,
1920 (41 STAT., 437).

(Exclusive of Alaska.)

[Circular No. 679.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 1, 1920.

Register and Receiver, United States Land Offices.

SIRS: Under authority of the act of Congress approved February 25, 1920 (Public No. 146), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," the following rules and regulations are prescribed for the administration of the provisions of said act relative to coal:

1. **Methods of disposition.**—Sections 2 to 8, inclusive, of said act authorize the Secretary of the Interior to—

(1) Divide into leasing units and award leases of coal lands and coal deposits owned by the United States;

(2) Issue permits to prospect unclaimed and undeveloped areas of coal lands and coal deposits; and

(3) Issue limited licenses or permits to prospect for, mine, and take for use coal from public lands.

2. **Lands to which applicable.**—The act applies to the coal lands, or the deposits of coal, classified and unclassified, owned by the United States, including those in national forests, and including the coal deposits reserved under laws authorizing entries and patents with reservation to the United States of such deposits; also to coal lands in ceded or restored Indian reservations the proceeds from the disposition of which are the property of the United States. It does not include land or deposits in (a) national parks, (b) forests created under the act of March 1, 1911 (36 Stat., 961), known as the Appalachian forest reserve act, (c) lands in military or naval reservations, (d) Indian reservations, nor (e) ceded or restored Indian lands, the proceeds from the disposition of which are credited to the Indians.

All permits or leases for the exploration for or development of coal deposits under this act within the limits of national forests or other reservations or withdrawals to which this act is applicable shall be subject to and contain such conditions, stipulations, and reservations as the Secretary of the Interior shall deem necessary for the protec-

tion of such forests, reservations, or withdrawals, and the uses and purposes for which created.

3. Who may take.—Leases and prospecting permits may be issued to citizens of the United States, associations of citizens, corporations organized under the laws of the United States or any State or Territory thereof, and to municipalities. Limited licenses or permits for the mining of coal may be issued to citizens, associations of citizens, and municipalities. Leases may also be issued to operating railroad companies to mine coal for their own use for railroad purposes, subject to certain restrictions found in section 2 of the act.

4. Equitable rights.—Equitable rights of claimants who, prior to the date of the act, occupied and improved coal lands in good faith may be recognized in awarding leases of such lands, in which cases the rents and royalties, not less than the minimum provided for leases under the act, will be fixed by the Secretary of the Interior.

5. Repealing and saving clause.—Section 37 of the act provides that hereafter the deposits of coal, phosphate, sodium, oil, oil shale, and gas referred to and described in the act, including lands and deposits described in joint resolution of August 1, 1912 (37 Stat., 1346), may be disposed of only in the manner provided in the act "except as to valid claims existent at date of 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."

As to coal, those claims initiated under the preexisting law may go to patent, which, at the date of the act, were covered by valid coal declaratory statements or applications to purchase which are timely followed up and perfected in accordance with the controlling coal land laws (secs. 2348 to 2352, Revised Statutes), and the regulations thereunder (Circular No. 557); likewise, one who has opened and improved a mine of coal on unsurveyed lands may proceed to perfect his claim within sixty days from the filing of the official plat of survey, pursuant to section 2349 R. S.

6. Fees and commissions.—(a) For receiving and acting upon each application for a permit, lease, or license filed in the district land office in accordance with these regulations, there shall be paid a fee of \$2 for every 160 acres, or fraction thereof, in such application, but such fee in no case to be less than \$10, the same to be paid by the applicant and considered as earned when paid, and to be credited in equal parts on the compensation of the register and receiver within the limitations provided by law.

(b) Registers and receivers shall be entitled to a commission of 1 per cent of all moneys received in each receiver's office, to be equally divided between the register and receiver; such commission will not

be collected from the applicant, lessee, or permittee in addition to the moneys otherwise provided to be paid.

It should be understood that the commissions herein provided for will not affect the disposition of the proceeds arising from operations under the act, as provided in section 35 thereof; also that such commissions will be credited on compensation of registers and receivers only to the extent of the limitation provided by law for maximum compensation of such officers.

I. COAL LEASES.

7. Leasing units.—Under section 2 of the act, no coal land or deposits may be leased until after division into suitable leasing units or tracts. Such leasing units may be created by the Secretary of the Interior (*a*) pursuant to the petition of a qualified applicant, that is, qualified to take a lease under the act, or (*b*) on his own initiative.

Leasing units will not exceed 2,560 acres in area. All material factors, such as character and depth of the coal deposits, topography of the land, situation with respect to adjacent private holdings of coal lands, the proximity of rail or water transportation, and outlet for other lands in the immediate vicinity, as well as the investment reasonably required to provide the requisite development and operating facilities, will be given consideration in the establishment of leasing units.

Such leasing units will comprise contiguous tracts, except in cases where it appears that noncontiguous tracts can be practically worked on a single mine or unit.

Leasing units may include, in whole or in part, unsurveyed land, but a survey of the land will be made and the leasing unit conformed to such survey prior to the execution of a lease thereof.

8. Minimum development.—An actual bona fide expenditure for mine operation, development, or improvement purposes of the amount determined by the Secretary, and stated in the lease offer hereinafter referred to, is adopted as the minimum basis for granting leases, with the requirement that not less than one-third of the required investment shall be expended in development of the mine during the first year, and a like amount each year for the two succeeding years, the investment during any one year over such proportionate amount for that year to be credited on the expenditure required for the ensuing year or years. A bond executed by the lessee, with approved corporate surety, will be required to be furnished, in the sum of \$10,000, conditioned upon the expenditure of the specified amount of investment. After said investment has been made a similar bond in the sum of \$5,000, conditioned upon compliance with the terms of the lease, will be required.

9. Petitions for leasing units.—Any person, association of persons, or corporation qualified to take a lease may file in the proper district land office a petition to divide coal lands into leasing units for purpose of lease. Such petition should set forth—

(a) Name and post-office address of petitioner.

(b) Statement showing qualifications of petitioner to take a lease under the act; proof of citizenship to be made by affidavit if native born; if naturalized, by certified copy (special form for land cases) of certificate thereof if copy is not already on file; if a corporation, by certified copy of the articles of incorporation; if a municipality, a showing of (1) the law or charter and procedure taken by which it became and exists a legal body corporate, (2) that the taking of a permit or lease is authorized under such law or charter, and (3) that the action proposed has been duly authorized by the governing body of such municipality; and the applicant must make affidavit that he or it is not disqualified to take a permit or lease under the provisions of section 27 of the act. Corporations must also submit a showing as to the residence and citizenship of its stockholders.

(c) Description of the land, by legal subdivisions if surveyed, or if not surveyed, by metes and bounds or natural monuments, with such particularity as to render possible its identification with certainty. Where possible, description of the land by the approximate subdivisions of the future survey should be given.

(d) Statement of the general situation of the land with respect to other mines, its topography, outlet to market, and transportation facilities.

(e) Character and extent of the coal deposits so far as known.

(f) The contemplated investment for the development and equipment of a producing mine of a stated average daily output.

(g) Maximum royalty petitioner is willing to pay if awarded lease of the land described in petition, or any specific portion thereof, together with a statement by or on behalf of petitioner that, in the absence of any better bid for lease of said land, he will, within 30 days from auction of lease, execute a lease therefor and comply with its terms in good faith.

10. Action by local office.—Registers and receivers will assign current serial numbers to such petitions, promptly note the petitions on their records, and transmit them to the General Land Office with report of the record status of the land described.

After receipt of such a petition, no filing for any of the land described therein will be accepted until so directed, except other petitions for dividing into leasing units.

11. Action on petition.—If the terms offered by the petitioner for lease of the land or deposits are considered tentatively acceptable as

minimum terms for such land or deposits, examination, classification, and blocking the land into leasing unit or units will be directed. If it be found thereby that the land desired by the petitioner constitutes a suitable unit, and the terms offered by him are considered acceptable therefor, the land or deposits will be advertised for lease to the bidder offering the highest bonus for such lease on the same terms. But, if it be found as a result of such examination and blocking out, that the land does not constitute an acceptable leasing unit, or if the royalty offered, or investment contemplated, is considered inadequate, the petitioner will be so advised, and also of the form and area in which the land or deposits will be leased and the minimum terms on the basis of which lease will be offered for sale, whereupon the petitioner will be permitted to amend his offer to meet the terms required. If the offer is so amended, the leasing units will be advertised for lease to the bidder offering the highest bonus for such lease; but if no bidder offers a bonus for such lease, same will be awarded to the petitioner. In case the petitioner fails to make a satisfactory minimum lease offer, the leasing unit may or may not be offered for lease, in the discretion of the Secretary of the Interior.

12. Notice of offer.—When any coal lands are divided into leasing tracts, the appropriate district land office will be advised thereof, whereupon the register will publish a notice, for a period of 30 days in a newspaper of general circulation in the county in which the lands or deposits are situated, of the offer of the land for lease, and the date and hour on which bids will be received at his office, such date to be not earlier than the last day of publication. The notice will describe the land, state the amount of royalty and rental to be charged, and the minimum investment required, and that the sale of lease will be made at public auction at the time fixed to the qualified bidder offering the highest bonus for the privilege of leasing the land on the terms set forth. A copy of the notice will also be posted in the land office during publication thereof. Publication of the offer will be at the expense of the Government.

All bidders at any public sale of leases are warned against committing any act by intimidation, combination or unfair management, to hinder or prevent bidding thereat, in violation of section 59 of the Criminal Code of the United States, approved March 4, 1909.

13. Auction of lease.—At the time fixed in the notice, the register or receiver will, by public auction at his office, offer the land or deposits for lease on the terms and conditions fixed in the notice to the qualified bidder of the highest amount offered as a bonus for the privilege of leasing the land, subject to the approval of the Secretary of the Interior. The successful bidder must deposit with the receiver on the day of sale a certified check or cash, for one-fifth of the

amount of his bid, such sum to be deposited by the receiver in his account "Trust funds—Unearned money."

14. Right to reject bids.—The right is reserved by the Secretary of the Interior to reject any and all bids; and should a bid be rejected, the deposit made by the bidder will be returned.

15. Action by bidder.—The successful bidder will be allowed 30 days from date of auction within which (a) to file in the district land office a lease, duly executed by him in triplicate in the form herein prescribed (par. 18); (b) to file evidence of qualifications as prescribed by paragraph 9 (b) hereof, unless such evidence has theretofore been filed; (c) to file the bond required by Section 2 (b) of the lease, or U. S. bonds in lieu thereof under the act of February 24, 1919 (40 Stat., 1148); (d) to pay the remainder of the bonus bid by him and the annual rental for the first year of the lease, together with the required filing fee of \$2 for each 160 acres of land, or fraction thereof, but in no case less than \$10.

16. Action by district officers.—At the end of the 30 days allowed the successful bidder, or sooner, if the foregoing be complied with by him, the local officers will forward by special letter all papers with full report of action taken. In case of default, the amount deposited by the bidder will be forfeited, and disposed of as other receipts under this act.

17. Modifications of leases.—Under section 3 of the act, where a lease has been issued, modifications may be secured to include therein additional contiguous coal lands or coal deposits, not exceeding a total of 2,560 acres in the lease. Under section 4 of the act, upon satisfactory showing by the lessee that all of the workable coal within a tract covered by the lease will be exhausted, worked out, or removed within three years thereafter, additional tracts may be leased, which, including the lands or deposits remaining in the lease, shall not exceed 2,560 acres, such lease of additional lands to be made under similar procedure and on the same conditions as original leases.

18. Form of lease.—Leases hereunder will be in substance as follows:

U. S. Land Office at _____
Serial No. _____

THE UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.

**MINING LEASE OF COAL LANDS UNDER ACT OF FEBRUARY 25,
1920.**

This indenture of lease, entered into, in triplicate, this _____
Date. day of _____, A. D. 19___, by and between the United States
of America, acting in this behalf by _____ Secretary of the
Parties. Interior, party of the first part, hereinafter called the lessor, and
_____ of _____ party of the second part, hereinafter

called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress, approved February 25, 1920 (41 Stat., —), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," hereinafter called the "act."

WITNESSETH:

That the lessor, in consideration of the rents and royalties to be paid and the covenants to be observed as hereinafter set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine and dispose of all the coal in, upon, or under the following-described tracts of land, situated in the State of _____, to wit: _____, containing _____ acres, more or less, together with the right to construct all such works, buildings, plants, structures, and appliances as may be necessary and convenient for the mining and preparation of the coal for market, the manufacture of coke or other products of coal, the housing and welfare of employees, and subject to the conditions herein provided, to use so much of the surface as may reasonably be required in the exercise of the rights and privileges herein granted.

Purposes.

Description of land. Mining and surface rights.

SECTION 1. That the lessor expressly reserves:

(1a) The right to permit for joint or several use such easements or rights of way, including easements in tunnels upon, through, or in the land leased, occupied, or used as may be necessary or appropriate to the working of the same or other lands containing the deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

Rights reserved by lessor. Easements.

(1b) The right to lease, sell, or otherwise dispose of the surface of said lands or any part thereof under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the mining and removal of the coal therein, and to lease other mineral deposits in the lands, under the provisions of said act.

Disposition of surface.

(1c) Full power and authority to carry out and enforce all the provisions of section 30 of said act to insure the sale of the production of said leased lands to the United States and to the public at reasonable prices, to prevent monopoly; and to safeguard the public welfare.

Monopoly and fair prices.

Sec. 2. The lessee in consideration of the lease of the rights and privileges aforesaid hereby covenants and agrees as follows:

(2a) To invest in actual mining operations, development, or improvements upon the land leased, or for the benefit thereof, the sum of _____ dollars, of which sum not less than one-third shall be so expended during the first year succeeding the execution of this instrument and a like sum each of the two succeeding years, unless sooner expended; and submit annually, at the expiration of each year for the said period, an itemized statement of the amount and character of said expenditure during such year.

Investment.

(2b) To furnish a bond in the sum of \$10,000, conditioned upon the expenditure of the amount specified in (2a) hereof, and after said investment has been made, a similar bond in the

Bond.

sum of \$5,000, conditioned upon compliance with the terms and provisions of this lease.

Annual rental. (2 c) To pay as an annual rental for each acre or part thereof covered by this lease the sum of 25 cents per acre for the first year, payment of which amount is hereby acknowledged, the sum of 50 cents per acre per year for the second, third, fourth, and fifth years, and \$1 per acre for the sixth and each succeeding year during the life of this lease, all such annual payments of rental to be made to the receiver of the United States Land Office of the district in which said land is situated, on the anniversary of the date hereof, and to be credited on the first royalties to become due hereunder during the year for which said rental was paid.

Royalty. (2 d) To pay to such receiver a royalty of _____ cents on every ton of 2,000 pounds of coal mined during the first 20 years succeeding the execution of this lease. Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.

Record of coal mined. (2 e) To determine accurately the weight of all coal mined from the leased premises, and to accurately enter the weight or weights thereof in due form in books to be kept and preserved by the lessee for such purpose.

Quarterly reports. (2 f) To furnish quarterly, within 30 days after the expiration of the quarter, a written report covering such quarter, certified under oath by the superintendent of the mine, or by such other agent having personal knowledge of the facts as may be designated by the lessee for such purpose, showing the number of tons of 2,000 pounds of coal mined during the quarter, the character and quality thereof, amount of coal and products and by-products thereof disposed of and price received therefor, amount of coal and its products in storage or held for sale, and amount used in operations under this lease.

Annual reports. (2 g) Also to furnish annually, and at such other times as the Secretary of the Interior may require, in the manner and form prescribed by the Secretary of the Interior, plat, map, or tracings showing all development work and improvements upon the leased lands, and other related information, with a report the leased lands, a statement as to the amount and grade of as to all buildings, structures, or other works placed in or upon coal produced and sold, and amount received therefor by operations hereunder, and, if a corporation, the amount of capital stock and list of its stockholders.

Mine maps. (2 h) To keep at the mine office clear, accurate, and detailed maps, on a scale not more than 200 feet to the inch, in the form of horizontal projections on tracing cloth, of the workings in each coal bed in each separate mine on the leased lands, a separate map to be made for each such bed, and for the surface immediately over the underground workings, and to be so arranged with reference to a public land corner that the maps can be readily superimposed.

Detailed map of workings. Each map of the workings in any coal bed shall show the thickness of the coal and of partings, and the dip and strike of each bed at intervals of 500 feet or less; the location of all

openings connecting such bed with the workings in any other bed, or with any adjacent mine, or with the surface; the location of all entries, gangways, rooms, or breasts, and all other mine openings, shafts, airways, appliances, and devices, constructed or placed in the mine or any of the workings thereof; and such maps shall also show the elevation relative to sea level or a Government survey corner of the principal points of the various beds and workings.

Blueprints or reproductions in duplicate of the maps required as aforesaid shall be furnished the lessor when made, and supplemental prints or reproductions in duplicate furnished on or before the first day of each succeeding year, showing the extensions, additions, and changes since the last map or supplement was submitted. All mine progress maps kept by the lessee shall at all times be subject to examination by lessor.

Progress maps.

(2 i) That, beginning with the fourth year of the lease, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, the lessee shall mine and pay a royalty on not less than _____ tons of coal per year, unless on application and showing made, operations shall be suspended for not exceeding six months at any one time, pursuant to section 7 of the act; or unless the lessee shall pay the royalty less rent, on such minimum amount of coal, for one year in advance, in which case operations may be suspended for that year.

Royalty on minimum production.

(2 j) 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 lessor being first had and obtained.

Assignment of lease.

Sec. 3. It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof, and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period, but in case the lessee be dissatisfied with the rate of royalty or other terms and conditions so fixed, he may terminate this lease in the manner and under the conditions provided in sections 6 (b) and 6 (c) hereof.

Readjustment of terms.

Sec. 4. This lease is made subject to the following provisions, which the lessee accepts and covenants faithfully to perform and observe, unless the laws of the State where the leased land or deposits are situated otherwise provide, in which case such State laws control:

(4 a) The lessee shall carry out and observe regulations prescribed by the Secretary of the Interior and in force at the date hereof relative to (1) reasonable diligence, skill, and care in the operation of said property in accordance with approved methods and practices; (2) the prevention of undue waste; (3) the safety and welfare of miners; and (4) insuring the fair and just weighing or measurement of the coal mined by each miner.

Operating regulations.

(4 b) And also shall pay all miners and other employees, both above and below ground, at least twice each month in lawful money of the United States, and shall permit such miners and

Payment of wages.

Freedom of purchase. other employees full and complete freedom of purchase, but with a view to increasing safety this provision shall not apply to the purchase of explosives, detonators, or fuses; and shall not require or permit miners or other employees, except in case of

Eight-hour workday. emergency, to work underground for more than eight hours in any one workday, and shall not employ any boy under the age of 16 years, or any girl or woman without regard to age in any mine below the surface.

Inspection. SEC. 5. And the lessee also expressly agrees that all mining and related operations shall be subject to the inspection of authorized representatives of the lessor, and that such representatives, with all proper and necessary assistants, may at all reasonable times enter into and upon the leased lands and survey and examine same and all surface and underground improvements, works, machinery, equipment, and operations.

Examination of books and records. (5 a) And also shall permit the lessor to examine all books and records pertaining to operations under this lease, and to make copies of and extracts from any or all of same, if desired.

Operations on adjoining lands. (5 b) And also shall permit the lessor or its lessees or transferees, with the approval of the lessor, to make and use upon or under the leased lands any workings necessary for freeing any other mine from water or gas, or extinguishing fires, causing as little damage or interference as possible to or with the mine or mining operations of the lessee hereunder; provided, that any such use by a transferee or another lessee shall be conditioned upon the payment to the lessee hereunder of the amount of actual damages sustained thereby and adequate compensation for such use.

Result of forfeiture. (5 c) And also shall, at the termination of this lease, as the result of forfeiture thereof, pursuant to paragraph (6 d), deliver up to the lessor the lands covered thereby, including all fixtures, machinery, improvements, and appurtenances, other than strictly personal property, situate on any of said lands, in good order and condition, so as to permit of immediate continued operation to the full extent and capacity of the leased premises.

SEC. 6. It is further mutually understood and agreed as follows:

Waiver of conditions. (6 a) That the lessor may, in writing, waive any breach of the covenants and conditions contained herein, except such as are required by the act, but any such waiver shall extend only to the particular breach so waived, and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular cause of forfeiture prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

Surrender of lease. (6 b) The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease upon payment of all rents, royalties, and other debts due and payable to the lessor and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that the public interest will not be impaired; and the lessee may with like consent surrender any legal subdivision of the area included within the lease; but in no case shall such termination

be effective until the lessee shall have made provision for the preservation of any mines or productive works or permanent improvements on the lands covered hereby.

(6c) That on the termination of this lease, pursuant to the last preceding paragraph, the lessor, his agent, licensee, or lessee shall have the exclusive right, at the lessor's election, to purchase at any time within six months, at the appraised value thereof, all buildings, machinery, equipment, and tools, placed by the lessee in or on the land leased hereunder, save and except all underground timbering, and such other supports and structures as are necessary for the preservation of the mine, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to be paid for said buildings, machinery, equipment, and tools to be purchased as aforesaid, shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party thereto and the third by the two so designated), the valuation of the three or a majority of them to be conclusive; that pending such election to purchase within said period of six months none of said buildings or other property shall be removed from their normal position; that if such valuation be not requested, or the lessor shall affirmatively elect not to purchase within said period of six months, the lessee shall have the privilege of removing said buildings and other property, except said timbering and other supports and structures, as are necessary for the preservation of the mine, as aforesaid.

Privilege of purchasing equipment.

(6d) If the lessee shall fail to comply with the provisions of the act or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at date hereof, the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided in section 31 of the act, but this provision shall not be construed as depriving the lessor of any legal or equitable remedy which the lessor might otherwise have.

Forfeiture.

SEC. 7. It is further covenanted and agreed that, should the lessee fail to take prompt and necessary steps to prevent loss or damage to the mine, property, or premises, or danger to the employees, the lessor may enter on the premises and take such measures as may be deemed necessary to prevent such loss or damage or to correct the dangerous or unsafe condition of the mine or works thereof, which shall be at the expense of lessee.

Action by lessor to prevent loss or damage.

SEC. 8. It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Continuing obligation.

SEC. 9. It is also further agreed that no member of or delegate to Congress, or resident commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes

Unlawful interest.

of the United States and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat., 1109), relating to contracts enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA,
By _____
Secretary of the Interior, Lessor.

Lessee .

Witnesses.

II. COAL PROSPECTING PERMITS.

19. **Character of lands.**—Permits are authorized by section 2 of the act to be issued to qualified applicants to prospect unclaimed, undeveloped lands where prospecting or exploratory work is necessary to determine the existence or workability of the coal deposits.

20. **Area.**—Permits will be issued for tracts of not exceeding 2,560 acres of contiguous lands, or, if not contiguous, in reasonably compact form, considering the reasons for not including a contiguous area. Where lands included in a permit have been or may be disposed of with reservation of the coal deposits, a permittee must make full compliance with the law under which such reservation was made, reference being made to the acts of March 3, 1909 (35 Stat., 844); June 22, 1910 (36 Stat., 583); December 29, 1916 (39 Stat., 862), and other laws authorizing such reservations.

21. **Rights conferred.**—A permit will entitle the permittee to the exclusive right to prospect for coal on the land described therein. In the exercise of this right, the permittee shall be authorized to remove from the premises only such coal as may be necessary in order to determine the workability and commercial value of the coal deposits in the land.

22. **Application for permit.**—Applications for permits shall be filed in the proper district land office, and, after due notation thereof on the records, forwarded to the General Land Office with report of status of the land affected. No specific form of application is required and no blanks will be furnished, but it should cover, in substance, the following points:

- (a) Applicant's name and address;
- (b) Proof of citizenship and qualifications to take a lease as required by paragraph 9 (b) hereof;

(c) Description of land for which a permit is desired by legal subdivision if surveyed, and by metes and bounds and such other description as will identify the land if unsurveyed. If unsurveyed, a survey sufficient to identify more fully and segregate the land may be required before permit is granted;

(d) Condition of coal occurrences, so far as determined; description of workings, and outcrops of coal beds, if any, and reason why the land is believed to offer a favorable field for prospecting for coal;

(e) Detailed plan and method of conducting prospecting or exploratory operations on the land, estimated cost of carrying out such proposed prospecting operations, and the diligence with which such operations will be prosecuted;

(f) Brief statement of applicant's experience in coal mining operations, if any, together with one or more references as to his reputation and business standing.

The application must be under oath of the applicant, or if a corporation, of one of its officers theretofore duly authorized.

23. **Form of permit.**—On receipt of the application, if found sufficient and the lands subject thereto, a permit will be issued, of which the district land office will be advised. Permits will be in substantially the following form:

U. S. Land Office at _____
Serial No. _____

THE UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.

COAL PROSPECTING PERMIT.

Know all men by these presents, that the Secretary of the Interior, under and by virtue of the act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain, approved February 25, 1920 (Public No. —), has granted and does hereby grant a permit to _____ of the exclusive right for a period of two years from date hereof to prospect for coal the following described lands: _____ but for no other purpose, under the provisions of said act and upon the following express conditions, to wit:

1. To begin prospecting work within 90 days from date hereof and to diligently prosecute the same during the period of such permit in accordance with the following plan: _____

2. To remove from said premises only such coal or other material as may be necessary to prospecting work, and to keep a record of all coal mined and disposed of, payment of a royalty thereon of 25 cents per ton of 2,000 pounds to be made to the receiver of the district land office not later than during the calendar month succeeding that during which such coal was disposed of.

3. To afford all facilities for inspection of the prospecting work on behalf of the Secretary of the Interior, and to make report on demand of all matters pertaining to the character, progress, and results of such work.

4. To observe such conditions as to the use and occupancy of the surface of the land as provided by law, in case any of said lands shall have been or may be entered or patented with a reservation of the coal deposits to the United States.

Expressly reserving to the Secretary of the Interior the right to permit for joint or several use such easements or rights of way upon, through or in the land embraced herein as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes; also reserving to the United States the right to lease, sell or otherwise dispose of the surface of said lands under existing law or laws hereafter enacted in so far as said surface is not necessary for the use of the permittee in prospecting hereunder, and *further reserving* the right and authority to cancel this instrument for failure of the permittee to comply with any of the conditions hereof, after 30 days' notice of the reasons for such cancellation.

Valid existing rights acquired prior hereto on the lands described herein will not be adversely affected hereby.

Dated this _____ day of _____, 19__.

Secretary of the Interior.

24. Leases to permittees.—A qualified permittee who has shown, within the period of the permit, that the land included therein contains coal in commercial quantities, will be entitled to a lease for such land, or part thereof as the permittee may desire, upon due application and publication of notice thereof. The application for lease should be filed in the proper district land office before the expiration of the period of the permit. An application for lease under this section should describe the land desired, and set forth fully and in detail the extent and mode of occurrence of the coal deposits as disclosed by the prospecting work performed under the permit. Such leases will be granted without competitive bidding, on rents and royalties to be fixed by the Secretary of the Interior, and otherwise substantially in the form of lease provided in section 18 of these regulations.

III. LIMITED LICENSE TO MINE COAL.

Under section 8 of the act, the Secretary of the Interior is authorized to issue limited licenses to individuals and associations of individuals to mine and take coal for their own use, but not for sale, without the payment of any rent or royalty, and such licenses may be issued to municipalities to mine and dispose of coal without profit to their residents "for household use." Attention is called to the fact that, under this section, an individual or association of individuals may mine and take coal under such a license for his or their own strictly local domestic needs for fuel, whatever such use may be,

but in no case for barter or sale; while a municipality may under such a license supply coal to its residents for household use only, which excludes mining coal by a municipality either for its own use or use of its residents other than for household purposes, thus barring factories, stores, heating and lighting plants and other business establishments.

25. Area and duration.—(a) A license to an individual or association, in the absence of unusual conditions or necessity, will be limited as to area to a legal subdivision of 40 acres or less; and may be revoked at any time, and such license will expire by limitation at the end of two years from date of issuance, unless timely renewed on application filed and proper showing made prior to expiration of the two-year period.

(b) Licenses to municipalities are limited as to area by the provisions of the act, as follows: Not to exceed 320 acres for a municipality of less than 100,000 population, not to exceed 1,280 for a municipality of not less than 100,000 and not more than 150,000 population, and not to exceed 2,560 acres for a municipality of 150,000 population or more. Licenses to municipalities will expire by limitation at the end of four years from date of issuance, unless renewed; but every such licensee must make to the Commissioner of the General Land Office an annual report of all operations conducted under such license.

26. Application for license.—Application for such limited license must be filed in duplicate in the district land office having jurisdiction over the land, in the form herein provided. A municipality must file with the application a showing of (1) the law or charter and procedure taken by which it became and exists a legal body corporate, (2) that the taking of a license is authorized under such law or charter, and (3) that the proposed action has been duly authorized by the governing body of the municipality. Appropriate serial number will be assigned to such application, notation made thereof on the office records, and the application promptly forwarded to the General Land Office with report of status of the lands.

27. Form of application—License.—An application in substantially the following form, approved by the Secretary of the Interior, will constitute the license; one copy will be retained for the land office records and the other returned to the licensee. Blank forms of applications will be printed and available in the district land offices.

THE UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.

U. S. Land Office at.....

Serial No.....

APPLICATION FOR LICENSE TO MINE COAL UNDER SECTION 8
OF THE ACT OF FEBRUARY 25, 1920.

-----,
----- 19--,
The COMMISSIONER OF THE GENERAL LAND OFFICE,

Washington, D. C.

SIR: The undersigned ----- of -----, hereby appl for a license to prospect for, mine, and remove coal from the following described land ----- containing approximately ----- acres, situated within the ----- land district, State of -----, and in support of this application make the following representations as to qualifications to receive a license.-----

The purpose for which the coal mined hereunder is to be used is: ----- for which approximately ----- tons are required annually.

In consideration of the granting of the license applied for, the applicant hereby agrees to the following express terms and conditions, to wit:

1. That only so much of the surface of the land as may be necessary to prospecting and mining operations hereunder shall be used or occupied by said licensee, and the right is reserved by the Secretary of the Interior to dispose of any portion of said land not already disposed of with reservation of the coal deposits under the act of June 22, 1910 (36 Stat., 583), or other acts authorizing such disposition, such licensee to observe in prospecting and mining operations hereunder all provisions of the laws under which any part of the land has been or may hereafter be disposed of with reservation of the coal deposits therein.

2. That all prospecting, mining and removal of coal hereunder shall be conducted in accordance with approved methods and practice, considering the extent of the operation; that no underground working shall be abandoned until all the available coal is taken therefrom; that due provision shall be made for the prevention of fires in the mine or mines opened hereunder and for the safety of the miners or other workmen engaged therein, and reasonable diligence, skill, and care shall be exercised in all mining operations hereunder; and shall carry out and observe any regulations prescribed by the Secretary of the Interior, and in force at the date hereof, relative to the foregoing provisions in this paragraph; and on termination the licensee to leave the premises in a safe condition for future mining operations.

3. That the license is granted for a period of ----- years from the date hereof, subject to an extension at the end of such period for a like term of years upon application for such extension and satisfactory showing as to the mining of coal from the land, giving the amount of coal mined, the disposition made thereof, the condition of the mine, and the amount of coal remaining in the land which can be mined.

4. That the right is reserved to cancel and recall this license at any time, after 30 days' notice of such purpose, for failure to mine and use the coal deposits in accordance with the conditions and provisions of said act, or for committing waste or other unnecessary damage to the land or the deposits therein, for abandonment or nonuse or for other violation of the terms of this license;

that in case this license is canceled prior to its expiration, or expires by limitation, all mining machinery, tools and appliances placed thereon by said licensee shall be removed within 60 days from date of expiration of notice of such cancellation; otherwise, said machinery, tools, and appliances to become the property of the United States: *Provided*, That no underground support or structure necessary for the preservation of the mine shall be removed.

5. That the right is reserved to the Secretary of the Interior to permit, upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in said lands as may be necessary or appropriate to the working of the same, or of other lands containing coal, or other deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the United States, its lessees, or permittees, and for other public purposes; al the right to dispose of the land, or any deposits therein, under laws authorizing such disposition with reservation of the coal deposits to the United States and the right to prospect for, mine, and remove the same.

6. That said permittee, if a municipality, shall submit to the Secretary of the Interior annually on the anniversary of the date hereof a complete and detailed report of operations under the permit, together with a map or maps showing the mine workings, giving character and dimensions of underground work performed, buildings and structures erected, and machinery installed during the year, size of the coal vein mined and its dip and strike, character of the coal, amount of coal mined, amount on hand or in stock and where stored, number of miners employed, total amount of wages paid miners and other employees, number of other employees, total salaries paid, cost of supplies and other operating expenses, amount of coal and its products sold and amount received therefor, giving a full statement of the operations under the permit.

Subscribed and sworn to by _____, this _____ day of _____, 19__.

[Signature of applicant.]

Approved:

Secretary of the Interior.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved April 1, 1920.

JOHN BARTON PAYNE,
Secretary of the Interior.

**AN ACT TO PROMOTE THE MINING OF COAL, PHOSPHATE, OIL,
OIL SHALE, GAS AND SODIUM ON THE PUBLIC DOMAIN.**

(Public No. 146, 41 Stat., —.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, 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, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or re-

served for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further*, That 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.

COAL.

SEC. 2. That the Secretary^a of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: *Provided*, That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants: *Provided further*, That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act, prospecting permits for a term of two years, for not exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act for all or part of the land in his permit: *And provided further*, That no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated: *And provided further*, That no company or corporation operating a common carrier railroad shall be given or hold a permit or lease under the provisions of this Act for any coal deposits except for its own use for railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations, and no such company or corporation shall receive or hold more than one permit or lease for each two hundred miles of its railroad line within the State in which said property is situated, exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam: *And provided further*, That nothing herein shall preclude such a

railroad of less than two hundred miles in length from securing and holding one permit or lease hereunder.

Sec. 3. That any person, association, or corporation holding a lease of coal lands or coal deposits under this Act may, with the approval of the Secretary of the Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.

Sec. 4. That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the existing lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same conditions as in case of an original lease.

Sec. 5. That if, in the judgment of the Secretary of the Interior, the public interest will be subserved thereby, lessees holding under lease areas not exceeding the maximum permitted under this Act may consolidate their leases through the surrender of the original leases and the inclusion of such areas in a new lease of not to exceed two thousand five hundred and sixty acres of contiguous lands.

Sec. 6. That where coal or phosphate lands aggregating two thousand five hundred and sixty acres and subject to lease hereunder do not exist as contiguous areas, the Secretary of the Interior is authorized, if, in his opinion the interests of the public and of the lessee will be thereby subserved, to embrace in a single lease noncontiguous tracts which can be operated as a single mine or unit.

Sec. 7. That for the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods: *Provided*, That the Secretary of the Interior may, if in his judgment the public interest will be subserved thereby, in lieu of the provision herein contained requiring continuous operation of the mine or mines, provide in the lease for the payment of an annual advance royalty upon a minimum number of tons of coal, which in no

case shall aggregate less than the amount of rentals herein provided for: *Provided further*, That the Secretary of the Interior may permit suspension of operation under such lease for not to exceed six months at any one time when market conditions are such that the lease can not be operated except at a loss.

Sec. 8. That in order to provide for the supply of strictly local domestic needs for fuel, the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue limited licenses or permits to individuals or associations of individuals to prospect for, mine, and take for their use but not for sale, coal from the public lands without payment of royalty for the coal mined or the land occupied, on such conditions not inconsistent with this Act as in his opinion will safeguard the public interests: *Provided*, That this privilege shall not extend to any corporations: *Provided further*, That in the case of municipal corporations the Secretary of the Interior may issue such limited license or permit, for not to exceed three hundred and twenty acres for a municipality of less than one hundred thousand population, and not to exceed one thousand two hundred and eighty acres for a municipality of not less than one hundred thousand and not more than one hundred and fifty thousand population; and not to exceed two thousand five hundred and sixty acres for a municipality of one hundred and fifty thousand population or more, the land to be selected within the State wherein the municipal applicant may be located, upon condition that such municipal corporations will mine the coal therein under proper conditions and dispose of the same without profit to residents of such municipality for household use: *And provided further*, That the acquisition or holding of a lease under the preceding sections of this Act shall be no bar to the holding of such tract or operation of such mine under said limited license.

[Secs. 9 to 12 inclusive apply to phosphates,

Secs. 13 to 20 inclusive apply to oil and gas,

Sec. 21 applies to oil shales.

Sec. 22 applies to oil and gas in Alaska,

Secs. 23 and 25 inclusive apply to sodium.]

GENERAL PROVISIONS APPLICABLE TO COAL, PHOSPHATE, SODIUM, OIL, OIL SHALE,
AND GAS LEASES.

Sec. 26. That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this Act appropriate provisions for its cancellation by him.

Sec. 27. That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State; no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field; no corporation shall hold any interest as a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corpora-

tions holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this Act. Any interests held in violation of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property, or some part thereof, is located, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition: *Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal: *Provided further*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same: *And provided further*, That if any of the lands or deposits leased under the provisions of this Act shall be subleased, trustee, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of, or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings.

SEC. 28. That rights of way through the public lands, including the forest reserves, of the United States, are hereby granted for pipe line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for

the district in which the property, or some part thereof, is located in an appropriate proceeding.

SEC. 29. That any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 30. That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

SEC. 31. That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

SEC. 33. That all statements, representations, or reports required by the Secretary of the Interior under this Act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require.

SEC. 34. That the provisions of this Act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits.

SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

SEC. 36. That all royalty accruing to the United States under any oil or gas lease or permit under this Act on demand of the Secretary of the Interior shall be paid in oil or gas.

Upon granting any oil or gas lease under this Act, and from time to time thereafter during said lease, the Secretary of the Interior shall, except whenever in his judgment it is desirable to retain the same for the use of the United States, offer for sale for such period as he may determine, upon notice and advertisement on sealed bids or at public auction, all royalty oil and gas accruing or reserved to the United States under such lease. Such advertisement and sale shall reserve to the Secretary of the Interior the right to reject all bids whenever within his judgment the interest of the United States demands; and in cases where no satisfactory bid is received or where the accepted bidder fails to complete the purchase, or where the Secretary of the Interior shall determine that it is unwise in the public interest to accept the offer of the highest bidder, the Secretary of the Interior, within his discretion, may readvertise such royalty for sale, or sell at private sale at not less than the market price for such period, or accept the value thereof from the lessee: *Provided, however*,

That pending the making of a permanent contract for the sale of any royalty, oil or gas as herein provided, the Secretary of the Interior may sell the current product at private sale, at not less than the market price: *And provided further*, That any royalty, oil, or gas may be sold at not less than the market price at private sale to any department or agency of the United States.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of 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.

SEC. 38. That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land offices on account of business transacted under the provisions of this Act.

Approved, February 25, 1920.

**PHOSPHATE LAWS AND REGULATIONS—ACT OF FEBRUARY 25,
1920 (41 STAT., 437).**

[Circular No. 696.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 23, 1920.

*Registers and Receivers,
United States Land Offices.*

SIRS: Sections 9 to 12, inclusive, of the act of Congress approved February 25, 1920 (Public No. 146), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," authorize the Secretary of the Interior to lease lands belonging to the United States containing deposits of phosphates, and accordingly the following rules and regulations are prescribed for the administration of the provisions of said sections of the act:

1. **Lands to which applicable.**—The act applies to the lands belonging to the United States containing deposits of phosphates, including lands in national forests and including the phosphate deposits reserved under laws authorizing entries and patents with reservation to the United States of such deposits; also to phosphate lands in ceded or restored Indian reservations the proceeds from the disposition of which are the property of the United States. The act is not applicable to lands in the Appalachian Forest Reserve (under act of March 1, 1911, 36 Stats., 961), lands in national parks, lands withdrawn for military or naval purposes, or lands in ceded or restored Indian reservations the proceeds from the disposition of which belong to the Indians.

All leases of phosphate deposits within the limits of national forests or other reservations or withdrawals to which the act is applicable shall be subject to and contain such conditions, stipulations, and reservations as the Secretary of the Interior shall deem necessary for the protection of the forests, reservations or withdrawals, and the uses and purposes for which created.

2. **Leasing area.**—Leases may embrace not exceeding 2,560 acres of lands or deposits, in compact form, the length of which shall not exceed two and one-half times its width. If surveyed, the lands must be taken by legal subdivisions of such survey; and if unsurveyed, to be surveyed by the Government at the expense of the applicant prior to the issuance of lease. Such surveys will be made under the regu-

lations governing public land surveys, prior to the execution of which applicants will be required to deposit with the United States surveyor general the estimated expense thereof.

3. **Qualifications of applicants.**—Leases may be issued to (*a*) citizens of the United States, (*b*) associations of citizens, and (*c*) to corporations organized under the laws of the United States or of any State or Territory thereof.

4. **Minimum development.**—An actual bona fide expenditure for mine operations, development or improvement purposes of the amount determined by the Secretary of the Interior will be a condition in each lease as the minimum basis on which each lease will be granted, with the requirement that not less than one-third of such proposed investment shall be expended in development of the mine during the first year, and a like amount each year for the two succeeding years, the investment during any one year over such proportionate amount for that year to be credited on the expenditure required for the ensuing year or years. A bond executed by the lessee with approved corporate surety will be required to be furnished in the sum of \$10,000, conditioned upon the expenditure of the specified amount of investment. After said investment has been made a similar bond in the sum of \$5,000, conditioned upon compliance with the terms of the lease will be required.

5. **Minimum production.**—Under the provision of the act requiring leases to be for indeterminate periods upon condition of a minimum annual production after the first three years, except where interrupted by strikes, the elements or casualties not attributable to the lessee, each lease will contain appropriate conditions fixing such minimum production of phosphates or phosphate rock from the land.

6. **Application for lease.**—Application for a lease must be under oath and filed in the proper district land office, addressed to the Commissioner of the General Land Office. No specific form is required and no blanks will be furnished, but the application should cover the following points:

(*a*) Applicant's name and address.

(*b*) Citizenship of applicant, whether native born or naturalized; and if naturalized, furnish a certificate thereof in the form provided for use in public land matters, if one is not already on file in the Land Department; if an association, citizenship of each member must be shown; if a corporation, furnish a certified copy of its articles of incorporation and a showing as to the residence and citizenship of its stockholders.

(*c*) A statement that the applicant holds no lease of phosphate lands under said act within the State in which the land is situated; nor, as a member of an association or stockholder in a corporation, holds any interest or interests in any lease or leases of phosphate

lands under said act, which, together with the lands applied for, exceed in the aggregate 2,560 acres.

(*d*) Description of the land, whether vacant or unclaimed; if surveyed, by legal subdivisions; if unsurveyed, by metes and bounds, and where possible by the approximate subdivisions the land will be when surveyed. If the land is unsurveyed, a survey thereof at the expense of the applicant must be provided for prior to the execution of a lease thereof, as provided in section 10 of the act.

(*e*) Description of the phosphate deposits in the land, giving nature and extent thereof; the proposed method of mining and reduction of same; and proposed investment in mining operations thereon and reduction facilities therefor if a lease be granted the applicant.

7. **Action by local office.**—Registers and receivers will assign current serial numbers to such applications when filed, promptly note their records, and require a notice of the application to be published at the expense of the applicant for a period of 30 days in a newspaper of general circulation in the county in which the deposits are situated, advising all adverse claimants or protestants that if they desire to object, or protect any interest as against the applicant, prompt action to that end should be taken, and upon proof of such publication, transmit the applications to the General Land Office with report of record status of the land described therein.

After receipt of such an application, no filing for any of the land described therein will be accepted until so directed, unless the application be rejected.

8. **Action on application.**—Upon consideration of the application in the General Land Office, if the tracts of land or deposits are found subject to lease and the application is otherwise satisfactory, a lease substantially in the form herewith will be submitted to the applicant for his execution.

9. **Action by successful applicant.**—The successful applicant will be allowed 30 days after receipt of the lease for execution within which to (*a*) file in the district office the lease duly executed by him in triplicate and in the form herein prescribed; (*b*) file evidence of citizenship and qualifications as required by paragraph 6 hereof, if not theretofore filed by him; (*c*) file the bond required by paragraph 2 *b* of the lease, or United States bonds in lieu thereof under the act of February 24, 1919 (40 Stat., 1148); and (*d*) pay the annual rental for the first year of the lease.

10. **Action by local office.**—At the end of the 30 days allowed the successful applicant, or sooner if the foregoing be complied with by him, the local officers will forward by special letter all papers with full report of action taken.

11. Form of lease.—Leases hereunder will be in substantially the following form:

Land Office at _____
Serial No. _____

The United States of America, Department of the Interior.

**MINING LEASE OF PHOSPHATE LANDS UNDER ACT OF
FEBRUARY 25, 1920.**

Date. This indenture of lease, entered into, in triplicate, this ____ day of _____, A. D. 19____, by and between the United States of America, acting in this behalf by _____, Secretary of the Interior, party of the first part, hereinafter called the lessor, and _____ of _____, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress, approved February 25, 1920 (41 Stat., —), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," hereinafter called the "act."

WITNESSETH:

That the lessor, in consideration of the rents and royalties to be paid and the covenants to be observed as hereinafter set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine and dispose of all the phosphate and phosphate rock in, upon, or under the following described tracts of land,

Description of land. situated in the State of _____, to wit: _____

Minning and surface rights. containing _____ acres, more or less, together with the right to construct all such works, buildings, plants, structures, and appliances as may be necessary and convenient for the mining and preparation of the phosphates for market, the manufacture of products thereof, the housing and welfare of employees, and, subject to the conditions herein provided, to use so much of the surface as may reasonably be required in the exercise of the rights and privileges granted.

SECTION 1. That the lessor expressly reserves:

Rights reserved by lessor. Easements. (1 a) The right to permit for joint or several use such easements or rights of way, including easements in tunnels upon, through, or in the land leased, occupied, or used as may be necessary or appropriate to the working of the same or other lands containing the deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

Disposition of surface. (1 b) The right to lease, sell, or otherwise dispose of the surface of said lands or any part thereof under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the mining and removal of the phosphates therein, and to lease other mineral deposits in the lands, under the provisions of said act.

(1 c) Full power and authority to carry out and enforce all the provisions of section 30 of said act to insure the sale of the pro-

duction of said leased lands to the United States and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare. Monopoly and fair prices.

SEC. 2. The lessee in consideration of the lease of the rights and privileges aforesaid hereby covenants and agrees as follows:

(2 a) To invest in actual mining operations, development or improvements upon the land leased, or for the benefit thereof, the sum of ----- dollars, of which sum not less than one-third shall be so expended during the first year succeeding the execution of this instrument and a like sum each of the two succeeding years, unless sooner expended; and submit annually, at the expiration of each year for the said period, an itemized statement of the amount and character of said expenditure during such year. Investment.

(2 b) To furnish a bond in the sum of \$10,000, conditioned upon the expenditure of the amount specified herein (2 a), and after said investment has been made, a similar bond in the sum of \$5,000, conditioned upon compliance with the terms and provisions of this lease. Bond.

(2 c) To pay as an annual rental for each acre or part thereof covered by this lease the sum of 25 cents per acre for the first year, payment of which amount is hereby acknowledged, the sum of 50 cents per acre per year for the second, third, fourth, and fifth years, and \$1 per acre for the sixth and each succeeding year during the life of this lease, all such annual payments of rental to be made to the receiver of the United States land office of the district in which said land is situated, on the anniversary of the date hereof, and to be credited on the first royalties to become due hereunder during the year for which said rental was paid. Annual rental.

(2 d) To pay to such receiver a royalty of ----- per cent (not less than 2 per cent) of the gross value of the output of phosphates or phosphate rock at the mine during the first 20 years succeeding the execution of this lease. (Special provisions suited to operations under the lease may be here inserted if found necessary.) Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the phosphates are mined. Royalty.

(2 e) To determine accurately the weight or quantity of all phosphates or phosphate rock mined from the leased premises, and to accurately enter the weight or quantity thereof in due form in books to be kept and preserved by the lessee for such purpose. Record of phosphates mined.

(2 f) To furnish quarterly, within 30 days after the expiration of the quarter, a written report covering such quarter, certified under oath by the superintendent of the mine, or by such other agent having personal knowledge of the facts as may be designated by the lessee for such purpose, showing the amount of phosphates or phosphate rock mined during the quarter, the character and quality thereof, and amount of its products and by-products disposed of and price received therefor, and amount of phosphates or phosphate rock and its products in storage or held for sale. Quarterly reports.

(2 g) Also to furnish in such manner and form as may be prescribed by the lessor, at the end of each year, beginning on the first anniversary of the date of the lease, and at such other times as the lessor may require, a plat showing all development work and improvements on the leased lands, and other related information, Annual reports.

with a report under oath as to all buildings, structures, or other works placed in or upon said leased lands, accompanied by a report in detail as to the stockholders, investment, depreciation, and cost of operation, together with a statement as to the amount of phosphate or phosphate rock produced and sold, and the amount received therefor, by operations hereunder.

Mine maps.

(2 h) To keep at the mine office clear, accurate, and detailed maps, on a scale not more than 200 feet to the inch, in the form of horizontal projections on tracing cloth, of the workings in each phosphate bed in each separate mine on the leased lands, a separate map to be made for each such bed, and for the surface immediately over the underground workings, and to be so arranged with reference to a public land corner that the maps can be readily superimposed.

Progress maps.

Blue prints or reproductions in duplicate of the maps required as aforesaid shall be furnished the lessor when made, and supplemental prints or reproductions in duplicate furnished on or before the first day of each succeeding year, showing the extensions, additions, and changes since the last map or supplement was submitted. All mine progress maps kept by the lessee shall at all times be subject to examination by lessor.

Minimum production.

(2 i) That, beginning with the fourth year of the lease, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, the lessee shall mine each year and pay a royalty thereon, not less than ----- tons of phosphate rock from the leased premises, unless operations are suspended as provided in section 11 of the act.

Assignment of lease.

(2 j) 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 lessor being first had and obtained.

Readjustment of terms.

SEC. 3. It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties payable hereunder and other terms and conditions including amount of minimum annual production, at the end of 20 years from the date hereof, and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period, but in case the lessee be dissatisfied with the rate of royalty or other terms and conditions so fixed, he may terminate this lease in the manner and under the conditions provided in sections 6 (b) and 6 (c) hereof.

SEC. 4. This lease is made subject to the following provisions, which the lessee accepts and covenants faithfully to perform and observe, unless the laws of the State where the leased land or deposits are situated otherwise provides, in which case such State laws control:

Operating regulations.

(4 a) The lessee shall carry out and observe regulations prescribed by the Secretary of the Interior and in force at the date hereof relative to (1) reasonable diligence, skill, and care in the operation of said property in accordance with approved methods and practices, (2) the prevention of undue waste, and (3) the safety and welfare of miners.

Payment of wages.

(4 b) And also shall pay all miners and other employees, both above and below ground, at least twice each month in lawful money

of the United States, and shall permit such miners and other employees full and complete freedom of purchase, but with a view to increasing safety this provision shall not apply to the purchase of explosives, detonators, or fuses; and shall not require or permit miners or other employees, except in case of emergency, to work underground for more than eight hours in any one workday, and shall not employ any boy under the age of 16 years or any girl or woman without regard to age in any mine below the surface.

Freedom of purchase.

Eight-hour workday.

Inspection.

SEC. 5. And the lessee-also expressly agrees that all mining and related operations shall be subject to the inspection of authorized representatives of the lessor, and that such representatives may at all times enter into and upon the leased lands and survey and examine same and all surface and underground improvements, works, machinery, equipment, and operations.

(5 a) And also shall permit the lessor to examine all books and records pertaining to operations under this lease and to make copies of and extracts from any or all of same, if desired.

Examination of books and records.

(5 b) And also shall permit the lessor, or its lessees or transferees, with the approval of the lessor, to make and use upon or under the leased lands any workings necessary for freeing any other mine from water or gas, or extinguishing fires, causing as little damage or interference as possible to or with the mine or mining operations of the lessee hereunder: *Provided*, That any such use by a transferee or another lessee shall be conditioned upon the payment to the lessee hereunder of the amount of actual damages sustained thereby and adequate compensation for such use.

Operations on adjoining lands.

(5 c) And also shall, at the termination of this lease, as the result of forfeiture thereof, pursuant to paragraph (6 d), deliver up to the lessor the lands covered thereby, including all fixtures, machinery, improvements, and appurtenances, other than strictly personal property, situate on any of said lands, in good order and condition, so as to permit of immediate continued operation to the full extent and capacity of the leased premises.

Result of forfeiture.

SEC. 6. It is further mutually understood and agreed as follows:

(6 a) That the lessor may in writing waive any breach of the covenants and conditions contained herein except such as are required by the act, but any such waiver shall extend only to the particular breach so waived and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular cause of forfeiture prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

(6 b) The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that the public interest will not be impaired; and the lessee may with like consent surrender any legal subdivision of the area included within the lease; but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any

Surrender of lease.

mines or productive works or permanent improvements on the lands covered hereby.

Privilege of purchasing equipment.

(6 c) That on the termination of this lease, pursuant to the last preceding paragraph, the lessor, his agent, licensee, or lessee shall have the exclusive right, at the lessor's election, to purchase at any time within six months, at the appraised value thereof, all buildings, machinery, equipment, and tools, placed by the lessee in or on the land leased hereunder, save and except all underground timbering, and such other supports and structures as are necessary for the preservation of the mine, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to be paid for said buildings, machinery, equipment, and tools to be purchased as aforesaid, shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party hereto and the third by the two so designated), the valuation of the three or a majority of them to be conclusive; that pending such election to purchase within said period of six months none of said buildings or other property shall be removed from their normal position; that if such valuation be not requested, or the lessor shall affirmatively elect not to purchase within said period of six months, the lessee shall have the privilege of removing said buildings and other property, except said timbering and other supports and structures, as are necessary for the preservation of the mine, as aforesaid.

Forfeiture.

(6 d) If the lessee shall fail to comply with the provision of the act or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or in the general regulations promulgated and in force at date hereof, the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided in section 31 of the act, but this provision shall not be construed as depriving the lessor of any legal or equitable remedy which the lessor might otherwise have.

Action by lessor to prevent loss or damage.

SEC. 7. It is further covenanted and agreed that, should the lessee fail to take prompt and necessary steps to prevent loss or damage to the mine, property, or premises, or danger to the employees, the lessor may enter on the premises and take such measures as may be deemed necessary to prevent such loss or damage or to correct the dangerous or unsafe condition of the mine or works thereof, which shall be at the expense of the lessee.

Continuing obligation.

SEC. 8. It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

SEC. 9. It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent or employee of the Department of the Interior, shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1909

(35 Stat. 1109), relating to contracts enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA,

By _____
Secretary of the Interior, Lessor.

Witnesses, _____

_____ Lessee .

12. Use permits for additional lands.—Under section 12 of the act a lessee may be granted a right to use the surface of not exceeding 40 acres of unappropriated and unentered land as may be necessary for the proper prospecting for or development, extraction, treatment, or removal of the phosphate deposits in the leased lands.

Applications for permits for such additional tracts shall be filed in the district office having jurisdiction over the lands and should identify the lease by the serial number under which issued, and be filed under the same number. Such applications must be under oath and set forth the specific reasons why the additional tract is necessary to the lessee for the use named, describe the land desired by legal subdivision if surveyed, and if unsurveyed, by the approximate description it will be when surveyed, and also set forth the reasons why the land is desirable and adapted to the uses named, either in point of location, topography, or otherwise, and that it is unoccupied and unappropriated.

FORM OF USE PERMIT UNDER SECTION 12.

Land Office at _____
Serial No. _____

THE UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.

USE PERMIT UNDER SECTION 12, ACT OF FEBRUARY 25, 1920.

Know all men by these presents, that the Secretary of the Interior, under and by virtue of the act of Congress approved February 25, 1920, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," hereby grants to _____, holder of lease bearing serial No. _____, the exclusive right, so long as needed, used, and occupied during the life of the aforesaid lease, the use of the surface of the following described tract of land, to wit, _____

_____ for the proper prospecting for or development, extraction, treatment, or removal of the phosphate deposits covered by the aforesaid lease, all rights hereunder to cease and terminate upon the termination of the aforesaid lease.

Dated this _____ day of _____, 19__.

Secretary of the Interior.

13. **Repealing and saving clause.**—Section 37 of the act provides that hereafter the deposits of coal, phosphate, sodium, oil, oil shale, and gas referred to and described in the act may be disposed of only in the manner provided by the act, “except as to valid claims existent at date of passage of this act, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under said laws, including discovery.” As to phosphate claims, those claims initiated under the preexisting law may go to patent which, at the date of the act, were valid mining locations, duly made and maintained as such on lands subject to such location at the date initiated.

14. **Fees and commissions.**—(a) For receiving and acting upon each application for lease filed in the district land office in accordance with these regulations, there shall be paid by the applicant a fee of \$2 for every 160 acres or fraction thereof in the application, such fee in no case to be less than \$10, the same to be considered as earned when paid, and to be credited in equal parts to the compensation of the register and receiver within the limitations provided by law.

(b) Registers and receivers shall be entitled to a commission of 1 per cent of all moneys received in each register’s office, to be equally divided between the register and receiver. Such commission will not be collected from the applicant or lessee in addition to the moneys otherwise provided to be paid.

It should be understood that the commissions herein provided for will not affect the disposition of the proceeds arising from operations under the act, as provided in section 35 thereof; also that such commissions will be credited on compensation of registers and receivers only to the extent of the limitation provided by law for maximum compensation of such officers.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved May 22, 1920.

JOHN BARTON PAYNE,
Secretary of the Interior.

**AN ACT TO PROMOTE THE MINING OF COAL, PHOSPHATE, OIL,
OIL SHALE, GAS, AND SODIUM ON THE PUBLIC DOMAIN.**

(Public No. 146, 41 Stat., —.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, 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, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further*, That 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.

[Sections 2 to 58, inclusive, relates to coal.]

SEC. 6. That where coal or phosphate lands aggregating two thousand five hundred and sixty acres and subject to lease hereunder do not exist as contiguous areas, the Secretary of the Interior is authorized, if, in his opinion the interests of the public and of the lessee will be thereby subserved, to embrace in a single lease noncontiguous tracts which can be operated as a single mine or unit.

[Sections 7 and 8 relate to coal.]

PHOSPHATES.

SEC. 9. That the Secretary of the Interior is hereby authorized to lease to any applicant qualified under this Act any lands belonging to the United States containing deposits of phosphates, under such restrictions and upon such terms as are herein specified, through advertisement, competitive bidding, or such other methods as the Secretary of the Interior may by general regulation adopt.

SEC. 10. That each lease shall be for not to exceed two thousand five hundred and sixty acres of land to be described by the legal subdivisions of the public land surveys, if surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease, in accordance with rules and regulations prescribed by the Secretary of the Interior and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such survey;

deposits made to cover expense of surveys shall be deemed appropriated for that purpose; and any excess deposits shall be repaid to the person, association, or corporation making such deposits or their legal representatives: *Provided*, That the land embraced in any one lease shall be in compact form, the length of which shall not exceed two and one-half times its width.

SEC. 11. That for the privilege of mining or extracting the phosphates or phosphate rock covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed by the Secretary of the Interior in advance of offering the same, which shall be not less than 2 per centum of the gross value of the output of phosphates or phosphate rock at the mine, due and payable at the end of each third month succeeding that of the sale or other disposition of the phosphates or phosphate rock, and an annual rental payable at the date of such lease and annually thereafter on the area covered by such lease at such rate as may be fixed by the Secretary of the Interior prior to offering the lease, which shall be not less than 25 cents per acre for the first year thereafter, 50 cents per acre for the second, third, fourth, and fifth years, respectively, and \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of a minimum annual production, except when operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions shall be made as the Secretary of the Interior shall determine unless otherwise provided by law at the time of the expiration of such periods: *Provided*, That the Secretary of the Interior may permit suspension of operation under such lease for not exceeding twelve months at any one time when market conditions are such that the lease can not be operated except at a loss.

SEC. 12. That any qualified applicant to whom the Secretary of the Interior may grant a lease to develop and extract phosphates, or phosphate rock, under the provisions of this Act shall have the right to use so much of the surface of unappropriated and unentered lands, not exceeding forty acres, as may be determined by the Secretary of the Interior to be necessary for the proper prospecting for or development, extraction, treatment, and removal of such mineral deposits.

[Sections 13 to 25, inclusive, relate to oil and gas, oil shale, Alaska oil proviso, and sodium.]

GENERAL PROVISIONS APPLICABLE TO COAL, PHOSPHATE, SODIUM, OIL, OIL SHALE, AND GAS LEASES.

SEC. 26. That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this Act appropriate provisions for its cancellation by him.

SEC. 27. That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State; no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field; no corporation shall hold any interest as

a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this Act. Any interests held in violation of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for the purpose in the United States district court for the district in which the property, or some part thereof, is located, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition: *Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or line of railroads to be operated and used by them jointly in the transportation of oil from their several wells or from the wells of other lessees under this Act, or the transportation of coal: *Provided further*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same: *And provided further*, That if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteeed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of, or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings.

SEC. 28. That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas

or oil under the provisions of this Act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

SEC. 29. That any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 30. That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

SEC. 31. That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force

at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

SEC. 33. That all statements, representations, or reports required by the Secretary of the Interior under this Act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require.

SEC. 34. That the provisions of this Act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits.

SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production $52\frac{1}{2}$ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production $37\frac{1}{2}$ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

SEC. 36. That all royalty accruing to the United States under any oil or gas lease or permit under this Act on demand of the Secretary of the Interior shall be paid in oil or gas.

Upon granting any oil or gas lease under this Act, and from time to time thereafter during said lease, the Secretary of the Interior shall, except whenever in his judgment it is desirable to retain the same for the use of the United States, offer for sale for such period as he may determine, upon notice and advertisement on sealed bids or at public auction, all royalty oil and gas accruing or reserved to the United States under such lease. Such advertisement and sale shall reserve to the Secretary of the Interior the right to reject all bids whenever within his judgment the interest of the United States demands; and in cases where no satisfactory bid is received or where the accepted bidder fails to complete the purchase, or where the Secretary of the Interior shall determine

that it is unwise in the public interest to accept the offer of the highest bidder, the Secretary of the Interior, within his discretion, may readvertise such royalty for sale, or sell at private sale at not less than the market price for such period, or accept the value thereof from the lessee: *Provided, however,* That pending the making of a permanent contract for the sale of any royalty, oil or gas as herein provided, the Secretary of the Interior may sell the current product at private sale, at not less than the market price: *And provided further,* That any royalty, oil, or gas may be sold at not less than the market price at private sale to any department or agency of the United States.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of 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.

SEC. 38. That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land offices on account of business transacted under the provisions of this Act.

Approved, February 25, 1920.

**SODIUM REGULATIONS—ACT OF FEBRUARY 25, 1920
(41 STAT., 437).**

[Circular No. 699.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 28, 1920.

I.

**PERMITS AUTHORIZING EXPLORATION OF PUBLIC LANDS FOR
SODIUM.**

Registers and receivers, United States land offices:

SIRS: The act of Congress approved February 25, 1920, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" (Public No. 146), authorizes the Secretary of the Interior, under such rules and regulations as he may prescribe, to issue prospecting permits, for a period not to exceed two years, for the exploration of the land described therein for sodium in any of the forms named in said act, and under authority thereof the following rules and regulations will govern the issuance of such permits:

1. *Qualifications of applicants.*—Permits may be issued to (a) citizens of the United States, (b) an association of such citizens, (c) or a corporation organized under the laws of any State or Territory thereof.

2. *Lands to which applicable.*—The permit thus issued may include not more than 2,560 acres of public lands of the United States in reasonably compact form, by legal subdivisions if surveyed; if unsurveyed, by metes and bounds description.

3. *Rights under permit.*—The permit will confer upon the recipient the exclusive right to prospect for chlorides, sulphates, borates, silicates, or nitrates of sodium, dissolved in and soluble in water, and accumulated by concentration, on the lands embraced therein. In the exercise of this right the permittee shall be authorized to remove from the premises only such material as may be necessary to experimental work and the demonstration of the existence of such deposits or any of them in commercial quantities.

4. *Reward for discovery.*—If the permittee within the two years specified shall discover valuable deposits of one or more of the forms of sodium as described in said act within the area covered by his permit, such discovery shall entitle him to a lease of one-half the land embraced in the permit, to be taken in compact form. The dis-

covery of a valuable deposit of sodium under this permit shall be construed as the discovery of a deposit which yields commercial sodium in commercial quantities.

The remainder of the land embraced in such permit, if containing deposits of sodium, will thereafter become subject to lease, under such regulations as may be found requisite in dealing with the land containing said deposit, the permittee having a preference right to lease such remainder.

5. *Camp sites.*—In addition to land embraced in the permit, the Secretary may, in his discretion, issue to the permittee, during the life of the permit, the exclusive right to use a tract of unoccupied, nonmineral public land, not exceeding 40 acres in area, for purposes connected with and necessary to the development of the deposits covered by the permit, subject to the payment of an annual rental of not less than 25 cents per acre.

6. *Form and contents of application.*—Applications for permits should be filed in the proper district land office, addressed to the Commissioner of the General Land Office, and after due notation promptly forwarded for his consideration. No specific form of application is required, but it should cover, in substance, the following points, namely:

(a) Applicant's name and address.

(b) Proof of citizenship of applicant; by affidavit of such fact, if native born; or, if naturalized, by the certificate thereof or affidavit as to time and place when issued; if a corporation, by certified copy of the articles thereof.

(c) Description of land for which the permit is desired, by legal subdivisions, if surveyed, and by metes and bounds, if unsurveyed, in which latter case, if deemed necessary, a survey sufficient more fully to identify and segregate the land may be required before the permit is granted; also a statement whether the land is vacant and unclaimed.

(d) Reasons why the land is believed to offer a favorable field for prospecting.

(e) Proposed method of conducting exploratory operations, amount of capital available for such operations, and the diligence with which such explorations will be prosecuted.

(f) Statement of the applicant's experience in operations of this nature, together with references as to his character, reputation, and business standing.

7. On the receipt of the application, if found in compliance with the terms of the act, a permit will issue and the district land officers be promptly notified thereof.

8. *Form of permit.*—The form of permit issued under this act will be in substance as follows:

THE UNITED STATES OF AMERICA,
Department of the Interior.

SODIUM PROSPECTING PERMIT.

Know all men by these presents, that the Secretary of the Interior, under and by virtue of the act of Congress entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," approved February 25, 1920, has granted and does hereby grant a permit to _____ of the exclusive right for a period of two years from date hereof to prospect the following described lands _____ for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium, dissolved in and soluble in water, and accumulated by concentration, but for no other purpose, upon the express conditions as follows, to wit:

1. To begin the prospecting for said minerals within ninety days from date hereof and to diligently prosecute the exploration and experimental work during the period of such permit, in the manner and extent as follows, to wit:

 2. To remove from said premises only such material as may be necessary to experimental work and the demonstration of the existence of such deposits in commercial quantities.

3. To afford all facility for inspection of such exploratory work on behalf of the Secretary of the Interior, and to report fully when required all matters pertaining to the character, progress, and results of such exploratory work, and to that end to keep and maintain such accounts, logs, or other records, as the Secretary of the Interior may require.

4. Not to assign or transfer the permit granted hereby without the express consent in writing of the Secretary of the Interior.

Expressly reserving to the Secretary of the Interior the right to permit for joint or several use such easements or right of way upon, through or in the lands covered hereby, as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in said act; *and further reserving* the right and authority to cancel this instrument for failure of the permittee or licensee to exercise due diligence in the execution of the prospecting work in accordance with the terms hereof.

Valid existing rights, acquired prior hereto, on the lands described herein, will not be affected hereby.

In witness whereof I have affixed my signature hereto and the seal of the Department this _____ day of _____, 19...

-----,
Secretary of the Interior.

II.

REGULATIONS PERTAINING TO LEASES FOR LANDS CONTAINING SODIUM.

The act of February 25, 1920 (Public No. 146), in section 24, authorizes the Secretary of the Interior, under such general regulations as he may adopt, to lease, for the production of the sodium and other mineral deposits contained therein, public lands, except those in San Bernardino County, California:

A. Known to contain sodium in commercial quantity and character and found in some or any of the forms described in said act.

B. Embraced in any permit, under which the existence of such deposits has been demonstrated, but not included in the lease awarded to the permittee, and by virtue of such authority the following regulations are hereby prescribed:

1. *Qualifications of applicants.*—Applications for leases in the form as herein provided may be filed in the proper district land office, addressed to the Commissioner of the General Land Office for any lands in classes A and B, by citizens of the United States, an association of such citizens or corporations organized under the laws of any State or Territory thereof; the qualifications of the applicant in this respect to be fully covered by the application.

2. *Area and description.*—Leases are authorized by the terms of the act for an area not exceeding 2,560 acres, but will be granted only for such area as may be shown to the satisfaction of the Secretary of the Interior to contain deposits of sodium, in such form and quantities as to constitute a commercial value, and will be limited to lands reasonably compact in form and described by legal subdivisions of the public land surveys, if surveyed, or if unsurveyed, by the approximate description they will bear when surveyed; the survey in the latter case to be made at the expense of the applicant if the application for lease is otherwise found satisfactory, the descriptions of the land in the lease when granted to conform to the official survey.

3. *Action by register and receiver.*—Applications when filed with the district land office will be given the current serial number, promptly noted of record and transmitted to the Commissioner of the General Land Office, accompanied by a statement as to the status of the lands embraced therein. After the receipt of such applications, no applications, filings, or selections for the lands embraced therein will be permitted until so directed; except applications for leases under this act.

4. *Notice of application.*—When an application for a lease is filed in the district land office, notice thereof shall be published at the expense of the applicant in a general newspaper to be designated by the register, published in the county where the lands are situated, describing the lands embraced therein, stating the purpose of the application and that it will be submitted to the Commissioner of the General Land Office for action within 30 days from the date fixed therein, advising all adverse claimants or protestants that if they desire to object or protect any interest as against the application, prompt action to that end should be taken; and further advising the public that any other applications for lease of the same lands may be filed at any time during said period of publication without publication of notice of said second or further application, in which case applications so filed will be considered as prescribed in section 5 hereof. Proof of publication will be required prior to action by the commissioner on the application for lease.

5. *Action in General Land Office.*—On the receipt of the application or applications in the General Land Office, the same will be considered, investigation made if deemed necessary, and submitted to the Secretary of the Interior with appropriate recommendation and report as to the proper action to be taken thereon, giving due consideration to the proposed effectual development of the alleged sodium deposits, and the amount of capital to be invested therein; the award of priority in case of conflicting applications to be determined by the respective proposed investments, date of productive development proposed by the several applicants, and any equities that may exist in one or more of the applicants resulting from improvement or development under claims made under other laws.

6. *Lease by permittee.*—The permittee for lands in class B has a preference right within the two years of his permit to file application to lease any or all of the land included in his permit, upon showing to the satisfaction of the Secretary of the Interior that he has discovered a valuable deposit of sodium thereon. Any lands not leased by the permittee will be subject to be leased by others under the terms set forth in sections 3, 4, and 5 of these regulations.

7. *Verity of statements.*—The verity of all representations contained in applications for leases shall be deemed an essential thereto, and a moving consideration to the award of a lease, if such action is taken; misrepresentations in this respect will be treated as a proper ground for proceedings in forfeiture, as provided in section 31 of the act.

8. *Lease a waiver of other claims.*—The acceptance of a lease under the provisions of this act will be construed as a waiver and relinquish-

ment of all claims on the part of the applicant for any lands embraced within said lease and claimed under the provisions of any other law.

9. *Form and contents of application.*—Applications for leases must be under oath, and should be filed in the proper district land office, addressed to the Commissioner of the General Land Office. No specific form of application is required, and no blanks will be furnished, but it should cover in substance the following points:

(a) Applicant's name and address.

(b) Proof of citizenship of applicant, by affidavit of such fact, if native born; if naturalized, by a certified copy of a certificate thereof in the form provided for use in public land matters, unless such copy is on file. If the applicant is an association, each member thereof must show his qualifications as above stated; if a corporation, a certified copy of the articles of incorporation must be filed, together with a showing as to the residence and citizenship of its stockholders.

(c) A statement that the applicant has no lease under the provisions of this section, nor any other application for lease thereunder pending, and that he does not hold interests in such leases or applications which, with the land applied for, will exceed 2,560 acres in the same State.

(d) Description of land for which the lease is desired, by legal subdivisions if surveyed, and by metes and bounds if unsurveyed, in which latter case the description should be connected to some corner of the public land surveys where practicable, or to some permanent landmark. If the land is unsurveyed, the applicant, after he has been awarded the right to a lease, but before the issuance thereof, will be required to deposit with the United States surveyor general of the State where the land is located the estimated cost of making a survey of the lands, any balance remaining after the work is completed to be returned. This survey will be an extension of the public land surveys over the tract applied for, the leased land to be conformed to legal subdivisions of such survey when made.

(e) Evidence that the land is valuable for its sodium content, except so much thereof as is necessary for the extraction and reduction of the leased minerals, with a statement as accurate as may be of the character and extent and mode of occurrence of the sodium deposits in the lands applied for.

(f) Proposed method, so far as determined, as to the process of mining and reduction to be adopted, the diligence with which such operations will be carried on, and the contemplated investment in reduction works and development, and the capital available therefor.

(g) The application shall be accompanied by a notice for publication, in duplicate, prepared for the signature of the register, in substantially the following form:

Serial No. -----

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT -----,
-----, 19--.

NOTICE OF APPLICATION FOR SODIUM LEASE.

Notice is hereby given that in pursuance of the act of Congress, approved February 25, 1920, -----, whose post office address is -----, has made application for sodium lease covering the following described lands:-----

Any and all persons claiming adversely any of the above described lands are required to file their claims in this office on or before -----, otherwise their claims will be disregarded in the granting of such lease.

-----, Register.

The register will fix the time within which adverse or conflicting claims may be filed at not less than 30 nor more than 40 days from first publication.

10. *Disposition of application.*—(a) The application will be given the current serial number by the register and receiver, noted on their records, and the notice for publication will be signed by the register.

(b) One copy of the signed notice will be delivered to the applicant, who will cause the same to be published in a newspaper to be designated by the register, of general circulation, and best adapted to give the widest publicity in the county where the land is situated. If the land is in two or more counties, notice must be published in each. Notice must also be posted in the local land office during the period of publication.

(c) At the expiration of the period of publication the evidence of publication and posting in said office should be promptly transmitted by the register and receiver to the Commissioner of the General Land Office, with a statement of the status of the land involved as to conflicts, withdrawals, protests, and any other matters that may be necessary to determine the availability of the land or deposits therein for lease.

11. *Form of lease.*—

Serial No. -----.

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT -----.
SODIUM LEASE.

Date—Parties.—This indenture of lease entered into in triplicate this ----- day of -----, 19--, by and between the United States of America, acting in this behalf by

-----, Secretary of the Interior, party of the first part, hereinafter called the lessor, and -----
 -----, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved February 25, 1920 (Public No. 146), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," hereinafter referred to as the act, which is made a part hereof, witnesseth:

SEC. 1. *Purposes.*—That the lessor, in consideration of the rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine, remove, and dispose of all the sodium and other minerals in, upon, or under the following-described tracts of land situated in the County of -----, State of -----, and more particularly described as follows, to-wit: -----, containing -----

acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, or reservoirs necessary to the full enjoyment hereof, together also with the right to use any timber, stone, or other materials on said land in connection with the operations to be conducted hereunder, for an indeterminate period, upon condition that at the end of each twenty-year period succeeding the date hereof such readjustment of terms and conditions may be made as the party of the first part may determine; provided, that this lease shall extend only to or include any right or interest in the lands, or the minerals therein, reserved to the United States under any entry that may be allowed, or patent that may issue, or may have issued, with a reservation of minerals to the United States.

SEC. 2. In consideration of the foregoing the lessee hereby agrees:

(a) To invest in actual development, or improvements, upon the land leased, or for the benefit thereof, the sum of ----- dollars, of which sum not less than one-third shall be so expended during the first year succeeding the execution of this instrument and a like sum each of the two succeeding years, unless sooner expended; and submit annually, at the expiration of each year for the said period, an itemized statement of the amount and character of said expenditure during such year.

To furnish a bond in the sum of \$10,000, conditioned upon the expenditure of the amount specified in (a) hereof, and after said investment has been made, a similar bond in the sum of \$5,000, conditioned upon compliance with the terms and provisions of this lease.

(b) *Royalty.*—To pay a royalty of ----- per cent (not less than 12½ per cent) of the amount or value of the production of the lands leased.

(c) *Rents.*—To pay the receiver of the district land office on all leases annually, in advance, beginning with the date of the execution of the lease, the following rentals: Fifty cents per acre for the first calendar year or fraction thereof; and one dollar per acre for each and every calendar year thereafter during the continuance of the lease, such rental for any year to be credited against the royalties as they accrue for that year.

(d) *Taxes.*—To pay when due all taxes assessed and levied under the laws of the State upon the improvement, output of mines, or other rights, property, or assets of the lessee.

(e) *Monthly statements.*—To furnish monthly certified statements in detail in such form as may be prescribed by the lessor of the amount and value of output from the leasehold as a basis for determining amount of royalties. All books and accounts of the lessee shall be open at all times for the inspection by any duly authorized officer of the department. Falsification of such statements shall be a basis for action for the cancellation of the lease.

(f) *Plats and reports.*—To furnish annually a plat in the manner and form prescribed by the Secretary of the Interior showing all prospect and development work on the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, or on lands covered by permit issued under section 25 of the act, as well as any buildings, reduction works, or equipment, situated elsewhere and owned or operated in conjunction with, or as a part of, the operations conducted hereunder, accompanied by a report, in detail, as to the stockholders, business transacted, assets and liabilities of the lessee, together with a statement of the amount of sodium, and other minerals produced and secured by operations hereunder, and the cost of production thereof.

(g) *Sodium in solution.*—Where the minerals are taken from the earth in solution, such extraction shall not be within five hundred feet of the boundary line of leased lands without permission from the Secretary of the Interior.

(h) *Diligence—Prevention of waste—Health and safety of workmen.*—To develop and produce in commercial quantities, with reasonable diligence, the sodium and other mineral deposits susceptible of such production in the lands covered hereby; to carry on all mining, reducing, refining, and other operations, in a good and workmanlike manner in accordance with approved methods and practice, having due regard to the health and safety of miners and other employees, the prevention of waste and the preservation and conservation of the property for future productive operations, observing all State laws relative to the health and safety of such workmen and employees, all mining and related productive operations to be subject to the inspection of the lessor.

(i) *Forfeiture of lease.*—To deliver up to the lessor on the termination of this lease, as a result of forfeiture thereof pursuant to section 31 of the act, the lands covered thereby, together with any land permission for the use of which has been granted under and pursuant to the provisions of section 25 of said act, including all fixtures, improvements, and appurtenances, other than machinery, tools, and personal property located and used above ground, situate on any of said lands, in good order and condition, so as to permit of immediate continued operation to the full extent and capacity of the leased premises: *Provided*, That on such forfeiture the lessor, his agent, licensee, or lessee shall have the exclusive right, at the lessor's option and at any time within six months from such forfeiture, to purchase such machinery, tools, and personal property and employees, all mining and related productive operations to be determined in the manner prescribed in section 5 of this lease.

(k) *Reserved deposits.*—To comply with all statutory requirements where the surface of the lands embraced herein has been disposed of under laws reserving to the United States the mineral deposits therein.

(l) *Assignment.*—Not to assign or sublet, without the consent of the Secretary of the Interior, the premises covered hereby.

(m) *Excess holdings.*—To observe faithfully the provisions of section 27 of the act whereunder this lease is executed, as to the interest or interests that may be taken or acquired under leases authorized by said act.

(n) *Minimum production.*—Beginning with the fourth year of the lease, except when operations are interrupted by strikes, the elements, or casualties not attributable to the lessee, to produce each year and pay the royalty thereon of not less than ----- tons of sodium, in some of the forms specified herein from the premises covered hereby.

SEC. 3. The lessor expressly reserves:

(a) *Easements and rights of way.*—The right to permit for joint or several use such easements or rights of way upon, through, or in the lands hereby leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act; and the treatment and shipment of the products thereof, by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) *Disposition of surface.*—The right to dispose of the surface of the land embraced herein under existing law, or laws hereafter enacted, in so far as said surface is not necessary for use of the lessees in extracting and removing the deposits therein.

(c) *Monopoly and fair prices.*—Full power and authority to carry out and enforce all the provisions of section 30 of said act to insure the sale of the production of said leased lands to the United States

and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

SEC. 4. *Surrender and termination of lease.*—The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease at any time after the first four years of the term herein provided for, by giving six months' notice in writing to the lessor, and upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mines or productive works or permanent improvements on the lands covered by such relinquishment.

SEC. 5. *Purchase of materials, etc., on termination of lease.*—That on the termination of this lease, pursuant to the last preceding section, the lessor, his agent, licensee, or lessee, shall have the exclusive right, at the lessor's election, to purchase at any time within six months, at the appraised value thereof, all buildings, machinery, equipment and tools, whether fixtures or personalty, placed by the lessee in or on the land leased hereunder, or on lands covered by permit under section 25 of the act, save and except underground improvement, machinery, equipment, or structures, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to be paid for said buildings, machinery, equipment, and tools to be purchased as aforesaid shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party thereto and the third by the two so designated); the valuation of the three or a majority of them to be conclusive; that pending such election to purchase within said period of six months none of said buildings, or other property, shall be removed from their normal position; that if such valuation be not requested, or the lessor shall affirmatively elect not to purchase within said period of six months, the lessee shall have the privilege of removing said buildings and other property except said underground equipment and structures as aforesaid.

SEC. 6. *Judicial proceedings in case of default.*—If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at date hereof, and such default shall continue for ninety days after service of written notice thereof by the lessor, then the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided

in section 31 of the act. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

SEC. 7. *Heirs and successors in interest.*—It is further agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties thereto.

SEC. 8. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part of this lease, or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1909 (35 Stat., 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA,

By -----,

Secretary of the Interior, Lessor.

-----, *Lessee.*

-----, *Lessee.*

-----, *Lessee.*

Witnesses:

III.

USE PERMITS FOR CAMP SITE AND REFINING WORKS.

Section 25 of the act of February 25, 1920, "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," provides:

"That in addition to areas of such mineral land which may be included in any such prospecting permits or leases the Secretary of the Interior, in his discretion, may grant to a permittee or lessee of lands containing sodium deposits, and subject to the payment of an annual rental of not less than 25 cents per acre, the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land not exceeding forty acres in area for camp sites, refining works, and other purposes connected with and neces-

sary to the proper development and use of the deposits covered by the permit or lease."

In accordance with the provisions of this section the following regulations are prescribed, by which a permittee or lessee under the act may acquire the right therein granted.

1. Application may be made by the permittee or lessee identifying by serial number his permit or lease, setting forth in detail the specific reasons why it is necessary for the applicant to have the use of an additional tract of land for a camp site, refining works, or other purposes, connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

2. The application should contain a description of the lands by legal subdivisions, if surveyed, or, if not surveyed, by the approximate description thereof as it will appear when surveyed, for which the right of use is desired, together with a statement of the particular reasons why it is especially adapted thereto, either in point of location, topography, or otherwise, and that it is unoccupied, nonmineral land.

3. Use permits granted hereunder will be for indeterminate periods, dependent in that respect upon the existence of the permit or lease made the basis of the right authorized by section 25; upon the termination of such permit or lease all rights secured hereby will also cease and terminate, and such condition shall be expressly recognized and stated in the application.

4. No blank forms of application will be furnished to applicants hereunder, but they will be guided by the foregoing as to the essential requirements of the application, which will be verified by the affidavit of the applicant.

5. The rental of not less than 25 cents per acre must be paid the receiver of the proper local land office as soon as applicant is notified of the allowance of the permit, and a like sum each year thereafter in advance.

IV.

FORM OF USE PERMIT FOR CAMP SITE OR REFINING WORKS.

The form of use permit issued under section 25 of the act of February 25, 1920, will be in substance as follows:

THE UNITED STATES OF AMERICA,
Department of the Interior.

USE PERMIT.

Know all men by these presents, that the Secretary of the Interior, under and by virtue of section 25 of the act of Congress entitled "An

act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium, on the public domain," approved February 25, 1920, has granted to and does hereby grant to _____, the holder of _____, bearing serial number _____, the exclusive right, so long as needed, used, and occupied, to use, during the life of the aforesaid _____, the following-described tract of land, to wit: _____ for a camp site, refining works, and other purposes connected with and necessary to the proper development and the use of the deposits covered by the aforesaid _____, all rights hereunder to cease and terminate upon the termination of the aforesaid _____, and conditioned upon the payment in advance of 25 cents per acre for the area covered hereby.

In witness whereof I have affixed my signature hereto and the seal of the department this _____ day of _____, 19____.

Secretary of the Interior.

V.

REPEALING CLAUSE, ETC.

Repealing and saving clause.—Section 37 of the act provides that hereafter the deposits of coal, phosphate, sodium, oil, oil shale, and gas referred to and described in the act may be disposed of only in the manner provided by the act, "except as to valid claims existent at date of passage of this act, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under said laws, including discovery." As to sodium claims, those claims initiated under the preexisting law may go to patent which, at the date of the act, were valid mining locations, duly made and maintained as such on lands subject to such location at the date initiated.

Fees and commissions.—(a) For receiving and acting upon each application for prospecting permit or lease filed in the district land office in accordance with these regulations, there shall be paid by the applicant a fee of \$2 for every 160 acres or fraction thereof in the application, such fee in no case to be less than \$10, the same to be considered as earned when paid and to be credited in equal parts to the compensation of the register and receiver within the limitations provided by law.

(b) Registers and receivers shall be entitled to a commission of 1 per cent of all moneys received in each register's office, to be equally divided between the register and receiver. Such commission will not

be collected from the applicant or lessee in addition to the moneys otherwise provided to be paid.

It should be understood that the commissions herein provided for will not affect the disposition of the proceeds arising from operations under the act, as provided in section 35 thereof; also that such commissions will be credited on compensation of registers and receivers only to the extent of the limitation provided by law for maximum compensation of such officers.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved May 28, 1920.

JOHN BARTON PAYNE,
Secretary of the Interior.

AN ACT TO PROMOTE THE MINING OF COAL, PHOSPHATE, OIL, OIL SHALE, GAS, AND SODIUM ON THE PUBLIC DOMAIN.

(Public No. 146, 41 Stat., —.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, 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, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further*, That 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.

[Secs. 2 to 22, inclusive, relate to coal, phosphates, oil and gas, oil shale, and Alaska oil proviso.]

SODIUM.

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

belonging to the United States for a period of not exceeding two years: *Provided*, That the area to be included in such a permit shall be not exceeding two thousand five hundred and sixty acres of land in reasonably compact form: *Provided further*, That the provisions of this section shall not apply to lands in San Bernardino County, California.

SEC. 24. That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof has been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor the permittee shall be entitled to a lease for one-half of the land embraced in the prospecting permit, at a royalty of not less than one-eighth of the amount or value of the production, to be taken and described by legal subdivisions of the public-land surveys, or if the land be not surveyed by survey executed at the cost of the permittee in accordance with the rules and regulations to be prescribed by the Secretary of the Interior. The permittee shall also have the preference right to lease the remainder of the lands embraced within the limits of his permit at a royalty of not less than one-eighth of the amount or value of the production to be fixed by the Secretary of the Interior. Lands known to contain such valuable deposits as are enumerated in section 23 hereof and not covered by permits or leases, except such lands as are situated in said county of San Bernardino, shall be held subject to lease, and may be leased by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres; all leases to be conditioned upon the payment by the lessee of such royalty of not less than one-eighth of the amount or value of the production as may be fixed in the lease, and the payment in advance of a rental of 50 cents per acre for the first calendar year or fraction thereof and \$1 per acre per annum thereafter during the continuance of the lease, the rental paid for any one year to be credited on the royalty for that year. Leases may be for indeterminate periods, subject to readjustment at the end of each twenty-year period, upon such conditions not inconsistent herewith as may be incorporated in each lease or prescribed in general regulation theretofore issued by the Secretary of the Interior, including covenants relative to mining methods, waste, period of preliminary development, and minimum production, and a lessee under this section may be lessee of the remaining lands in his permit.

SEC. 25. That in addition to areas of such mineral land which may be included in any such prospecting permits or leases, the Secretary of the Interior, in his discretion, may grant to a permittee or lessee of lands containing sodium deposits, and subject to the payment of an annual rental of not less than 25 cents per acre, the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land, not exceeding forty acres in area, for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease.

GENERAL PROVISIONS APPLICABLE TO COAL, PHOSPHATE, SODIUM, OIL, OIL SHALE,
AND GAS LEASES.

SEC. 26. That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this Act appropriate provisions for its cancellation by him.

SEC. 27. That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State; no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field; no corporation shall hold any interest as a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this Act. Any interests held in violation of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property, or some part thereof, is located, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition: *Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal: *Provided further*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same: *And provided further*, That if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of, or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings.

SEC. 28. That rights of way through the public lands, including the forest reserves, of the United States, are hereby granted for pipe line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide

in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

SEC. 29. That any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

SEC. 30. That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions

shall be in conflict with the laws of the State in which the leased property is situated.

SEC. 31. That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

SEC. 33. That all statements, representations, or reports required by the Secretary of the Interior under this Act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require.

SEC. 34. That the provisions of this Act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same subject to such conditions as are or may hereafter be provided by such laws reserving such deposits.

SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located; said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

SEC. 36. That all royalty accruing to the United States under any oil or gas lease or permit under this Act on demand of the Secretary of the Interior shall be paid in oil or gas.

Upon granting any oil or gas lease under this Act, and from time to time thereafter during said lease, the Secretary of the Interior shall, except whenever in his judgment it is desirable to retain the same for the use of the United States, offer for sale for such period as he may determine, upon notice and advertisement on sealed bids or at public auction, all royalty oil and gas accru-

ing or reserved to the United States under such lease. Such advertisement and sale shall reserve to the Secretary of the Interior the right to reject all bids whenever within his judgment the interest of the United States demands; and in cases where no satisfactory bid is received or where the accepted bidder fails to complete the purchase, or where the Secretary of the Interior shall determine that it is unwise in the public interest to accept the offer of the highest bidder, the Secretary of the Interior, within his discretion, may readvertise such royalty for sale, or sell at private sale at not less than the market price for such period, or accept the value thereof from the lessee: *Provided, however,* That pending the making of a permanent contract for the sale of any royalty, oil, or gas as herein provided, the Secretary of the Interior may sell the current product at private sale, at not less than the market price: *And provided further,* That any royalty, oil, or gas may be sold at not less than the market price at private sale to any department or agency of the United States.

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal-mining operations on certain lands in Wyoming," approved August 1, 1912 (37 Stat. L., 1346), shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at date of 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.

SEC. 38. That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land offices on account of business transacted under the provisions of this act.

Approved, February 25, 1920.

INSTRUCTIONS.

May 10, 1920.

ACT OF FEBRUARY 25, 1920—OIL SHALE PLACER CLAIMS.

Oil shale having been recognized by both the Department and Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to be subject to valid location and appropriation under the placer-mining laws to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas.

VOGELSANG, *First Assistant Secretary:*

The Department is in receipt of your [Commissioner of the General Land Office] memorandum dated April 20, 1920, stating that your office has before it for consideration the first application for patent for oil shale placer claims, the same being Glenwood Springs mineral entry 015847 by Verner Z. Reed and James Doyle for fourteen placer mining claims covering 2,240 acres now situate in Naval Oil Shale Reserve No. 1, created by Executive order of December 6, 1916.

You refer to the provisions of the leasing law of February 25, 1920 (41 Stat., 437), relating to oil shale deposits, and state that you deem the matter of sufficient importance to warrant its submission for instructions of the Department.

The entry in question was allowed February 25, 1919, for the La Paz Nos. 1 to 14, inclusive, placer mining claims, survey No. 19837, situate in what, if otherwise surveyed would be parts of Secs. 14 to 20, inclusive, 22, and 23, T. 6 S., R. 95 W., 6th P. M., Parachute mining district, Glenwood Springs, Colorado, which claims purport to have been located November 14, 1912, on account of "petroleum and other mineral oils, oil shales, hydrocarbons and related materials," each by eight persons.

By section 2319 of the Revised Statutes it is provided that:

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

And by the act of February 11, 1897 (29 Stat., 526), it is provided:

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.

Oil shale has long been recognized as a valuable mineral deposit and for many years the mining of such deposits and the distillation of petroleum and other mineral substances therefrom has been an extensive industry in Scotland, that has afforded employment to many people and produced large dividends. While there are no oil shale operations in the United States that have reached that point of commercial development or production, a reference to departmental publications indicates that there is great activity, particularly in the States of Colorado, Utah, Montana, Nevada, and California, looking to such development and production at places where there are large and easily accessible deposits of rich oil shale, and that some shale oil has been produced. It is reported that several small plants have been already completed, or are under construction, near DeBeque, Colorado, which is only a short distance from the land included in the entry of Reed and Doyle.

The Department has had numerous inquiries as to the locatability and patentability of such deposits under the mining laws and in response thereto, while disclaiming any intention of expressing a binding opinion in the premises, it has nevertheless declared itself as favorable to the view that such deposits, if valuable, are subject

to location and purchase under the mining laws. In a letter dated May 16, 1916, addressed to Senator Myers the Department said that:

* * * it would seem that a discovery by competent locators, locating in good faith, of oil shale, upon the unreserved, unappropriated and unwithdrawn public domain, capable, by approved methods, of yielding oil in sufficient quantities so as to make the land chiefly valuable therefor, would be a sufficient compliance with the provisions of said oil placer act of 1897, and that locations based upon such a discovery must be made and entered, if at all, under the provisions of said act of 1897.

In a letter dated December 26, 1917, addressed to Representative W. A. Ayers, it was said:

Large areas of land in Colorado, Utah, and Wyoming have been classified by the Department as mineral land valuable for oil shale. The lands so classified, except two small areas, one each in Colorado and Utah which have been set aside as naval oil shale reserves, are open to mineral entry under the mining laws of the United States and to nonmineral entry in accordance with the provisions of the act of July 17, 1914, the shale deposits when entries are made under this act being reserved for separate acquisition under the mineral land laws.

In a letter dated April 11, 1918, addressed to Mr. Fred L. Morris, Lawrence, Kansas, it was said that:

* * * if these deposits of oil shales are valuable they are now subject to location and entry under the mining laws by citizens of the United States.

And in a letter dated June 30, 1919, addressed to Mr. Hal P. Wilson, Detroit, Michigan, it was said:

The lands included in Naval Oil Shale Reserve Colorado No. 1 and Utah No. 2 were withdrawn from appropriation and reserved for the United States Navy, and are not subject to location or the acquirement of any rights under the United States public-land laws while the withdrawal remains in force. If valid claims have been initiated prior to the withdrawal and have been maintained in accordance with law, they are protected under the terms of the withdrawal act of June 25, 1910 (36 Stat., 847), but I am not advised as to whether any portions of the withdrawn lands are so held.

In the letter of the Director of the Geological Survey of May 23, 1916, addressed to you and advising you of the classification of certain areas, including that embraced in the said entry of Reed and Doyle, the Director said:

The net result of oil shale investigations already made is that the oil-shale areas in Colorado, Utah, and Wyoming constitute a latent petroleum reserve whose possible yield is several times the estimated total remaining supply of petroleum in the United States.

While the data at hand are not sufficient to warrant a specific statement as to the total recoverable nitrogen content of these shales, it is believed possible that this will prove so large as to give these deposits a value as a source of nitrogen equal to their value as a source of petroleum.

In view of the high prospective mineral value of lands underlain by oil-shale deposits it is, of course, apparent that they should not be permitted to be

acquired under the nonmineral land laws. The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws, even though they are ambiguous and but poorly adapted to deposits of this type.

Accordingly, I hereby classify the tracts listed below as mineral lands, valuable as a source of petroleum and nitrogen, and request that you make the proper notation of the classification upon your records.

Such classifications of lands containing oil shale have been accepted by the Department as *prima facie* evidence of the value of the lands so classified for mining purposes so as to require agricultural entrymen therefor to accept restricted patents to their claims under the provisions of the act of July 17, 1914 (38 Stat., 509), or assume the burden of establishing their nonmineral character.

In his letter of November 15, 1916, transmitting to the Department a proposed Executive order for the creation of Naval Oil Shale Reserve No. 1, Colorado No. 1, embracing approximately 45,400 acres, and including the land applied for by Reed and Doyle, the Director of the Geological Survey said: "The Colorado area is near transportation, and includes a part of the richest of the known shale deposits."

By section 37 of the leasing act of February 25, 1920, it was provided:

That the deposits of * * * oil, oil shale, and gas herein referred to, in lands valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at the 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.

Oil shale having been thus recognized by the Department and by Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to have been subject to valid location and appropriation under the placer mining laws, to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas. Entries and applications for patent for oil shale placer claims will, therefore, be adjudicated by your office in accordance with the same legal provisions and with reference to the same requirements and limitations as are applicable to oil and gas placers.

The record of the entry accompanying your memorandum is returned for such adjudication.

**OPERATING REGULATIONS TO GOVERN THE PRODUCTION OF OIL
AND GAS—ACT OF FEBRUARY 25, 1920 (41 STAT., 437).**

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 4, 1920.

DEFINITIONS.

The following terms used in these regulations shall have the meanings here given, namely:

Supervisor.—The agent appointed by and acting for the Secretary of the Interior to supervise all operations for the discovery or production of oil and gas under these regulations.

Deputy supervisor.—Any person appointed by the Secretary of the Interior to supervise, under the direction of the supervisor, operations for the discovery or production of oil and gas under these regulations.

Lessee.—Any person, firm, corporation, or municipality to whom a permit or lease for the discovery or production of oil and gas is issued under the act of February 25, 1920.

Leased lands, leased premises, or leased tract.—Any lands or deposits occupied under permit or lease granted in accordance with the act of February 25, 1920, for the discovery or production of oil or gas.

POWERS AND DUTIES OF SUPERVISOR AND HIS DEPUTIES.

It shall be the duty of the supervisor and his deputies—

1. To visit from time to time leased lands where operations for the discovery or production of oil and gas are conducted, to inspect and supervise such operations with a view to preventing waste of oil and gas, damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits, injury to life or property, or economic waste; and to issue, in accordance with the provisions of the lease and these regulations, such necessary instructions to lessees as will effectively prevent waste or damage to deposits containing oil, gas, water, or other minerals or injury to life or property.

2. To make reports to the Secretary of the Interior as to the general condition of the leased property and the manner in which operations are being conducted and his orders are being complied with, and to submit from time to time information and recommendations for safeguarding and protecting the property and the underlying mineral-bearing formations.

3. To prescribe, subject to the approval of the Secretary of the Interior, the manner and form in which all records of operations, reports, and notices shall be made.

4. To require that tests shall be made to detect waste of oil or gas or the presence of oil, gas, or water in a well and to prescribe or approve the methods of making such tests.

5. To require the correction, in a manner to be prescribed or approved by him, of any condition existing subsequent to the completion of a well which is causing or is likely to cause damage to any formation bearing oil, gas, or water, or to coal measures or other mineral deposits, or which is dangerous to life or property or wasteful of oil or gas.

DUTIES OF LESSEES.

6. The lessee shall conform to the terms of the lease and regulations and to the written instructions of the supervisor and shall use all reasonable precautions, in accordance with the most approved methods, to prevent waste of oil or gas, damage to formations or deposits bearing oil, gas, or water or to coal measures or other mineral deposits, injury to life or property, or economic waste.

7. The lessee shall designate in writing a local or resident representative for each permit or lease or for each group of permits or leases he holds and shall give the local post-office address of such resident representative, on whom the supervisor or other authorized representative of the Department of the Interior may serve notice or with whom he may otherwise communicate in securing compliance with these regulations. The resident representative of the lessee of lands not yet drilled shall be designated before drilling or other operations are begun; the resident representative of the lessee of lands on which such operations were begun prior to the approval of these regulations shall be designated within thirty days after their approval.

If said designated local or resident representative shall at any time be incapacitated for duty or absent from his residence as given in the address furnished, the lessee shall designate in writing some person to serve in his stead, and in the absence of such representative and of written notice of the appointment of a substitute, any employee of the lessee who is on the leased premises, or the contractor or other person in charge of the drilling, shall be considered the representative of the lessee for the service of orders or notices as herein provided, and service upon any such employee, contractor, or other person shall be deemed service upon the lessee.

8. The lessee shall not begin to drill, redrill, deepen, plug, or abandon any well or alter the casing in it without first notifying the supervisor or his deputy of his plan or intention.

9. The lessee shall keep on the leased premises or at his headquarters in the field accurate records of the drilling, redrilling, deepening, plugging, or abandoning of all wells and of all alterations of

casings, the records to show all the formations drilled through and their content of oil, gas, or water, if any, and the kinds, length, and sizes of casings used in drilling the wells; and copies of such records shall be transmitted to the supervisor by the lessee within fifteen days after the first completion of any well or after the completion of any further operations on it. The lessee shall also submit to the supervisor such other reports and records of operations as may be required, in the manner and form prescribed by the supervisor.

10. The lessee shall permanently mark all rigs or wells in a conspicuous place with his name and number or designation of the well and shall take all necessary means of precautions to preserve these markings.

11. If the lessee shall fail to plug properly any dry or abandoned well the supervisor, after giving thirty days' notice to the parties in interest, may plug such well at the expense of the lessee or his surety.

12. The lessee shall recover all oil in B. S. or emulsion and put it into marketable condition if it can be recovered at a profit. If the formation of B. S. or emulsion is not preventable and the oil can not be recovered by the usual modes of treatment, the cost of putting the oil into marketable condition by any unusual mode of treatment shall first be deducted from the amount received for it before royalty is computed.

13. The lessee shall make a full report to the supervisor of all accidents or fires on the leased premises.

REGULATIONS RELATIVE TO GAGING OIL.

14. The lessee shall provide tanks suitable for containing and accurately measuring the crude oil produced from the wells, and shall furnish to the supervisor accurate copies of all tank tables and all run tickets as and when requested. The lessee shall not, except during an emergency, permit oil to be stored or retained in earthen reservoirs or in any other receptacle in which there may be undue waste of oil by seepage or evaporation. If the lessor elect to take its royalty in oil it shall give the lessee ninety days' notice thereof in advance. The lessee shall furnish storage for such royalty oil free of charge for thirty days after the end of the calendar month in which such oil is produced, the oil to be stored on the leased premises or at such place as the lessor and the lessee may mutually agree upon.

MEASUREMENT OF NATURAL GAS.

15. All gas subject to royalty shall be measured by meters approved by the supervisor and installed at the expense of the lessee at such places as may be determined by the supervisor or his deputy. The standard of pressure in all measurements of gas sold or subject to

royalty shall be 10 ounces above atmospheric pressure, and the standard of temperature shall be 60° Fahrenheit, and all measurements of gas shall be reduced by computation to these standards, no matter what may have been the pressure and temperature at which the gas was actually measured.

METHODS OF COMPUTING VALUE OF CASING-HEAD GAS.

16. For computing the royalties provided for in the lease the value of all casing-head gas produced shall be assumed to be one-third of the value of the marketable casing-head gasoline extracted from such gas, but if the lessee receive a higher price for casing-head gas than the equivalent of one-third of the value of the casing-head gasoline manufactured from such gas the royalties shall be computed on that price.

17. For computing royalties the gasoline content of all casing-head gas produced at any plant during any month shall be determined by dividing the total quantity of marketable casing-head gasoline produced during that month (after deducting all naphtha or other materials used for blending products) by the quantity of casing-head gas used in the plant during the month, as shown by meters. If the gasoline plant on the leased premises obtain casing-head gas both from those premises and from other sources, or if casing-head gas is sold or transported from the leased premises to plants not on the leased premises, the gasoline content of the gas shall be determined by field tests made under the supervision of the supervisor or his deputy, and, if they are deemed necessary or desirable, tests shall be made of all casing-head gas used in any such plant in order to determine whether the field tests of the gas produced from the leased premises shows as great a gasoline content as is shown by the casing-head gasoline marketed in the actual operations of the plant; and after such tests have been made the supervisor or his deputy shall determine the gasoline content of the gas produced from the leased premises.

ENFORCEMENT OF ORDERS.

18. If the lessee fail to comply with these regulations or any part thereof or with the order or orders of the supervisor or his deputy, the supervisor or his deputy shall have authority to require him to suspend the operation or practice that conflicts with the regulations or orders or the use of any device that the supervisor or his deputy may consider wasteful or improper. This order of suspension shall remain in force until the lessee complies with the regulations or orders that have been violated or until such order of suspension has been revoked by the Secretary of the Interior, provided, that when the continuance of such operation or practice, or of the use of the

device considered wasteful or improper, does not threaten immediate, serious, and irreparable damage to oil or gas or other valuable mineral deposits, the supervisor shall temporarily waive compliance with such order of suspension pending an appeal to and a review by the Secretary of the Interior of such order, upon the lessee's lodging with the supervisor a surety bond or depositing in escrow cash or United States liberty bonds in a fixed sum, the forfeiture of the amount of the bond or deposit to be conditioned upon compliance with the order or orders of the supervisor if such order or orders are not revoked by the Secretary of the Interior. Such appeal must be made within ten days from the issuance of the order, and the Secretary of the Interior shall pass upon the appeal as soon thereafter as possible and shall return the bonds or the sum deposited, or make such disposition of it as the law, regulations, and facts may warrant.

APPEAL TO THE SECRETARY.

19. The lessee must immediately obey all orders of the supervisor or his deputy except as hereinbefore provided, but any order shall be subject to review by the Secretary of the Interior upon appeal filed by the lessee within thirty days after it has been served.

The administration of these regulations shall be under the direction of the Bureau of Mines.

JOHN BARTON PAYNE,
Secretary.

THE FEDERAL WATER POWER ACT.

July 13, 1920.

ACT OF JUNE 10, 1920—SECTION 24.

The purpose of section 24 of the act of June 10, 1920, is to permit of the agricultural or other use of lands withdrawn or classified as water-power sites in so far as same may not thereafter be needed and utilized by the United States, its permittees, or licensees for power purposes, as authorized and defined by said act; and one securing such limited patent has no right by virtue thereof, or by possession of the land thereunder, to utilize or develop the water-power resources, unless and until he shall have secured a permit or license from the Government.

HOPKINS, *Acting Secretary*:

Your [Director of the Geological Survey] letter of July 3, 1920, states that a representative of a western power company interprets section 24 of the act of June 10, 1920 (41 Stat., 1063), "The Federal Water-Power Act," as authorizing the opening of lands in power-site reservations to location, entry, or selection under the public-land laws, subject to a reservation permitting the United States, its permittees, or licensees to develop water power, but that the right to

make such development is not exclusive and will not prevent or restrict the land patentee or his assigns from utilizing the lands patented, subject to the reservation for power purposes.

You suggest that this would permit power companies to acquire restricted patents to such lands and thereafter use them for the development of hydroelectric power without restriction or regulation by the Federal Government, and suggest an amendment of the water-power act, providing that the reservation to the United States, its permittees, and licensees shall be of the sole or exclusive right of power use, thus giving the patentees a limited fee, from which the right of power development is specifically excluded.

Section 24 provides that whenever the Federal Power Commission shall determine that the value of any lands of the United States, entry of which is applied for under any public-land law, and which have been or may be reserved or classified as power sites—

will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the commission, for the purposes of this Act, which right shall be expressly reserved in every patent issued for such lands, and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, * * *.

The act in question repeals all acts and parts of acts inconsistent therewith, and provides a complete and exclusive method for the use of public lands, reservations, and navigable waters for the development, transmission, and utilization of hydroelectric power.

The evident purpose of section 24 is to permit of the agricultural or other use of lands withdrawn or classified as water-power sites in so far as same may not be thereafter needed and utilized by the United States, its permittees, or licensees for power purposes, as authorized and defined in the act. The reservation is analogous to that contained in agricultural entries and selections patented under the acts of Congress of March 3, 1909, June 22, 1910, July 17, 1914, and February 25, 1920, wherein certain minerals and the right to enter upon the lands for the purpose of prospecting for, mining, and removing same is reserved to the United States, its grantees, permittees, or lessees. All these reservations, as well as the reservation contained in the act of June 10, 1920, *supra*, are, in the opinion

of the Department, exclusive and reserve and retain in the United States the right to utilize and develop the resource so withheld, a right which is inconsistent with the view expressed to you by the power company's representative, or that suggested in your letter.

It is manifest from the language of section 24 of the act of June 10, 1920, read in connection with the remainder of the act, that water-power development upon any lands which may be patented by the United States, with the reservation provided for in section 24, can only lawfully be made by the United States, its permittees, or licensees, and that the person securing the limited patent has no right whatever by virtue of the patent or his possession of the land thereunder to utilize or develop the water-power resources, unless and until he shall have secured a permit or license from the United States, as provided by the act.

The construction of the law suggested by you would be manifestly inconsistent with the purpose and intent of the provision and is not warranted by the language of the statute. Moreover, as a practical matter, it would be foolish for one claiming under a restricted patent issued under said provision to construct works upon the land for the development, transmission, or utilization of power without the consent of the United States, for the United States might immediately thereafter exercise the right conferred upon it by the statute and reserved in the land patent issued to enter upon the lands in question, take possession of the water power development, and operate it or lease it to others.

However, in my opinion, there is no doubt that no power development, transmission, or utilization may be had upon lands of the character described except it be pursuant to the act of June 10, 1920, *supra*, or acts amendatory thereof or supplementary thereto.

FOSDICK v. SHACKLEFORD.

Decided August 9, 1920.

APPLICATION TO CONTEST—DEFECTIVE AFFIDAVIT.

Where neither the contestant nor the corroborating witness states facts, but mere conclusions, the affidavit of contest is defective, and in the event demurrer be interposed must be rejected.

VOGELSANG, *First Assistant Secretary*:

David R. Shackelford has appealed from a decision of the Commissioner of the General Land Office, dated February 20, 1920, overruling the demurrer and motion to dismiss interposed by him in the contest proceedings by Clarence E. Fosdick against his entry under

the enlarged homestead act, made March 29, 1916, for NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 11, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 14, E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 15, T. 48 N., R. 69 W., 6th P. M., Sundance, Wyoming, land district.

Fosdick charged in his application to contest, filed August 25, 1919, that entryman "has failed to establish and maintain residence on said land and has failed to cultivate the same as required by law," followed by the required averments relative to military and naval service. The affidavit was corroborated by M. K. Thompson in the following words:

That he is acquainted with the tract described in the above affidavit, and knows from personal knowledge and observation that the statements therein made are true. M. K. Thompson also states that the said David R. Shackelford has failed to establish and maintain residence on said land and has not cultivated the same as required by law.

After being served with notice of the contest, entryman demurred to the affidavit of contest and moved the dismissal thereof, contending that the affidavit does not allege facts sufficient to warrant cancellation of the entry, and that the corroboration by Thompson is defective and insufficient and does not conform to Rule of Practice 3. The local officers overruled the demurrer and motion.

Rule of Practice 2 provides that the application to contest must contain—

(d) statement, in ordinary and concise language, of the facts constituting the grounds of contest.

Rule of Practice 3 as amended September 23, 1915 (44 L. D., 365), requires that the charges in an application to contest—

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

The application to contest does not comply with either of said Rules 2 or 3. The charge is but the statement of two conclusions, and omits any statement of alleged facts on which the conclusions are based. The allegations that entryman "has failed to establish and maintain residence on said land" and "has failed to cultivate the same" are both qualified by "as required by law." Inasmuch as there is nothing in the record to indicate that Fosdick correctly understands the requirements of the law under which the entry was made, the qualifying phrase renders the affidavit unacceptable.

The repetition of the conclusions of the contest affidavit by the corroborating witness is not sufficient. It is imperative that "the facts must be set forth." However, Rule 3 can be complied with without a repetition of the facts alleged, if the corroborating witness states that he knows from personal knowledge and observation that

the statements made by contestant are true, coupled with a statement of how and why he knows them to be true. (*Gilbert v. Vallier*, 47 L. D., 337.)

Where neither the contestant nor the corroborating witness states facts, but mere conclusions, the affidavit is defective, and in the event a demurrer is interposed the affidavit must be rejected.

In *Obritschkewit v. Long* (41 L. D., 118), cited in the decision appealed from, entryman moved to dismiss the contest for the reason that it charged abandonment for six months immediately prior to contest, which covered, in part, a period for which he was granted leave of absence by the act of January 28, 1910 (36 Stat., 189). The affidavit not only alleged that entryman "has not resided upon and cultivated said land as is by law required," but set forth a statement of the facts to sustain such conclusion—*i. e.*, "That he has abandoned the same and has been continuously absent therefrom for a period or more than six months immediately prior to the commencement of this action. That default now exists." While the entryman, as stated in said decision, "rested his defense solely upon the sufficiency of his motion to dismiss the proceedings for insufficiency of the charge," the alleged insufficiency related only to the charge that he had abandoned the land for more than six months prior to contest, the contention being that he was entitled to a leave of absence for three months from January 28, 1910. He made no point of the fact that the first allegation was a mere conclusion, which had it not been followed by a statement "of the facts constituting the grounds of contest" would have been subject to objection.

A defendant who timely objects to the sufficiency of the charge set forth in a contest affidavit is entitled to a ruling thereon, and the contestant, in the absence of an intervening contest or adverse claim, is at liberty to amend the charges, the amended affidavit to date from such amendment. But an entryman who joins issue without calling into question the sufficiency of the contestant's charges can not thereafter be heard to complain.

For the reasons aforesaid, the decision appealed from is reversed and the contest dismissed.

FRANK A. KEMP.

Decided August 9, 1920.

LEASING ACT OF FEBRUARY 25, 1920—FORMER UNCOMPAGRE AND WHITE RIVER
UTE INDIAN LANDS.

The Indian title to the area in the State of Colorado formerly occupied by the Uncompagre and White River Utes being extinguished and Congress, in declaring same to be subject to disposition under the public land laws,

having made no exception that would preclude appropriate disposition under laws applicable to other tracts of like character, such lands and deposits therein are subject to the provisions of the leasing act of February 25, 1920, notwithstanding the fact that under the terms of agreement the Indians would be entitled to the proceeds from disposition thereof.

VOGELANG, *First Assistant Secretary*:

This is an appeal from what in effect is a decision by the Commissioner of the General Land Office of July 24, 1920, affirming the action of the local officers in rejecting the application 08759 of Frank A. Kemp filed under the provisions of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil, gas, and kindred petroleum substances upon the S. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 17, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, E. $\frac{1}{2}$, Sec. 19, all of Sec. 20, W. $\frac{1}{2}$, Sec. 21, W. $\frac{1}{2}$, Sec. 28, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 29, and E. $\frac{1}{2}$, Sec. 30, T. 36 N., R. 17 W., N. M. P. M., Durango land district, Colorado.

The tracts above described are within that portion of the Ute Indian Reservation in the State of Colorado formerly occupied by the Uncompahgre and White River Utes ceded to the United States by the confederated bands of Ute Indians by the treaty of March 2, 1868, as amended, accepted, and ratified by the act of June 15, 1880 (21 Stat., 199), and opened to disposal under the provisions of the act of July 28, 1882 (22 Stat., 178).

By section 3 of the said act of 1880, it is provided that after certain allotments should have been made to the Indians:

all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act.

By the said act of 1882 it is declared:

That all of that portion of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Utes be, and the same is hereby, declared to be public land of the United States, and subject to

disposal from and after the passage of this act, in accordance with the provisions and under the restrictions and limitations of section 3 of the act of Congress approved June fifteenth, eighteen hundred and eighty, chapter two hundred and twenty-three, except as hereinafter provided, under regulations to be prescribed by the Secretary of the Interior in accordance with the provisions of this act.

And by section 3 of the act provision is made for the validation of all entries, settlements, or locations theretofore made under any laws of the United States upon a strip of land not exceeding 10 miles in width within that part of the Ute Reservation in the State of Colorado then lately occupied by said Uncompahgre and White River Utes and bounded on the east by the 107th meridian of longitude:

Provided, however, That if homestead entries have been made on said strip, the lands so entered shall be paid for in cash, after proof which would be satisfactory under the preemption laws: *And provided further,* That none of said lands shall be disposed of for any consideration other than cash, nor for a less price than one dollar and twenty-five cents per acre.

The application for said permit was rejected pursuant to the provisions of paragraph 2 of the oil and gas regulations approved March 11, 1920, issued under said act of February 25, 1920, wherein it is declared that leases under the act may not include land or deposits in "(e)ceded or restored Indian lands, the proceeds from the disposition of which are credited to the Indians."

By said act of February 25, 1920, it is provided:

That deposits of * * * 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, approved March 1, 1911 (Thirty-sixth Statutes, page 951), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities.

Section 13 of the act authorizes the Secretary under such necessary rules and regulations as he may prescribe to grant any applicant qualified under the act a permit to prospect which shall give him the exclusive right for a certain period to prospect for oil or gas upon not to exceed 2,560 acres of land "wherein such deposits belong to the United States" and are not within any known geologic structure of a producing oil or gas field, subject to compliance with certain prescribed conditions. Section 14 of the act declares that upon establishing to the satisfaction of the Secretary that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for lands included in his permit upon payment of certain royalties and rentals and compliance with certain specified requirements.

The Indian title to the area in the State of Colorado formerly occupied by the Uncompahgre and White River Utes, including the tracts here in question, has long since been extinguished, leaving in the Indians, however, a right to the proceeds of the lands if and when disposed of, at a price of not less than \$1.25 per acre. Congress has in express terms declared said area to be public land of the United States, and "subject to disposal under the laws providing for the disposal of public lands, at the same price and on the same terms as other public lands of like character," except as otherwise provided, and has made no exception that would preclude the disposition of any of said lands that may be valuable for mineral under laws applicable to other lands of like character. Aside from the provisions of the acts of June 15, 1880, and July 28, 1882, *supra*, Congress, by the act of June 13, 1902 (32 Stat., 384), extended to said area, with certain exceptions, the provisions of the free homestead laws, but therein provided that the moneys lost to the Indians by reason of the passage of said act should be paid by the United States into the fund for the benefit of the Indians, and that all moneys received by reason of the commutation of homestead entries of said lands should be paid into said fund. Congress also, by the act of February 24, 1909 (35 Stat., 644), extended to the area the provisions of the act of August 18, 1894 (28 Stat., 372, 422), known as the Carey Act, as amended by the acts of June 11, 1896 (29 Stat., 413, 434), and March 3, 1901 (31 Stat., 1133, 1188), but provided that before any patent should issue to the State of Colorado under said act, the State should pay into the Treasury of the United States the sum of \$1.25 per acre for the lands so patented, the money so paid to be subject to the provisions of the act of June 15, 1880, *supra*. Lands included in said former Indian reservation have been reserved, under the provisions of section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), for forest purposes, which act applies only to public lands of the United States; and, under the authority conferred upon the Court of Claims by the act of March 3, 1909 (35 Stat., 788), that court awarded to the Indians judgment for the value of the lands so included in forest reservations (*The Ute Indians v. The United States*, 45 Court of Claims Reports, 440). In its decision awarding judgment the court, at page 467, said:

* * * It was unquestionably within the political power of Congress to authorize the withdrawal of these forest reserves from the market indefinitely, or for such periods as it should see fit, notwithstanding the agreement, and thus deprive the Utes of the proceeds of sales which otherwise would have been made, and interest upon the same. Having done so, their claim for the proceeds of lands deemed to have been sold by the setting apart of the forest reserves, and interest thereon, must be derived entirely from the language of the jurisdictional act.

The lands here in question and the deposits contained therein are therefore lands and deposits "owned by the United States" and the lands are not so far as appears within any of the exceptions enumerated in the said leasing act of February 25, 1920; hence it must be held that by the express terms of said act, said lands and deposits are subject to the provisions of the act notwithstanding the fact that pursuant to the terms of the agreement with the Indians, they would be entitled to receive the proceeds from any disposition that may be made thereof, the above cited provisions of paragraph 2 of the regulations issued under the leasing act being thus inoperative as to lands in the said former Ute Reservation.

For the reasons hereinbefore stated the action appealed from is reversed and all else being regular, the application for permit here under consideration will be allowed.

ALASKA TIMBER REGULATIONS MODIFIED—ACT OF JUNE 5, 1920.

[Circular No. 722.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 1, 1920.

The act of Congress approved June 5, 1920 (41 Stat., 874, 917), making appropriations for sundry civil expenses of the Government, contained a provision that hereafter birch timber may be exported from Alaska.

It had been reported that there is considerable white birch timber, which is a hardwood and is valuable for the manufacture of furniture, flooring, and finishings, on some of the public lands along and near the line of the Government railroad in the Susitna valley and also in the Matanuska and Tanana valleys and in some of the small valleys along the coast. The market in Alaska for this class of timber for manufacturing purposes has been extremely limited and such use as it has been put to has chiefly been for fuel. The provision authorizing its exportation was enacted with the view to encouraging the use of this class of timber for a more appropriate and beneficial purpose. The rules and regulations governing the sale and use of timber upon the vacant, unreserved public lands in Alaska as set forth in Circular No. 491, approved July 19, 1916 (45 L. D., 227, 250), are accordingly hereby modified to the extent that birch timber may be sold for export purposes under the following conditions:

(1) Sales of birch timber to be cut for export may be made pursuant to the procedure and under the conditions set forth in the existing rules and regulations (Circular No. 491) where the quantities are such

as will be disposed of from year to year. This provision has particular reference to cases where purchases are made by those who do not contemplate large scale production and expenditure of large sums of money for developing enterprises for the exportation of this class of material.

(2) Sales of birch timber suitable for manufacturing purposes are hereby authorized in quantities, if found available, sufficient to supply a mill or proposed mill for a period of as much as ten years, when it is satisfactorily shown that the purchaser in good faith intends to develop an enterprise for the cutting of this class of timber for export from Alaska. The amount of timber that any one purchaser will be permitted to purchase under this provision and the period of the contract will be governed by the capacity of the mill and the estimated quantity that it will be capable of producing during the period covered by the contract of sale. When a ten years' supply is sold, the period within which the same must be cut (ten years) will begin to run from the time that the contract of sale is executed if the manufacturing plant has been built, or from the time that the mill has been constructed and ready to begin operations, if it is to be built, but in no case will more than a two years' deduction be allowed for construction, and each contract shall contain a provision that all rights acquired thereunder shall be forfeited if operations have not been commenced within three years from the date of execution of the contract, unless, upon satisfactory showing, the Secretary of the Interior shall, in his discretion, excuse the delay. Commencement of operations in this sense will be construed as a *bona fide* commencement of actual cutting of timber in quantity sufficient to show that it is the purpose of the purchaser to fulfill the conditions of the contract and that it was not entered into merely for speculative purposes.

(3) Applications to purchase birch timber pursuant to the act of June 5, 1920, *supra*, must be filed in duplicate in the United States land office for the district wherein the lands to be cut over are situated, and should show: (a) name, post-office address, residence, and business location of applicant; (b) amount or approximate amount in board feet of timber that the applicant desires to purchase; (c) a description by legal subdivision or subdivisions, if surveyed, or by metes and bounds with reference to some permanent natural landmark, if unsurveyed, and the area or approximate area of the land from which the timber is to be cut, and if the lands are within the area (Alaskan Timber Reserves) withdrawn pursuant to the act of March 12, 1914 (38 Stat., 305), in aid of the construction of Alaskan Government-owned railroads, it should be so stated, and evidence of consent previously obtained from the Alaskan Engineering Commission should be filed with the application; (d) whether or not the applicant is prepared to commence cutting immediately; and

if not approximately how long before timber-cutting operations will be commenced; (e) the estimated annual capacity of the mill or proposed mill, and the amount of money invested or to be invested in the establishment of the enterprise, accompanied with evidence as to the financial standing of the applicant and a statement showing the general plan of operation and the purpose for which the timber is to be used. The sum of \$200 must be deposited with each application, as an evidence of good faith, and for the purpose of helping to defray the cost of appraisal. If the sale is consummated, the amount of the deposit will be credited on the purchase price without deduction for the cost of appraisal. All remittances must be in cash, or by certified check or postal money order. No other form of remittance can be accepted.

(4) Immediately upon the filing of an application to purchase birch timber under section 2 of these rules and regulations, a notice shall be published, at the expense of the applicant, in a newspaper designated by the register, published in the vicinity of the land from which the timber is to be cut and most likely to give notice to the general public, once a week for a period of five consecutive weeks, if in a weekly paper, or if in a daily paper for a period of thirty days. The description of the land in the notice must be identical with the description in the application. The register and receiver will post a copy of said notice in a conspicuous place in their office during the period of publication. Upon the execution of a contract the purchaser shall, if the lands from which the timber is to be cut are unsurveyed, cause the boundaries to be blazed or otherwise marked in order that they may be identified. This requirement has been adopted in order that others who may subsequently desire to purchase timber or to settle upon or enter the land may have notice that the timber has been applied for or sold.

(5) The local officers will make appropriate notations upon the records of their office and transmit the application to the Commissioner of the General Land Office and at the same time transmit the duplicate to the chief of the Alaskan Field Division at Juneau, Alaska, or to a special agent located in the particular land district who shall have been designated by the chief of field division to make appraisals; upon receipt of the same the latter will without delay cause the timber applied for to be examined and appraised. The appraisal rates will be based upon a fair stumpage rate taking into consideration the quality of the timber and its accessibility to market. In no event will any timber suitable for manufacturing purposes be appraised at less than \$1 per thousand feet, board measure. The Government reserves the right to reappraise the remaining timber at the expiration of five years from the time that the period within which the timber must be cut begins to run, but in no instance shall

the reappraisal be at more than double the rate of the original appraisal. After an examination and appraisal shall have been made, the chief of field division will at once notify the applicant, advising him of the result of the appraisal, and also submit a report to the Commissioner of the General Land Office.

(6) Upon receipt of notice the applicant shall, within thirty days therefrom, enter into a contract with the Government, through the Commissioner of the General Land Office as its agent, subject to the approval of the Secretary, to purchase the timber applied for, pursuant to the rules and regulations of the Department of the Interior pertaining thereto, and shall execute and file therewith a bond with a bonding company listed on an approved list issued by the Treasury Department, as surety, in a sum to equal 50 per cent of the stumpage value of the estimated amount of timber to be cut during each year of the contract. The bond shall be conditioned on the payment for the timber in accordance with the terms of the contract and to the faithful performance of the contract in other respects and to observance of the rules and regulations pursuant to which the sale is made. Forms of contract and bond to be used hereunder are appended to these rules and regulations. All contracts and bonds executed hereunder must be approved by the Secretary of the Interior.

(7) All contracts shall contain provisions against waste and precaution against forest fires. The Government may reserve the right to insert in a contract a provision authorizing the disposition for local use of birch timber that is not suitable for manufacturing purposes and of timber of other varieties upon the area described in the contract, to another or others pursuant to the provisions of Circular No. 491, sections 1 and 2. Contracts entered into under these rules and regulations will also be subject to the right of qualified persons to settle upon or enter the lands under the provisions of the homestead laws, but such settlers or homesteaders shall not have any title to or interest in the timber purchased under the contract or be permitted to interfere with the purchaser's operations incident to the cutting and removal of the timber.

(8) At the expiration of a contract a new contract may be entered into for a period of five years, upon the approval of the Secretary of the Interior, where there is sufficient timber available to warrant. Prior good faith of the purchaser and substantial compliance with the conditions of the expired contract will be given consideration with reference to awarding a new contract. A new appraisal shall be made at that time for the purpose of fixing the stumpage price. Further renewals for five-year periods may be made to the same purchaser upon approval of the Secretary of the Interior.

(9) These rules and regulations are not applicable to timber on national forest lands, Indian or Eskimo claims, prior homestead or

mining claims, or lands reserved or withdrawn for any purpose, except where the terms of the reservation or withdrawal order permit it. For information relative to areas in Alaska from which timber can not be sold, see Circular No. 491, section 8.

CLAY TALLMAN,
Commissioner.

Approved:

JOHN BARTON PAYNE,

Secretary.

SCHOOL SECTION LANDS—BLACKFEET INDIAN RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 22, 1920.

REGISTER AND RECEIVER, KALISPELL, MONTANA:

The applicable portions of the act of Congress approved March 1, 1907 (34 Stat., 1035), read as follows:

That the Secretary of the Interior is hereby authorized and directed to immediately cause to be surveyed all of the lands embraced within the limits of the Blackfeet Indian Reservation, in the State of Montana.

That so soon as all the land embraced within said Blackfeet Indian Reservation shall have been surveyed the Commissioner of Indian Affairs shall cause allotments of the same to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who may rightfully belong on said reservation.

* * * * *

That the Secretary of the Interior may reserve such land as he may deem necessary for agency, school, and religious purposes, to remain reserved so long as needed and so long as agency, school, or religious institutions are maintained thereon for the benefit of the Indians, not exceeding two hundred and eighty acres to any one religious society; also such tract or tracts of timber lands as he may deem expedient for the use and benefit of the Indians of said reservation in common * * *.

* * * * *

That upon the completion of said allotments the President of the United States shall appoint a commission consisting of three persons to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians or reserved by the Secretary of the Interior or otherwise disposed of.

* * * * *

That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, agricultural land of the third class; fourth, agricultural land of the fourth class; fifth, agricultural land of the fifth class; sixth, agricultural land of the sixth class; seventh, agricultural land of the seventh class; eighth, agricultural land of the eighth class; ninth, agricultural land of the ninth class; tenth, agricultural land of the tenth class; eleventh, agricultural land of the eleventh class; twelfth, agricultural land of the twelfth class; thirteenth, agricultural land of the thirteenth class; fourteenth, agricultural land of the fourteenth class; fifteenth, agricultural land of the fifteenth class; sixteenth, agricultural land of the sixteenth class; seventeenth, agricultural land of the seventeenth class; eighteenth, agricultural land of the eighteenth class; nineteenth, agricultural land of the nineteenth class; twentieth, agricultural land of the twentieth class.

ond class; third, grazing land; fourth, timber land; fifth, mineral land, the mineral land not to be appraised:

* * * * *

That when said commission shall have completed classification and appraisal of all of said lands and the same shall have been approved by the Secretary of the Interior, the lands shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands and except such sections 16 and 36 of each township, or any part thereof, for which the State of Montana has not heretofore received indemnity lands under existing laws, which sections, or parts thereof, are hereby granted to the State of Montana for school purposes. And in case either of said sections, or parts thereof, is lost to the State of Montana by reason of allotment thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other lands not occupied or reserved within said reservation, not exceeding two sections in any one township, which selections shall be made prior to the opening of the lands to settlement: *Provided*, That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

* * * * *

That the lands within said reservation not already previously entered, whether classified as agricultural, grazing, timber, or mineral land, shall be subject to exploration, location, and purchase under the general provisions of the United States mineral and coal-land laws, at the prices therein fixed, except that no mineral or coal exploration, location, or purchase shall be permitted upon any lands allotted to an Indian.

* * * * *

That the Secretary of the Interior is hereby authorized and directed to reserve and set aside for town-site purposes, and to survey, lay out, and plat into town lots, streets, alleys, and parks, not less than eighty acres of said land at or near the present settlements of Browning and Babb, and each of such other places as the Secretary of the Interior may deem necessary or convenient for town sites, in such manner as will best subserve the present needs and the reasonable prospective growth of said settlements.

The act of Congress approved June 30, 1919 (41 Stat., 3, 16), provides:

That so much of the Indian appropriation act of March 1, 1907 (Thirty-fourth Statutes at Large, pages 1015 and 1035), as relates to the disposal of surplus unallotted lands within the Blackfoot Indian Reservation in Montana, is hereby repealed, and the Secretary of the Interior is authorized to make allotments under existing laws within the said reservation to any Indians of said Blackfoot tribe not heretofore allotted, living six months after the approval of this act, and thereafter to prorate all unallotted and otherwise unreserved lands therein among the Indians who have been allotted or may be entitled to rights within said reservation: *Provided*, That of the lands so allotted eighty acres of each allotment shall be designated as a homestead by the allottee and be evidenced by a trust patent and shall remain inalienable and nontaxable until Congress shall otherwise direct: *Provided further*, That the Blackfoot tribal rolls shall close six months after the approval of this act and thereafter no additional names shall be added to said rolls: *Provided*, That nothing herein shall be con-

strued to repeal the grants of lands made by the act of March 1, 1907, to religious institutions and to the State of Montana for school purposes, nor repeal the authority of the Secretary of the Interior to dispose of any land within said reservation suitable for town-site purposes, as provided by that act: *Provided*, That the State of Montana in making indemnity selections shall be confined to nonmineral and nonirrigable lands: *Provided further*, That the provisions of the act of March 1, 1907, which require a division of the funds received from the sale of the surplus lands immediately upon the date of the approval of the allotments of land are hereby repealed: *Provided further*, That the lands within said reservation, whether allotted, unallotted, reserved, set aside for town-site purposes, granted to the State of Montana for school purposes, or otherwise disposed of, shall be subject to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country until otherwise provided by Congress: *Provided further*, That any and all minerals, including coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly: *Provided*, That the lands containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe: *And provided further*, That allotments herein provided for shall be made under such rules and regulations as the said Secretary may prescribe, and trust patents shall be issued therefor as provided by the aforesaid act of March 1, 1907, except as to the homestead hereinbefore mentioned.

The said act of March 1, 1907, provides (first) for the survey of the Blackfeet Indian Reservation lands; (second) for allotment to Indians; (third) for reservations for agency, school, townsite, and religious purposes, and of timber lands for use of the Indians in common; (fourth) for classification and appraisalment of lands not allotted, reserved, or otherwise disposed of; (fifth) for disposal of the surplus lands, except such as shall have been classified as timber lands, and except certain sections 16 and 36, or parts thereof, thereby declared granted to the State of Montana for school purposes. Provision for the selection of indemnity school lands, within the boundaries of the reservation, is also made.

The act of June 30, 1919, repeals so much of the act of 1907 as provided for the disposal of the surplus lands within the reservation. The portion of the act making the grant of school-section lands to the State is not repealed, but the selection of indemnity school lands within the boundaries of the reservation is confined to nonmineral and nonirrigable lands.

The State has selected and had certified to it, lands outside the reservation, in lieu of the major portion of the school-section lands within the reservation, under the exchange provisions of the act of February 28, 1891 (26 Stat., 796). These selections, a few of which are yet pending unapproved, were based on a protraction diagram of the reservation made prior to survey. It is found in a few cases that selections were made and approved in accordance with said diagram indicating school sections 16 and 36 as regular (640 acres),

while actual subsequent survey shows the sections to be fractional, containing more, or less, than 640 acres each.

Prior to the passage of the act of June 30, 1919, reservation lands had been allotted to Indians, and reservations made of timber lands, of lands for agency, school, and religious purposes, also for townsite purposes at or near the settlements of Browning and Babb. It is found also that withdrawals had been made of reservation lands, excepting "tracts the title to which has passed out of the United States" for reclamation purposes, under authority of section 13, act of June 25, 1910 (36 Stat., 858), and that certain lands had been classified by the Geological Survey as coal in character, and others as prospectively valuable for deposits of petroleum and natural gas.

Action was taken prior to the act of June 30, 1919, looking to the classification and appraisalment of the surplus lands after allotments to the Indians, as provided in the act of March 1, 1907, but such classification and appraisalment were not approved by the Secretary of the Interior nor were such surplus lands opened to entry. However, sections 16 and 36 of each township are specifically granted by the act of 1907 to the State of Montana for school purposes. That act provided for the disposal of the surplus lands under the general provisions of the homestead, mineral, and townsite laws "except such of said lands as shall have been classified as timber lands and except such sections 16 and 36 of each township, or any part thereof, for which the State of Montana has not heretofore received indemnity lands under existing laws, *which sections, or parts thereof, are hereby granted to the State of Montana for school purposes.*" The act of 1919 repeals so much of the act of 1907 as related to the disposal of the surplus unallotted lands, and authorized the Secretary of the Interior to prorate such lands among the Indians. As to sections 16 and 36, the act provided that "nothing herein shall be construed to repeal the grants of lands made by the act of March 1, 1907, to religious institutions and *to the State of Montana for school purposes * * **" There was thus no postponement by the act of 1919 of the vesting of title in the State but the same passed pursuant to the grants made in the act of 1907 when and as soon as the lands were surveyed. There is no provision in the act of 1907 for the reservation of minerals for the benefit of the Indians, consequently as to sections 16 and 36 in place they passed to the State without such reservation, as the grants of land made to the State by said act are in nowise repealed or affected by the act of 1919. In this connection, the following provision in the act of 1907 is pertinent:

That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of one dollar and twenty-five cents per acre * * *.

The act of June 30, 1919, provides that in making indemnity selections the State is confined to nonmineral lands. This provision is followed by a proviso:

That any and all minerals, including coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly.

This provision standing alone is seemingly broad enough to authorize reservation of minerals as to sections 16 and 36, or other lands. But, considering the context, the proviso evidently refers to allotted and indemnity lands. This is indicated by the proviso following, authorizing the Secretary of the Interior to lease lands containing minerals, which could not be of school lands in place unless it be assumed that it was the intention to grant surface rights to the State. Besides, in view of the grant to the State by the act of 1907, the serious question would arise as to the power of Congress to impose reservation of minerals on lands in place after its unconditional grant by the act of 1907.

After due and careful consideration, the following conclusions are reached with respect to the school-land grants to the State:

(1) The State takes title as of the date of survey under the provisions of the act of March 1, 1907, without patent or certification and without reservation of mineral deposits, for the benefit of the Blackfeet tribe of Indians, to school sections 16 and 36 or portions thereof within the reservation not of known mineral character on that date, not occupied by or allotted to Indians, not reserved for agency, school, religious, townsite, or other public purposes under acts of Congress, or as timber lands for use of the Indians in common, and for which the State has not received indemnity.

(2) The State may select nonmineral, nonirrigable, unoccupied, and unreserved lands within the boundaries of the reservation, not more than two sections in any one township, in lieu of the lands in school sections lost to the State as indicated in the paragraph just above, and for which indemnity has not been received by the State. However, as such selections may not be made of known mineral lands, those classified as mineral in character by the Geological Survey, are not subject to selection. Approval of these selections and certification of selected lands will be with reservation to the United States of all mineral deposits for the benefit of the Blackfeet tribe of Indians.

(3) Pending, unapproved selections made under the exchange provisions of the act of February 28, 1891, *supra*, embracing lands outside the reservation, based on reservation school-section lands now granted to the State, are without valid base, because of the express provisions of the statutes of 1907, herein mentioned. New and valid base may be assigned by the State in support of these selections; otherwise they must be canceled.

(4) In cases where the State has received indemnity for sections 16 or 36, the acreage applied for and received being in accord with that indicated by the protraction diagram, above mentioned, while actual subsequent survey shows the sections to contain land in excess of the area indicated by protraction, the grant must be considered adjusted as to those particular sections, except that the State may select lands outside the reservation in lieu of the excess acreage. In cases where the actual surveyed acreage is less than that indicated by protraction, it will be necessary for the State to assign new and valid base to the extent of the deficit.

(5) The State may select lands within or without the boundaries of this reservation in satisfaction of losses occurring within such boundaries. If reservation lands are selected it is suggested that officials of the State confer with officials of the Indian Office, who may be selecting lands for allotment or to be prorated among the individual Indians.

Selections of lands within the reservation boundaries may be made on the forms ordinarily used by the State for the selection of indemnity school lands, so modified as to show that same are made under the provisions of the act of March 1, 1907, *supra*, as amended by the said act of June 30, 1919, and expressly subject to reservation of all minerals to the United States for the benefit of the Blackfoot tribe of Indians.

The usual nonmineral and nonoccupancy affidavits and publication of notice of the selections will be required, and where the base lands are reserved for timber or other Indian purposes, the usual county recorder's certificate of nonsale and nonencumbrance must be furnished.

Lists of such selections, filed by the State and accepted by you, are to be given proper serial numbers and will be transmitted to this office in special letter. Care must be taken to place notations, showing the facts and date of transmittal, in each case in the column for remarks in the "Schedule of Serial Numbers" for the month in which the lists are accepted and transmitted.

A list or schedule showing the status of all school-section lands within the boundaries of the reservation will be prepared for the use of this office, the State, the Indian Office, and your office.

CLAY TALLMAN,
Commissioner.

E. B. MERITT,

Assistant Commissioner of Indian Affairs.

Approved:

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

TOSS WEAXTA.

Decided September 29, 1920.

INDIAN HOMESTEADS—TRUST PERIOD.

The trust period prescribed in trust patents issued on Indian homesteads under the act of July 4, 1884, runs from the date of issuance of such patent.

ACT OF JUNE 21, 1906—EXTENSION OF TRUST PERIOD.

Indian homesteads and Indian allotments are in all essential respects upon the same footing, and are equally within the purview of the act of June 21, 1906, which affords authority for the extension of the trust period in the matter of trust patents issued thereon.

VOGELSANG, *First Assistant Secretary*:

This appeal is filed on behalf of Toss Weaxta, a full-blood Indian of the Nooksack tribe, from decision of the Commissioner of the General Land Office, dated March 15, 1919, denying his application for issuance of fee patent upon his Olympia homestead entry for lot 6, Sec. 7, lot 3, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 8, T. 38 N., R. 5 E., W. M., Washington.

The homestead application of Toss Weaxta was filed August 25, 1887, and it appears from indorsements on the papers that his entry was treated as one made under the Indian homestead act of July 4, 1884 (23 Stat., 96). He was not required to pay fees and commissions as is done under the act of March 3, 1875 (18 Stat., 420), which extends the benefits of the homestead law to Indians. The act of 1884 provides:

That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

The Indian submitted final proof and a final certificate was issued, but he paid no final fee in connection therewith. Trust patent was issued December 11, 1891, in accordance with the above provisions of the act of July 4, 1884. The twenty-five year trust period would have expired under the patent on December 11, 1916, the Department

and the courts holding that the trust period begins to run from the date of the trust patent. Klamath allotments (38 L. D., 559, 561); *United States v. Reynolds* (250 U. S., 104, 109). But on February 23, 1916, the trust period was by order of the President extended for one year, and similar action has been taken in subsequent years. These orders were under authority found in the act of June 21, 1906 (34 Stat., 325, 326), which provides "that prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best."

The above provisions have been invoked and applied indiscriminately as containing authority for the extension of the trust period in the matter of both allotments and Indian homesteads. It is contended, however, that an Indian homestead is not an Indian allotment, and that the act of June 21, 1906, by its terms limits the authority to extend the trust period to "Indian allotments only."

There are two what are known as Indian homestead acts—that of 1875, which granted to a specific class of Indians, those who had abandoned or should abandon their tribal relations, the right to homesteads on the public lands under a restriction against alienation for five years from date of patent; and that of 1884, a general law, which granted to Indians whether they had abandoned their tribal relations or not, rights to homesteads, subject to restrictions for twenty-five years on their alienation. *Hemmer v. United States* (204 Fed., 898); *United States v. Hemmer* (241 U. S., 379). The benefits of the acts of 1875 and 1884 are conferred upon Indians as such, and prior to said acts Indians, even though living apart from their tribes, could not make homestead entry on the public domain. *United States v. Joyce* (240 Fed., 610, 614). These acts were followed soon after by the general allotment act of February 8, 1887 (24 Stat., 388), which, after providing for allotments of lands in Indian reservations, declared in section 4 thereof that any Indian not residing upon a reservation who should make settlement upon public lands might have the same allotted to him and his children in quantities and manner prescribed for Indians residing upon reservations. The provision in the act of 1887 as to the form, effect, and conditions of patents to be issued is the same as that of the act of 1884. Summarizing the acts of 1875 and 1884, the court in the case of *Entiat Delta Orchards Co. v. Unknown Heirs of Saska* (168 Pac., 1130, 1133), said:

Under the act of 1875, if an Indian had abandoned his tribal relations, he might upon satisfactory proof of that fact take up public land. He would be required to pay the fees provided by law or prescribed by the Department. In

consideration of his abandonment of tribal relations, customs, and restraints, the limitation upon his right to convey or incumber his land was fixed at 5 years. Under the act of 1884, an Indian who had not severed his tribal relations, but who stood in the attitude of dependency as one of a tribe and as a ward of the Government, might nevertheless avail himself of the homestead law, but by reason of his tribal character and his dependency as a ward of the Government, no fees for filing or making proof were to be exacted of him, and for like reason his title was to be retained by the Government for a period of 25 years. This reasoning is strengthened by reference to the act of 1887, which may be justly regarded as a legislative interpretation. It makes one qualified under the act of 1875 a full citizen, whereas one who might be qualified under the act of 1884 would not be affected by it.

The fourth section of the act of 1887, although the lands taken thereunder are on the public domain, refers to the lands so taken as allotments. This is against the contention of Toss Weaxta on appeal that the terms "allottee" and "allotments," as defined in the cases cited by him, are necessarily confined or limited to the dividing up of reservation lands or common tribal property.

The Department all along has considered Indian homesteads and Indian allotments upon the public lands as being upon practically the same footing, and Congress has recognized the similarity. An Indian allottee, by virtue of the approval of his allotment by the Secretary of the Interior, acquires equitable title in the land but the legal title remains in the Government. This is equally true of an Indian homesteader under the act of 1884. In the case of *Parcher v. Gillen* (26 L. D., 34, 41, 43), after referring to the statutes defining the powers and duties of the Department and various decisions of the Supreme Court relating thereto, it was said:

A consideration of these decisions interpreting the statutes defining the authority and duties of the officers of the Land Department clearly demonstrates that so long as the legal title remains in the Government the lands are public within the meaning of those statutes and the laws under which such lands are claimed, or are being acquired, are in process of administration under the supervision and direction of the Secretary of the Interior. * * *

So long as the legal title remains in the Government the Secretary of the Interior, whoever he may be, is charged with the duty of seeing that the land is disposed of only according to law. The issuance of a patent is the final act and decision in that disposition, and with it and not before does the supervisory power and duty of the Secretary cease.

It was held in the case of *Doc Jim* (32 L. D., 291, 293):

Both the acts of 1875 and 1884 provide special rules and limitations not applicable to other homestead cases, and impose certain restrictions, as to encumbrance and alienation, upon the title the beneficiaries secure. The language of section 5 of the act of February 8, 1887 (24 Stat., 388, 389), with respect to the issuance of patents upon Indian allotments and the trusteeship of the United States, closely follows that of the act of 1884 with respect to Indian homesteads. It is well settled that the issuance of the first or trust patent on an allotment does not terminate the jurisdiction of the Department. Until the issuance of final patent the allottee remains as a ward subject to guardianship,

whose rights the Department is bound to protect. The language of the act of 1884 is undoubtedly susceptible of the same construction, and all the reasons for the exercise of the protecting care of the Government in the case of an Indian allottee are equally applicable in the case of the Indian homesteader.

In the case of Jim Crow (32 L. D., 657, 659), wherein it was held that the provisions of the act of May 27, 1902 (32 Stat., 245, 275), authorizing the sale and conveyance of inherited Indian lands by the heirs of a deceased allottee, applied to the heirs of all Indian claimants for portions of the public lands to whom a trust or other patent containing restrictions upon alienation has been issued, whether the claim was initiated under what are known as Indian homestead laws or under Indian allotment laws, it was said, referring to the acts of 1875 and 1884:

The general allotment act, so far as it affects public lands, and the preceding Indian homestead provisions, are so clearly connected that they should be construed *in pari materia* as relating to the same subject matter. The later allotment act but carries forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

Congress has recognized that allotment claims are of the same nature as homestead rights. A fund had been provided for assisting Indian homesteaders and carried upon the books of the Treasury Department under the title "Homesteads for Indians," and by the act of March 3, 1891 (26 Stat., 989, 1007), the Secretary of the Interior was authorized and directed to apply the balance of this fund for the employment of allotting agents "to assist Indians desiring to take homesteads under section 4," of the act of February 8, 1887.

Here Congress characterized claims under the allotment act as homesteads. Claims under the various laws relating to Indian homesteads may with equal propriety be characterized as allotments. In fact the terms mean substantially the same thing so far as the laws in which they are found affect the public lands and so far as the interests of the Indian claimant are concerned.

This Department has considered Indian homesteads upon practically the same footing as Indian allotments upon the public lands. It is held that the Government is bound to protect the rights of the Indian homesteader during the trust period, that no preference right of entry is obtained by contest against an Indian homestead and a relinquishment of an Indian homestead entry does not become effective until approved by this Department. (Doc Jim, 32 L. D., 291.) These rules apply also to Indian allotments. The control, jurisdiction, and obligations of the Department are the same in one case as in the other.

The objects of the laws relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the Government are the same. Both the legislative and the executive branches of the Government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the Government.

The act of June 25, 1910 (36 Stat., 855), authorizing the Secretary of the Interior to determine the heirs of deceased Indians, provides "that when any Indian to whom an *allotment* of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent," etc. In an

opinion by the Solicitor for this Department dated December 22, 1917, in the matter of determining the heirs to the estate of Ann Tellop Towtux, a Yakima Indian, which consisted of an Indian homestead under the act of 1884, it was held, after referring to the act of 1910, "By the express terms of this act the Department's jurisdiction to determine the heirs of deceased Indians continues until legal title passes from the United States by the issuance of final or fee patent. The act is equally applicable to both Indian homesteaders and Indian allottees to whom trust patents have been issued."

It was said in the case of *Robinson v. Steele* (157 Pac., 845, 848), after discussing the acts of 1875 and 1884 and numerous decisions thereunder:

That Congress has ample power to extend the period of limitation upon the power of alienation of Indian homesteads between the time of the making of the original entry by a claimant and the time of the perfection of his title by making final proof is settled by the decisions of the federal courts. *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1; *United States v. Hemmer* (D. C.) 195 Fed. 790; *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738.

It was earnestly contended in the Oklahoma case of *United States v. Allen*, *supra*, "that after allotments had been made subject to a specific limitation, the Government was without power to enlarge the period of that limitation; that the Indian obtained a vested right to his allotment, subject only to the restriction which was imposed upon it at the time the allotment was made, and that to enlarge the period of the restriction would be an impairment of his vested rights, in violation of the 14th amendment to the Constitution." But the court held "so long as the lands were held by the Indian allottee, or by an Indian who claimed under him by inheritance, we do not think this contention is sound. The grant of citizenship to the Indian did not destroy the right of the Federal Government to regulate and restrict his use of these lands. Though a citizen of the United States, he did not cease to be an Indian, and both he and his property remained subject to the National Government. Congress has from time to time asserted this authority, and to hold that its enactments in that respect are unconstitutional would be disastrous to the Indians and would probably still further confuse the already complicated title to lands in Oklahoma."

The case of *Seaples v. Card* (246 Fed., 501), is cited in support of the brief. It is not regarded, however, as necessarily controlling here. The question of the extension of the trust period on Indian homesteads was not involved in that case, nor is the question of the cancellation of Indian homestead patents involved here. The court merely held that the act of May 8, 1906 (34 Stat., 182), amendatory of section 6 of the act of February 8, 1887, while authorizing the Sec-

retary of the Interior in his discretion to issue fee patents to Indian homesteaders under the latter act, did not in terms authorize him to cancel patents issued under the acts of 1875 and 1884. The power to extend the trust period on Indian homesteads is a different proposition and is by analogy and implication, if not directly, found in the act of June 21, 1906, and directly in the policy of the Government looking to the benefit and protection of its Indian wards so long as their property remains under its jurisdiction.

The case of *United States v. Seufert Bros. Co.* (233 Fed., 579), also cited in the brief, is not in point for the reason that an Indian homestead was not involved, but one made under the regular homestead laws by an Indian who had become a citizen by reason of an allotment on the reservation of his tribe. The Department itself has taken the position that "the provisions of the act of May 8, 1906, *supra*, clearly embrace Indians to whom allotments have been made, as such, and not those who by reason of their position have been allowed to make homestead entry as citizens of the United States." Instructions (37 L. D., 219, 225).

That the Department has complete jurisdiction over the public lands until title passes has never been doubted nor denied. As stated in the case of *United States v. Hemmer* (195 Fed., 790), which involved an entry under the Indian homestead act, "Congress has the power to determine when the guardianship which is maintained over Indians shall cease, and may extend the period of limitation on the alienation of lands by an Indian at any time before the issuance to him of final patent."

The Department has treated Indian homesteads upon practically the same footing as Indian allotments, and as therefore equally coming within the purview of the act of June 21, 1906, considering the purposes of *pari materia* laws, the condition and standing of the Indians, and the obligations of the Government. The courts have invariably declined to disregard or overrule the construction placed upon statutes by the Executive Departments charged with their administration "except for cogent reasons and unless it is clear that such construction is erroneous" (*United States v. Johnston*, 124 U. S., 236, 253), or, "unless a different one is plainly required" (*Hawley v. Diller*, 178 U. S., 476, 488). The Supreme Court, in speaking of a long-continued practice of this Department, said: "Its (Congress) silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress." *United States v. Midwest Oil Co.* (236 U. S., 459, 481).

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

ASH PEAK MINING COMPANY.

Decided October 11, 1920.

MINING CLAIM—MILL SITE.

The sinking of wells and the construction of substantial improvements for the conveyance and utilization of water therefrom in the operation of a lode claim are such use as will justify the allowance of entry of the land as a mill site.

VOGELSANG, *First Assistant Secretary*:

This is an appeal from the decision of the Commissioner of the General Land Office of March 20, 1919, requiring the Ash Peak Mining Company to make a further showing of valuable minerals on its Great Eastern, Commerce, Fraction, Summit, and Homestead lode claims, and of use and occupancy of its Commerce and Summit mill sites (Survey 3076, A. & B.), in Secs. 2, 3, 10, and 11, T. 8 S., R. 30 E., G. & S. R. M., in the Phoenix, Arizona, land district, embraced in its mineral entry 039798.

Final certificate issued on the mineral application, September 25, 1918. On November 13, 1919, a mineral examiner reported favorably on all the lode claims, and reported as to the mill sites that on each of them wells had been sunk and substantial improvements for utilizing their waters constructed, but on one the improvements had been destroyed by flood and not yet replaced; and that said waters, which were conveyed by pipes to the lode claims, were essential to the operation of the mines. The application was accordingly clear listed, April 30, 1920.

Said previous decision of the Commissioner, however, still stands for review, upon said appeal therefrom, in this Department. With said appeal, the applicant submitted affidavit as to the mineralization of the lode claims and the large shipments of valuable ore therefrom, which the Department finds to be sufficient; and submitted a brief (supported by an affidavit) setting forth the use to which the mill sites are devoted and the improvements made thereon. From this it appears that during the past eighteen years the applicant has expended more than \$4,000 in constructing a pipe line from the mill sites to the mine (1¼ miles distant therefrom) in sinking two wells on the mill sites, tunneling into solid rock for the purpose of increasing the water supply, in erecting a house on one of the mill sites for the occupancy of its employees, and in installing a pumping plant at the mine; that the water developed by said wells is used in operating the mine, and water essential therefor is obtainable from no other source except at a cost which is prohibitive.

The Commissioner's decision holds, on the authority of the case of Charles Lennig (5 L. D., 190) and other early decisions of the

Department, that the obtaining of water from the mill sites for use at the mine is not such a use or occupancy thereof for mining purposes as is contemplated by the mill-site law (section 2337 Revised Statutes).

✓ The Commissioner's decision appears to the Department to draw too narrowly the lines within which a mill-site claim must be found to be used for mining purposes to meet the terms and spirit of said statute. It was held in the Lennig case, *supra*, that the mill site could not be patented because the claim of its use in connection with the mine was merely the use of a water right within its limits for the supplying of water to the mill-site claimant's neighboring mine—not the use of the land itself as distinguished from the use of the water right situated thereon. This rule was followed in Cyprus Mill Site (6 L. D., 706), and in Two Sisters Lode and Mill Site (7 L. D., 557), as well as in Iron King Mine and Mill Site (9 L. D., 201), where the use shown was in taking of water from a creek flowing through the mill site, with the aid of improvements built thereon, and the conveying of it thence by pipe to a smelter reservoir elsewhere, which smelter was presumably used for the reduction of the product of the applicant's lode claim embraced in the same application.

But these cases and particularly the Lennig case, *supra*, are distinguished in the later case of Sierra Grande Mining Co. v. Crawford (11 L. D., 338), and Gold Springs and Denver City Mill Site (13 L. D., 175), upon the ground that in the later cases the water obtained on the mill site, which was essential to the operation of the applicant's mine, was obtained by means of improvements erected on the land, which was also indispensable as a site for contemplated reduction works. The principle of these later cases was affirmed in Satisfaction Extension Mill Site (14 L. D., 173).

The Sierra Grande case, *supra*, is decisive of the one at bar. The distinction is clear. In the Lennig case, *supra*, acquisition of the land claimed as the mill site was not essential to the utilization of the water right acquired within its limits and no other use of the land in connection with mining, or substantial improvement thereof, was shown, and in the Iron King Mine and Mill Site, *supra*, the taking of water from the mill-site claim and its conveyance from thence to a smelter apparently not in the applicant's mining claim were held to be too remote to rank as its use in connection with the mining operations, while in the case at bar, the water is obtained by the sinking of wells on the mill-site areas, in itself a substantial and permanent improvement thereof (not to mention the other improvements on said mill sites), and it is conveyed thence to the mining claims for use directly in their operation, to which it is essential.

The Commissioner's decision is, therefore, reversed, and in the absence of other objection patent will issue for said claims and mill sites.

WILMER JEANNETTE.

Decided October 16, 1920.

LEASING ACT OF FEBRUARY 25, 1920—KNOWN GEOLOGICAL STRUCTURE—PROSPECTING PERMIT.

Land designated by the Geological Survey, under the supervision of the Secretary of the Interior, as within the known geological structure of a producing oil or gas field, is not subject to a prospecting permit under the provisions of section 13 of the act of February 25, 1920, nor to a lease under section 14 thereof, even though such designation be not made until after a claim to so prospect has been duly initiated.

KNOWN GEOLOGICAL STRUCTURE—ACCURACY OF BOUNDARIES.

A party seeking to question the accuracy of the boundaries of the known geological structure of a producing oil or gas field may file in the Department an affidavit containing allegations of definite and specific geological facts which, if true, would tend to show such boundaries to be outside the geological structure, and such showing will be considered with a view to the reestablishment of the boundaries to accord with the true situation; but until the designation by the Geological Survey of a tract as within such known geological structure shall be revoked by the Secretary of the Interior the same will be observed and acted upon by the Land Department in the administration of the leasing act.

VOGELSANG, First Assistant Secretary.

Wilmer Jeannette has appealed from the decision of the Commissioner of the General Land Office of July 10, 1920, affirming the action of the local officers rejecting his original and amended applications filed, respectively, February 29 and March 22, 1920, under the provisions of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas on the SE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 19, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, S. $\frac{1}{2}$, NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 29, and all of Sec. 30, T. 15 N., R. 30 E., M. P. M., Lewistown land district, Montana, for the reason that the tracts described are reported by the United States Geological Survey to be within a producing oil field.

Under date of July 6, 1920, the Director of the Geological Survey reported to the Commissioner that the lands above described lie within the known geologic structure of the Cat Creek field, as defined by the Director on April 2, 1920, and transmitted to the Commissioner under date of April 15, 1920. The Director also stated that since under section 13 of the said act of February 25, 1920, prospecting permits can not be granted within a known geologic structure of a producing field, it appeared that the application in question must

be rejected, and it was on the basis of said report that the action of the Commissioner complained of was taken.

In the application it is alleged that the notice of intention to apply for a prospecting permit was posted on the land February 26, 1920.

In the appeal the correctness of the Commissioner's decision is challenged on the ground that on February 26, 1920, when the applicant alleges that he initiated his claim for a permit to prospect the land, the area was not within a producing field; that by virtue of such initiatory acts he secured a preference right to a permit, conditioned only upon his compliance, within thirty days from the initiation of his claim, with certain requirements prescribed in the act, and that the later designation of the land as within the known geological structure of a producing field can not be lawfully held to relate back so as to deprive him of that right.

The Department is not impressed with the soundness of this contention. Section 13 of the act authorizes the Secretary of the Interior to grant to any applicant qualified under the act a permit under which he is given the exclusive right, for a prescribed period, to prospect for oil or gas upon not to exceed 2,560 acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field. The sole purpose of such a permit is to induce the person to whom it is granted to go upon land outside of known geological structures of producing oil or gas fields and diligently explore the same for oil or gas, and as a reward for the discovery of oil or gas within the limits of the area covered by a permit the permittee is by section 14 of the act accorded the right to lease the lands embraced in his permit under far more advantageous terms than those prescribed by the provisions of section 17 of the act, respecting deposits of oil or gas situated within a known geological structure of a producing oil or gas field. The act clearly does not contemplate the granting of a prospecting permit covering deposits of oil or gas within the known geological structure of a producing field, even though such a status as to the deposits may have arisen only during the pendency of the application for a permit, for the reason that the sole purpose of the granting of a permit—merely the establishment of the deposits as within a known geological structure of a producing oil or gas field—would and could no longer exist; and with the ceasing of that purpose would also end whatever reason would have otherwise existed for affording a permit applicant, through the granting of a permit, an opportunity to attempt to secure the privileges enumerated in section 14 of the act.

It is also urged on behalf of appellant that the Commissioner erred in giving conclusive effect to the designation of the land by the Geological Survey as within the known geological structure of a producing oil field, and contended that such a designation should not fore-

close an inquiry by the Secretary respecting the status of any given tract but that the question should be made subject to determination as the result of a hearing. It was essential to the prompt and intelligent exercise of the authority conferred upon the Secretary by section 13 of the act to grant permits to prospect for oil and gas only upon lands not within any known geological structure of a producing oil or gas field, and to make leases of unappropriated deposits within such areas as are provided for by section 17 of the act, that areas within such known geological structures be designated, and to that end the Secretary was authorized by section 32 of the act to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act." Pursuant to said provisions, it is prescribed in section 2 of the regulations of March 11, 1920, issued under the act, that:

The boundaries of the geological structures of producing oil or gas fields will be determined by the United States Geological Survey under the supervision of the Secretary of the Interior, and maps or diagrams showing same will be placed on file in local United States land offices.

It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, *as the facts may be deemed to warrant.*

While, therefore, the determination of the boundaries of known geological structures of producing oil and gas fields by the Geological Survey, under the supervision of the Secretary, is not necessarily conclusive, the Department is not persuaded that it would be conducive to an orderly administration of the act that the accuracy of the boundaries so fixed and determined should be made the subject of hearings. If, however, a party in interest seeking to question the accuracy of such boundaries shall file in the Department an affidavit, duly corroborated, containing allegations of definite and specific geological facts which, if true, would indicate that areas included within such boundaries are outside the known geological structure of producing oil and gas fields, and for that reason subject to the operation of the provisions of section 13 of the act, the showing would be considered by the Secretary with a view to a reestablishment of the boundaries to accord with the true situation; but until the designation by the Survey of an area as being within such a structure shall be revoked by order of the Secretary, the same will be observed and acted upon by the Land Department in the administration of the act. The Department finds nothing in the record in the present case that would tend to impeach the correctness of the designation by the Geological Survey of the area here involved, or any portion thereof.

For the reasons stated the decision of the Commissioner is affirmed, the case closed and the record remanded to the General Land Office with instructions to cause the land to be advertised for lease under the provisions of section 17 of the leasing act.

BURKE ET AL. v. TAYLOR ET AL.¹

Decided October 21, 1920.

LEASING ACT OF FEBRUARY 25, 1920—SECTION 18.

Section 18 of the act of February 25, 1920, contemplates and requires that a lease thereunder shall issue to the person, persons, or corporation possessing and surrendering to the United States the mining title; those claiming under or through such claimant or claimants being protected by the provision therein that "all leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear."

VOGELSANG, *First Assistant Secretary:*

June 21, 1920, Robert Taylor, claiming as lessor and owner under mining locations made in 1890, the Columbine Oil Company, claiming as assignee of a lessee of Taylor, and the Ohio Oil Company, claiming as an assignee of the said Columbine Oil Company, filed application for a relief lease under the provisions of section 18 of the act of February 25, 1920 (41 Stat., 437), of the E. $\frac{1}{2}$, Sec. 12, T. 39 N., R. 79 W., 6th P. M., Douglas, Wyoming, land district, all of the parties named filing quitclaim deeds to the United States. Notice of said application was duly published for the required period.

During the period of publication of said notice and on August 9, 1920, M. B. Burke and the Eclipse Oil Company, the latter claiming under an assignment from one J. Condit Smith, who in turn claimed under a lease dated November 21, 1911, of the above-described land, executed by a person purporting to be the attorney in fact of Robert Taylor, filed what is denominated a protest and adverse claim against said application, charging that the land in question is not the property of the applicants or either of them "in the manner or to the extent in the said application set forth," and alleging that the protestants are the owners and holders of a valid and existing oil and gas lease of said land, arising out of and from the same locations as those under which the applicants claimed; and that the leasehold rights of the protestants are prior and superior to any rights or interests claimed under the placer mining claims on the part of the applicants. The protestants, therefore, pray that a hearing be ordered and that action on the application be stayed and suspended until such hearing and further proceedings

¹ See decision on motion for rehearing, page 586.

be had as shall be ordered by the Land Department; that the application be rejected and that a lease covering the land be awarded to the protestants under the said section 18 of the leasing act.

Upon considering the protest the Commissioner of the General Land Office by decision of September 25, 1920, rejected the same on the ground that matters such as those alleged in the protest should be determined in the courts and not before the Land Department. From this action the protestants appeal, alleging numerous errors in the decision complained of.

In instructions of the Department dated September 25, 1920, and addressed to the Commissioner, it was said:

Section 18 of the oil-leasing act provides that upon relinquishment to the United States of all right, title, and interest claimed "by the claimant or his predecessor in interest" "the claimant or his successor" shall be entitled to a lease. The section further provides that "all leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear."

The law is construed by the Department to contemplate and require that the lease shall issue to the person, persons, or corporation possessing and surrendering to the United States the mining title, those claiming through or under the mining claimant or claimants being protected by the clause of the act last hereinbefore quoted.

The case at bar is controlled by the view of the Department as expressed in said instructions, as the protestants are claiming through and under the mining claimant possessing and surrendering to the United States the mining title to the area here in question. The decision appealed from is accordingly affirmed, the case closed, and the record returned to the General Land Office.

BURKE ET AL. v. TAYLOR ET AL. (ON REHEARING).

Decided November 18, 1920.

PAYNE, Secretary:

In the above-entitled matter Robert Taylor claiming under mining locations made in 1890, and the Columbine Oil Company and Ohio Oil Company, claiming as lessees, have applied for a lease under section 18 of the act of February 25, 1920 (41 Stat., 437), for the E. $\frac{1}{2}$, Sec. 12, T. 39 N., R. 79 W., Douglas, Wyoming, land district. Burke and the Eclipse Oil Company protested, asserting that they hold a prior lease of the land from said Taylor and are entitled to appear in the lease, if one be granted.

Decision of the First Assistant Secretary of October 21, 1920 [47 L. D., 585], affirmed the Commissioner of the General Land Office and dismissed the protest, holding that under the provisions of section 18 of the act, the lease, if issued, must issue to the person or

persons possessed of the mining title to the land, and that all persons claiming through or under them as lessees, under contract or otherwise, must settle their rights, either by agreement or in the courts, under the so-called inuring clause of section 18.

After oral argument and consideration of papers filed in connection therewith, it is held:

1. That the instrument entitled "Oil and gas lease" executed by Taylor to J. Condit Smith November 21, 1911, is a lease and not a deed or its equivalent, as contended by protestants. The title of the instrument, the designation of the parties as lessor and lessee, respectively, the provision for royalty, other language of the instrument, and the actions of the parties so far as known to the Department, all support this conclusion. The case of *Guffey v. Smith* (237 U. S., 101), cited, is not inconsistent with the conclusion reached, for while it is stated that a lease like the one under consideration by the court passes to the lessee "a freehold interest" it treated the parties as lessor and lessee and determined the case upon priority, the controversy being one between two lessees. There is nothing in the Department's prior decision nor is it held here that there is anything which will preclude the determination of the interests of the several persons in this case claiming through or under Robert Taylor in the event that the Department shall issue to him a lease based upon his record mining title.

2. That controversies, like the one at bar, are to be determined outside of the Department is clearly shown by the language of the applicable statute. Section 18 provides that upon relinquishment of the right, title, and interest claimed "by the claimant or his predecessor in interest under the preexisting placer mining law" the claimant or his successor "shall be entitled to a lease thereon." It clearly appears from this section and from the following section 19 that the "claimant" is the person who located the land under the mining laws or who claims under the locator or locators through a deed or equivalent instrument. That lessees of such person or persons claiming under them through drilling contracts or other arrangements are not regarded as persons eligible to a lease from the United States is shown not only by the language above quoted, but by the so-called inuring clause of section 18.

All * * * leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear.

The purpose of this provision is obviously to permit the Land Department to deal with the holder or holders of the record mining title. He or they must surrender and convey that title to the United States. Those who claim through or under him are not recognized

as persons entitled to a lease, but their interest is protected by the inuring clause so that if lease issue to him, their interests may be determined by agreement or litigation in the proper form and so protected.

The motion for reconsideration is denied.

CHARLES R. HAUPT.

Decided October 30, 1920.

LEASING ACT OF FEBRUARY 25, 1920—SECTION 20—PREFERENCE RIGHT.

The act of February 25, 1920, does not contemplate that an agricultural entry made after its approval shall constitute the basis for a preference right to a prospecting permit under section 20 thereof.

VOGELANG, First Assistant Secretary:

On March 5 and April 1, 1920, Charles R. Haupt filed, respectively, his original and amended applications, 044044, under the provisions of section 13 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon the NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, T. 15 N., R. 30 E., M. P. M., Lewistown, Montana, land district, and is also asserting a preference right to a permit to prospect on said land under the provisions of section 20 of said act by virtue of his application 044041, filed March 5, 1920, to make an additional homestead entry thereof, which application, however, has not been passed to entry.

By decision of July 8, 1920; the Commissioner of the General Land Office found that the area in question had been, on April 15, 1920, designated by the Geological Survey as being within the known geologic structure of the producing Cat Creek oil fields, and, for that reason, was not subject to the provisions of section 13 of the act above named, which excludes from the operation thereof all lands occupying such status.

Finding it to be obvious that no entry could have been allowed on the above-mentioned homestead application 044041 prior to February 25, 1920, the date of the act, the Commissioner held that no preference right to a permit could be lawfully claimed by the applicant under section 20 of said act, for the reason that section 12 of the regulations of March 11, 1920, as amended by the circular of March 25, issued under the act [see reprint as amended to October 29, 1920, 47 L. D., 437], prescribes that, to entitle claimants under agricultural entries to a preference right to a permit, the entry must have been made prior to the date of the act. The claim for preference right, under section 20, was therefore rejected. From said decision the applicant appeals.

The Commissioner properly rejected the application for a permit under section 13 of the act, on the ground that the land had been designated as within the known geological structure of a producing oil field. See Wilmer Jeannette, decided by the Department October 16, 1920 (47 L. D., 582).

The appeal challenges the correctness of the Commissioner's holding with regard to the claimed preference right to a prospecting permit under section 20 of the act, the appellant contending that that section accords a preference right to a permit, and to a lease, in case of discovery, to claimants of all "lands *bona fide* entered as agricultural, and not withdrawn or classified as mineral at the time of entry," and contains no restrictions as to entries otherwise within the provisions of this section made after the date of the act.

Said amended section 12 of the regulations cited by the Commissioner reads in part as follows:

* * * A preference right to a permit is given to an owner or entryman of the land with a reservation of the oil deposits to the United States, under the following conditions: (a) The land must have been withdrawn or classified as oil or gas lands; (b) entry must have been *bona fide* and made prior to such withdrawal or classification, and prior to the date of the act. * * *

While it is true that the italicized portion of the provisions of the circular above quoted is not based upon any specific provision to the effect that agricultural entries relied upon as a basis for a preference right must be made prior to the date of the act, it is to be observed that said section 20 is one of the relief, or remedial sections (comprising sections 18 to 22, inclusive) of the leasing act, which provide methods for protecting the prior equitable claims of those to whom a preference right to prospecting permits and leases is thereby accorded. Said section 20 was manifestly designed to recognize the equities only of persons who had gone upon the public domain and made agricultural entries upon the theory and under the belief that they would obtain unrestricted title to their lands. This is shown by the fact that entries of lands withdrawn or classified as mineral at the time of entry are expressly excluded from those that can be made a basis for preference rights. The language used in this section has been uniformly construed by the Department, in decisions as well as regulations, as relating only to entries made prior to the act, for the reason that such entries could have been made after February 24, 1920, only with a knowledge on the part of the entryman of the policy of Congress with respect to the development and disposition of oil and gas deposits, in the manner and form provided for in sections 13, 14, and 17 of the act, occurring in lands not covered by agricultural claims at the date of the act, and free from any preferred mineral rights that might be attempted to be asserted by virtue of agricultural entries made after the act; that Congress

intended that the section should operate exclusively with respect to agricultural entries that antedated the act is also clearly indicated by the provision therein that extends its benefits to persons claiming under assigned entries only in cases "where assignment was made prior to January 1, 1918." A further reason for the rule lies in the fact that the granting of such preferences to those making entries after the date of the act would invite the making of speculative agricultural entries on possible or known oil or gas lands solely or primarily for the purpose of securing the advantageous rights under the section, which Congress clearly sought to discountenance.

The evils above pointed out as likely to arise by the adoption of the construction of section 20 urged in the appeal are forcibly illustrated in the present case, where, with full knowledge of the policy of Congress as disclosed by the act, the claimant is shown by the records to have gone upon the land March 2, 1920, and posted a notice of his intention to apply for a prospecting permit under section 13 of the act, and on March 5, to have made simultaneous filings in the local office of an application for such permit and an application for homestead entry of the same lands, alleging in the homestead application that the land is essentially nonmineral, but evidently having in mind the assertion of a preference right to a permit under section 20 of the act, if for any reason his claim to a preference right under section 13 should be rejected.

For the reasons stated the rule announced in paragraph 12 of the regulations is adhered to and was properly followed by the Commissioner herein.

The decision appealed from is accordingly affirmed, the case closed, and the record returned to the Commissioner for appropriate action.

—
R. R. ROUSSEAU.

Decided October 30, 1920.

PRACTICE—COMPUTING TIME.

In all cases where the last day of the statutory period within which an act is required to be performed falls on Sunday or a legal holiday, such period shall be held to include the next following business day.

CONFLICTING DECISION OVERRULED.

Departmental decision in *Holman v. Central Montana Mines Company* (34 L. D., 568), overruled in so far as in conflict.

VOGELSANG, First Assistant Secretary:

On March 29, 1920, R. R. Rousseau filed application 012055, under the provisions of section 13 of the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon (together with

other tracts) all of Sec. 3, T. 50 N., R. 100 W., Lander, Wyoming, land district, alleging that on February 27, 1920, he posted on the land embraced in his application his notice of intention to apply for a permit within thirty days from said date of posting.

Upon considering Rousseau's application the Commissioner of the General Land Office, by decision of August 2, 1920, found that the same was in conflict as to section 3 with a similar application 011848 of Clark E. Longshore, filed March 11, 1920, based upon a location dated February 28, 1920. He held that the preferential period of thirty days following the date of Rousseau's location (the date of posting) had expired before he filed his application and that his rights could therefore date only from the date the application was filed. The application was accordingly rejected as to the tract described because of conflict with the prior application of Longshore, whose rights were held to be superior to those of Rousseau. From this action Rousseau has appealed, alleging that his application was mailed to the local office March 26 and was received at that office March 27.

As the Commissioner in effect correctly finds, Rousseau's notice of intention to apply for a permit was posted February 27, and that of Longshore, February 28, 1920. Longshore's application was filed in the local office March 11, well within thirty days after his notice was posted, while that of Rousseau is stamped as having been filed March 29, or on the thirty-first day after posting of his notice.

By the provisions of section 13 of said act, the Secretary of the Interior is authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under the act, a prospecting permit which shall give him the exclusive right, for a designated period, to prospect for oil and gas upon an area not to exceed 2,560 acres, if occupying a certain status. It provides that the applicant shall, prior to filing his application for a permit, locate such lands in a reasonably compact form, and that if he shall cause a monument of a certain height to be erected at a conspicuous place on the land and shall post on or near such monument a notice in writing containing certain recitals and stating that the application for permit will be made within thirty days after the date of posting "he shall, during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified."

By paragraph 5 (b) of the regulations of March 11, 1920, issued under said act, it is provided that—

* * * The preference right will exist for 30 days after the date of posting such notice, and if no application is filed within that time, the land will be subject to any other application for permit or to other disposal. * * *

While Rousseau's application, as indicated by the file marks thereon, was not filed in the local office until the thirty-first day after the posting of his notice on the land included therein, it is noted that the last day of the thirty-day period succeeding the date of posting fell on Sunday and this fact gives rise to the question as to whether, in such a case, the last day should be included in the period, or, on the other hand, excluded therefrom and the succeeding day be included. If such a Sunday is entitled to be excluded, the filing of Rousseau was in time; otherwise, it was one day out of time.

It is provided in Rule 94 of Practice of the Department that—

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

In the case of *Street v. United States* (133 U. S., 299, 306) it is declared by the Supreme Court of the United States that Sunday is a *dies non* and that—

* * * a power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day.

In *Monroe Cattle Company v. Becker* (147 U. S., 47, 56) it is held to be the general rule that—

* * * when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation. *Endlich* on Statutes, Sec. 393; *Salter v. Burt*, 20 Wend. 205; *Hammond v. American Life Ins. Co.* 10 Gray, 306. * * *

The above-quoted provisions of said Rule 94 are thus in full accord with what the Supreme Court of the United States has held to be the general rule in cases where the last day of the period within which an act is required to be performed falls on Sunday, and the Department is of the opinion that the same principle should be followed with respect to all filings required by statute to be made in the Land Department within a limited period, viz, that if the last day of a statutory period within which a filing is required to be made falls on Sunday, or a legal holiday, such time shall be held to include the next following business day.

Applying that principle to Rousseau's application, it is clear that the same was filed in time, and his posting having been made prior to that of Longshore, Rousseau is clearly entitled to be accorded a preference right to a permit to prospect said land.

For the reasons stated, Longshore's application as to the area in conflict will be rejected, and in the absence of other objection Rousseau's application allowed.

In so far as in conflict herewith, the decision in the case of *Holman v. Central Montana Mines Company* (34 L. D., 568) is hereby overruled. The decision appealed from is reversed, the case closed, and the record returned to the General Land Office.

**ALASKA HOMESTEAD PROOFS—UNSURVEYED LAND—CIRCULAR
NO. 491 AMENDED.**

[Circular No. 727.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 10, 1920.

REGISTERS AND RECEIVERS OF

UNITED STATES LAND OFFICES IN ALASKA:

Paragraphs 12, 13, and 14 of Circular No. 491, dated July 19, 1916 (45 L. D., 227, 233), which relate to submission of proofs on homestead claims for unsurveyed lands, are amended to read as follows:

12. Where the public system of surveys has not been extended over a duly located homestead and the settler is prepared to submit proof thereon by way of commutation or otherwise, but does not desire to apply for survey at Government expense as permitted by the act of June 28, 1918 (40 Stat., 632), he may have a survey of the tract made at his own expense by a deputy surveyor appointed by the United States surveyor general. After the survey has been completed and has been approved by the surveyor general the latter shall forward two certified copies of the plat and one copy of the field notes to the land office for the district in which the land is situated.

13. Upon receipt of the plat and field notes the register will prepare a notice of the settler's intention to apply for homestead entry of the lands and patent pursuant thereto. He will forward to the settler this notice, together with one copy of the plat of survey and an application to enter the land, both notice and application being prepared for the settler's signature; also the necessary blanks for final-proof testimony and such instructions as may be needed for the settler's guidance. The homesteader must post the plat and notice on the claim. He must execute the application before an officer qualified to administer oaths and having an official seal; he and two witnesses must submit proof testimony before such officer. He should forward the duly executed application and proof papers to the United States land office, and the papers should be accompanied by a remittance of sufficient funds to cover original and final entry.

14. The register will thereupon issue, for publication, notice of the homesteader's intention to apply for entry and patent, designating the newspaper of general circulation nearest the land, and arrangements will be made for publication of the notice in said paper at the entryman's expense for a period of 60 days. If the newspaper be published daily, there must be 60 insertions of the notice; if daily except Sunday, 52 insertions; if weekly, 9 insertions; and if semiweekly, 18 insertions. During the same period the register will post a copy of the notice in his office. Evidence of publication will consist of the affidavit of the publisher. There must also be furnished the affidavit of the home-

steadier showing that the plat and notice of intention have been posted on the land for a period of not less than 60 days, which period shall include the time during which the publication was running.

CLAY TALLMAN, *Commissioner.*

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

LIMITING TIME FOR FILING APPLICATIONS FOR REPAYMENT—
ACT OF DECEMBER 11, 1919.

[Circular No. 728.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 13, 1920.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

Your attention is directed to the act of Congress, December 11, 1919 (41 Stat., 366), limiting the time of filing repayment claims under the act of March 26, 1908 (35 Stat., 48), to two years. The act of 1908 as amended, reads as follows:

Sec. 1. That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application: *Provided*, That such person or his legal representatives shall file a request for the repayment of such purchase moneys and commissions within two years from the rejection of such application, entry, or proof, or within two years from the passage of this act as to such applications, proofs, or entries, as have been heretofore rejected.

Sec. 2. That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives: *Provided*, That such person or his legal representatives shall file a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment, or within two years from the passage of this act as to such excess payments as have heretofore been made.

Sec. 3. That when the Commissioner of the General Land Office shall ascertain the amount of any excess moneys, purchase moneys, or commissions in any case where repayment is authorized by this statute, the Secretary of the Interior shall at once certify such amounts to the Secretary of the Treasury, who is hereby authorized and directed to make repayment of all amounts so

certified out of any moneys not otherwise appropriated and issue his warrant in settlement thereof.

SEC. 4. That the Secretary of the Interior is hereby authorized to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

Claims for repayment under the provisions of this act which originated prior to its passage must be filed on or before December 11, 1921. After that date the time of filing claims for repayment will be limited to two years from rejection of the application, entry, or proof; and in case of payments in excess of lawful requirement, claims for repayment must be filed within two years from issuance of patent.

CLAY TALLMAN,
Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

FEDERAL WATER POWER ACT—SECTION 24.

INSTRUCTIONS.

[Circular No. 729.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 20, 1920.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Section 24 of The Federal Water Power Act approved June 10, 1920 (41 Stat., 1063), reads as follows:

SEC. 24. That any lands of the United States included in any proposed project under the provisions of this act shall from the date of the filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purpose of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such a determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purpose of this act, which right shall be expressly

reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the Commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained. ✓

Action is being taken by this office on locations, entries, selections, and filings made prior to June 10, 1920, the date of the approval of The Federal Water Power Act, in accordance with the proviso to said section.

Applications of any sort filed subsequent to June 10, 1920, looking toward the acquisition of title to public or reserved lands, within, or in conflict with power projects under this act, or which shall have been "reserved or classified as power sites," will be governed by the following rules:

ACTION TO BE TAKEN BY LOCAL OFFICERS.

1. You will at once reject, subject to appeal, any application filed *subsequent* to June 10, 1920, which is wholly in conflict with lands reserved or classified as power sites, or covered by a power application under this act, except—

(a) A homestead application predicated upon settlement prior to the reservation, classification, or filing of the power application, and accompanied by corroborated affidavit of such prior settlement.

An application of this character should be received, noted in pencil on your records, and transmitted to this office by special letter, for consideration, *without allowance*.

(b) Any application which, were it not for the reservation, classification or power application, would be allowable, wherein claim is made, by way of corroborated affidavit, that applicant has acquired equitable rights antedating the withdrawal. Such applications should be received for transmission to this office, for consideration, but *should not be allowed by you*.

2. Where any such application is only partially in conflict with lands reserved or classified as power sites, you will allow it only *as to the subdivisions not in conflict*.

3. Where any application is presented which conflicts with a transmission-line withdrawal of a strip of land *crossing* the land applied

for, you will, if otherwise regular, allow the entry, but will note upon the face of the entry papers, and upon your records, the following:

Entry made subject to conditions and reservations of section 24, Federal Water Power Act, approved June 10, 1920, in so far as transmission-line withdrawal No. _____, created by Executive withdrawal of _____ (or water-power application heretofore filed under the act of June 10, 1920), may affect same.

4. Whenever you find it necessary to reject an application, in carrying out these instructions, you should inform the applicant that he is at liberty to file an application for the restoration of such withdrawn lands, under the provisions of section 24 of The Federal Water Power Act, but that favorable action upon such application will not give the applicant any preference right, or right to preferential treatment if or when the lands are finally restored. The lands will be so restored in strict accordance with Circular No. 324 of May 22, 1914 (43 L. D., 254), as modified by Circular No. 678 of March 31, 1920 (47 L. D., 346).

GENERAL.

Notify all inquirers that withdrawn public lands are not subject to lease, or other disposition, other than such as is specifically recognized by The Federal Water Power Act; that there is no way to acquire preference rights, preferential treatment, or equitable or legal preference, excepting where legal or equitable rights were acquired *before* the withdrawal of the land; and that, in all cases where such rights are claimed, careful investigation as to its *bona fides* will be made before it is recognized.

You will further observe that, while the act of June 25, 1910 (36 Stat., 847), allows metalliferous mineral explorations and applications based thereon, the act of June 10, 1920, makes no exceptions.

Therefore, in future, any mineral application or location, based upon discoveries made *subsequent* to June 10, 1920, which is in conflict with lands reserved or classified as power sites, should be rejected by you, subject to appeal.

If the application alleges discovery or location prior to the date of the act, it should be accompanied by corroborated affidavit, attesting the fact, and transmitted to this office for consideration, *without allowance*.

Applications for permit under the oil-leasing act of February 25, 1920 (41 Stat., 437), embracing lands applied for under The Federal Water Power Act, or reserved or classified as power sites, should be received and transmitted, as heretofore, to this office. If, upon reference of such an application for permit to the Commission, it shall determine that a permit may be granted without injury to or destruc-

tion of the value of the lands for the purpose of power development, the application will be considered and acted upon in accordance with section 2, Circular No. 672 (47 L. D., 437).

Lands within final power permits under the act of February 15, 1901 (31 Stat., 790), or transmission-line permits or approved rights of way, whether under said act of February 15, 1901, or the act of March 4, 1911 (36 Stat., 1253), are deemed "classified as valuable for power purposes," and, whether withdrawn as power-site reserves or not, occupy the status of withdrawn lands for the purposes of these regulations.

C. M. BRUCE,
Acting Commissioner.

Approved:

ALEXANDER T. VOGELSANG,
Acting Secretary.

ROBERT A. WILLIAMS.

Decided November 29, 1920.

SWAMP LANDS—MINNESOTA DRAINAGE LAW—ACT OF MAY 20, 1908.

A homestead entryman in the State of Minnesota who has continued to comply with the law as to residence, improvements, and cultivation may discharge his obligations to the State under the act of May 20, 1908, and accomplish redemption after the lapse of the statutory period, by becoming subrogated to the rights of the purchaser or holder of the tax sales certificates.

VOGELSANG, *First Assistant Secretary:*

Robert A. Williams has appealed from a decision of the Commissioner of the General Land Office, dated June 5, 1920, refusing reinstatement of his homestead entry which had been canceled May 1, 1920, and canceling the final certificate issued thereon April 28, 1920.

It appears that Williams made entry February 9, 1915, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 30, T. 161 N., R. 33 W., 5th P. M., Crookston, Minnesota, land district, subject to the provisions of the act of May 20, 1908 (35 Stat. 169), extending the Minnesota drainage laws over public lands within the State and rendering said lands liable to sale for the nonpayment of drainage charges and assessments. It further appears that the land in question was sold at a tax sale May 10, 1915, for delinquent drainage charges for the year 1913, and was bid in by A. G. Patton. The land was again sold May 12, 1919, for delinquent charges for the year 1917, and bid in for the State.

In December, 1919, Fritz A. Watterberg, presented an application to make entry for the tract above described and other lands

embracing about 600 acres in all, under section 6 of the act of May 20, 1908, *supra*. In support of his application for the 80 acres here involved he filed certificates of tax judgment sale numbers 11332 and 11333 for the year 1913, covering, respectively, the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said Sec. 30, which certificates had been purchased by and duly assigned to Watterberg. He also submitted redemption certificates and receipts showing payment of the delinquent charges for the years 1915 and 1916, and a certificate by the county auditor to the effect that expiration notice had issued upon the tax certificates above mentioned in accordance with the Minnesota laws and no redemption had been made.

In this regard instructions of August 13, 1918 (46 L. D. 438), relating to proceedings after expiration of the period of redemption, provide as follows:

The certificate of the county auditor under his official seal, after the expiration of the sixty-day period mentioned above, that the entryman has been duly notified, in accordance with the laws of the State of Minnesota, of the amount for which the lands which should be described were sold, the amount required to redeem the same, and the time when the redemption period expires, shall be deemed satisfactory evidence that proper service of notice was made, and upon receipt of such certificate in your office, you will cancel the entry upon the records of your office, as of the date of such receipt. Note the fact of such cancellation upon the certificate of the auditor over the register's signature, referring in each case to this letter as authority therefor, note the serial number of the entry on each certificate and forward said certificate with your monthly returns.

On January 26, 1920, Williams filed notice of intention to make final three-year proof in support of his entry before the United States commissioner at Warroad, March 10, 1920, and proof was submitted as advertised. Shortly after filing notice of intention to submit final proof Williams also filed a protest against the allowance of Watterberg's application as to the 80 acres embraced in his homestead entry, attacking the validity of the auditor's notice of expiration and urging his equities in the matter.

In support of his protest, Williams filed a corroborated affidavit stating that he was a widower with four children and an aged mother dependent upon him for support, his wife having died after they moved onto the land in question; that such residence was established March 4, 1915, and that he had maintained his home thereon continuously since, having no other place of residence; that he had made valuable improvements consisting of dwelling house 12 by 28 feet, a log barn 16 by 28 feet, with a haymow 12 by 28 feet, a curbed well, 300 rods of fencing, and 11 acres cleared and grubbed and under cultivation, worth about \$750, and that he owned some poultry and several head of live stock; that he applied to make final proof in September, 1918, before the United States commissioner at

Baudette, Minnesota, but did not submit proof as intended because of his temporary absence and employment in North Dakota earning money for the support of himself and family; that he was advised by the commissioner at Baudette that he could postpone the submission of proof to a later date; that about the time he applied to make final proof he wrote to the county auditor of Beltrami County, asking for a statement as to the taxes assessed against the land, and his letter was returned with a brief notation at the foot to the effect that there were none; that he was advised and believed that his entry was not subject to forfeiture while he continued to reside on the land and make it his home, provided he made proof in support thereof within the time provided by law, which he desired to do, and that he was ready and willing to pay all delinquent taxes if permitted to make proof.

Considering this protest, under date of March 1, 1920, the Commissioner found and held that—

* * * the writing names no grounds on which he bases the protest against the allowance of the application of the said Watterberg except that it raises the question of the acceptance of the county auditor's certificate as to service of notice in connection with said application * * *. The auditor's certificate filed with the application of Fritz A. Watterberg appears to meet all the requirements set forth in said circular 617. This office can not go back of this auditor's certificate. However, if any of the things alleged to have been done in the said auditor's certificate were not in fact done, or were not legally done, then action should be brought by Mr. Williams in the local Minnesota courts to set aside the service. The regularity or legality of the service certified to by the auditor is purely a matter for the State courts.

If Mr. Williams desires to test the validity of the auditor's certificate in the local courts, this office will suspend action on the protest of Mr. Williams for sixty days or for a longer period on his showing that such additional time is necessary.

Thereafter, and subsequent to the submission of final proof, it appears Williams procured a transfer and assignment by Watterberg of tax certificates numbers 11332 and 11333 and a quitclaim deed relinquishing all right and claim to the lands described therein. He also procured and filed in the local office redemption certificates and receipts evidencing the payment of all delinquent charges, taxes, and assessments. At the same time, Watterberg's application to purchase under section 6 of the act of May 20, 1908, *supra*, was withdrawn as to the said E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 30.

On these facts the Commissioner held, by decision of May 1, 1920, that under the law of the State of Minnesota, Williams's right of redemption had lapsed and that his entry had been forfeited. The entry was, accordingly, canceled as of February 2, 1920, the date on which Watterberg filed evidence that Williams had failed to redeem the land within the period allowed by law, the Commissioner

stating that this was in accordance with said instructions of August 13, 1918.

By decision of June 5, 1920, the Commissioner, upon review and further consideration of the facts, refused to reinstate the entry, holding that—

* * * the law appears to recognize no rights on the part of an entryman who has failed to redeem his land * * *.

At the same time he canceled final certificate which had not been before him at the time cancellation of the homestead entry was directed.

The Department does not concur in this holding. While it is true the statutory period of redemption had expired and the entry of Williams was subject to cancellation and the land to entry by the purchaser or qualified holder of the tax certificates, the law does not, under the conditions here disclosed, demand an absolute and peremptory forfeiture of the homestead by an entryman in possession.

Whether expressly recognized by State law or not, it would seem that tax sales certificates held by one purchasing at public vendue are assignable and the assignee succeeds to all the rights of the assignor in and to the property involved. The rights of a certified holder may be transferred by quitclaim deed (29 Northwestern, 59). In this connection, paragraph 28 of instructions of April 15, 1916, under the act of May 20, 1908, *supra* (45 L. D., 45), provides:

The act makes no mention of, nor reference to, assignments of drainage-tax certificates or rights acquired at any sale of land for nonpayment of a State drainage assessment. It is held, however, that a purchaser at a sale may waive his right to enter the land.

Manifestly there is no absolute right of redemption from tax sales beyond the period specified in the State law, and upon failure of an entryman of public lands to redeem within this period his entry becomes subject to cancellation under the provisions of the act of May 20, 1908, and instructions of August 13, 1918, *supra*. But the Department finds nothing in the statute inhibiting an entryman of public lands, who has complied with the provisions of the homestead law, from discharging his obligations to the State and accomplishing redemption from tax sales, after the lapse of the statutory period, by purchasing the outstanding tax-sale certificates and becoming subrogated to all rights of the holder who has the sole right to enforce the lien and demand forfeiture.

The primary object of the law and the proceedings throughout is to subject the public lands, within the State, to their equitable proportion of the cost of ditch and drainage works constructed, and to bring the unpaid charges, interest, etc., into the State or county treasury (a) by the sale of delinquent lands, and (b) if bid in for the State,

for want of bidders, by a sale and assignment of the interest of the State in such lands to purchasers who will pay the required amount. When these charges are paid the State has no longer any interest.

Under the facts disclosed in the case at bar, the Department believes that Williams's entry should be reinstated. Forfeitures are never favored in the law and the Department can not concur in the view that a redemption in fact fully accomplished is invalid because made after the statutory right had lapsed.

In construing the reclamation act of June 17, 1902 (32 Stat., 388), which contains a provision for forfeiture for failure to make the required annual payments of construction charges when due, the Department held in the case of Marquis D. Linsea (41 L. D., 86), syllabus:

The provision in section 5 of the reclamation act that failure to make payment of any two annual installments when due shall render the entry subject to cancellation, with forfeiture of all rights under the act, is not mandatory, but it rests in the sound discretion of the Secretary of the Interior whether the entryman in such case may thereafter be permitted to cure his default by payment of the water charges, where he has continued to comply with the provisions of the homestead law; and in event an entry has been canceled for such failure, the Secretary may, in the absence of adverse claim, authorize reinstatement thereof with a view to permitting the entryman to cure his default.

It is believed a similar construction may be given the forfeiture provision of the act of May 20, 1908, *supra*.

The decision of the Commissioner is accordingly reversed and in the absence of other objections Williams's entry will be reinstated.

GEORGE W. HATCH.

Decided November 30, 1920.

PRACTICE—NOTICE—TRANSFEREE.

In any proceeding against an entry on which final certificate has issued the Government is bound to make a known transferee a party thereto, even though notice of such transfer has not been filed in the district land office as provided in Rule 98 of Practice.

VOGELANG, *First Assistant Secretary*:

George W. Hatch has appealed from a decision of the Commissioner of the General Land Office dated June 10, 1920, holding for cancellation his homestead entry, made March 19, 1918, for S. $\frac{1}{2}$, Sec. 22, T. 35 N., R. 49 E., M. M., Glasgow, Montana, land district, with a view to the reinstatement of the homestead entry of Austin E. Belyea for said tract, made December 6, 1913, and canceled September 24, 1917.

The entry of Belyea was made immediately after the filing of the plat of survey of the township, and final proof was submitted January 20, 1915, final certificate issuing ten days later. Proceedings against the entry were instituted April 14, 1916, on the report of a special agent, who charged that Belyea had not complied with the law as to residence. Notice of the charge was sent to Belyea at his address of record, but no answer was filed, whereupon the entry was canceled. On September 29, 1917, Joseph E. Lamb made homestead entry for the land, which entry was relinquished on the same day that the entry of Hatch was made.

Nine days after the entry of Hatch was allowed, Carrie Sund filed an application for the reinstatement of Belyea's entry, and later Hatch filed a protest against the allowance of said application. By decision dated May 29, 1918, the Commissioner of the General Land Office held that as the report of the special agent on which the proceedings were based stated that the land was in the possession of Carrie Sund as transferee, and as said transferee had not been notified of the proceedings, the case should be reopened and the transferee afforded an opportunity to introduce evidence in defense of the entry of Belyea. Testimony was submitted before a designated officer near the land; Hatch appeared in person and by attorney, testified, and cross-examined the witnesses called on behalf of the Government. When the Government rested, the transferee moved that the proceedings be dismissed. She thereafter submitted testimony in support of Belyea's entry. Upon consideration of the testimony of the witnesses produced by the Government, the local officers, by decision of October 30, 1919, sustained the motion to dismiss, and without considering any other testimony, recommended that the adverse proceedings be dismissed and the entry reinstated.

It appears that on February 9, 1915, Belyea transferred the land, by warranty deed, to W. C. Rawson, who on June 3, 1915, transferred it to Carrie Sund, the purchase price being \$3,500 and the assuming of a mortgage of \$2,000. Immediately after purchasing the land, Mrs. Sund and her husband established their home thereon, built another house and barn, and increased the area under cultivation. Mrs. Sund was occupying the land at the date of Hatch's entry. Apparently Hatch knew that the transferee was in possession of the land when he made the entry, as he immediately began proceedings to dispossess her.

The testimony introduced by the transferee was to the same effect as the testimony of Belyea and his final-proof witnesses. Residence was established by Belyea about December 1, 1911, and was continuously maintained until the date of final proof, 30 acres being cultivated in 1912, and 55 acres in 1913 and 1914.

The Land Department having been advised that the land had been transferred to and was being occupied by Mrs. Sund, the cancellation of Belyea's entry without notice to her was erroneous. Upon the matter's being called to the attention of the Commissioner of the General Land Office, he took the correct action—reopened the proceedings and allowed a hearing. Hatch participated in the proceedings, and it became unnecessary to thereafter issue any rule on him to show cause.

The fact that Mrs. Sund did not file notice of the transfer of the land to her did not relieve the Government from the necessity of making her a party to the proceedings, the Land Department having notice of the transfer. The Supreme Court of the United States in *Krueger v. United States* (246 U. S., 69) held, in effect, that one who seeks to make entry of a tract of land is charged with notice of a recorded transfer of the property. It follows that the Government in a proceeding against an entry on which final certificate has issued is bound to make a known transferee a party to any adverse proceedings.

The land was not subject to entry by Hatch, being in the possession of Mrs. Sund under the transfer from Belyea's immediate transferee, and it appearing that Belyea had earned title to the land and that there was no basis in fact for the adverse proceedings, patent must issue under the final certificate.

The decision appealed from is affirmed.

LUCERO v. HEIRS OF BRUN.

Decided November 30, 1920.

CONTEST—ACT OF MARCH 8, 1918.

Section 501 of the act of March 8, 1918, which was enacted for the purpose of enlarging the benefits conferred upon persons in the military or naval service in connection with public-land claims, is sufficiently broad in its scope to require an affirmative allegation that the default was not caused by employment in the military or naval forces of the United States, in all contests against homestead entries charging failure of cultivation.

VOGELSANG, First Assistant Secretary:

June 12, 1914, Sante Brun made homestead entry for lots 3 and 4, Sec. 18, T. 33 N., R. 8 W., and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 13, T. 33 N., R. 9 W., N. M. P. M., within the Durango, Colorado, land district.

September 24, 1919, Manuel Lucero filed contest affidavit against said entry, charging that entryman has not cultivated said land nor improved same since making the entry. October 10, 1919, he filed an application for leave to amend so as to make the widow and un-

known heirs of Sante Brun, deceased, parties defendant. Said application was allowed by the local officers. On October 28, 1919, the attorney for contestant filed his affidavit for service of notice of contest by publication. Publication thereafter appears to have been duly made.

March 23, 1920, the Commissioner of the General Land Office, upon consideration of the record, dismissed the contest for the reasons that the affidavit of contest did not contain the requisite nonmilitary averments nor did the corroborating witness thereto state facts upon which his knowledge was based as required by Rule 3 of Practice.

Contestant has appealed from said decision. He contends that the requirement of a nonmilitary or nonnaval averment, contained in the act of July 28, 1917 (40 Stat., 248), has no application herein as he merely charges failure of cultivation, and his contest is not based upon a charge of abandonment. Said act provides that no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained unless it shall be alleged in the affidavit of contest and proved at the hearing that the alleged absence from the land was not due to employment in the military or naval service. It is deemed unnecessary to determine the question thus presented as it is believed that the Soldiers' and Sailors' Civil Relief Act of March 8, 1918 (40 Stat., 440, 448), which was enacted for the purpose of enlarging the benefits conferred upon persons in the military or naval service in connection with public-land claims is sufficiently broad in its scope to require an affirmative allegation in such a case as is here involved that the default was not caused by employment in the military or naval forces of the United States.

The affidavit being defective as indicated, service by publication thereof confers no jurisdiction upon the Department to hear and determine the issues presented. See *Nemnich v. Colyar* (47 L. D., 5). The decision appealed from is affirmed.

PREFERENCE RIGHT OF ENTRY ON RESTORED CAREY ACT LANDS.

[Circular No. 731.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 10, 1920.

REGISTERS AND RECEIVERS,
UNITED STATES LAND OFFICES:

October 30, 1920, the First Assistant Secretary of the Interior approved the following regulations under the act of February 14, 1920

(41 Stat., 407), providing for preference right of State entrymen upon restored Carey Act lands.

(1) The act approved February 14, 1920 (41 Stat., 407), provides as follows:

That the Secretary of the Interior, when restoring to the public domain lands that have been segregated to a State under section 4 of the Act of August 16, 1894, and the Acts and resolutions amendatory thereof and supplemental thereto, commonly called the Carey Act, is authorized, in his discretion and under such rules and regulations as he may establish to allow for not exceeding ninety days to any Carey Act entryman a preference right of entry under applicable land laws of any of such lands which such person had entered under and pursuant to the State laws providing for the administration of the grant under the Carey Act and upon which such person had established actual bona fide residence or had made substantial and permanent improvements: *Provided*, That each entryman shall be entitled to a credit as residence upon his new homestead entry allowed hereunder of the time that he has actually lived upon the claim as a bona fide resident thereof.

(2) Prior to the restoration to entry of lands theretofore segregated under the Carey Act, you will take steps to ascertain from the proper State officers whether any entries have been allowed under the State law for any of the segregated lands which are to be restored, and if any such entries have been allowed, the status thereof and action taken by the State with reference thereto.

(3) If it is shown with reasonable certainty, either from the report of the State officers or by other available information, that there are no entries under the State law on the basis of which a claim to preference right of entry might be asserted and maintained, then the said act of February 14, 1920, may be disregarded in the restoration of the lands to entry.

(4) But if it appears from the report of the State officers or otherwise that there are entries under the State law which may properly be the basis of preference right under this act, in the order restoring the lands, you will make suitable provision for the filing of applications to enter or select by those claiming a preference right under this act, when the restoration is effective or during the twenty days preceding, according to existing practice. The period during which such preference-right claims may be submitted may be fixed at thirty, sixty, or ninety days following the date on which such restoration is effective, as may appear best to meet the situation presented by each particular restoration. The order of restoration should instruct the register and receiver that during such preference-right period, other applications not based on preference rights under this act may be filed pursuant to the terms of the order of restoration, but in the case of lands covered by an application timely filed and claiming a preference right under this act all of such other conflicting applications will be suspended pending action on the application

claiming a preference right under this act; and further that the register and receiver will take no action on such preference-right applications, other than to give same a serial number, note their records, and transmit such applications with report of status and conflicts to your office for action on the preference-right claim.

(5) In case the preference-right claim *is allowed*, any conflicting applications will be rejected as to the land embraced in the allowed preference claim; in case the preference right claim *is rejected*, conflicting applications will then be disposed of the same as if such preference-right claim had not been filed.

(6) You are advised that the said act of February 14, 1920, applies only to cases of entries in good faith in compliance with the requirements of the State law, with a view to reclaiming the land and procuring title pursuant to the provisions of the Carey Act; the act does not apply to cases where persons have settled on or improved the segregated land, either with the approval of the State authorities or otherwise, not pursuant to the State laws or not in anticipation of reclaiming the lands and procuring title under the Carey Act, but for the purpose of initiating some kind of a claim to the land on its restoration because of failure of the project or cancellation of the segregation.

(7) You are also advised that the act does not apply to cases where the State entry has been canceled or forfeited for default on the part of the State entryman in carrying out his part of the contract, unless such default on the part of the State entryman as the result of conditions which culminated in the elimination of the lands from the project; the allowance of a subsequent entry for the same land by the State would be presumptive that the default was the fault of the State entryman whose entry was forfeited or canceled.

(8) You are further advised that any rights to which a claimant may be entitled under said act of February 14, 1920, are not affected by Resolution No. 29 of February 14, 1920 (41 Stat., 434), giving preference rights to ex-service men, for by the terms of the resolution rights thereunder are made subject to "prior existing valid settlement rights and * * * preference rights conferred by existing laws or equitable claims subject to allowance or confirmation"; rights under this act of February 14, 1920, are considered to be within the class described by the language quoted.

(9) Applications to enter or select under applicable public-land laws in the exercise of the preference rights granted by this act of February 14, 1920, will be considered and adjudicated the same as other applications under such laws, except as otherwise provided in the act of February 14, 1920; that is to say, each applicant must be qualified under the law under which he seeks to make entry or selection, and he must fully comply with such law in order to secure

patent, with the single exception that one who exercises his preference right by making entry under the homestead law "shall be entitled to a credit, as residence upon his new homestead entry allowed hereunder, of the time he has actually lived upon the claim as a *bona fide* resident thereof."

CLAY TALLMAN,
Commissioner.

DELFINO CORDOVA AND JAMES R. WILSON.

Decided December 11, 1920.

PRACTICE—SERVICE—RULES 47 AND 48.

Where an appeal is taken from a decision rejecting an application because of conflict with a subsisting entry, it will not be considered unless duly served on the adverse claimant of record as provided in Rules 47 and 48 of Practice.

VOGELSANG, First Assistant Secretary:

Delfino Cordova has appealed from a decision of the Commissioner of the General Land Office dated June 26, 1920, holding his homestead entry for cancellation because of conflict with the preference-right application of James R. Wilson, made under section 8 of the stock-raising homestead law of December 29, 1916 (39 Stat., 862).

The case is this: Cordova in 1901 made homestead entry under section 2289, Revised Statutes, for the SE. $\frac{1}{4}$, Sec. 9, T. 31 N., R. 27 E., N. M. P. M., Clayton land district, New Mexico, and made an additional entry under the enlarged homestead act, July 28, 1915, for the NE. $\frac{1}{4}$, said Sec. 9.

February 23, 1917, James R. Wilson made homestead entry for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 9, N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, T. 34 S., R. 60 W., 6th P. M., Pueblo land district, Colorado.

March 30, 1917, Cordova filed a petition for designation and an application (032612) for an additional entry under the first proviso to section 3 of the stock-raising law, covering the S. $\frac{1}{2}$, Sec. 4, T. 34 S., R. 60 W., 6th P. M., Pueblo land district, Colorado, these lands being situated just north of the Colorado-New Mexico boundary and within 20 miles of the applicant's original entry in New Mexico. This application was suspended pending designation of the lands.

September 17, 1918, Wilson filed an application (037506) to make additional entry under the stock-raising homestead law for the said S. $\frac{1}{2}$, Sec. 4, T. 34 S., R. 60 W., which tract adjoins his original entry. This application was likewise suspended.

All of the above-described lands in Colorado and New Mexico were classified September 27, 1918, as stock-raising lands, the designation being effective October 15, 1918, and manifestly Wilson had a preference right of additional entry as to the lands contiguous to his original entry for a period of ninety days thereafter under the provisions of section 8 of the act, his right relating back in point of time to the date of his original entry (47 L. D., 150).

The local officers, however, apparently overlooking this fact, allowed Cordova's application February 1, 1919, and thereupon rejected that of Wilson because of conflict. February 13, 1919, Wilson appealed to the Commissioner and upon consideration of the facts the Commissioner under date of February 7, 1920, laid a rule upon Cordova to show cause why his entry should not be canceled because of the preference right accorded Wilson by the statute.

Cordova responded to this rule, saying that although Wilson knew of the existence of his claim he was not served with a copy of his appeal from the action of the local officers rejecting his application, and that he had no notice of any claim or application filed or made by Wilson until sometime in October or November, 1919; that in the meantime he had placed valuable improvements upon the land worth approximately \$2,000, had established residence thereon and otherwise prepared himself for a full compliance with the law under which he made his entry.

In opposition to this showing Wilson stated that he was under no obligation to serve Cordova with a copy of his appeal from the erroneous action of the local officers, and although unfortunate it was no concern of his that the register and receiver had accepted Cordova's application and notified him of the allowance of his entry. He denied that Cordova's improvements were worth \$2,000, asserting that they were not worth more than \$500, and that a large part of them was put upon the land after Cordova had notice of his prior and better claim; that he had discussed the matter with Cordova late in August, 1919, interrogating him as to his purpose in putting improvements upon the land in the face of his (Wilson's) claim; that this conversation was the continuance of a prior discussion during which his claim was fully made known to Cordova, and at which time the only improvements upon the land were about one mile of wire fence; that thereafter Cordova began the construction of an adobe house but upon further notice being given him work on this structure was abandoned and a frame shanty erected in its stead. He produced the affidavit of one P. V. Pitt, who stated that he was present and overheard the conversation between Wilson and Cordova in August, 1919, at which time Cordova was told that whatever improvements were placed upon the land were made at his peril and subject to the risk of being compelled to remove or lose them.

By his decision of June 26, 1920, the Commissioner held that the showing made by Cordova was not sufficient to defeat Wilson's preference right under section 8 of the statute, and his entry was accordingly held for cancellation.

The case is before the Department upon appeal from that decision, Cordova contending that the Commissioner erred in holding in effect that notwithstanding he was an adverse claimant of record he was not entitled to notice of Wilson's appeal from the action of the local officers rejecting his application to enter; that it was error to hold in effect that Cordova had no equities deserving of consideration and error not to hold under the facts disclosed that Wilson is estopped from asserting his claim to the land in controversy.

Cordova's contention that, as an adverse claimant of record, he was entitled to notice of Wilson's appeal is well founded and the Commissioner erred in considering said appeal in the absence of proof of service thereof, as required by the Rules.

There is some apparent shadow of ambiguity surrounding the practice in this regard inasmuch as Rules 64 and 65 of Practice relating to appeals from decisions rejecting applications to enter public lands do not specifically state that such service shall be made, and since the practice has not been uniform at all times and appears now to be somewhat clothed in doubt and misunderstanding, it seems appropriate to refer to some of the changes and modifications that have been made therein.

In the revision of Rules approved August 13, 1885 (4 L. D., 45), Rule 70 provides: "Rules 43 to 48, inclusive, and Rule 93 are applicable to all appeals from the decisions of the register and receiver." This Rule was amended October 26, 1885 (4 L. D. 234), so as to read:

Rules 43 and 48, inclusive, and Rule 93, are not applicable to appeals from decisions rejecting applications to enter public lands.

The amended Rule, however, was not uniformly observed. (See 9 L. D., 264; 10 L. D., 408; 11 L. D., 375; *ibid.*, 621; 13 L. D., 392; 14 L. D., 658.) This conflict of practice was called to the attention of Secretary Hoke Smith, who held under date of September 21, 1893 (17 L. D., 325), that the original rule requiring an appeal from the rejection of an application to enter to be served on an adverse claimant of record—

embodies a sound principle of law (and) conduces to the ends of justice and fair dealing between claimants for the same land.

He accordingly revoked amended Rule 70 and restored the rule as originally approved and printed in 4 L. D., page 45. Thus the original rule without change was carried into the revision approved July 15, 1901 (31 L. D., 527). The Rules were again revised in 1910.

(See 39 L. D., 395.) This revision materially changed the Rules previously in force in a number of important matters. For instance, Rule 70 as contained in the revision of July 15, 1901, was entirely omitted, the new Rule of that number relating to altogether different matters, but its potential provisions were incorporated in changed Rules 47 and 48 which relate to appeals to the Commissioner from the action or decision of the register and receiver. Existing Rule 47 provides that—

No appeal from the action or decision of the register and receiver will be considered unless notice thereof is served and filed with the local officers in the manner and within the time specified in these Rules.

Rule 48 specifies that notice of an appeal shall be served and filed with such register and receiver within thirty days after receipt of notice of decision.

The language of Rule 47 is sufficiently explicit. It admits of no exception and excludes from consideration by the Commissioner all appeals which have not been served and filed in the manner and within the time specified.

In the nature of things Cordova's prior filing of record constituted notice to Wilson of the existence of his claim. As an adverse claimant of record he was entitled to notice of Wilson's appeal and he has a right to complain of Wilson's failure to apprise him of the attack on the validity of his entry. The rule is mandatory and the injury to Cordova resulting from its nonobservance is manifest, because upon the faith of the assurance conveyed by the acceptance of his application by the local officers, that the lands were unaffected by any adverse claim or right, he went into possession thereof, proceeded to improve them, and otherwise comply with the provisions of the homestead law.

Considering all the facts and circumstances the Department believes that a hearing should be ordered in this case for the purpose of determining the nature and extent of Cordova's improvements, their reasonable worth, when they were placed on the land, and when he first had actual notice or direct knowledge of Wilson's claim of a preference right of entry under the statute. If it should be found that Wilson remained silent when he had an opportunity to speak and passively acquiesced in Cordova's possession and labor of improvement or that Cordova has in good faith and without timely notice or knowledge of Wilson's claim expended his time and money in improving the land, Wilson will not be heard further to assert his claim of a preference right thereto, save upon terms of fair and reasonable allowance for Cordova's improvements.

The decision of the Commissioner is accordingly reversed and the case remanded for appropriate action hereunder.

OIL AND GAS PERMIT—EXTENSION OF TIME.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 12, 1921.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

With your memorandum of January 8, 1921, you submitted applications for extensions of time within which to commence drilling under oil prospecting permits issued pursuant to section 13 of the act of Congress approved February 25, 1920 (41 Stat., 437).

The statute requires—

that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of the permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet, unless valuable deposits of oil or gas shall be sooner discovered. The Secretary of the Interior may, if he shall find that the permittee has been unable, with the exercise of diligence, to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe.

The language of the statute clearly implies, and paragraph 7 of the regulations so construes, that the extension of time authorized may be granted to cover a period of not exceeding two years from and after the date of the expiration of the two years fixed in the permit "to test the land." Consequently, an extension at the end of six months would be premature and not specifically authorized by statute.

However, the Department is aware that under many of the permits issued the principal part or all of the six months' period within which to begin drilling will fall in the winter season, when drilling may be impracticable in many sections of the country. There may be other cases where, for good and sufficient reasons, permittees are unable to begin drilling within the six months' period.

Therefore no action will be taken looking to the cancellation of a permit issued under section 13 of the oil and gas leasing act for failure to begin drilling operations within six months from date of the permit if the permittee, or his assignee exercises due diligence, and because of climatic conditions or other reasons beyond his control, has been unable to begin actual drilling within six months.

Every permittee or his assignee claiming under a permit issued under section 13 of the oil and gas leasing act shall, within twelve months and ten days from date of his permit, file in the local land office of the district in which the land is situated a corroborated affidavit specifically describing the work done upon the land embraced

therein, together with such other information as may be pertinent as to his operations thereon.

JOHN BARTON PAYNE,
Secretary.

OIL AND GAS REGULATIONS AMENDED.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 15, 1921.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Your attention is directed to clerical error in paragraph *a* of section 10 of the oil and gas regulations, reprint of October 29, 1920 (47 L. D., 443), which implies that permits in Alaska, under section 13 of the act, may be granted in producing structures, whereas under the law, no prospecting permit under section 13 of the act can be granted in a producing structure, and but one permit to a single person or corporation can be granted in a nonproducing structure. Accordingly, said paragraph *a* is amended to read as follows:

A person, association, or corporation is authorized to hold five permits at one time in said Territory, but only one permit in any geologic structure; hence, subdivision *c* of section 4 of these regulations should be modified accordingly in making application for permits for lands in Alaska under section 13 of the act.

JOHN BARTON PAYNE,
Secretary.

INDIAN HOMESTEADS—PATENTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 15, 1921.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

The Department has received your office letter of December 10, 1920, relative to the issuance of patents on Indian homestead entries, the particular cases referred to being those of James Pawlo of the Cosumnes Tribe, and Thomas of the Kern River Tribe of Indians, of California. In answering the questions propounded by your office it seems advisable to set forth the situation at some length.

These entries were made under the act of March 3, 1875 (18 Stat., 402, 420), which extended the benefits of the homestead law of May 20, 1862 (12 Stat., 392), to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his

tribal relations," with a proviso that title to the lands thus acquired should not be subject to alienation or encumbrance "for a period of five years from the date of the patent issued therefor."

The act of July 4, 1884 (23 Stat., 76, 96), provided: "That such Indians as may now be located on public lands, or as may * * * hereafter so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may be done by citizens of the United States"; and that no fees or commissions should be charged on account of entries or proofs. All patents were to be of the legal effect and declare that the land would be held in trust for the benefit of the Indian or his heirs for a period of twenty-five years.

In the case of James Pawlo entry was made in 1882, under the act of 1875, at which time he declared that he had abandoned his tribal relations. Final certificate was issued to him in 1887, and patent in 1890, under the special Winnebago act of January 18, 1881 (21 Stat., 315, 317), which provides that title acquired to lands thereunder shall remain inalienable for a period of twenty years. He paid fees and commissions at the time of entry and when final certificate was issued. In the case of the Indian Thomas entry was made in 1877, under the act of 1875, it being stated that he had abandoned his tribal relations. He paid fees and commissions at the time of entry but not when final certificate was issued in 1888. Patent was issued to him in 1890, with a twenty-year restriction against alienation as provided in the Winnebago act of 1881.

The patents issued to these Indians were not in accordance with either the act of 1875, prescribing a five-year limitation upon the power of alienation, or that of 1884, providing for a twenty-five-year trust period, but the act of January 18, 1881, providing for a twenty-year period against alienation, which latter act is only applicable to Winnebago Indians of Wisconsin. It is well settled, however, that a provision in an Indian homestead patent restricting alienation for which the law furnishes no warrant is mere surplusage, having no controlling force upon the title of the grantee, and that the patent must, when its legal effect is sought, have read into it the law under which the title it conveys was acquired regardless of the limitation which may be expressed in such patent. All decisions are in accord upon this question.

There has been some difference of opinion and resultant confusion in construing the Indian homestead acts of 1875 and 1884. The opinion was expressed in 1888, by the Attorney General (19 Op. Atty. Gen., 161, 166), "that the act of 1884 was intended to be supplemental to and somewhat in modification of the act of 1875, and that its provisions apply to all entries made under the act of 1875, for which patents had not issued at the time the act of 1884 went into effect." Under

this ruling the courts held that the act of 1884 was a continuation of the homestead privilege granted to Indians by the act of 1875, with an enlargement of the time of restriction upon alienation from five to twenty-five years, and that an entryman under the act of 1875, who had not fully complied with all the requirements essential to perfecting his title under that act prior to the act of 1884, might complete his entry and receive patent under the later act, which provides that the land shall be held in trust for twenty-five years. *Frazees et al. v. Spokane County et al.* (69 Pac., 779); *Frazees et ux. v. Piper* (98 Pac., 760); *Robinson v. Steele et al.* (157 Pac., 845); *United States v. Hemmer et al.* (195 Fed., 790). This construction of the acts was followed until decision by the Circuit Court of Appeals in 1912 in the case of *Hemmer et al. v. United States* (204 Fed., 898), affirmed by the Supreme Court in 1916 (241 U. S., 379), wherein it was held that the act of 1884 did not repeal, amend, nor modify any of the provisions of the act of 1875; that all the provisions of the two acts stand together and remain in force; and that the act of 1884 did not have the effect to extend from five years to twenty-five years the restriction on alienation of the land acquired by an Indian homesteader under the act of 1875. Both the lower court and the Supreme Court in that case, however, were careful to point out that title under an entry made in 1878, under the act of 1875, was earned prior to the act of 1884, and that consequently the entryman was entitled to patent in accordance with the provisions of the act of 1875, his right to make final proof having accrued prior to the act of 1884. In principle this is not inconsistent with the view expressed by the Attorney General in 1888. The courts refrained from deciding what would have been the effect if the entryman in that case had not earned title under the act of 1875 prior to the act of 1884. The Department distinguished these two situations in the cases of *Gregorie Frazees* (43 L. D., 95), February 17, 1914, and *Ulsha* or "Mack," November 23, 1916, unreported. The court in 1917, in the case of *Felix v. Yaksum* (163 Pac., 481, 485), which is followed in the case of *Entiat Delta Orchards Co. v. Unknown Heirs of Saska et al.* (168 Pac., 1130), recognizes these distinctions but goes one step further than the decisions in the *Hemmer* case and holds that as the act of 1875 is not repealed or amended by the act of 1884, as held by the Circuit Court of Appeals and the Supreme Court in the *Hemmer* case, an Indian may initiate and acquire a homestead under the act of 1875, after the passage of the act of 1884, as well as before that act.

The situation in respect to the Indian homestead acts of 1875 and 1884 is further somewhat complicated by the general allotment act of February 8, 1887 (24 Stat., 388), in section 6 of which it is provided:

And every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and

apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States * * *.

The Department has held that this declaration necessarily includes the privilege on the part of an Indian possessing the necessary qualifications to make entry under the provisions of the regular homestead law just as any other citizen. The fact is that prior to the acts of 1875 and 1884 Indians as such, although living apart from their tribe and whether they were members of a tribe or not, could not take up public lands under the homestead law. The Supreme Court in the case of *Elk v. Wilkins* (112 U. S., 94), referring to said acts, stated that "the recent statutes concerning homesteads are quite inconsistent with the theory that Indians do or can make themselves independent citizens by living apart from their tribes," and the court held:

An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the Government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who has not been naturalized, or taxed, or recognized as a citizen, either by the United States or by the State, is not a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the constitution.

After the passage of the acts of 1875 and 1884, Indians could exercise the homestead privilege under said acts as fully and to the same extent as citizens of the United States but they had to do so as Indians as distinguished from citizens. In fact, under the terms of the act of 1875, they must show that they are members of an Indian tribe and have abandoned their tribal relations. They are forbidden alienation, or title to the lands is held in trust for specific periods. This situation is further shown by the provision in the act of 1884, which excuses them from paying fees and commissions on account of their entries and proofs, for the obvious reason that they are Indians. But under the act of 1887 an Indian who is living apart from any tribe, or whether he is a member of any tribe or not and has adopted the habits of civilized life, is declared to be a citizen and is entitled to make entry under the regular homestead law, and upon showing compliance with said law in the matter of residence and cultivation is entitled to fee patent like any other citizen. A person who takes a homestead by virtue of the provisions of the act of 1887 is no longer an Indian within the purview of the acts of 1875 and 1884. To that class belongs the case of *Jennie Adass et al.* (35 L. D., 80), followed in *Instructions* (37 L. D., 219), and to which your office makes reference. Also of this class are the

cases of *Turner v. Holliday* (22 L. D., 215); *Feeley v. Hensley* (27 L. D., 502); *Frank Bergeron* (30 L. D., 375); and *Clara Butron*, unreported, and cited in Instructions (37 L. D., 219). See also Circular No. 427, July 27, 1915. In another class is the case of *James Pawlo*, wherein, as hereinbefore stated, entry was made in March, 1882, and final proof submitted in March, 1887, fees and commissions being paid in both instances, as required by the act of 1875. Patent was erroneously issued under the Winnebago act of 1881, and it was subsequently found under the facts that fee patent should have issued under the act of 1875. In the case of *Thomas*, entry was made in 1877, final proof submitted in 1888, and patent issued under the Winnebago act of 1881. The fact that no fees and commissions were paid at the time of final proof was taken as an indication that he desired to avail himself of the act of 1884, and consequently a twenty-five-year trust patent was substituted. Your office was directed on October 19, 1920, to issue fee patent as the trust period which had been extended had expired. To this class belong the cases of *Toss Weaxta* (47 L. D., 574); *United States v. Hemmer*, and *Entiat Delta Orchards Co. v. Unknown Heirs of Saska et al.*, to which your office also refers. See also Circular No. 394 of March 29, 1915. In the last two cases the facts were that the entries were initiated under the act of 1875, and final proof submitted after the act of 1884. The question involved was as to whether the Indians were entitled to fee patent under the act of 1875, or trust patent under the subsequent act of 1884, in view of the changed ruling by the courts.

The distinctions herein pointed out seemingly were not taken into consideration by your office for in the present letter reference is made indiscriminately to cases where entry was shown to have been made by the Indian as a citizen under the act of 1887, and cases where entry was made by the Indian as such under the act of 1875 or 1884, as distinguished from a citizen. With this distinction in mind it will be found that the course of the Department has been reasonably consistent considering the rather confused situation due to the various acts of Congress and the different constructions by the Attorney General and the courts and not inconsistent as suggested in your office letter. This distinction is set forth in the *Adass* and *Ulsha* or "Mack" cases, the Instructions of June 2, 1908 (37 L. D., 219), and in numerous decisions cited on which such cases were based. In the *Adass* case it was found that the facts brought the Indian within the terms of the act of 1887, notwithstanding the homestead application was indorsed "Indian, act of July 4, 1884," and that the entryman was, therefore, entitled to patent like any other citizen. That case followed decisions in the cases of *Clara*

Butron, Feeley *v.* Hensley, and Frank Bergeron, *supra.* In the first case it was held that Butron was a "native-born Indian woman who has abandoned all tribal relations" * * * "her citizenship results from such conditions under the terms of section 6 of the act of February 8, 1887." * * * "It appears, therefore, that prior to her entry the applicant was clothed with full citizenship even though she might have been of Indian birth, and that she had the right to make entry of public lands without any restriction except such as are imposed upon citizens generally." In the second, that "these conditions brought him within the pale of citizenship, where he has voluntarily placed himself. (24 Stat., 388, 390, section 6, act of February 8, 1887.) * * * The homestead privilege was conferred upon native-born Indians who have severed tribal relations and abandoned savage for civilized life. (Turner *v.* Holliday, 22 L. D., 215.)" And in the third, that "Every Indian who has received an allotment of land is a citizen of the United States and every citizen of the United States having the other prescribed qualifications is entitled to the benefits of the homestead law. One who becomes a citizen by virtue of having taken his share of the lands of his tribe, as an allotment, is as much entitled to the benefits of the homestead law as one who becomes a citizen by any other method." It was accordingly held in the Adass case:

An Indian homesteader holding title under a trust patent issued to him under the provisions of the act of July 4, 1884, who at the time of making the entry had abandoned his tribal relation and was occupying the status of a citizen of the United States under the terms of section 6 of the act of February 8, 1887, may, upon application therefor, have the trust patent canceled and patent under the general homestead law substituted therefor.

The facts in the cases of Jennie Adass and Toss Weaxta are referred to by your office as being the same. On the contrary, the entry of Weaxta was treated by your office and the Department as one made under the act of 1884. He was not required to pay fees and commissions when he made entry or at the time of final proof, and trust patent was issued under the act of 1884. The trust period of twenty-five years would have expired in 1916, under the patent, but the time was extended under the provisions of the act of June 21, 1906 (34 Stat., 325, 326), which uses the term "any Indian allottee." The sole contention on appeal was that an Indian homestead is not an Indian allotment, and that consequently said act of 1906 was not authority for the extension of the trust period. There was no contention that the proper patent was not issued or that the Indian was entitled to patent as a citizen under the terms of the act of 1887, as was the fact in the Adass and allied cases, and consequently that matter was not directly considered nor discussed.

The specific questions propounded by your office in this matter are as follows:

Does the fact of the nonpayment of fee and commissions at entry, or at time of offering final proof by one qualified to enter under the act of March 3, 1875, constitute sufficient grounds to indicate an intention to take advantage of the twenty-five-year trust provision of the act of 1884, or should the test be the sworn statements of the party as to his condition with respect to membership in an Indian tribe, with the certificate of the Indian Office required by Circular No. 427, where appropriate, unless the party makes a specific application for a change in the character of his entry, or should the character of the patent to be issued be left in each such case to the determination reached by the Commissioner of Indian Affairs after investigation of the actual competency of the entryman?

Is it necessary to issue a fee simple patent on an entry made under the act of March 3, 1875, when fee patent with twenty-year restriction was erroneously issued under the act of 1881, the twenty-year period having expired?

The gist of the decisions construing the acts in question is that an Indian homesteader under the act of 1875 may, when his title is not earned prior to the act of 1884, avail himself of the later act, which is entirely consistent with the idea that he may insist upon completing his entry under the act of 1875, even though final proof is not submitted until after the act of 1884; that an Indian homestead entry may also be initiated and completed under the act of 1875, after the act of 1884; and that after the act of 1887, an Indian is entitled to make entry under the regular homestead law as a citizen of the United States. In determining the applicant's intentions in the premises recourse must necessarily be had to all the facts and circumstances surrounding each particular case. Where an entry was made under the act of 1875, prior to the act of 1884, and fees were paid, it does not conclusively follow that upon submitting proof the Indian did not choose to avail himself of the provisions of the latter act especially where no fees or commissions are paid. In fact, under the original construction of the law where the entry was not completed until after the act of 1884, the practice was to treat the entry as one made under the latter act, the papers carrying the notation "Indian Homestead Act July 4, 1884." It was held in the case of *Entiat Delta Orchards Co. v. Unknown Heirs of Saska et al.*:

Where an Indian entering a homestead in his proofs showed that he had abandoned his tribal relations and had every qualification prescribed by Act Cong. March 3, 1875, c. 131, he acquired the homestead under such act, and not under Act Cong. July 4, 1884, c. 180, although he was issued a patent under the latter act, and was not called on for the fees, and the final receipt carried the notation, "Indian Homestead Act July 4, 1884," as the most favorable statute that will apply to the established character and qualifications of the entryman ought to be applied.

The court also took the position in that case that while the nonpayment of fees is a circumstance that should be considered it is not

sufficient to overcome the facts showing that the Indian was a qualified entryman under the act of 1875, and that patent should have been issued accordingly, as the failure of the local officers was not the fault of the Indian and "their error should not operate to deny a right or limit a title to which the entryman is otherwise entitled." The fact of a notation "Indian Homestead Act July 4, 1884," by the local officers on the homestead papers and that the Indian paid no fees as provided in that act, are undoubtedly circumstances indicative of an intention or election on his part to take advantage of said provision. It is possible that this evidence may be overcome by a showing that it was the Indian's intention to complete his entry under the act of 1875, and that the mistake was that of the local officers. The Department, however, is unwilling to adopt as a general rule the finding of the court in this respect and probably it was not so intended by the court, but each case should be considered in the light of the surrounding circumstances after a full investigation, which should be had in cooperation with the Indian Office. Furthermore, none of these cases where patents have issued should be disturbed in the absence of a specific application on the part of the Indian homesteader for a change. Where the patents were issued under a construction as it then existed of the acts of 1875 and 1884, the Department is not disposed to interfere with the situation because of the comparatively recent and different construction placed upon said acts by the courts especially in cases where the entryman has since died, his heirs possibly determined, and the estate distributed or sold. Where no interests would be affected except those personal to the original homesteader there is probable justification in recognizing and enforcing such changed construction. The foregoing is in a general way an answer to your first question.

In answer to the second question it may be said that so far as the Indian's right and title are concerned it is unnecessary to issue a fee patent to an Indian where it may be found that his entry is one made under the act of 1875, but where a patent was issued under the Winnebago act of 1881, for the reason that under the rule such patent must have read into it the law under which the title was acquired. Ordinarily a proper notation on the records of your office would be sufficient. But in view of the fact that these instruments are recorded on the county records, and owing to the difficulty and possible neglect in noting changes the better practice is to issue a new patent with a recital therein that it is issued in substitution of the instrument erroneously issued. For the same reason this practice should be followed in all cases of substitution of patent under the acts in question.

It may be said in this connection that in those instances where patents were erroneously issued under the Winnebago act of 1881, no

consideration should be given that fact further than as matter of recital. The limitation prescribed in such patents should not be used as a basis of calculating the time with which the Indian is to be credited. He must be considered as coming under the Indian homestead acts of 1875 and 1884, or the regular homestead law under the provisions of the act of 1887, as the case may be according to the surrounding facts and circumstances.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

NANCY M. HOUGH.

Decided January 18, 1921.

DESERT-LAND ENTRY—FINAL PROOF—CULTIVATION.

Where the final proof offered in support of a desert-land entry shows the ownership of a sufficient water right, construction of necessary ditches, and that one-eighth of the land has been irrigated and cultivated, it is not incumbent upon the claimant to show, as a matter of establishing the element of good faith, that the crop produced thereon was reasonably remunerative.

VOGELSANG, *First Assistant Secretary:*

Nancy M. Hough has appealed from a decision of the Commissioner of the General Land Office dated July 19, 1920, rejecting her final proof, submitted November 14, 1918, upon her desert-land entry, for the fractional W. $\frac{1}{2}$ (327.60 acres), Sec. 2, T. 31 S., R. 37 E., M. D. M., Independence, California, land district, on the ground that the water supply afforded by claimant is insufficient to irrigate the land in the entry and that owing to want of proper application of water the cultivation of the required area does not appear reasonably remunerative to the extent necessary to be shown to establish good faith.

The record discloses that the entry was made December 6, 1912, and that a map exhibiting the mode of contemplated irrigation was filed and annual proofs showing compliance with the law as to expenditures were submitted. Final proof was made November 14, 1918, but final certificate was withheld at the request of the chief of field division.

It appears that on March 2, 1916, the claimant filed an application for relief under section 5, act of March 4, 1915 (38 Stat., 1161), alleging ownership of a one-half interest in a well furnishing a water supply insufficient to meet the requirements of the desert-land law, and requesting relief upon the ground that the drilling of additional wells or the installation of a larger plant would make the cost of irrigation unreasonable in proportion to the value of the land. The Commissioner of the General Land Office found that an adequate water supply could be obtained at a cost which would not

be prohibitive, and denied the application. Subsequently the entrywoman submitted evidence of purchase of the remaining one-half interest in the well and applied for an extension of time within which to submit proof.

It is contended in the appeal that the Commissioner erred in his holding that the water supply is insufficient to irrigate the land in the entry and that proof of crops must be submitted to establish good faith.

The proof shows that with the exception of about 6 acres, the land is irrigable; that the water is obtained from a 12-inch well, connected with a 50-horsepower gasoline engine and an 8-inch pump, capable of supplying 47 to 52 miner's inches; that 43 acres of the entry have been plowed and during April, 1918, were sowed with sudan grass, feterita, sunflower, and a variety of vegetables; that a main ditch about 3 feet wide and from one to two feet deep has been constructed along the south side of the S. $\frac{1}{4}$ SW. $\frac{1}{4}$ of the section, from which extend seven laterals or distributing ditches conveying water over the one-eighth tract in cultivation; that as a result of the irrigation 16 tons of sudan grass and feterita and a variety of vegetables were obtained in 1918.

On February 22, 1917, a field examiner of the Land Office submitted a report upon the relief application to the effect that this entry adjoins a desert-land entry made by one William W. Hough and that it was evidently intended that the two entries were to be worked in partnership; that 45 acres in each entry had been cleared and fenced; that more than the required expenditure, \$3 per acre, had been made; that the well which was owned in common was capable of supplying, on the basis of 1 miner's inch to 8 acres, water sufficient to irrigate 376 acres, or one entire entry, but not both entries.

The entrywoman subsequently acquired by purchase the remaining one-half interest in the well and pumping plant attached thereto. A certified copy of the deed of conveyance is incorporated in the entry record.

On February 19, 1919, another field examiner of the Land Office submitted a report in which it was stated that the water supply was probably adequate to irrigate by prudent application the entire entry for the production of sudan grass, feterita, barley, or wheat; that 40 acres had been cultivated, but poor crops raised on account of insufficient application of water; that if more water had been applied better crops would have been produced; that ditches have been so constructed that water can be delivered to each legal subdivision.

The Commissioner, after reviewing the report of the field examiner made February 19, 1919, arrived at the conclusion that the water supply is barely sufficient to irrigate 160 acres. His reasoning upon that point is as follows:

A constant flow of $\frac{1}{3}$ miner's inch for 210 days, the maximum irrigation season in this vicinity, is an equivalent of 3.47 acre-feet. However, in actual practice, pumps are not operated continuously in excess of 12 hours per day, and, in such case, a flow of $\frac{1}{3}$ miner's inch of water for 210 days is equivalent to 1.735 acre-feet, which covers an acre to a depth of 20.8 inches. There are 327.60 acres in this entry, 6 of which are not susceptible of irrigation. At the rate of $\frac{1}{3}$ miner's inch per acre, 42 miner's inches in this locality will irrigate 126 acres for general crops, and after making a deduction of 15 per cent, ordinarily allowed for roadways, ditches, and improvements, her supply of 42 miner's inches is barely enough for the 160 acres in the SW. $\frac{1}{4}$, upon which her improvements are located.

It is obvious that there is a controversy as to the conclusion arrived from the facts in this case relative to the adequacy of the water supply. The decision of the Commissioner merely assumes that the well is to be pumped twelve hours per day. There is nothing that indicates that the well does not contain an ample supply of water to permit of pumping twenty-four hours per day, thereby affording a double amount of water, sufficient to irrigate the entire entry. It appears that one-eighth of the land within the entry has been plowed, irrigated, and cultivated. As a matter of law an entryman is not required to cause water to be distributed over all the irrigable land in the entry before being entitled to receive a patent. The requirements are fulfilled if at least one-eighth of the land is irrigated and cultivated, and the entryman owns a sufficient water right and has constructed ditches or other conveyances, has brought water to the land, and is prepared to turn water upon the entire tract when it shall have been prepared for cultivation. *United States v. McIntosh* (85 Fed., 333); *Connor et al. v. United States* (214 Fed., 522); *Dickinson v. Auerbach* (18 L. D., 16); *United States v. McKinney* (27 L. D., 516); *Alonzo B. Cole* (38 L. D., 420).

After considering the facts as presented in the record and measuring the accomplishment of the entrywoman by the law established by this Department and by the courts, it must be concluded that the requirements as to affording a water supply and installing an adequate irrigation apparatus have been fulfilled to the extent to entitle her to receive a patent. There is no adverse claimant in the case, and there is no doubt of the desert character of the land, and that it will not produce crops without irrigation.

One other question remains to be considered, that is, whether or not it is incumbent upon the claimant to show as a matter of establishing the element of good faith, that a reasonably remunerative crop had been produced.

The act of March 3, 1891 (26 Stat., 1095), amending the act of March 3, 1877 (19 Stat., 377), contains, among others, the provision that before a patent shall be issued, proof must be made showing cultivation of one-eighth of the land within the entry. The law itself contains nothing to the effect that the cultivation must be re-

munerative or profitable to the entryman. The departmental regulations pertaining to final proof under the desert-land laws (Circular No. 474, 45 L. D., 345, 359), merely state that it must be shown that one-eighth of the entire area entered has been "properly cultivated and irrigated."

The popular definition of "cultivation" is the working of ground for the purpose of raising crops, the raising of crops by tillage, etc. In a legal sense the term cultivation means plowing and preparing the ground for crops or the raising of something that grows from the ground, besides grass. It is ordinarily understood as something more than the spontaneous growing of crops. To cultivate has been defined as to improve the product of the earth by manual industry. *Clark v. Phelps* (4 Cowens, N. Y., 190, 203); *American Emigrant Company v. Rogers Locomotive Machine Works* (50 NW., 52); *United States v. Niemeyer* (94 Fed., 147). The extent of productivity or remunerativeness of crops obtained as a result of cultivation does not form any part of the definition. The cultivation may be of a high grade and yet the crops may be wholly unremunerative. In *United States v. McKinney, supra*, this Department held that the entryman's desert-land proof should have been accepted as sufficient. In that case the ground had been plowed preparatory for fruit culture, but actual planting was suspended because of a flood disaster and want of means of the entryman.

In view of the foregoing, the Department is of the opinion that the final proof shows compliance with the law as to cultivation and that the Commissioner, by declaring in his decision that it was incumbent upon the claimant to show that the crop was reasonably remunerative in order to establish good faith, placed upon her a requirement which the statute does not impose nor Congress contemplate.

Accordingly the action appealed from is reversed.

RECLAMATION ACT—FIRST FORM WITHDRAWALS—APPLICATIONS.

INSTRUCTIONS.

[Circular No. 734.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 25, 1921.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

By direction of the First Assistant Secretary of the Interior, as set forth in an order dated January 12, 1921, you are instructed as follows:

(1) Cases are being received by the General Land Office wherein entries have been allowed for lands situated within areas withdrawn under the first form of the reclamation act of June 17, 1902 (32 Stat., 388). Such practice is contrary to the rules and regulations of the Department of the Interior. Your attention is particularly called to paragraph 13 of the circular approved May 18, 1916 (45 L. D., 385, 388), containing the laws and regulations relating to the reclamation of arid lands by the United States, in which it is specifically stated that, after lands have been withdrawn under the first form, they can not be entered, selected, nor located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations should be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal.

(2) Paragraph 20 of said regulations contains the statement that, upon cancellation of an entry covering lands embraced within a withdrawal under the reclamation act, such withdrawal becomes effective as to such lands without further order; also, that such lands under first form withdrawal can not, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person.

(3) The act of February 18, 1911 (36 Stat., 917), as amended by section 10 of the act of August 13, 1914 (38 Stat., 686), relating to entries made prior to June 25, 1910, that have been or may be relinquished, in whole or in part, has reference only to lands covered by second form withdrawals, and is, therefore, inapplicable in the case of lands withdrawn under the first form. See paragraph 4 of the regulations of May 18, 1916.

(4) You will in the future adhere to a strict observance of the rules and regulations pertaining to first form withdrawn lands and cause all applications for the entry of lands within such areas to be promptly rejected.

CLAY TALLMAN,
Commissioner.

EDWARD PIERSON.

Decided January 27, 1921.

RECLAMATION HOMESTEAD—DEATH OF ENTRYMAN AFTER PROOF—ASSIGNEE.

Where a reclamation homestead entryman dies after he has offered satisfactory final proof the entry becomes a part of the assets of his estate, and when duly sold as such by the administrator, the purchaser, if otherwise qualified, will be recognized as the assignee of the entryman under the act of June 23, 1910.

VOGELSANG, *First Assistant Secretary:*

After considering the final proof offered by James McDonough under his reclamation homestead entry, Glasgow 03780, embracing the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 27, T. 30 N., R. 29 E., M. M., the Commissioner of the General Land Office, on February 6, 1911, announced that it had been found sufficient as to residence, cultivation and improvement required by the ordinary provisions of the homestead law.

The land mentioned is not included within farm units and no public notice having been issued announcing that water is available for its irrigation, no application for water right has been filed.

After the making and acceptance of the final proof referred to the entryman died, intestate, and his interest in the land became a part of the assets of his estate (Heirs of William L. Naftzger, 46 L. D., 61), and as such was sold, and on January 14, 1914, conveyed by his administrator to Edward Pierson "in order to raise funds to pay debts, and expenses of administration of said estate" pursuant to an order and with the approval of a State court. The court ordering the sale of these lands acted within its jurisdiction; and, inasmuch as its proceedings were regular and no exception was taken to its action by the entryman's heirs or devisees, the sale to Pierson must now be considered as free from the possible objection that the land could not be sold to pay the entryman's debts. *Doran v. Kennedy* (237 U. S., 362).

After Pierson had sought to have his assignment recognized the Commissioner of the General Land Office made certain requirements as necessary to its recognition, among which was that he should file the affidavit required by paragraph 41 of the regulations of May 18, 1916 (45 L. D., 385, 395), entitled "affidavit of assignee."

With his appeal from that decision Pierson meets all the requirements made by the Commissioner except as to the filing of the affidavit mentioned, in lieu of which he filed one in which he stated among other things:

That as far as known to him he possesses all of the qualifications of an assignee * * * that he is the possessor under purchase of the described land, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, lots 8 and 11, Sec. 3, T. 30 N., R. 30 E., which he has brought to a high state of cultivation, and has complied with the law governing such homestead and is now the owner and possessor of said tract of land.

It was held in Marshall Humphrey's case (46 L. D., 370), that one who purchased an entry such as this one at a sheriff's sale was *if otherwise qualified* "an assignee" under the act of June 23, 1910 (36 Stat., 592), which authorizes the assignment of such entries. Pierson must, therefore, be considered and recognized as the assignee of the entryman in this case if he does not come within the class of persons who are inhibited by law from taking such an assignment.

The act of June 23, 1910, *supra*, declares that such assignments as are there authorized "shall be subject to the limitations, charges, terms, and conditions of the reclamation act." That act does not, however, require Pierson to show that he now has all the usual qualifications of an entryman prescribed by the homestead laws. *Sadie A. Hawley* (43 L. D., 364, 366). The only possible inhibition against

his taking title to this entry is found in section 3 of the act of August 9, 1912 (37 Stat., 265), which declares:

That no person shall at any one time or in any manner, except as herein-after otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation act of June seventeenth, nineteen hundred and two, and acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this act.

In speaking of the disqualifications imposed by that act it was said in *Hawley's case*, *supra*:

That a person may hold a water right for but one tract for which he has a water-right application not paid in full, either a single farm unit or a tract not exceeding the limit of acreage for land in private ownership; also that after payment in full has been made of all building and betterment charges in connection with a farm unit or a tract held in private ownership, the law does not prohibit the acquisition of an additional tract of land by assignment or purchase, subject to the terms and conditions of the reclamation law.

Following the interpretation of that statute, paragraph 40 of the present regulations (45 L. D., 394), declares:

No assignment of a homestead entry or any part thereof shall be accepted by the Commissioner of the General Land Office, or recognized as valid for any purpose, until after the filing in the local land office of the instruments required by paragraph 41.

From this it will be seen that it will be necessary for Pierson to file an affidavit showing that he does not own or hold and is not claiming any other farm unit or entry under the reclamation law upon which all installments of construction or building and betterment charges have not been paid in full and has no existing water-right applications covering an area of land which, added to that taken by assignment, will exceed 160 acres. If this is done he will be recognized as assignee.

The decision appealed from is hereby modified to conform herewith.

THOMAS DORMAN.

Decided January 29, 1921.

REPAYMENT—PRICE OF LANDS.

As no map of definite location was ever filed in the matter of the contemplated branch line of the Northern Pacific Railway Company from Wallula Junction, Washington, to Portland, Oregon, there was no grant, hence no alternate reserved sections. The price of lands in the even-numbered sections in the area involved, therefore, was \$1.25 per acre; and where a purchaser thereof has been required to pay a higher price, he is entitled to the repayment of such excess.

VOGELSAW, *First Assistant Secretary*:

This is an appeal by Thomas Dorman from the decision of the Commissioner of the General Land Office dated July 15, 1919, rejecting his application for the repayment of an excess of \$1.25 per acre under his preemption cash entry No. 1320, made February 12, 1883, at La Grande, Oregon, for the NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 6, T. 4 N., R. 33 E., W. M., containing 140.42 acres.

The case involves the question of repayment upon even-numbered sections within the territory adjacent to the contemplated branch line of the Northern Pacific Railway Company from Wallula Junction, Washington, to Portland, Oregon. The situation as to the grant is the same as that considered by the Supreme Court of the United States in the case of *United States v. Laughlin* (249 U. S., 440), which involved an odd-numbered section.

The map of general route was filed August 13, 1870, and February 14, 1872, an order was issued by the Secretary of the Interior withdrawing the odd-numbered sections from entry and placing a price of \$2.50 per acre on the even-numbered sections. Dorman settled upon the land in May, 1880, and paid for it at the rate of \$2.50 per acre under the above preemption cash entry. No map of definite location was ever filed, the road was never constructed, and the grant became forfeited to the United States by virtue of the act of September 29, 1890 (26 Stat., 496).

Under section 3 of the act of July 2, 1864 (13 Stat., 365), the railway company received such odd sections as were not otherwise disposed of at the time of filing a map of definite location. Section 6 provided that the reserved alternate sections (that is, the even sections), should be sold for \$2.50 per acre.

The Supreme Court in *Nelson v. Northern Pacific Railway Company* (188 U. S., 108), held that the grant to the Northern Pacific Railway Company was a mere float until the filing of the map of definite location and that its grant did not attach to any specific sections until that time. In the *Nelson* case and also in the prior case of *U. S. v. Oregon and California Railroad Company* (176 U. S., 28), it was pointed out that there was no specific statutory authority for

the order of withdrawal, which did not take the lands out of the category of ordinary public lands so as to prevent settlement by homesteaders or prevent the attachment of another railway grant.

The Commissioner refers to section 4 of the act of March 2, 1889 (25 Stat., 854), providing—

That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and also of all lands within the limits of any such railroad grant, but not embraced in such grant, lying adjacent to and coterminous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at one dollar and twenty-five cents per acre.

His view appears to be that the language "which were by the act making such grants or have since been increased to the double minimum price" was a Congressional recognition and sanction of the increased price fixed by the withdrawal order of February 14, 1872. Congress there referred to lands which, by virtue of the definite location of a railroad and the actual attachment of the grant, had been increased to a price of \$2.50 per acre, either by virtue of the granting act itself or under the general provisions of section 2357, Revised Statutes. Here the grant to the Northern Pacific Railway Company never attached and section 4 of the act of March 2, 1889, *supra*, has no application.

Under the rulings of the Supreme Court, cited above, until the map of definite location was filed, there was no grant and, therefore, there could be no alternate reserved sections. The even-numbered sections remained ordinary public land the price of which was \$1.25 per acre as fixed by sections 2357 and 2359, Revised Statutes. (See *United States v. Laughlin, supra*, at page 447.)

The appellant is entitled to repayment of the excess of \$1.25 per acre. The decision of the Commissioner is reversed and such repayment will be allowed.

APPLICATIONS UNDER THE ENLARGED AND STOCK-RAISING HOMESTEAD LAWS DISTINGUISHED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 12, 1921.

Reference is had to your [Commissioner of the General Land Office] communication of September 21, 1920 (836290 "FS" FSH), calling attention to certain decisions and instructions of the Department deemed inconsistent in respect to applications for entry and

for designation of lands under the enlarged and the stock-raising homestead acts, where the lands so applied for are prior to designation placed within the exterior limits of a national forest.

It appears that the language adopted in the year 1908 by agreement between this Department and the Department of Agriculture, and since generally used in proclamations establishing national forests for the protection of prior rights, reads as follows:

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

You refer to letter of October 10, 1919, by this Department to the Geological Survey in the case of Maurice E. Spencer (Denver 023555), wherein it was held that the application of Spencer to make enlarged homestead entry, accompanied by petition for designation, was not defeated by later proclamation including the land within the exterior limits of a national forest as the application "legally appropriated" the land within the meaning and intent of the proclamation.

You also refer to like holdings of August 11, 1917, and June 12, 1919, in respect to pending stock-raising homestead applications.

As opposed to the above rulings you mention the more recent case of Thomas B. Farrow (Phoenix 038215), wherein the Department by decision of June 30, 1920, held that a pending stock-raising homestead application, with petition for designation, did not prior to designation of the land constitute a legal appropriation within the meaning of a similar proclamation; that "filing of an application to enter under the (stock-raising) homestead law does not segregate the land from the public domain so as to prevent a withdrawal for a public purpose."

Upon mature consideration, the Department is convinced that the distinction made in the decisions referred to (cases of Spencer and Farrow) as to the segregative effect of applications under the two acts, is correct. An application for undesignated land, under the enlarged homestead law, is specifically given a segregative effect by the act of March 4, 1915 (38 Stat., 1162), while no such provision is found in the stock-raising homestead law or any amendment thereof. That Congress did not intend to recognize any segregative effect to a stock-raising application for undesignated land is shown, not only by the absence of any provision in that law similar to the one referred to in the act of March 4, 1915, *supra*, but by the prohibition, in section 2 of the act of December 29, 1916, *supra*, of the occupation of the land pending designation thereof. The Department has repeatedly held that the right conferred upon the appli-

cant by section 2 of the stock-raising act, and that created by section 8 thereof, are mere preference rights, neither of which attaches to the land unless and until designated, and which, when in conflict, are to be determined by the dates of the original claims. Manifestly, therefore, there can be no appropriation, either under section 2 or section 8 of the stock-raising law, prior to designation of the land—in fact, such appropriation is forbidden—and this Department, in the face of a withdrawal, such as the one here under consideration, is without jurisdiction to designate under the stock-raising law, as subject to entry thereunder, land withdrawn from entry by competent authority.

The views herein expressed should be observed in future proclamations wherein it is deemed proper to protect applicants for the designation of lands under the stock-raising law or those who would be entitled to avail themselves of the provisions of section 8 thereof.

ALEXANDER T. VOGELSANG,

First Assistant Secretary.

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2. Where an application is filed by one duly qualified under the provisions of the act of March 28, 1912, for the sale of a tract of land "mountainous or too rough for cultivation," jurisdiction is thereby conferred upon the Commissioner of the General Land Office in the exercise of discretion to order into market and

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See *Mining Claim*, 8, 9; *Private Claim*; *School Land*, 6, 7.

The tribunal vested with authority to determine whether or not rights are conveyed by an instrument has the power to control such instrument if declared invalid; and when so adjudged it should be canceled and deposited among the records of the tribunal that has passed upon its legality. 86

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3. The right of election under the provisions of the act of April 6, 1914, is one which accrues at the date of marriage by operation of law and is not dependent on the filing of a formal declaration that it has been made, that being a requirement of regulation and not of statute; and election to reside upon the land embraced in the husband's entry having in fact been made, failure to file such a declaration prior to his offer of final proof and receipt of final certificate does not warrant the rejection of the declaration. 9

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6. Instructions of October 8, 1919; absence during course of vocational rehabilitation; act of September 29, 1919. (Circular No. 657)-----	283
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2. Oil and gas regulations of March 11, 1920, act of February 25, 1920. (Circular No. 672, reprint)..... 437

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4. Instructions of January 12, 1921, relative to extension of time under oil and gas permit..... 612

5. Instructions of January 15, 1921, amending paragraph 10(a) of the oil and gas regulations of March 11, 1920. (Circular No. 572)..... 613

6. Oil shale having been recognized by both the Department and Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to be subject to valid location and appropriation under the placer-mining laws to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas..... 548

7. The Indian title to the area in the State of Colorado formerly occupied by the Uncompahgre and White River Utes being extinguished and Congress, in declaring same to be subject to disposition under the public land laws, having made no exception that would preclude appropriate disposition under laws applicable to other tracts of like character, such lands and deposits therein are subject to the provisions of the leasing act of February 25, 1920, notwithstanding the fact that under the

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terms of agreement the Indians would be entitled to the proceeds from disposition thereof----- 560

8. Land designated by the Geological Survey, under the supervision of the Secretary of the Interior, as within the known geological structure of a producing oil or gas field, is not subject to a prospecting permit under the provisions of section 13 of the act of February 25, 1920, nor to a lease under section 14 thereof, even though such designation be not made until after a claim to so prospect has been duly initiated.--- 582

9. A party seeking to question the accuracy of the boundaries of the known geological structure of a producing oil or gas field may file in the department an affidavit containing allegations of definite and specific geological facts which, if true, would tend to show such boundaries to be outside the geological structure, and such showing will be considered with a view to the reestablishment of the boundaries to accord with the true situation; but until the designation by the Geological Survey of a tract as within such known geological structure shall be revoked by the Secretary of the Interior the same will be observed and acted upon by the Land Department in the administration of the leasing act.----- 582

10. Section 18 of the act of February 25, 1920, contemplates and requires that a lease thereunder shall issue to the person, persons, or corporation possessing and surrendering to the United States the mining title; those claiming under or through such claimant or claimants being protected by the provision therein that "all leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear"----- 585

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3. Instructions of July 7, 1920, as to sale of isolated tracts. (Circular No. 709)----- 418

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See *Homestead (Stock Raising)*, 32; *Right of Way*, 3; *Survey*, 1.

1. Where title has passed from the Government by the issue of patent for a tract of public land, after which in a court of competent jurisdiction it is adjudged that another is entitled thereto, and up failure of patentee to so convey a master in chancery deed is issued as decreed, the patentee is without authority thereafter to reconvey said land to the United States, and an attempt to do so does not revert title in the Government----- 48

2. Coal deposits in land segregated from the public domain by entry and patent which is later annulled, is not subject to a preference-right claim or to the lawful possession of a coal claimant until its restoration is duly noted upon the records of the local land office.----- 219

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See *Application*, 2; *Contest*, 2, 6, 9; *Res Judicata*.

1. While the present Rules of Practice, approved December 9, 1910, make no provision for service of notice on a person of unsound mind, yet Rule 9 of Practice adopted December 23, 1896, does so provide and,

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- as it has never been revoked, service in accordance with its provisions will be deemed sufficient ----- 3
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3. The provision of Rule 8 of Practice as to filing proof of publication of notice of contest is mandatory and has all the force and effect of law, and in order to thus make proper service it is incumbent upon contestant to show strict compliance therewith ----- 100
4. Depositions regularly taken under the provisions of the Rules of Practice become a part of the record of the case upon their receipt by the local officer's, subject to any legal objection which must be made at the hearing; if not so made it can not be successfully urged on appeal.----- 101
5. Where an entry has been regularly allowed upon a sufficient *prima facie* showing, or final or other proof submitted exhibiting compliance with the law under which the entry was made, the burden is upon the Government to sustain charges preferred against such entry or proof by a field officer ----- 185
6. The Rules of Practice prescribed for the orderly transaction of the business of the Land Department, and for the protection of private rights, do not recognize letters to the Commissioner of the General Land Office as appeals from the action of the local officers; such appeals must be duly served and filed in the local land office within the period of time allowed therefor.----- 192
7. No departmental regulation or practice, however long continued, can override a plain statutory right, unambiguous and not the subject of construction ----- 288
8. Motion for exercise of supervisory authority does not act as supersedeas ----- 419
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10. In any proceeding against an entry on which final certificate has issued the Government is bound to make a known transferee a party thereto, even though notice of such transfer has not been filed in the district land office as provided in Rule 98 of Practice ----- 602
11. Where an appeal is taken from a decision rejecting an application because of conflict with a subsisting entry, it will not be considered unless duly served on the adverse claimant of record as provided in Rules 47 and 48 of Practice.----- 608
- Preference Right.**
- See *Carey Act*; *Coal Lands*, 4, 6; *Contestant*; *Coos Bay Wagon Road Land*, 2; *Homestead*, (*Stock-raising*), 38; *Military Service*, 7, 8; *Oil and Gas Lands*, 11; *Oregon and Cal. R. R. Lands*, 2; *School Land*, 4; *Settlement*, 3; *Town site*, 7.
- Private Claim.**
- As the United States is without jurisdiction over the vacant and unappropriated private lands within the State of Texas, it has no duty to perform in the matter of surveys, determinations, or adjustments necessary to define the rights of any parties in interest; they must be performed by the State, or such tribunals as may have authority therefrom ----- 372
- Public Lands.**
1. The Land Department has no jurisdiction over the bed of a meandered lake, or authority to grant a potash lease therefor; and under the law of Nebraska it appears that if navigable, title thereto is in the State, but if nonnavigable, that title is in the riparian owners.----- 71
2. So far as relates to the beds of meandered lakes or other bodies of water, it appears that the common law is still in force in the State of North Dakota, and that thereunder, if navigable, title to the soil is in the State, but if nonnavigable, that title is in the riparian owners.----- 72
- Railroad Grant.**
- See *Contest*, 7; *Repayment*, 1, 4, 5.
1. Instructions of December 13, 1919, relative to price of land within granted limits of railroad. (Circular No. 664.) ----- 260
2. The purpose of the act of July 1, 1898, was to settle disputes arising out of conflicting claims of settlers and the Northern Pacific Railway Co. to lands within the limit of the latter's grant, and one who long

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Railroad Grant—Continued. Page.

prior to the passage of the act had recognized the company's claim by procuring conveyance of the disputed tract therefrom for a valuable consideration, does not come within the purview of the said act----- 161

3. One who abandons settlement on a tract in conflict with the Northern Pacific Railroad Co. under its grant, and thereafter exhausts his homestead right by perfecting an entry under the general provisions of the homestead laws, is not entitled to any adjustment under the provisions of the act of July 1, 1898.--- 161

4. No interest whatever, contingent or otherwise, passed under the railroad grant of July 27, 1866, to lands in odd-numbered sections which were embraced in valid homestead settlements existing at the time the company filed its map of definite location----- 303

5. A claimant, asserting that lands were excepted from a railroad grant by a settlement existing at the date of the filing of the company's map of definite location, must show by a preponderance of the testimony that the settlement was made in good faith to obtain title under the homestead or preemption laws, and that the settler was fully qualified; but he is not required to show that rights acquired by reason of such settlement passed to him through conveyances from subsequent occupants of the land who were also qualified to make and maintain such a settlement----- 304

Railroad Land.

See *Repayment*, 1, 4, 5.

Instructions of May 2, 1919. Settlers on indemnity lands in Montana. (Circular No. 643)----- 138

Reclamation.

See *Homestead*, 17; *Right of Way*, 2; *School Land*, 5; *Swamp Land*, 3.

1. Instructions of May 6, 1919. Castle Peak Irrigation Project. (Circular No. 645)----- 144

2. Instructions of May 16, 1919, relative to payment of water-right charges by entrymen in military service----- 167

3. Public notice of October 3, 1919; First Mesa Unit, Yuma Auxiliary Project, Arizona----- 273

4. Instructions of October 18, 1919, relative to Reclamation Extension Act of August 13, 1914.--- 285

5. Administrative order of April 23, 1920, cancelling temporary water-right contracts made under act of August 10, 1917----- 370

Reclamation—Continued. Page.

6. Instructions of May 7, 1920, as to claims for damages on projects----- 392

7. Instructions of June 9, 1920, as to furnishing of water for miscellaneous uses----- 404

8. Instructions of June 23, 1920, as to Government town sites on reclamation projects----- 413

9. Instructions of July 1, 1920, amending paragraphs 41 and 76 of General Reclamation Circular----- 417

10. Instructions of January 25, 1921, relative to first form withdrawals. (Circular No. 734)----- 624

Records.

See *Homesteads*, (*Soldiers' Additional*), 86.

Relinquishment.

See *Homestead*, (*Stock-raising*), 28.

Unless coming within the provisions of the act of October 22, 1914, the wife of a homestead entryman takes nothing by the final certificate which issues on the husband's entry. He may thereafter demand patent in his own name; sell the land and make good equitable title to it without the wife's consent, or relinquish the perfected claim to the Government----- 401

Repayment.

1. Instructions of December 13, 1919, as to price of land within granted limits of railroad. (Circular No. 664)----- 260

2. Instructions of November 13, 1920, act of December 11, 1919. (Circular No. 728)----- 594

3. While under the provisions of the act of June 16, 1880, a relinquishment of all claims under the entry is required as a basis for repayment, it is not contemplated, in a case where chancery deed issued pursuant to a decree of court, that the patentee should thereafter surrender his patent upon which such deed is based or attempt a reconveyance to the United States, in order to avail himself of the benefit of said statute----- 49

4. The price of lands in an odd-numbered section within the limits of a railroad grant, but excepted therefrom, is \$1.25 per acre; and where a purchaser thereof has been required to pay a higher price, he is entitled to the repayment of such excess----- 258

5. As no map of definite location was ever filed in the matter of the contemplated branch line of the

Repayment—Continued.	Page.	Residence—Continued.	Page.
Northern Pacific Railway Co. from Wallula Junction, Wash., to Portland, Oreg., there was no grant, hence no alternate reserved sections. The price of lands in the even-numbered sections in the area involved, therefore, was \$1.25 per acre; and where a purchaser thereof has been required to pay a higher price, he is entitled to the repayment of such excess-----	628	claim; it is sufficient that the absence be in good faith for the purpose contemplated by the statute, and that due compliance be made with the regulations thereunder-----	47
Reservation.		Res Judicata.	
See <i>Alaska</i> , 1; <i>Homestead (Stock-raising)</i> , 32; <i>School Land</i> , 11.		Final adjudication of a case involving the time settlement was initiated, renders that question <i>res adjudicata</i> between the parties thereto, and the unsuccessful applicant is estopped from having the matter relitigated by alleging an earlier hour of settlement than that originally asserted-----	13
1. The cancellation of a homestead entry, based upon proceedings initiated more than two years after the issuance of final certificate thereon, is without authority of law, and a forest lieu selection rejected because of such erroneous cancellation of the base land, remains legally pending and comes within the provisions of the act of March 3, 1905-----	99	Restorations.	
2. The proviso to the act of March 3, 1905, authorizing the making of a new forest lieu selection, provides no specific period within which its benefits may be claimed, and any attempt to limit the right of reselection to a certain time is an abridgment of the selector's rights and without authority of law; but in the absence of an application to select a specific tract of land, the Department will not attempt to determine whether the selector, or those for whom he acts, is entitled to make further selection-----	109	See <i>Alaska</i> , 1; <i>Patent</i> , 2; <i>Reservation</i> , 3.	
3. Lands temporarily withdrawn from settlement and all forms of disposal for use by the War Department in connection with the construction through said lands of the military road to Fort Bayard; are not "included within the limits of a military reservation" within the meaning of the act of July 5, 1884; and when such withdrawal is vacated and the lands restored to the public domain they are not subject to disposition thereunder-----	141	Revised Statutes.	
		See <i>Table of</i> , page XXX.	
		Right of Way.	
		1. Instructions of April 8, 1919, amending paragraph 36 of circular of June 6, 1908. Stock-watering reservoirs on unsurveyed lands. (Circular No. 638)-----	117
		2. The act of August 30, 1890, reserves perpetually to the United States an easement and right of way through and over all lands west of the one hundredth meridian thereafter patented under any of the public-land laws; and thereunder, in the necessary construction, maintenance, and operation of any ditches, canals, or laterals for the purpose of irrigation and reclamation of arid lands, the Government is not liable for damages resulting to the land; nor can they be included in the computation of the actual value of improvements thereon for which compensation may be made-----	158
		3. Neither the act of March 4, 1913, nor the instructions of January 13, 1916, authorize the withdrawal or reservation of public land, or insertion of an excepting clause in a patent for said land, over which may pass a trail or right of way for a prospective road-----	181
		4. An application for a right of way for a reservoir site within the limits of a forest reserve, shown to be reasonably needed for the purpose of the storage of tailings produced by the milling and reduction of copper ores, is clearly within the contemplation of that provision of section 4 of the act of February 1, 1905, authorizing the granting of such rights of way for the purposes of mining, milling, and reduction of ores, during the period of their beneficial use-----	224
Residence.			
See <i>Absence, Leave of</i> ; <i>Homestead (Stock-raising)</i> , 41; <i>Marriage</i> , 1, 2; <i>Military Service</i> , 1, 2; <i>Reclamation</i> , 1; <i>Settlement</i> , 1.			
The leave of absence granted to any homestead settler or entryman under the provisions of the act of December 20, 1917, for the purpose of performing farm labor during the pendency of the existing war is not dependent upon the remoteness of the place of employment from the			

School Land.

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1. Instructions of May 20, 1920, as to substitution of new bases for indemnity selections -----	393
2. Instructions of September 22, 1920; school sections, Blackfeet Indian Reservation-----	568
3. A company which, under claim of right and in privity with the title asserted by the State, in good faith takes possession of and makes valuable improvements upon a portion of a school section thereafter lost to the State because of adjudication that it was known coal land at the date of the school grant, may be protected by, according to the State opportunity to select the land, exclusive of the coal deposits, under the act of April 30, 1912, for the benefit of the company-----	58
4. One who successfully contests the <i>prima facie</i> claim of the State to a tract in a school section, upon the ground of the known coal character of the land at the date of the school land grant, gains thereby no preference right to make coal entry for the tract involved-----	58
5. State school lands sold in 1917 and 1918 do not fall within the language of the proviso to article 4 of the supplemental contract entered into by the Secretary of the Interior with the Belle Fourche Valley Water Users Association on January 24, 1911, as they are neither public lands entered nor private lands contracted prior thereto; and the purchasers from the State are accordingly bound by the construction charge in effect at the time water right application is filed-----	102
6. As the granting act of June 16, 1880, expressly provides that selections thereunder shall be duly certified to the State by the Commissioner of the General Land Office and "approved by the Secretary of the Interior," such approval operates to pass the fee title to the State; thereafter the jurisdiction of the Government is at an end, and so long as that certification and approval are outstanding it is without power to allow any application for or entry of the land involved-----	152
7. As approval by the Secretary of the Interior, upon due certification, of a selection made by the State of Nevada pursuant to the act of June 16, 1880, operates to pass the fee title, the land involved is not thereafter within the jurisdiction of the United States-----	156

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8. An act of the State of Nevada, permitting mineral prospecting and location of mining claims upon lands duly certified to the State, can not have the effect of reinvesting the United States with legal title to lands already conveyed, in the absence of proper legislation by Congress authorizing the revesting of title-----	156	
9. Directions given that suitable instructions be prepared providing for a general and uniform rule relative to publication of notice in the matter of State selections for educational and other purposes, such as now governs the publication of final proof notices-----	255	
10. Land embraced in subsisting entries at the date of the granting act and at the time of the admission of the State of Utah into the Union is excepted from the grant of lands in place, and the subsequent cancellation of such entries does not cause the grant to attach; but the land becomes a part of the public domain subject to disposition as other public lands-----	359	
11. A withdrawal of public lands for power-site purposes under the provisions of the act of June 25, 1910, is a reservation within the meaning of the act of February 28, 1891, amending sections 2275 and 2276, Revised Statutes-----	363	
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Instructions of October 15, 1919, amending Rules 9 and 11 of regulations of June 23, 1910, governing selections under grants to State for educational and other purposes. (Circular No. 659)-----		257
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See <i>Homestead</i> , (<i>Enlarged</i>), 11; <i>Railroad Grant</i> , 4, 5; <i>Res Judicata</i> ; <i>Withdrawal</i> , 2.		
1. The rule that a settler must establish residence upon the land claimed within a reasonable time after initiating settlement and maintain such residence as against a rival settler, has no application in case of a homestead entry based on an application filed prior to the hour of settlement asserted by the conflicting claimant-----		13

Settlement—Continued.

2. Prior lawful occupancy of land within a national forest under a special use permit, by one who, subsequent to enactment of the statute of June 6, 1912, procures the listing and homestead entry thereof under the act of June 11, 1906, is not settlement or residence within the purview of the act of March 4, 1913; and such entry can only be perfected under the provisions of said act of June 6, 1912----- 173

3. In the exercise of the preference right accorded to settlers under the provisions of the act of June 9, 1916, lands in more than one quarter section may be embraced in the application where there is fencing, improvement, or other evidence of appropriation on each of the tracts sufficient to identify them as being embraced within the settlement----- 297

Settlers.

See *Coos Bay Wagon Road Lands; Oregon and Cal. R. R. Lands; Railroad Grant, 3; Town Site, 7.*

1. Instructions of May 2, 1919. Settlers on Northern Pacific Ry. Co. indemnity lands in Montana. (Circular No. 643)----- 138

2. Where a homestead settler on unsurveyed land has in good faith fully complied with the requirements of law as to residence, improvement, and cultivation, and is thus entitled to offer proof and receive patent were the land surveyed, he should be permitted, upon survey thereof, to make entry if he show that he was duly qualified to do so at the time he completed compliance, regardless of the fact that he may have later become disqualified through the purchase and ownership of other lands----- 304

3. If a *bona fide* settler possesses the necessary qualifications at the time of initiation of his homestead claim, the subsequent ownership of more than 160 acres of land prior to time of making record-entry does not invalidate such settlement claim----- 406

Sodium.

Regulations of May 28, 1920, act of February 25, 1920. (Circular No. 699)----- 529

Soldiers' Additional.

See *Homestead, 24-27.*

Statutes.

See *Acts of Congress and Revised Statutes cited and construed, pages XXV-XXX.*

See *Practice, 7.*

Stock-Raising Homesteads.

See *Homestead, 28-41.*

Supervisory Authority.

See *Practice, 8.*

Surface Rights.

See *Potash Lands; School Land.*

Survey.

See *Private Claim.*

1. Instructions of March 1, 1920; issuance of patents for lands withdrawn pending resurvey----- 342

2. Where, in a survey of public land, a body of water or lake is found to exist and is meandered, and the abutting lands disposed of, the Land Department has no jurisdiction over the submerged land or lake bed, or authority to grant potash lease therefor----- 72

Swamp Land.

1. The claim of a State to land under its swamp-land grant is incomplete and inchoate, and does not become perfect, as of the date of the act, until patent is issued conveying the fee simple title; and until so patented the Land Department has jurisdiction to investigate and determine both the swamp and overflowed condition of the land as well as its mineral character----- 92

2. Lands covered by an apparently permanent body of water at the date of the swamp land grant to the State are not of the character contemplated thereby, even though subsequently, by a recession of the waters, land of a swampy character should come into existence----- 93

3. The grant of swamp and overflowed lands to the State of California by the act of September 28, 1850, has no application to lands ceded by the State to the Government for the purpose of aiding in the operations of irrigation and reclamation conducted by the Reclamation Service----- 207

4. Only upon approval by the Secretary of the Interior under the act of March 2, 1849, granting swamp and overflowed lands to Louisiana, or the issuance of patent under the general swamp act of September 28, 1850, does the fee simple title vest in the State; prior thereto its title is inchoate and imperfect both in law and in equity----- 366

5. Lands embraced within a petroleum withdrawal are thereby impressed with a *prima facie* mineral character; and the burden is upon the State to overcome this or suffer the rejection of its claim thereto under the swamp-land grant, which does not embrace mineral lands----- 366

Swamp Land—Continued.
 6. A homestead entryman in the State of Minnesota who has continued to comply with the law as to residence, improvements, and cultivation may discharge his obligations to the State under the act of May 20, 1908, and accomplish redemption after the lapse of the statutory period, by becoming subrogated to the rights of the purchaser or holder of the tax sales certificates----- 598

Texas.

See *Private Claim.*

Timber and Stone.

1. Where timber and stone application has been duly filed, notice of proof given, and the purchase money actually paid, the applicant has shown more than a mere intent to purchase—in fact is in practical effect a purchaser; and upon her death under such conditions, proof by the heirs that the law has been complied with should be accepted and patent issued thereon----- 196

2. An irrigation district is not a corporation within the contemplation of the regulations approved August 22, 1911, under the timber and stone act of June 3, 1878, and is therefore neither qualified nor entitled to make purchase thereunder----- 250

Timber Cutting.

See *Coos Bay Wagon Road Lands; Oregon and Cal. R. R. Lands.*

1. Instructions of November 3, 1919; free use of timber in Idaho by citizens of Malheur County, Oregon----- 295

2. Instructions of November 3, 1919; free use of timber in Nevada by citizens of Modoc County, California----- 296

3. Alaska timber regulations of September 1, 1920; act of June 5, 1920. (Circular No. 722)----- 564

Townsite.

See *Mining Claim, 1; Reclamation, 8.*

1. Regulations for the sale of unsold and unreserved lots and tracts in Pablo, Tabor, and d'Aste town sites in the former Flathead Indian Reservation, Mont----- 175

2. Regulations for the sale of certain lots in Minnesota town site in the former Rosebud Indian Reservation, Tripp County, South Dakota----- 177

3. Regulations for the sale of lots in the town sites of Omak, Nespelem, Astor and Inchellum, in the former Colville Indian Reservation, and Klaxta, in the former Spokane Indian Reservation, Wash----- 179

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4. Regulations for the sale of lots in Browning town site, within Blackfeet Indian Reservation, Teton County, Mont----- 213

5. Regulations for the sale of lots in the town sites of Desmet, Worley, and Plummer, in the former Coeur d'Alene Indian Reservation----- 215

6. Instructions of June 23, 1920, as to Government town sites on reclamation projects. (Circular No. 705½)----- 413

The preference right accorded by the act of March 16, 1912, to certain settlers does not contemplate residence, but actual occupation in good faith for town-site purposes; and the operation of a warehouse is occupation within the meaning of that act----- 323

Transferee.

See *Practice, 10.*

Turtle Mountain Indians.

An Indian who avails himself of the privileges of the general homestead law and receives patent thereunder necessarily acts in the capacity of a citizen; and as he thus separates himself from the tribe, he is not entitled thereafter to also make selection under the Turtle Mountain act of April 21, 1904----- 356

Unsurveyed Lands.

See *Alaska, 3.*

Ute Lands.

See *Indian Lands, 13.*

Wagon Road Grant.

Instructions of March 21, 1919, Coos Bay Wagon Road lands----- 53

Water Power.

1. Instructions of November 20, 1920, relative to section 24 of the Federal Water Power act. (Circular No. 729.)----- 595

2. The purpose of section 24 of the act of June 10, 1920, is to permit of the agricultural or other use of lands withdrawn or classified as water-power sites in so far as same may not thereafter be needed and utilized by the United States, its permittees, or licensees for power purposes, as authorized and defined by said act; and one securing such limited patent has no right by virtue thereof, or by possession of the land thereunder, to utilize or develop the water-power resources, unless and until he shall have secured a permit or license from the Government----- 556

Widow; Heirs; Devisee.

See *Homestead, 3; Timber and Stone, 1.*

Withdrawal.

See *Reservation*, 3; *School Land*, 11; *Swamp Land*, 5; *Water Power*.

1. Instructions of January 25, 1921, relative to first form reclamation withdrawals. (Circular No. 734)----- 624

2. While a withdrawal under the act of June 25, 1910, reserves the land from settlement and entry by all except those coming within the proviso thereto, it is not such an "adverse claim" as will defeat an application by one who has maintained settlement to date of filing, even though more than three months have elapsed from the date such settlement right might have been made of record in the form of an entry-- 326

3. As coal is not a "metalliferous mineral," the provision of the act of June 25, 1910, as amended August 24, 1912, that lands withdrawn thereunder "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 metallifer-

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Withdrawal—Continued.

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ous minerals," does not authorize the allowance of a coal entry for land so withdrawn----- 329

4. As there was ample power in the Executive to make withdrawal or reservation of public lands for public use prior to the passage of the act of June 25, 1910, such withdrawals theretofore made were not revoked or made ineffective by that act.---- 329

5. While the act of June 4, 1897, provides that mineral lands in any forest reservation shall continue to be open to location and entry under the mining laws, yet this does not prevent withdrawal or reservation from any and all form of private appropriation, and devotion of the land to public use----- 329

Words and Phrases.

1. "Honorably discharged," see *Homestead*, 27.

2. "Irrigation district" is not a "corporation" within contemplation of regulations approved August 22, 1911, under timber and stone act--- 250