

UNITED STATES DEPARTMENT OF THE INTERIOR

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**DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR**

EDITED BY

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THIRD CIRCUIT

The Property of the United States

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PREFACE

In 1883 the Department of the Interior began publication of the more important decisions of the Land Department with the view to preserving in authentic manner and in permanent form convenient for reference a line of consistent precedents in departmental rulings illustrating the land laws of the United States. Prior to that time the only published decisions of the Department were those by private reporters, the more familiarly known being Brainard, Copp, and Lester. As originally conceived, the publication entitled "Decisions of the Department of the Interior relating to the Public Lands," and thereafter referred to as the "Land Decisions," pertained almost exclusively to matters coming under the jurisdiction of the General Land Office and a few matters from the Indian Office. Gradually the jurisdiction of the Department has been enlarged by the creation of new bureaus, among them being the Bureau of Reclamation, the Geological Survey, and the National Park Service. Many new laws have been enacted and policies established relating to the Indians and Indian affairs. New and important problems in other bureaus and services are constantly arising and call for solution. Consequently, there has been an increasingly growing demand for the publication of decisions by the Secretary and his Assistant Secretaries and opinions by the Solicitor, relating to matters other than those pertaining to the public lands. On July 7, 1930, the Secretary issued an order amending the title so as to read "Decisions of the Department of the Interior," and directing that thereafter leading decisions and important opinions relating to all activities of the Department be published in future volumes. Including this volume, 57 volumes have been published covering the period from July 1881 to June 1942. Volumes 1 to 52 are referred to as the "Land Decisions" (L. D.). The abbreviation "I. D." when used in cited decisions of the Department and in the opinions of the Solicitor has reference to volume 53 and later volumes of this work.

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- Baca Float No. 3 (5 L. D. 705; 12 L. D. 676; 13 L. D. 624); vacated, 29 L. D. 44.
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- *Baker v. Hurst (7 L. D. 437); overruled, 8 L. D. 110. (See 9 L. D. 360.)
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¹ For abbreviations used in this title see editor's note at foot of p. xxviii.

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

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IN TITLE 43, CHAPTER 1, CODE OF FEDERAL REGULATIONS,
ADDED, AMENDED, OR SUPERSEDED DURING THE PERIOD
MARCH 1939 TO JUNE 1942**

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¹ Circulars Nos. 1093a and 1401a are reprints of circulars theretofore issued, with amendments to Dec. 1, 1942.

² Circular 1401a contains the regulations governing the leasing of public lands exclusive of Alaska, for the grazing of livestock, with amendments to Dec. 1, 1942, secs. 160.1-160.30.

³ Circular 1470a contains the regulations governing the lease or sale of 5-acre tracts, with amendments to Aug. 10, 1942, secs. 257.1-257.25.

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⁴ Circular 1470a contains the regulations governing the lease or sale of 5-acre tracts, with amendments to Aug. 10, 1942, secs. 257.1-257.25.

⁵ Circular 1401a contains the regulations governing the leasing of public lands, exclusive of Alaska, for the grazing of livestock, with amendments to Dec. 1, 1942, secs. 160.1-160.30.

⁶ Circular 1093a contains the regulations governing the sale of dead, down or damaged timber, or timber threatened with damage, with amendments to Dec. 1, 1942, secs. 284.1-284.22.

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DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR

KEITH v. YOUNG

*Decided May 12, 1938**

PRACTICE—EVIDENCE—BURDEN OF PROOF—HOMESTEAD ENTRYMAN'S QUALIFICATIONS.

Where contestant establishes that contestee was disqualified as a homestead entryman by reason of ownership of more than 160 acres of land acquired by devise or from one whose estate has not been partitioned or probated, to impose upon the contestant the burden of further proving that there is no possibility of the proof of debts against the estate to which the land might be subject is an onerous requirement and unnecessary to establish *prima facie* the entryman's disqualifications. The existence of such debts should be peculiarly within the knowledge of the contestee, and if they are such that affect the title and estate of contestee, the burden should be on contestee to allege and prove them.

Heirs of *DeWolf v. Moore* (37 L. D. 110) cited and applied.

HOMESTEAD—ENTRYMAN'S OWNERSHIP OF COMMUNITY PROPERTY.

The fact that under the community property law of Arizona the husband is the statutory agent to manage and control the property does not, in the opinion of the Department, affect the character of the interest of the wife as an owner of community property.

HOMESTEAD—ENTRYMAN'S OWNERSHIP OF COMMUNITY PROPERTY.

An applicant for an original homestead entry under section 2289, Revised Statutes, as amended by the act of March 3, 1891, who at the date of such application is invested by operation of the community property law with a one-half undivided interest in a tract of land in Arizona of more than 320 acres is a proprietor of more than 160 acres within the meaning of said act and is therefore disqualified from making entry, and that disqualification is not removed by the mere fact that the community is dissolved by the death of applicant's co-owner.

HOMESTEAD—CONTESTANT'S PREFERENCE RIGHT.

Contestant alleging intent to acquire title to the land contested under the act of June 28, 1934 (48 Stat. 1269), may be qualified under section 7 of said act, as amended by the act of June 26, 1936 (49 Stat. 1976), to make entry under some applicable public land law. There is no ground, therefore, for dismissing the contest for failure of the contestant to show that he is qualified to acquire title to the land. The question whether contestant may exercise a preference right is not properly before the Department until it is attempted to be exercised.

*Not released for publication in time for inclusion in Volume 56 I. D.

CHAPMAN, *Assistant Secretary*:

Fannie A. Young has appealed from a decision of the Commissioner of the General Land Office rendered January 24, 1938, which, upon the evidence adduced in contest proceedings brought by John M. Keith January 19, 1937, against her original and additional stock-raising homestead entries Phoenix 070712 and 071797, concurred in the action of the local register in holding the entries for cancelation.

Application for the original entry was made September 18, 1931, in which applicant stated that she was not the proprietor of more than 160 acres of land and that she was the actual head of a family by reason of the physical incapacity of her husband. The entry was allowed November 7, 1931. The additional entry was allowed June 9, 1932, which with the original embraces 639.84 acres in T. 15 S., Rs 19 and 20 E., G. & S. R. M. Final proof appears to have been filed January 22, 1937, but is not with the record.

In substance, the contestant charged failure to reside upon the entry for seven months each year for three years, failure to make one-half the required improvements within three years from date of entry or to make the total amount of improvements required at any time; that at the time the applications were filed entrywoman was the proprietor of more than 160 acres of land and was a married woman, not the head of a family.

The register held that the entrywoman had failed to comply with the residence requirements of the homestead law and both the register and Commissioner held in effect that her entries were illegal as at the date of the applications entrywoman was the proprietor of more than 160 acres of land which she still owned.

It is undisputed that Joseph K. Young, husband of Fannie A. Young, the entrywoman, obtained patents under the homestead law, subsequent to their marriage and prior to the applications in question to tracts of land amounting to 627.50 acres in the locality of the entries and in the State of Arizona; that Joseph K. Young died in December, 1933, and that his estate has never been probated and the property so acquired has not been disposed of in any manner. Evidence was introduced by contestant showing that entrywoman's husband was assessed for taxes on the land so patented during his life and that the entrywoman secured an exemption for taxation of such land because of widowhood.

Contestee admits that the land patented to the husband became community property; that she owned a one-half undivided interest therein when her husband became invested with title thereto, but it is contended in her behalf that she did not thereby become a "proprietor of more than 160 acres of land" within the meaning of section 2289, Revised Statutes, and thereby disqualify herself from making homestead entry.

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The arguments in support of this contention seem to be that whereas under section 2175, Revised Code of Arizona (1928), community property is liable for community debts contracted by the husband, and moreover, under section 985 of said code the community estate passes charged with the debts against it, and as contestant has not shown such debts do not exist, the interest of the contestee did not pass to her on the death of her husband; (2) that under the community property law the management and control of the estate was vested in her husband and she did not succeed to such management and control of her share until his death, therefore she could not dispose of it or otherwise exercise the rights of a proprietor; (3) that the estate had not been probated and the land has not been partitioned between herself and the children and therefore she is but a tenant in common and owns no exclusive right to any specific acreage.

In the case of *Thomas H. B. Glaspie*, 53 I. D. 577, the Department had occasion to determine the qualifications of Glaspie to make homestead entry, who during coverture had acquired and who held at the time of entry fee title to 240.10 acres of land in Arizona. The applicable statutes of Arizona relating to community property as construed by the Supreme Court of Arizona and the Supreme Court of the United States were set forth and discussed and it was held in conformity with the views of the courts that the wife of the entryman at the moment of acquisition of title by the husband of the 240.10 acres became invested by operation of law with a half interest therein, and that the entryman was not, therefore, disqualified to make homestead entry. The quotations from the authorities cited in that decision made it clear that in Arizona as in the State of Washington the law makes no distinction between husband and wife in respect to the right each has in the community property; that it gives the husband no higher or better title than it gives the wife and recognizes a marital community wherein both are equal, equal in respect not only to the title and interest in the common property but also in the income therefrom. The fact that section 2175 of State code makes the community property liable to community debts, in the absence of any showing that such debts had become a lien or charge against the property either by a voluntary incumbrance or as a result of legal proceedings by the creditor, would not seem to affect the title of either spouse to the community property. The application and entries here in question were made while the husband was living and not after he was dead. It is a settled rule that the validity of entry must be determined as of the time it is made. While under section 955 of the code of Arizona a conveyance of community property to be valid must be executed by both husband and wife, nothing appears

showing that the community property could not have been sold and a valid legal title given by the execution of a joint deed by husband and wife at the times the entrywoman applied for and obtained entry of the land in question. There could not have been any community debts of the husband chargeable against the estate of the husband before he died.

Upon the dissolution of the community by the death of the husband the property passed *without probate proceedings* or other legal action—one-half to the widow and the other half to the children of the marriage. *Molina v. Ramirez*, 15 Ariz. 249, 138 Pac. 17. The entrywoman's disqualification to make entry by reason of ownership of one-half of the community property consequently existed at the date notice of contest was served on her, so that there is no room for the argument that the cause of invalidity was removed before such date. The fact that section 985 of the Code of Arizona subjects the community property upon the death of either one of the spouses to community debts does not warrant the conclusion that the title of the surviving spouse is any way divested or qualified as to the one-half interest which passed to her. There is no presumption that the community owes debts. See *Husband and Wife*, Sec. 1374, and cases cited, 31 C. J. 216. The contestee did not offer any evidence that there were such debts, but merely suggested the possibility of their existence. There is no basis in the evidence for the Commissioner's statement that apparently there are such debts.

The contestee, however, contends that under the doctrine of *DeWolf v. Moore*, 34 L. D. 330, it was incumbent upon the contestant to prove that there were not any debts, and if there were that they did not consume the value of the estate.

DeWolf v. Moore was a case of contest against a homestead entry based upon a charge that the entrywoman was disqualified to make entry by reason of being the owner of 160 acres of land. The question to be determined in that case was whether entrywoman, who had acquired title to 122½ acres in Iowa as her share of her husband's estate, owned also in her own right an interest in 320 acres of land which, contestant alleged, entrywoman's husband died seized of in California but upon which there had been no administration and no partition. The Department held that the evidence was insufficient to show that defendant's husband ever had acquired title to the land in California, and further held, even if his ownership were proven, there was cast upon the contestant the burden of proving that the defendant took a beneficial interest in the California land, that is, something more than the legal title thereto that might, so far as disclosed by the record therein, be wholly defeated by the assertion of claims against her husband's estate having priority over defendant.

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This case, however, was opened for further testimony and upon its reconsideration by the Department (*Heirs of DeWolf v. Moore*, 37 L. D. 110), the Department said:

The evidence is amply sufficient now to demonstrate that defendant's husband, at the time of his death, was possessed of 320 acres of land in California free from incumbrance of any sort, and that under his will she took an undivided one-third interest in this property; the extent of her interest under the will would be exactly the same as it would have been under the Civil Code of California had he died intestate—an undivided one-third in fee.

Defendant has never asserted her claim to this land nor has there been any effort, by partition suit or otherwise, to assign any exact portion of the whole to her individually. Nevertheless the fact remains that immediately upon her husband's death, she became vested in fee simple with an interest amounting to one-third of the acreage of decedent's estate in California.

The interest, to be sure, is a tenancy in common with other heirs of the decedent, but she is severally seized of her share which at any time can be reduced to a delimited portion of the whole tract or conveyed to another person. It is such an interest in land as might, under the provisions of section 2260 of the Revised Statutes, disqualify the owner and occupant from entering land under the pre-emption law. See *Richard v. Ward*, 9 L. D. 605.

It was further held in that case:

That in estimating the acreage of an entryman's proprietorship in real estate, within the meaning of the 5th section of the act of March 3, 1891 (26 Stat., 1097), he shall be charged with that proportion of the total acreage of a tract owned by him in common with others which is represented by the fractional extent of his undivided interest. No other rule can well obtain until, of course, there has been partition of the estate.

The conclusion reached was that defendant in addition to 122½ acres in Iowa owned one-third of 325 acres in California and was therefore disqualified to make homestead entry.

It seems very clear upon second consideration of the case by the Department that evidence that the entryman acquired title to more than 160 acres was regarded as sufficient without proof by contestant that there were no debts of the estate that might consume the beneficial interest in the estate.

Where a contestant establishes that contestee was disqualified as a homestead entryman by reason of the ownership of more than 160 acres of land acquired by devise or from one whose estate has not been partitioned or probated, to impose upon the contestant the burden of further proving that there is no possibility of the proof of debts against the estate to which the land might be subject is an onerous requirement and unnecessary to establish *prima facie* the entryman's disqualifications. The existence of such debts should be peculiarly within the knowledge of contestee, and if they are such that affect the title and estate of the contestee, the burden should be on the contestee to allege and prove them.

The fact that under the community property law of Arizona the husband is the statutory agent to manage and control the property does not, in the opinion of the Department, affect the character of the interest of the wife as an owner of the community property. The word "proprietor" as employed in section 2289, Revised Statutes, as amended by the act of March 3, 1891, means "owner." *Alfred R. Thomas*, 46 L. D. 290. In the case of *Poe v. Seaborn*, 282 U. S. 101, 112, 113, the Supreme Court, in discussing the power of management and control of the community property by the husband conferred by the laws of Washington, said:

The reasons for conferring such sweeping powers of management on the husband are not far to seek. Public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged. Law-suits between them would tend to subvert the marital relation. The same policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions. The powers of partners, or of trustees of a spendthrift trust, furnish apt analogies.

The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers, by no means negatives the wife's present interest as a co-owner.

We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife.

The contestee relies in part on the definition of the word "owning" in *McHarry v. Stewart*, 9 L. D. 344, 348, and the word "own" in *Charles E. Burgess et al.*, 48 L. D. 270, as importing an absolute and not an undivided or qualified interest in land. The word "owning" formed a part of the language used in section 2289, Revised Statutes, prescribing a basis for adjoining farm entry and the word "own" with the word "occupy" was used in section 5 of the stock-raising homestead act as prescribing a basis for an additional entry under the section. The definitions of these words in the cases last cited resulted from the consideration of the object and purpose of that part of the statute in which they were employed, and are not regarded as pertinent in the instant case.

From what has been set forth above it seems clear that an applicant for an original homestead entry under section 2289, Revised Statutes, as amended by the act of March 3, 1891, who at the date of such application is invested by operation of the community property law with a one-half undivided interest in a tract of land in Arizona of more than 320 acres is a proprietor of more than 160 acres within the meaning of said act and is therefore disqualified from making such entry; and that disqualification is not removed by the mere fact that the community is dissolved by the death of applicant's co-owner.

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It appears from the evidence that contestee introduced an unrecorded deed of her interest in the property executed the day before the hearing and conveying the property to her daughter. Whether this deed represented a *bona fide* sale or whether the contestee had power to convey is no moment in the present case, the transfer came too late to affect the existing disqualification.

Defendant raised the question of invalidity of the contest and disqualification of the contestant to acquire title to the land on the ground that he had shown no qualification to acquire the land under Rules 1 and 2 of Practice. Contestant states in his contest affidavit that he claims "an interest in or desire and intent, if permitted to do so, to acquire title to said land under the act of June 28, 1934," the usual averments on the regular form of contest affidavit showing qualifications to enter the land being stricken out. As to this question the Commissioner held that contestant's qualifications were immaterial in view of the disqualifications of the entrywoman. The Government is a party to every contest and the invalidity of the entry being shown it must be canceled. Rule 1 of Practice permits contest "for any sufficient cause affecting the legality or validity of the claim not shown by the records of the Land Department." It is not inconceivable that contestant through the exercise of rights granted under section 7 of the Taylor Grazing Act may be qualified to acquire title to the land under some applicable public land law. Therefore no sufficient ground exists for dismissing the contest. The question whether contestant may exercise a preference right is not properly before the Department until it is attempted to be exercised.

A great amount of testimony was taken, and there is considerable discussion in the briefs as to the other issues raised by the charges. It is sufficient here to state that accepting the testimony of contestee as true as to the character, extent and value of the stockraising improvements and as to the character and period of her residence on the land to the exclusion of a home elsewhere, both improvements and residence appear insufficient to meet the requirements of the homestead law. Whether the circumstances are such that the defaults may be excused and further time allowed to perfect the entry need not be decided as the entries in question were invalid at the time they were made by reason of entrywoman's ownership of more than 160 acres of land.

It, however, should be said that from the evidence averments to the contrary are not deemed to have been made falsely and with fraudulent intent but rather arose from ignorance and misapprehension of the law as to what constituted ownership of land.

In accordance with the views above expressed the decision of the Commissioner is affirmed.

Affirmed.

ALFORD ROOS¹*Decided June 28, 1938²*

PUBLIC LANDS—GRAZING—GRAZING DISTRICTS—APPEALS.

The determination of the boundaries of grazing districts, and additions to and modifications of such districts, are matters committed wholly to the discretion of the Secretary of the Interior by section 1 of the Taylor Grazing Act, and no appeal will lie from recommendations for such determinations.

PUBLIC LANDS—GRAZING—LICENSES—RENEWALS.

A grazing license, being purely temporary in its nature, cannot constitute a bar to the authority of the Secretary of the Interior to adjust the boundaries of grazing districts, regardless of the fact that such adjustment may prevent the renewal of a license to one whose livestock unit is pledged as security for a loan.

PUBLIC LANDS—DIVISION OF INVESTIGATIONS—REPORTS.

Reports of special agents involving controversies under the Taylor Grazing Act are confidential and not subject to inspection by claimants, attorneys, or the public.

CHAPMAN, *Assistant Secretary*:

On July 23, 1935, Alford Roos filed an application for a grazing license under the provisions of the Taylor Grazing Act for 30 head of cattle and three horses on certain described tracts in Ts. 17 and 18 S., R. 12 W., N. M. P. M., New Mexico, lying within the exterior boundaries of New Mexico Grazing District No. 3, as at that time established. On July 1, 1936, the regional grazier granted a license to Roos to graze 22 head of cattle and two horses from July 1 to December 31, 1936, on an allotment embracing parts of Secs. 29, 30, 31, and 32, T. 17 S., R. 12 W., and Sec. 6, T. 18 S., R. 12 W., N. M. P. M.

In considering Roos' application for a 1937 license the regional grazier, by a notice dated April 17, 1937, first informed Roos that the advisory board had recommended as follows:

Class 1 applicant for 22 cattle. From January 1, 1937, to April 30, 1938. On public range allotment as described in license of July 1, 1936. Nonuse license for 14 CYL. The Advisory Board recommends that your temporary public range allotment be fenced at the earliest practicable date. It will be necessary that you apply to the Division of Grazing, Box 575, Albuquerque, New Mexico, for a permit to construct and/or maintain improvements on your public range allotment. Important that application for permit be approved by chairman of your Advisory Board.

Roos appears to have protested, for reasons which are not disclosed by the record, and the regional grazier, on April 23, 1937, notified him that the following recommendation of the advisory board had been adopted as his decision:

¹ Motion for rehearing denied October 25, 1938.

² Not released for publication in time for inclusion in Volume 56 I. D.

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That the recommendation of the Advisory Board dated April 17, 1937, be sustained. However, T. 17 S., R. 12 W., in which your public range allotment is located, has been recommended for elimination from the Grazing District.

Roos appealed and the case was set for hearing. A hearing was held June 16, 1937, before an examiner of the Division of Grazing, at which time it was agreed that the sole issue was whether or not the boundaries of District No. 3 should be adjusted so as to eliminate therefrom the lands in T. 17 S., R. 12 W. Testimony was offered and on June 18, 1937, the examiner rendered findings of fact and a decision, sustaining the decision of the regional grazier and recommending that the said township be eliminated from the district. The township was eliminated from the district on April 29, 1938. Roos has appealed.

None of the rules promulgated pursuant to the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), has made provision for a hearing on the issue involved in this case. The determination of the boundaries of grazing districts, and additions thereto and modifications thereof are matters committed wholly to the discretion of the Secretary of the Interior by section 1 of the Taylor Grazing Act, and the rules and regulations make no provision for appeals from recommendations for such determinations. Notwithstanding this, however, the matter has been carefully considered in the light of the showing submitted by appellant. There is no evidence that the elimination of the township was improper or that any injustice to or hardship on the appellant has resulted therefrom. It appears that the appellant is fully cognizant of his opportunity to apply for a lease under section 15 of the act.

In his appeal, Roos alleges that he has obtained a loan from the Resettlement Administration (now the Farm Security Administration) in the amount of \$500, the loan running for a period of five years and being secured by the pledge of his "livestock unit," and that the elimination from the grazing district of the township in which the greater part of his allotment is located, thus obviating the possibility of the renewal of his grazing license on the same area, is in violation of that part of section 3 of the act which provides:

* * * that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan.

This point was not raised by Roos at the time of the hearing although it appears that the loan had been obtained before that time. No testimony was offered regarding the loan and hence the attempt to raise the question by way of appeal is belated and would not require its consideration by the Department.

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However, even had the question been in issue and had testimony in regard thereto been properly presented, it would be of no benefit to the appellant. It will be noted that the above-quoted clause of section 3 merely deprives the Secretary of the right to deny the renewal of a *permit* under certain conditions. Roos has never held a permit but has had a mere temporary license.

In the early stages of the administration of the Taylor Grazing Act it was recognized that, before it would be desirable to issue permits within grazing districts, a considerable amount of preliminary work would be necessary. Range conditions needed to be studied, the various factors necessary to be considered in connection with the proper use and administration of the several grazing districts remained to be determined, rules for the granting of grazing privileges needed to be formulated, and the establishment of grazing districts and the proper boundaries thereof were still to be accomplished. It was recognized that all of these things could not be done in a time sufficiently limited to permit of the granting of permits for the grazing seasons immediately ensuing. Yet it was also recognized that to deny the use of the public range to livestock operators until such time as these administrative details were worked out, would result in undue hardship on stockmen and retard the accomplishment of the purposes of the act. Accordingly, temporary licenses, of the type granted to Roos, were issued.

Such a license, being purely temporary in its nature for the reasons set out, cannot constitute a bar to the authority of the Secretary to adjust the boundaries of grazing districts, regardless of the fact that the livestock unit in connection with which the license is granted may have been pledged as security for a loan. The fact that a license and not a permit was issued is notice in itself that the desirability of retaining the lands in question under the grazing district may have been in doubt. If at the time of the granting of the license to Roos, all details relating to the administration of the district had been worked out, and the allotment to him had been properly determined, there would have been no reason why a permit and not a license should not have been issued. However, only a license, carrying with it all of the uncertainties of duration, was issued, and the license as such was accepted without complaint. Roos cannot, therefore, be heard to complain if action is taken by the Secretary, authority for which is expressly committed to him by the act, and freedom for the exercise of such authority was contemplated by the issuance of the temporary license.

Even though it were true that the above-quoted provision of section 3 did prohibit the action complained of and the renewal of a license to Roos were mandatory, there is nothing to assure him of the renewal of his license on the identical lands heretofore allotted to him.

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The case does not require an answer to the question of whether there could be an adjustment of the boundaries of a grazing district so as to eliminate therefrom the lands allotted under a *permit* and where the livestock unit dependent on the allotment is pledged as security for a bona fide loan.

Accordingly, the appeal is dismissed without prejudice, however, to Roos' right to apply for a continuation of his allotment in T. 18 S., R. 12 W., and for a lease of the allotted lands in T. 17 S., R. 12 W., under section 15 of the act, or for a license within the present boundaries of District No. 3 commensurate with the loss of allotted lands through the elimination of T. 17 S., R. 12 W., from the district.

Before concluding, a further point which is not necessarily related to the issues heretofore discussed merits comment. With the appeal there is submitted what is styled "Exhibit G" wherein Roos sets out in chronological order the history of this case from the time of filing of his original application up to and including the hearing of June 16, 1937. In this exhibit Roos alleges that Special Agent Horace Wilcox, of the Division of Investigations, made an investigation and a report concerning a grazing trespass involving the appellant and one Vigil, that Roos requested the regional grazier to furnish him with a copy of Wilcox's report but that the request was refused, and that the refusal was affirmed by the Acting Director of Grazing; but that on April 12, 1937, an official of the Division of Grazing

* * * did then and there instruct the Regional Grazier and the custodians of the Grazing Division's files at Deming to give Appellant full and complete access to the complete file and to copy so much thereof as he desired; and Appellant did then and there * * * open said files * * * and did copy, in part, so much of said files as he could in a limited time, *including the report of Wilcox* * * *. [Italics supplied.]

In a letter dated October 16, 1908, and approved by the First Assistant Secretary, from the Commissioner of the General Land Office to Messrs. Clark, Prentiss, and Clark, attorneys in Washington, D. C. (38 L. D. 464), it was stated that on and after September 1, 1907, letters, press-copies, reports, or other papers on file in the Field Service Division (now Division of Investigations), or related to any case or matter referred to or pending in such division, excepting such papers as are technically a part of the application or entry, or such papers as may be a part of the pleadings in any case, should not be subject to inspection by claimants, attorneys, or the public.

No reason appears why the above rule is not fully as applicable to reports made by special agents of the Division of Investigations involving controversies under the Taylor Grazing Act as to controversies arising under other public land laws. In order that the Department can be fully and intelligently advised by its agents of the existing facts in the various cases on which investigations are

ordered, the special agent must at all times feel free to set out and discuss all pertinent matters coming within his observation without fear that his statements will be openly disclosed to any curious party. Oftentimes facts are disclosed to the agents by persons who may be subject to embarrassment if the source of the disclosure is made known, but who nevertheless are willing to assist the agents in their investigations. In fairness to these persons and in order that they will not be deterred from rendering such assistance by a fear that the source of the information thus obtained will later be disclosed, the reports of the agents should be treated at all times as strictly confidential and should not be held open to inspection by unauthorized persons. In the future, therefore, reports by agents of the Division of Investigations which for any reason may be in the files of the Division of Grazing should be open for inspection only by Government officials or agents who need or are required to examine such reports in connection with their official duties.

Appeal dismissed.

IMMUNITY OF THE UNITED STATES FROM OPERATION OF TERRITORIAL STATUTE OF LIMITATIONS

Opinion, March 14, 1939

ALASKA RAILROAD—RAILROAD HOSPITALS—ACTION TO RECOVER DEBT DUE THE
UNITED STATES FOR SERVICES—TERRITORIAL STATUTE OF LIMITATIONS.

Authority for the construction and operation of hospitals by the Alaska Railroad was contained in the act of March 14, 1912 (38 Stat. 305). An Alaska Railroad hospital is a United States institution. An obligation incurred for services rendered by a railroad hospital constitutes a debt due the United States, action for the collection of which is not barred by the statute of limitations of the Territory of Alaska.

KIRGIS, Acting Solicitor:

My opinion has been requested on the question as to whether actions to collect accounts due for services rendered by an Alaska Railroad hospital are barred by the statute of limitations of the Territory of Alaska in the event that such actions are not instituted within the prescribed time.

The facts indicate that there are outstanding accounts in the name of Mr. Carl Robinson for hospital services which were rendered during the years 1930 and 1931 in the sums of \$113 and \$163, and that the General Manager of the Alaska Railroad has been advised by the United States Attorney for the Third Division, District of Alaska, that these debts have been outlawed by the statute of limitations of the Territory. It is stated further by the General Manager that there are other outstanding accounts.

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Presumably the United States Attorney has reference to the territorial statute of limitations contained in section 3356 of the Compiled Laws of Alaska, 1933, under the chapter heading "Time of Commencement of Civil Actions," which provides as follows:

Within six years—

First. An Action upon a contract or liability, express or implied, * * *

The act of March 14, 1912 (38 Stat. 305), authorized the President to locate, construct, and operate railroads in the Territory of Alaska. The main purpose of the act was to construct a railroad to connect one or more of the open Pacific Ocean harbors on the southern coast of Alaska with the navigable waters of the interior, and with the interior coal fields, so as to aid in the development of the internal agricultural and mineral resources, and the settlement of the public lands, and so as to provide transportation of coal for the Army and Navy, and for other governmental and public purposes.

A railroad system known as the Alaska Railroad was constructed under the authority of this act. The Alaska Railroad is a governmental agency, an arm of the Federal Government, entirely owned and operated by the Federal Government, and performing a governmental function. *Ballaine v. Alaska Northern Ry. Co.* (U. S. Intervener), 259 Fed. 183; 34 Ops. Atty. Gen. 232, 236; 30 *id.* 402; 16 Comp. Gen. 568; 9 *id.* 332; 8 *id.* 420. By section 3 of the act of March 14, 1912, the earnings of the railroad above maintenance charges and operating expenses are required to be paid into the Treasury of the United States.

Section 1 of the act of March 14, 1912, gave to the President certain powers which were specifically enumerated, and in addition authorized him "to do all necessary acts and things * * * to enable him to accomplish the purposes and objects of this act." By this provision a broad and sweeping grant of power was conferred upon the President. 30 Ops. Atty. Gen. 332; 30 *id.* 402; 4 Comp. Gen. 19, and decisions of the Comptroller of the Treasury cited therein. Under the clear authority which is contained in this provision, hospitals were established and operated as a necessary incident to the accomplishment of the purposes of the act. These institutions have been maintained under appropriations made by Congress to provide for the expenses of the Alaska Railroad, 9 Comp. Gen. 332, 334.

Upon recommendations of the Secretary of the Interior the President pursuant to his powers under the act promulgated the Executive Order of June 30, 1916, No. 2414, which prescribed rules and regulations "for hospital service in connection with the construction and operation of the Government railway in Alaska." These rules and regulations related to the admission, care and treatment of patients,

fees, and payment for services at the railroad hospitals. The existence of the railroad hospitals was recognized by Congress in the Joint Resolution of March 3, 1927 (44 Stat., pt. 3, p. 1845), which authorized the President "to cause to be paid from hospital receipts or other funds of the Alaska Railroad the amounts heretofore or hereafter accruing to surgeons of the railroad under any agreements relating to fees collected in cases not entitled to free treatment under hospital regulations of the railroad."

In the decision, 16 Comp. Gen. 568, holding that the disability compensation due a United States Employees' Compensation beneficiary may be withheld and applied in liquidation of an amount due the Alaska Railroad hospital for hospital services furnished his wife, the Comptroller General stated as follows:

The hospital bill referred to apparently covers services furnished Mrs. Edmunson by an Alaska Railroad hospital—a *United States institution*. Such being the case, Mr. Edmunson's reported indebtedness is one owing to the United States. * * *

The situation therefore involves a debtor-creditor relationship between the beneficiary and the Government. [Italics supplied.]

It is clear in my opinion that an obligation which is incurred for services rendered by the railroad hospital such as in the instant case constitutes a debt due the United States. Any payments received for such services are public moneys of the United States applicable to public purposes and in collecting such obligations the Government is plainly acting in its governmental capacity.

In the case of *Ballaine v. Alaska Northern Ry. Co.*, *supra*, an action in tort was brought against the defendant railroad. The United States intervened in the suit. The Circuit Court of Appeals for the Ninth Circuit held that the United States had purchased the Alaska Railroad Company under the act of March 14, 1912, and became owner not only of the property, but of the corporation as its agent for governmental and public purposes, and without its consent the corporation could not be sued in tort.

To overcome the application of the rule that the United States cannot be sued for a tort the argument was made that in the operation and maintenance of the railroad the United States was carrying on a commercial business; and in such business had, to an extent, abandoned its sovereign capacity.

As to this contention the court stated as follows (p. 185):

We cannot uphold that view. Congress, in its power to regulate commerce, could construct, or could authorize a corporation or individuals to construct, a railroad, or to buy a railroad, and clearly in the territories has a plenary power to grant franchises, to create a railroad system, and to employ the agency of a

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corporation as a means of accomplishing such objects. * * * Taking all these provisions together, they plainly show that the United States, in acquiring the stocks and bonds and property of the Alaska Northern Railway Company, acted in the sovereign capacity, and in exercising entire control, possession, ownership, and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute.

On page 186 the court concluded as follows :

Here, however, the United States holds the railroad and stock for public purposes under clear statutory authority, and it operates the road in the necessary discharge of its duty to the public, and in our judgment, in this, a civil action, can claim the privileges and immunities of a sovereign.

Under the established general rule a statute of limitations runs against the United States only when it assents and upon the conditions prescribed. *Lucas, Com'r of Int. Rev. v. The Pilliod Lumber Co.*, 281 U. S. 245, 249. In the case of *Chesapeake and Delaware Canal Co. v. United States*, 250 U. S. 123, the Supreme Court held (p. 125) :

It is settled beyond controversy that the United States when asserting "sovereign" or governmental rights is not subject to either state statutes of limitations or to laches.

Also in the case of *Davis v. Corona Coal Co.*, 265 U. S. 219, the Supreme Court held (p. 222) :

Also it is established that a state statute of limitations cannot bar the United States, at least when a suit is brought in the United States courts. (Citing *United States v. Thompson*, 98 U. S. 486; *United States v. Nashville, Chattanooga & St. Louis R. Co.*, 118 U. S. 120; *Chesapeake & Del. Canal Co. v. United States*, *supra*; see also *United States v. Beebe*, 127 U. S. 338; *United States v. Minnesota*, 270 U. S. 181; *Gibson v. Chauteau*, 13 Wall. 92.)

A fortiori, a territorial statute of limitations cannot bar the United States. The Territory of Alaska derives its legislative power solely from a superior authority, namely, Congress, and the courts of the Territory were created by virtue of the exercise of the plenary power of Congress over the Territory. Clearly, the United States in asserting a governmental right in a court of the Territory is immune from the operation of the territorial statute of limitations in question.

By virtue of the foregoing, it is my opinion that an action to collect the debts due the United States, as aforementioned, which were incurred for services rendered by an authorized governmental activity is not barred by the territorial statute of limitations.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

CONTINUANCE OF ALLOTMENT ON FORT PECK INDIAN RESERVATION AND APPROVAL OF UNAPPROVED ALLOTMENT SELECTIONS

Opinion, May 31, 1939

INDIANS—RESERVATIONS NOT UNDER INDIAN REORGANIZATION ACT—CONTINUANCE OF AUTHORITY TO ALLOT LANDS THEREON—FORT PECK ALLOTMENT ACT OF 1914.

The authority in the Secretary of the Interior to allot lands to children of the Fort Peck Indian Reservation under the act of April 1, 1914 (38 Stat. 593), is a continuing one in view of the rejection by the Fort Peck Indians of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), prohibiting allotments, and in view of the act of June 15, 1935 (49 Stat. 378), providing that laws affecting Indian reservations which exclude themselves from the Indian Reorganization Act shall be deemed to have been continuously effective on such reservations.

INDIANS—UNAPPROVED ALLOTMENT SELECTIONS—AUTHORITY OF THE SECRETARY OF THE INTERIOR TO DECLINE TO APPROVE SELECTIONS FOR REASONS OF LAND POLICY.

The authority of the Secretary of the Interior to approve or disapprove allotment selections under the Fort Peck Allotment Act of April 1, 1914, is not broad enough to permit him to decline to approve allotment selections made under the instructions of the Interior Department and in pursuance of a course of allotment established on the reservation because of reasons not related to the merits of the individual selections but of land policy.

INDIANS—LANDS PURCHASED THROUGH THE RESETTLEMENT ADMINISTRATION—WHETHER SUBJECT TO ALLOTMENT.

When beneficial title to lands purchased by the United States through the Resettlement Administration is placed in the Indians, the lands will not be subject to allotment under the Fort Peck Allotment Act of April 1, 1914, as they do not constitute "surplus lands remaining undisposed of," but they may be subject to allotment under the General Allotment Act in the absence of contrary legislation.

INDIANS—UNDISPOSED OF SURPLUS LANDS RESTORED TO TRIBAL OWNERSHIP—WHETHER SUBJECT TO ALLOTMENT.

Undisposed of surplus lands on the Fort Peck Reservation when restored to tribal ownership would be subject to allotment under the Fort Peck Allotment Act of April 1, 1914, in the absence of contrary legislation.

INDIANS—UNAPPROVED ALLOTMENT SELECTIONS—RIGHT TO RENTALS THEREFROM.

Where unapproved allotment selections should have been approved according to the ordinary procedure of the Department but without sufficient justification were not so approved, the selectors are entitled to the rentals from such selections under the principle that equity will treat as done what ought to have been done.

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have referred to me for an opinion several questions raised by the Indian Office concerning the continuance of allotment activities on the Fort Peck Indian Reservation. The facts bearing upon the questions may be briefly outlined as follows:

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The original allotment of the reservation was undertaken pursuant to the act of May 30, 1908 (35 Stat. 558), which authorized and directed the Commissioner of Indian Affairs to cause allotments to be made under the general allotment laws to all the Indians belonging on the reservation. The surplus lands were to be opened to disposal and a system for the disposition of the entire reservation was provided for in the act. In accordance with this act allotments were made to all the Indians living at a certain date.

The act of April 1, 1914 (38 Stat. 593), authorized the Secretary to make allotments to children on the reservation who had not received allotments, as long as any of the surplus lands remained undisposed of. Since the questions raised by the Indian Office center around the interpretation of this act of 1914, the relevant provision thereof is quoted:

* * * *Provided*, That the Secretary of the Interior is hereby authorized to make allotments in accordance with the provisions of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes, page five hundred and fifty-eight), to children on the Fort Peck Reservation who have not received, but who are entitled to, allotments as long as any of the surplus lands within said reservation remain undisposed of, such allotments to be made under such rules and regulations as the Secretary of the Interior may prescribe.

For the purpose of carrying out this provision the Secretary of the Interior issued instructions on August 19, 1914, to the Superintendent of the Fort Peck Agency to allot each child in accordance with the 1908 act as long as any of the surplus lands remained undisposed of. The Superintendent was directed to make official allotment selections, to notify the local land office of the land selected, and to submit regularly a schedule of allotments to the Department with a certification that they had been made in accordance with the governing acts.

After these instructions were issued, a schedule of allotment selections was annually submitted and approved through the year 1933. On February 15, 1934, the Superintendent submitted thirteen timber selections and was instructed by office letter of April 10, 1934, that the Department did not favor further allotment of the reservation and that the selections should be made a matter of record for future reference. The Superintendent then reported that 140 grazing allotments had been selected prior to the notification of April 10 of the policy of the Department and he asked advice concerning the right of use and occupancy of these selections and the disposition of rentals therefrom. He was instructed by office letter of June 28, 1934, that the rentals should be treated as tribal proceeds.

Shortly thereafter the Indians of the Fort Peck Reservation rejected the application of the Indian Reorganization Act (act of June 18, 1934, 48 Stat. 984) and the question arose whether allotment of the surplus lands could and should be discontinued despite the fact

that section 1 of the Indian Reorganization Act, prohibiting further allotment of Indian lands, did not apply to the reservation. The determination of the Indian Office, embodied in the letter of June 7, 1935, to the Superintendent, was that further allotment activity on the Fort Peck Reservation would be contrary to the policy of the Department to preserve lands in tribal ownership, particularly as the lands of this reservation were not susceptible of effective individual use. The Superintendent was instructed to make no further allotment selections and was informed that the unapproved allotment selections would not be submitted for approval. The Solicitor advised the Indian Office by a memorandum of September 16, 1935, that he was not convinced of the authority of the Secretary of the Interior to deny approval for reasons of land policy to allotment selections already made.

The persistence of the Indians in seeking the approval of the pending allotment selections and the continuance of allotment of the surplus lands has caused the submission of the present questions for an opinion of the Solicitor. The questions will be answered in the order in which they have been presented.

1. If under existing law allotments can be made on the Fort Peck Reservation, is the present authority of law a continuing one under which allotments may be made indefinitely?

Under existing law allotments may be made on the Fort Peck Reservation and the authority for making such allotments will continue until further act of Congress or until the surplus lands have been completely disposed of. Since the Indians rejected the application of the Indian Reorganization Act, there is no prohibition on the making of allotments applicable to the reservation. The conclusion is fortified by the act of June 15, 1935 (49 Stat. 378), which provided that all laws affecting any Indian reservation which voted to exclude itself from the application of the Indian Reorganization Act shall be deemed to have been continuously effective as to such reservation notwithstanding the passage of that act. Accordingly, the Secretary has authority under the act of 1914, above quoted, to continue allotments to children on the Fort Peck Reservation.

2. May the Secretary of the Interior in his discretion decline to approve allotment selections made under the acts referred to?

Where allotment selections have been duly made under authority of the Department and pursuant to its official instructions and in accordance with a course of allotment on the reservation, in my opinion it is probable that a court would hold that the Secretary cannot decline to approve particular selections because of a subsequent change in land policy. His authority to disapprove such selections would be limited to disapproving particular selections not entitled to approval.

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because of error or the ineligibility of the applicant or other such reason. I base my opinion on the fact that when an official allotment selection has been duly made in accordance with the laws and regulations at the time of the selection, in ordinary circumstances the selector acquires a certain property interest in the land and a right to the perfection of his title which courts will protect.

An Indian eligible for allotment who has not properly selected an allotment under the instructions of the Interior Department has only a floating right to an allotment which is not inheritable and which gives him no vested interest in any land. *La Roque v. United States*, 239 U. S. 62; *Woodbury v. United States*, 170 Fed. 302 (C. C. A. 8, 1909). . . After proper selection of an allotment, however, an Indian has been held to have an individual interest in the land with many of the incidents of individual ownership. His interest is inheritable, transferable within limits, and deserving of protection against adverse claims by third persons. *United States v. Chase*, 245 U. S. 89; *Henkel v. United States*, 237 U. S. 43; *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U. S. 401; *Bonifer v. Smith*, 166 Fed 846 (C. C. A. 9, 1909); see 55 I. D. 295, at 303.

The cases before the Interior Department and before the courts which are of most concern in this problem are the cases dealing with the protection of an allotment selection against adverse action by the Government, either by Congress or by the Executive. The Department has taken the view that acts of Congress limiting allotment rights in "undisposed of" tribal lands do not apply to allotment selections even though they have not been approved. *Fort Peck and Uncompahgre Allotments*, 53 I. D. 538; *Raymond Bear Hill*, 52 L. D. 689. In these decisions it was held that the filing and recording of an allotment selection segregates the land from other disposal, withdraws the land from the mass of tribal lands, and creates in the Indian an individual property right.

In the case of the unapproved Fort Belknap allotment selections, 55 I. D. 295, it was held that the Indian Reorganization Act prohibiting the making of allotments, did not apply to unapproved selections made under an allotment act which had contemplated the equal division of the reservation among certain definite persons. The right to the completion of allotments had become vested in the circumstances of that case. A different situation was discussed in the Opinion of the Solicitor dated April 8, 1937, M. 29097, which held that a later act of Congress could constitutionally prohibit the completion of unapproved allotment selections on the Palm Springs Reservation, since they were made under an act of Congress which left the making of any allotments entirely within the discretion of the Secretary of the Interior and which was found to intend that no individual interest

in the tribal patented land would become vested until a trust patent had issued to the individual. The relevant court case of *Chase, Jr. v. United States*, 261 Fed. 833 (C. C. A. 8, 1919), upheld a subsequent act of Congress inconsistent with the act authorizing allotments, but it did not appear that the plaintiff had made a correct and final selection at the time the later act was passed or that any selection made had been made with the sanction of the Interior Department. The court merely stated that, assuming the plaintiff had a floating right in the unallotted lands, the right did not attach to a particular tract until it had been definitely located, selected and set apart to the allottee. A determination of when such a setting apart occurred was not made.

If allotment selections will be protected against restrictive action by Congress, at least where the processes of allotment have not been left completely to the discretion of the Secretary, it seems clear that, *a fortiori*, such allotment selections will be protected against changes of policy made by the Department. How far this is true may be seen from the cases dealing with the protection of allotment selections from adverse action by the Interior Department.

A court will not find an Indian selector entitled to a trust patent where his eligibility is in question and must be determined by the Interior Department as that is a matter within its discretion. *Lemieux v. United States*, 15 F. (2d) 518 (C. C. A. 8, 1926). But a court will protect a selector against mistake of law by the Department in patenting the selection to a third person, and against neglect or misconduct on the part of Government officers. *Hy-Yu-Tse-Mil-Kin v. Smith*; *Bonifer v. Smith, supra*. In these cases the court followed the equitable rule that a court will treat as done what ought to have been done. See also *Woodbury v. United States, supra*, at p. 306.

The significant question is, however, how far the courts will protect a selector against a refusal to approve the selection for reasons of policy. There are two cases which hold that the Department exceeds its authority to approve or disapprove an allotment selection where the refusal is based on such reasons. In *United States v. Payne*, 264 U. S. 446, the plaintiff had selected timber land under the instructions of an allotting agent, but the Department refused to approve the selection because of a subsequent determination that timber land was too valuable for allotment purposes. The court held that the General Allotment Act under which the allotment was selected did not prevent the allotment of timber land and the United States was bound to discharge its duty of allotment with good faith. In the decision of the case in the lower court (284 Fed. 827, C. C. A. 9, 1922), the court argued that the discretion of the Interior Department had been exercised when its decision was made that the

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land should be allotted, and that when the selection had been made the completion of the allotment could not be made dependent upon the character of the land. This case is highly in point, since the refusal to approve the Fort Peck selections is largely based upon an opinion by the Interior Department that the lands are not suitable for allotment but are more valuable for other purposes.

In the case of *Leecy v. United States*, 190 Fed. 289 (C. C. A. 8, 1911), the court is even more emphatic in denying to the Secretary of the Interior authority to refrain from completing allotments because of a decision to use the land for other purposes. In that case the land selected by the plaintiff on the White Earth Reservation had been withdrawn by the Interior Department as a sawmill reserve for tribal benefit. The following quotation from the reasoning of the court is pertinent:

If * * * the Secretary of the Interior could withdraw lands from allotment, or upon his judgment that lands authorized to be allotted by Congress ought not to be allotted refuse to approve an allotment submitted for action, the very statute under which action is brought [25 U. S. C. A., Sec. 345] * * * would be practically nullified.

The court added that the argument that the lands should be withheld from allotment should be addressed to Congress.

However, in the recent case of the unapproved allotment selections on the Palm Springs Reservation (*St. Marie v. United States*, 24 F. Supp. 237, S. D. Cal. 1938), the court reached a contrary conclusion based upon the wording of the statute under which the allotment selections were made. The statute authorized the Secretary of the Interior to cause allotments to be made whenever any of the Indians on the Mission Indian Reservations should be so advanced in civilization, in his opinion, as to be capable of owning and managing land in severalty. The court found that a determination of the capacity of the Indians was an essential prerequisite to the making of allotments and could not be compelled because of its discretionary character, and that no determination of the capacity of the Palm Springs Band had been made. Influenced by this feature of the act, the court concluded that the act under which the selections were made showed that it was not the intention of Congress to make the selection a source of vested right and that, on this ground, the case should be distinguished from contrary cases under other acts of Congress, citing the *Payne* and *Leecy* cases.

The allotment selections in the instant case fall, in my opinion, in the category of those in the *Payne* and *Leecy* cases, rather than in the category of those discussed in the Palm Springs case. The foregoing analysis has indicated that a judicial determination of whether or not an allotment selection merits protection against adverse governmental action involves a weighing of the equities in the light of

the intent of Congress and the history of administrative action. In the Palm Springs case the act contemplated that no allotments should be made until the Secretary of the Interior was satisfied of their advisability. No allotments were in fact made and the Secretary was clearly not satisfied of their advisability. If a court attempted to force the recognition and completion of tentative selections in the field, it would encroach upon executive discretion. In the *Payne* and *Leecy* cases, however, whatever discretion had been given to the Executive as to the advisability of allotments had been exercised and a course of allotment had been established. Thereafter, individual allotment selections were approved or disapproved according to their individual merits. In this situation a court could properly prevent, as an abuse of discretion, the failure to approve an individual allotment selection, not because of its own demerits, but because of extraneous policies.

Thus, in this Fort Peck case, Congress and the Secretary of the Interior had determined 25 years ago that allotments should be made to the children as they were born, and since then individual selections have been approved or disapproved on their own merits. This legislative and administrative action may be said to have established an equitable right in the individual selector to have his selection acted upon according to the same principles.

Most of the allotment selectors in the cases cited tried their rights to an allotment in the Federal courts pursuant to section 345, Title 25, U. S. C. This forum for the trial of a right to an allotment would be available, I believe, to the Fort Peck selectors. In view of the protection heretofore accorded to allotment selections and the probability that the court would hold that the Interior Department is not privileged to refuse to complete these allotments because of a change in land policy, in my opinion the allotment selections should be completed.

This decision does not dispose of the question whether the Secretary of the Interior is privileged to discontinue the further initiation of allotments on the Fort Peck Reservation. In my memorandum of September 16, 1935, previously mentioned, I indicated that the Secretary would have discretion to stop such further allotment. My reason was that the 1914 act did not contain words directing the allotment of the reservation such as were often contained in allotment acts, but merely authorized the Secretary to make allotments. In this respect the act was found to be similar to the General Allotment Act which left the determination of when the initiation of allotments should be undertaken on a reservation to the discretion of the Executive and under which the Interior Department has refrained from allotting numerous reservations. I believe my 1935 decision was sound.

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3. Whether the large area of lands (approximately 85,000 acres) purchased through the Resettlement Administration, the title to which is now in the United States but administration in the Secretary of the Interior for the benefit of the Indians of the Fort Peck Reservation, will also be subject to allotment in the event such lands are later, by appropriate legislation, added to and made a part of the tribal holdings of the Fort Peck Reservation.

The lands purchased through the Resettlement Administration are private lands within the reservation which had originally been disposed of as surplus lands or which were fee patented allotments. Such lands would not come within the provisions of the 1914 act, which authorizes the making of further allotments of "surplus lands" within the reservation which "remain undisposed of." There is no allotment act applying specifically to the Fort Peck Reservation which would authorize the allotment of such newly acquired tribal holdings. The act of February 14, 1920 (41 Stat. 408, 421), which authorizes the Indians entitled to allotments under existing laws to select lands classified as coal lands does not authorize allotments in addition to those allotments authorized by the 1914 act, but was intended to permit the selection of coal lands under the authority of the 1914 act. The terms of the General Allotment Act of February 8, 1887 (24 Stat. 388), particularly as extended to lands purchased for Indians by the act of February 14, 1923 (42 Stat. 1246), are broad enough to provide authority for the allotting of any tribal lands within an Indian reservation, but it is doubtful whether this general act would apply to a reservation, such as Fort Peck, where the manner of allotment and disposition of the reservation has been comprehensively provided for in special legislation. Since, however, the resettlement lands will not become tribal lands without act of Congress, all questions as to their availability for allotment should be removed through specific provision on that point in the legislation.

4. Whether the undisposed of opened lands of this reservation (embracing around 41,500 acres) would also be subject to allotment if and when restored to tribal ownership.

This question should probably be answered in the affirmative, since the restored lands would continue to be the surplus lands within the reservation remaining undisposed of which may be allotted under the act of 1914. However, since restoration of such lands would require an act of Congress, the question of allotment should be covered in the legislation.

5. There is also another question; that is, certain leasing funds have been collected on many of the allotment selections covered by the unapproved schedule referred to above. This money is

being held in a special deposit awaiting final disposition of the question whether the allotments will be made or not. If the allotments are granted at this late date, who will be entitled to this land leasing money collected after the selections were made but before the allotments were approved?

In view of the rule stated in the cases of *Hy-Yu-Tse-Mil-Kin v. Smith*; *Bonifer v. Smith*; and *Woodbury v. United States*, *supra*, that equity will treat as done what ought to have been done, the rentals which have been accruing from the unapproved allotment selections should be placed to the credit of the selectors. This follows from the fact that the selectors would have been privileged to receive these rentals if the allotment selections had been approved in the usual manner in which previous allotment selections of this reservation have been approved.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

CONTRACTS OF CANADIAN INDIANS WITH ATTORNEYS TO PROSECUTE CLAIMS AGAINST THE UNITED STATES

Opinion, June 1, 1939

INDIANS AND INDIAN AFFAIRS—CONTRACTS—SEC. 81, TITLE 25, UNITED STATES CODE.

A contract by which Indian residents and subjects of the Dominion of Canada propose to employ an attorney to prosecute claims against the United States is not subject to the approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Sections 1, 2, and 81, title 25, United States Code, are confined in scope and operation to Indians who reside in and are subject to the jurisdiction of the United States and have no application to the subjects of a foreign nation.

MARGOLD, *Solicitor*:

In my opinion dated February 8, 1939 (M. 30146), I expressed the belief that section 81, title 25, United States Code, is confined in its scope and operations to Indians who reside in and are subject to the jurisdiction of the United States and has no application to the subjects of a foreign nation. Accordingly, it was held that a contract, by which Indian residents and subjects of the Dominion of Canada propose to employ an attorney to prosecute claims against the United States, is not subject to the approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Counsel for the Canadian Pottawatomie Indians has now submitted a brief supplemented by a letter addressed to me under date of May 20, containing arguments that a contrary conclusion should be reached.

June 1, 1939

The primary contention relied upon in the brief is that section 81, title 25, United States Code, is a statute designed "to regularize the process by which claims may be prosecuted against the United States" and, as such, its operation is internal, rather than extraterritorial, in regulating the employment of counsel to prosecute a claim against the United States, notwithstanding the claimants are foreign subjects. That is to say, the argument advanced is that the statute regulates a purely domestic matter, namely, the procedure for presenting a claim against the United States, and its application to foreign subjects who are claimants does not constitute an extraterritorial application of the statute. In support of this argument counsel relies to some extent on the language of the section extending its provisions to "Indians not citizens of the United States."

In letter of May 20, counsel calls attention to sections 1 and 2, title 25, United States Code, committing to the Secretary of the Interior and the Commissioner of Indian Affairs the management of all matters arising out of Indian relations and suggests that since the employment of an attorney to prosecute the claims of Canadian Indians against the United States to enforce the payment of obligations arising out of treaties made between the United States and their ancestors is a matter arising out of Indian relations, the contract of employment would be subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs.

After carefully considering the arguments advanced by counsel, I remain of the opinion that the matter of employment of counsel by the Canadian Pottawatomies is not one coming within the jurisdiction of this Department.

I do not question the authority of Congress to prescribe the conditions under which claims against the United States may be prosecuted in the courts of the United States even by citizens of a foreign nation. That Congress has such authority was recognized in my opinion of February 8. None of the statutes relied upon by counsel purport to regulate the prosecution of claims against the United States.

Section 81, title 25, United States Code, contains restrictions and limitations designed to protect Indian tribes and individual Indians against the making of improvident contracts. The reference in that section to "Indians not citizens of the United States" does not refer to the subjects of a foreign nation, but to Indians residing in the United States who at the time of the enactment were not United States citizens. *Elk v. Wilkins*, 112 U. S. 94.

Section 1 of title 25, United States Code, creates the office of Commissioner of Indian Affairs. Section 2 commits to the Commissioner, under the direction of the Secretary agreeably to such regulations as the President may prescribe, the management of all Indian Affairs

and of all matters arising out of Indian relations. As pointed out in *Rainbow v. Young*, 161 Fed. 837, the authority so conferred on the Commissioner was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary, to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage.

Statutes such as these obviously were enacted not in an attempt to regulate the prosecution of claims against the United States, but in the exercise of the general guardianship powers possessed by the National Government over its Indian wards. These guardianship powers obviously do not extend to the subjects of a foreign nation. The national guardianship extends only to dependent Indian communities within the borders of the United States. *United States v. Sandoval*, 231 U. S. 28, 46. The theater for the exercise of the guardianship powers is "within the geographical limits of the United States." *United States v. Kagama*, 118 U. S. 375, 384.

The fact that the Canadian Pottawatomes may be descendants of ancestors at one time subject to the jurisdiction of the United States is not important. Their status is controlled, not by the nationality of their ancestors, but by their own nationality. As the subjects of a foreign nation, they are without the scope of the statutes enacted for the protection of Indians of the United States. Such statutes subject them to no disability. The validity of their contracts made in their own country necessarily must be determined by the laws of that country. In their contractual relations and dealings with others in this country, they occupy the position of other alien subjects, enjoying like rights and privileges. What these rights and privileges may be need not be determined here other than to point out that the protection extended to Indians of the United States by the statutes under consideration is not one of them. If these Canadian Indians are entitled to the protection of such statutes, they are entitled to the protection of all other general statutes enacted by Congress for the protection of the Indian wards of the United States. Aborigines of all other countries would be entitled to like protection. A construction permitting such a far-reaching result must be rejected as an unreasonable extension of the guardian and ward relationship existing between the United States and the Indians, and as a violation of the principle announced in the case of *The Apollon*, 9 Wheat. 362, that, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons upon whom the legislature have authority and jurisdiction.

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I am convinced that my former opinion is correct and should not be disturbed.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

EXTINGUISHMENT OF UNITED STATES LIEN ON LAND WITHIN RECLAMATION PROJECT BY REASON OF SALE FOR STATE OR LOCAL TAXES

Opinion, June 10, 1939

LOCAL TAX LIEN—PRIOR UNITED STATES LIEN UNDER WATER RIGHT APPLICATION.

A lien for local taxes assessed merely upon the interest of the property owner and subsequent in point of time to the lien of the United States under a water right application, is inferior to the lien of the United States.

PRIORITY OF UNITED STATES LIEN OVER LOCAL TAX LIEN WHERE NO STATE STATUTE.

A local tax lien which is not given priority by State statute is subordinate to a lien of the United States which is prior in time.

PRIORITY OF UNITED STATES LIEN OVER LOCAL TAX LIEN GIVEN PRIORITY OVER ALL OTHERS BY STATE STATUTE.

Where a local tax lien has, under State statute, priority over all other liens, this Department should, nevertheless, take the position, on the authority of the case of *City of New Brunswick v. United States*, 276 U. S. 547, that a lien of the United States which is prior in time is paramount to such tax lien and that a purchaser at a sale of the property for the nonpayment of such taxes takes subject to the lien of the United States.

MARGOLD, Solicitor:

My opinion has been requested as to whether a sale of land within a reclamation project for State or local taxes operates to extinguish a lien on the land created in favor of the United States under a duly recorded water right application to assure the payment of construction, operation, and maintenance charges.

It is understood that the inquiry relates to land in private ownership and, for purposes of this opinion, it will be assumed that the tax, for the nonpayment of which the land has been or is about to be sold under State law, was validly assessed on the land by the State or local authority and that the lien therefor attached subsequent in point of time to the recordation of the water right application.

Generally, liens take precedence in the order of their creation and those prior in time are prior in equity. See, *Portneuf-Marsh Co. v. Brown*, 274 U. S. 630, 636. But tax liens, which, by statute, are given a preferred status, are superior to any mortgage or lien on the land held by a private person, even though the tax was assessed and the lien therefor attached subsequent to such private mortgage or lien, and a purchaser at a sale of the land for such taxes, in the absence

of redemption, takes a clear and unencumbered title. Cooley, Taxation, Volume 3, 4th ed., pages 2470, 2943. The general rule, however, obtains where the tax is not declared to be a paramount lien. *Home Owners' Loan Corporation v. City of Phoenix*, 77 P. (2d) 818 (Ariz.); *Home Owners' Loan Corporation v. Mitchell*, 81 P. (2d) 268 (Wash.); Cooley, Taxation, *supra*, page 2472.

With respect to the effect of a tax sale upon liens or other property interests held by the United States upon the land, however, the authorities appear to be in conflict. Thus, in *Northern Pacific Railroad Co. v. Traill County*, 115 U. S. 600, in considering whether land granted by the United States to the railroad was taxable by the county, the court said, page 610:

No sale of land for taxes, no taxes can be assessed on any property, but by virtue of the sovereign authority in whose jurisdiction it is done. If not assessed by direct act of the legislature itself, it must, to be valid, be done under authority of a law enacted by such legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the State, must carry the title to the property sold, and if it does not do this, it is believed the assessment is void.

It follows that, if the assessment of these taxes is valid and the proceedings well conducted, *the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands.*
* * * [Italics supplied.]

The force of this dictum was modified by the Supreme Court in the case of *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375, where the tax was levied only upon the interest of the owner of the fee. It was there held that while the tax was valid, the interest of the United States in the land, which was merely a condition subsequent, could not be extinguished by the State. See, also, *United States v. Canyon County, Idaho*, 232 Fed. 985, 990. And in *City of New Brunswick v. United States*, 276 U. S. 547, where the tax was assessed upon the entire interest in the land, including the mortgage interest held by the United States Housing Corporation for the benefit of the United States to secure the unpaid purchase price, it was held that the city could enforce collection of the tax by the sale of the mortgagor's interest in the property only. The court said, page 556:

* * * But it is plain * * * that the City is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the Corporation as security for the payment of the unpaid purchase money, whether as an incident to the retention of the legal title or as a reserved lien or as a contract right to mortgages. That interest, being held by the Corporation for the benefit of the United States, is paramount to the taxing power of the State and cannot be subjected by the City to the sale for taxes.

We conclude that, although the City should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, as equitable owners, it should be enjoined from selling the lots for the collection

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of such taxes unless all rights, liens, and interests in the lots, retained and held by the Corporation as security for the unpaid purchase moneys, are expressly excluded from such sales, and they are made, by express terms, subject to all such prior rights, liens, and interest. * * *

It would seem that the case of *City of New Brunswick v. United States, supra*, is conclusive on the question here being considered. But cases have been found, none of which discuss the *New Brunswick* case, *supra*, in which Federal income tax liens have been held subordinate to local tax liens which were subsequent in time but which under State statute were given priority. *City of Winston-Salem v. Powell Paving Co.*, 7 Fed. Supp. 424; *In re Mt. Jessup Coal Co.*, 7 Fed. Supp. 603; *Berrymont Land Co. v. Davis Creek Land and Coal Co.*, 192 S. E. 577 (W. Va.); see also, *Sherwood v. United States*, 5 F. (2d) 991.

On the basis of the foregoing, it is my opinion that (1) a lien for local taxes assessed merely upon the interest of the property owner and subsequent in time to the lien of the United States under a water-right application, is inferior to the lien of the United States; (2) a local tax lien which is not given priority by State statute is subordinate to a lien of the United States which is prior in time; (3) where a local tax lien has, under State statute, priority over all other liens, this Department should, nevertheless, take the position, on the authority of the *New Brunswick* case, *supra*, that a lien of the United States which is prior in time is paramount to such tax lien and that a purchaser at a sale of the property for the nonpayment of such taxes takes subject to the lien of the United States.

Approved:

HARRY SLATTERY,

Under Secretary.

W. P. McINTOSH ET AL.

Decided June 27, 1939

GRAZING AND GRAZING LANDS—LEASE UNDER SECTION 15 OF TAYLOR GRAZING ACT—"PROPER USE OF CONTIGUOUS LAND."

The contention by an appellant from an award to the appellee of a grazing lease under section 15 of the amended Taylor Grazing Act that the award is not necessary in order to permit the appellee to make proper use of contiguous land, though true, constitutes no reason to change the award where the appellee would have equal reason for making the same contention against the award to the appellant.

GRAZING AND GRAZING LANDS—FENCE OBSTRUCTING STOCK DRIVEWAY AND ENCLOSING PUBLIC AND PRIVATE LANDS.

Establishment and maintenance of a fence enclosing both public and private land and obstructing the use of land withdrawn for a stock driveway is

in violation of law against the enclosure of public land and prior use of the public land so enclosed was not by sufferance but in violation of law.

TAYLOR GRAZING ACT—SECTION 15 LEASES—DEPRIVATION OF POSSESSION TO WHICH APPELLANT HAS NO EXCLUSIVE RIGHT.

In an appeal from the award of a grazing lease under section 15 of the amended Taylor Grazing Act, appellant cannot complain of injury in depriving him of possession of land to which he has no exclusive right of possession.

SLATTERY, Under Secretary:

By decision of November 1, 1938, the Commissioner of the General Land Office offered a 5-year grazing lease, Las Cruces 054913, to W. P. McIntosh and J. M. Cunningham for 1442.37 acres in Ts. 19 and 20 S., R. 35 E., and rejected the application for lease, 054871, of Herman Culp as to all lands included in said proposed lease. The proposed lease has been transmitted for execution, together with an appeal by Culp from the rejection of his application as to the N $\frac{1}{2}$ N $\frac{1}{2}$ Secs. 7, 8, 9, and 10 in said township. Upon the same date, an offer was made to Culp of 1679.84 acres in the same township and pursuant to the offer a lease was executed in his favor on December 27, 1938.

The N $\frac{1}{2}$ of each of the four sections above mentioned was subject to lease and applied for by both parties. The investigating agent found that the statutory preference right and the equitable rights of both parties were practically equal and therefore recommended an equal division of such area by offering the N $\frac{1}{2}$ N $\frac{1}{2}$ to Cunningham and McIntosh and the S $\frac{1}{2}$ N $\frac{1}{2}$ to Culp. It appears that there is a fence along the north boundary of the 4-mile strip in controversy, which is admitted to belong to Culp. Culp asserts that this fence is an old and long established division fence between the ranges of the parties and if the present award stands a needless expense will necessarily have to be incurred in removing the fence from its present position and rebuilding four and a quarter miles of fence a quarter of a mile further south. The appellees on the other hand allege that the east portion of the fence through sections 9 and 10 was one-half mile south of its present location until 1935 and was a "drift fence" used by stockmen, not for enclosure of any ranch holdings and not kept up for many years, but that after the passage of the Taylor Grazing Act it was repaired, straightened and removed to its present location by appellant. The records of the General Land Office show that the N $\frac{1}{2}$ Sec. 7, N $\frac{1}{2}$ Sec. 8, N $\frac{1}{2}$ Sec. 9 and NW $\frac{1}{4}$ Sec. 10 were withdrawn for a stock driveway November 12, 1917, and that the withdrawal was revoked November 18, 1936. The appellee points out that the fence unlawfully enclosed the driveway and contends no equities by reason of prior use of such tracts so enclosed can be predicated thereon.

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No reason is seen to change the award even if it be true, as contended, that the award to Cunningham and McIntosh is not necessary in order to permit their proper use of contiguous land, as it appears from the facts disclosed that the appellees would have equal reason for making the same contention in opposition to the award of the lands to appellant. As to the contention that the consequence of the award is to disturb existing range improvements, which is not in accordance with good range practice and does not materially benefit the awardee but does materially injure the appellant, it may be observed that whether the alleged improvement (the fence) has stood in its present position for many years or was partially put there in 1935, its establishment and maintenance was in violation of law against enclosure of public land with the land of the appellant and obstructed the use of the driveway, the fence operating to enclose public land. The prior use of the public land so enclosed was not by sufferance but in violation of law and no equities can be based upon it. The appellant cannot complain of injury in depriving him of actual possession of land to which he had no exclusive right of possession. Upon grant of the lease, the lessees are entitled to remove the fence, and if a division fence is necessary it must be left to the parties to arrange between themselves whether the one or the other shall assume the burden of removal or share the expense thereof between them.

For the reasons stated, no sufficient ground appears to disturb the award, the decision making it is affirmed, made final, the lease will be executed and the records returned to the General Land Office.

Affirmed.

CHARGES FOR RIGHTS-OF-WAY OVER PUBLIC LANDS

Opinion, July 8, 1939

PUBLIC LANDS—RIGHTS OF WAY—OIL PIPE LINES—TRANSMISSION LINES.

The Secretary may make a reasonable charge (a) for rights of way for oil pipe lines over the public land granted pursuant to section 28 of the act of February 25, 1920 (41 Stat. 437, 449), as amended, but not (b) for right of way for transmission line under section 5 (d) of the act of December 21, 1928 (45 Stat. 1057).

MARGOLD, Solicitor:

You [The Secretary of the Interior] have requested me to advise you whether you have legal authority to make a reasonable charge (a) for rights of way for oil pipe lines over the public lands of the United States, granted pursuant to section 28 of the act of February 25, 1920 (41 Stat. 437, 449), as amended, and (b) for rights of way for a transmission line under section 5 (d) of the act of December 21, 1928 (45 Stat. 1057).

Section 28 of the act of February 25, 1920, as amended by the act of August 21, 1935 (49 Stat. 674), provides:

That rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

The last paragraph of section 5 (d) of the act of December 21, 1928, provides:

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Neither of the provisions above quoted expressly confers authority to exact compensation for the rights of way granted thereunder. In 26 Op. Atty. Gen. 421, however, it was held that the Secretary of Agriculture had authority, under the act of February 15, 1901 (31 Stat. 790), to require the payment of a reasonable charge as a condition to the granting of a permit for rights of way through the national forests for the purposes contemplated by that act, even though that act did not specifically grant such authority. The ruling was predicated upon a previous opinion by the Attorney General (25 Op. Atty. Gen. 470) which involved the same question in connection with the act of June 4, 1897 (30 Stat. 35) and in which it was concluded that the act of 1897 contained "nothing inconsistent with the making of a reasonable charge on account of the use" of the forest reserves under a permit and that the authority to condition the granting of a permit upon the payment of a charge was implied in the

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discretionary power of the Secretary to grant or refuse the permit. Presumably pursuant to the above opinions of the Attorney General, the Secretary of the Interior has, through regulations (41 L. D. 454, 532), prescribed charges to be paid by permittees or grantees of rights of way under the act of February 15, 1901, *supra*, and the act of March 4, 1911 (36 Stat. 1253).

On the basis of the rationale in the above opinions of the Attorney General, I conclude that you are authorized to make reasonable charges for rights of way for pipe lines granted under section 28 of the act of February 25, 1920, as amended, *supra*. That section, like the act of February 15, 1901, vests a discretionary power in the Secretary of the Interior to grant rights of way through the public lands for pipe line purposes, and, in the exercise of that discretion, the Secretary could deny such rights of way if found incompatible with the purpose for which the public lands have been withdrawn or reserved. See 55 I. D. 211, 213. Moreover, the authority to impose a charge for the privilege of using public lands for such pipe lines may not only be implied from the discretionary authority of the Secretary to grant or deny pipe line rights of way but would also seem to come within the broad power of the Secretary to prescribe "regulations and conditions as to * * * use" of such rights of way. And the imposition by Congress of the express condition that such pipe lines shall be operated as common carriers and shall accept and transport, without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe lines, in my opinion is not inconsistent with, and does not necessarily preclude, an authority to require the payment of a reasonable charge as a condition to the granting of such rights of way.

A contrary conclusion, however, would seem to follow with respect to the use of public lands for transmission lines under section 5 (d) of the act of December 21, 1928, *supra*. It will be noted that this provision does not confer discretionary authority upon the Secretary of the Interior to grant rights of way for transmission lines for energy generated at the Boulder Canyon Project but constitutes, in and of itself, a grant of authority to use public lands necessary or convenient for that purpose. While it may be assumed that the Secretary of the Interior may prescribe the procedure for locating the right of way for such transmission lines, it is my opinion that he may not derogate from the grant by conditioning the use of the public lands necessary for such transmission lines upon the payment of any charge or fee.

Approved:

HAROLD L. ICKES, /
Secretary of the Interior.

SEPTEMBER 26, 1939.

MEMORANDUM TO THE COMMISSIONER OF THE GENERAL LAND OFFICE:

In your memorandum of July 28 you refer to my opinion of July 8 (57 I. D. 31) relative to the imposition by the Secretary of the Interior of charges for the use of public lands for rights of way under section 28 of the act of February 25, 1920 (41 Stat. 437, 449), as amended, and section 5 (d) of the act of December 21, 1928 (45 Stat. 1057), and inquire as to the legal authority of the Secretary to make charges for rights of way granted under the acts of March 3, 1875 (18 Stat. 482), March 3, 1891 (26 Stat. 1095), February 1, 1905 (33 Stat. 628), and November 9, 1921 (42 Stat. 212).

The acts of March 3, 1875, and March 3, 1891, are similar to section 5 (d) of the act of December 21, 1928, in that they neither vest in the Secretary of the Interior a discretionary power with respect to the granting of rights of way through the public lands nor authorize him to prescribe rules or regulations as to the use of such rights of way. I believe, therefore, that the Secretary may not require the payment of a charge or fee for the use of rights of way under those acts.

Under the act of February 1, 1905, however, rights of way for dams and reservoirs for municipal and mining purposes are granted within the forest reserves "under such rules and regulations as may be prescribed by the Secretary of the Interior." It is my opinion that under such general authority the Secretary may condition the use of such rights of way upon the payment of a reasonable charge. Moreover, section 5 of that act, which provides that "all money received from * * * the use of any lands or resources of said forest reserves shall be covered into the Treasury of the United States * * *," implicitly recognizes the propriety of making such a charge. See 25 Op. Atty. Gen. 470; 26 Op. Atty. Gen. 421.

Section 17 of the act of November 9, 1921, provides for the appropriation and transfer to the State highway department of public lands or reservations needed for highway purposes, if the Secretary of the department supervising the administration of such land or reservations "shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve." Inasmuch as there is no limitation as to the nature of the conditions that may be imposed, I am of the opinion that the Secretary of the Interior is authorized to require the payment of a reasonable charge as a condition to the use for highway purposes of a part of the public lands or reservations under the jurisdiction of this Department, if he should deem such a charge necessary for the adequate protection and utilization of such lands or reservations.

NATHAN R. MARGOLD, *Solicitor*.

EDWARD D. DUNN

Decided August 4, 1939

ATTORNEYS—PRACTICE BEFORE DEPARTMENT OF INTERIOR—NOTARIES.

A person who has notarized an application for a patent under the mining laws is disqualified to act as attorney for the claimant in proceedings before the Department.

ATTORNEYS—PRACTICE BEFORE DEPARTMENT OF INTERIOR—UNITED STATES COMMISSIONERS.

United States Commissioners are disqualified to act as attorneys or agents in any public land matter pending before the Department.

SLATTERY, *Under Secretary:*

On August 20, 1935, the New Park Mining Company filed an application for a patent under the mining laws. The application was notarized by the appellant, Edward D. Dunn, who was and is United States commissioner for the District of Utah. As commissioner he is authorized to administer oaths. 28 U. S. C. 525. The appellant also attempted to act as attorney for the claimant in the proceedings before the Department. By decision dated November 1, 1938, the Commissioner of the General Land Office held that he was disqualified to act as such attorney because he had notarized the application and because he was a United States commissioner. We think the decision was correct.

The act of June 29, 1906 (34 Stat. 622; Tit. 4, D. C. Code, Sec. 11), provides in part, "That no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent, in which he may be in any way interested before any of the Departments aforesaid." While the quoted portion was attached as a proviso to a statute concerning notaries public for the District of Columbia, the Attorney General and this Department have held that it applies to all notaries, and not merely to those of the District of Columbia. 26 Op. Atty. Gen. 236; *Rosetti v. Dougherty*, 50 L. D. 16; *Home Mining Co.*, 42 L. D. 526. The mandate of Congress constitutes a declaration that it is against public policy to attempt to act in the dual capacity of notary and attorney in the same matter.

An analogous provision is found in the Rules of Civil Procedure for the District Courts of the United States. Rule 28 (c) provides that no deposition shall be taken before a person who is an attorney for any of the parties in an action. See also, to same effect, 28 U. S. C. 639.

In harmony with the public policy thus declared by Congress, the first sentence of paragraph 10 of Circular 433 of the General Land Office, 44 L. D. 350, 352, provides:

No officer who takes an application, affidavit, or final proof in a case will be permitted to act as attorney therein.

And Regulation 9 of the Departmental Regulations Governing the Recognition of Agents and Attorneys before the Department, 46 L. D. 206, 210, provides:

No officer authorized to receive final proofs, or to officiate in the preparation and execution of applications and affidavits for entry of public lands, will be permitted to appear for and represent the claimant in any case pending before the Department, the General Land Office, or any district land office in which he shall have rendered such official service.

The fact is undisputed that the appellant acted as notary with respect to the application for a patent. It follows that he thus disqualified himself from acting as attorney for the applicant. That he acted as notary because the Register and Acting Register were absent when the application was filed is immaterial. Having taken the oath, regardless of the reasons for doing so, the regulations disqualified him from acting as attorney for the applicant.

There is another obstacle to his acting as attorney in the matter. The appellant is a United States commissioner, and as such is authorized to take testimony and proofs and verify affidavits in public land matters. 43 U. S. C. 254; 30 U. S. C. 40; 28 U. S. C. 525. Paragraph 10 of Circular 433 of the General Land Office, 44 L. D. 350, 352, in part provides:

No United States commissioner will, while holding that office, be recognized or permitted to appear as an agent or attorney for others in any matter pending before the Land Department affecting the title to public lands, nor will he be permitted to enroll himself as agent or attorney to practice before it.

It follows that as long as this regulation is in force and appellant is a United States commissioner, he may not act as attorney or agent in any public land matter pending before the Land Department.

The appellant argues that he is not an employee of the Department and there is no statutory authority for this regulation. The former fact is immaterial because he is not disqualified for any such reason and the regulation does not concern itself with such employees. The regulation is authorized by section 2478 of the Revised Statutes, 43 U. S. C. 1201, which grants power to the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, to "enforce and carry into execution, by appropriate regulations every part" of the public land laws "not otherwise specially provided for." It is also sanctioned by the statutes authorizing the Secretary of the Interior to "prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department * * *," 5 U. S. C. 493, and empowering the head of each department to prescribe regulations "for the government of his department * * * and the performance of its business * * *." 5

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U. S. C. 22. And apart from statute, authority to regulate the appearance of attorneys and agents before the Department is inherent in the office of the Secretary of the Interior. *Phillips v. Ballinger*, 37 App. D. C. 46, 49, 50; *Garfield v. United States ex rel. Stevens*, 32 App. D. C. 109, 140; *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117, 121, 122; 55 App. D. C. 229, 230.

The appellant also argues that there is now no reason for restricting United States commissioners or notaries public in Utah in this manner because, according to him, there are no public lands in that State outside of the grazing districts. Whatever validity there may be in the argument, it is immaterial while the regulations are in force. The argument may be relevant in the possible consideration of the question whether they should be revised in the light of new conditions. But while they are subsisting, they must be uniformly applied.

The decision of the Commissioner is affirmed.

Affirmed.

THE LEGAL STATUS OF THE INDIAN PUEBLOS OF NEW MEXICO AND ARIZONA

Opinion, August 9, 1939

INDIANS—PUEBLOS—POWERS OF SELF-GOVERNMENT.

Indian pueblos are endowed with powers of local self-government in all matters save where Congress has limited such powers by express legislation.

INDIAN LANDS—PUEBLOS—TITLE TO LANDS.

Legal title to "grant" lands and equitable title to "executive order reservation" lands, in each pueblo, is vested in the pueblo as a corporation and not in the individual members thereof.

INDIANS—CONTROL OF PUEBLOS BY CONGRESS.

The pueblos are subject to the same degree of control by Congress as are other Indian tribes.

INDIAN LANDS—PUEBLOS—TRANSFERS OF INTEREST IN LANDS—ADMINISTRATIVE SUPERVISION.

The pueblos are subject to administrative supervision with respect to any transfer of an interest in land.

INDIANS—PUEBLOS—CONSTITUTIONAL RIGHTS—REMEDIES FOR VIOLATION BY FEDERAL OFFICIALS.

The pueblos are entitled to the protection of the Federal Constitution and may resort to appropriate legal proceedings to maintain any rights violated by Federal officials.

INDIANS—PUEBLOS—STATE JURISDICTION.

The pueblos are not subject to State jurisdiction except in matters as to which Congress has made State law applicable or in suits in which the pueblo has duly invoked or submitted to the jurisdiction of State courts.

CORPORATIONS—PUEBLOS—POWERS.

The pueblos are public corporations which may enter into ordinary legal relations with third parties except in so far as such relations are limited by specific acts of Congress.

MARGOLD, *Solicitor*:

You [The Secretary of the Interior] have requested my opinion on the subject of the legal status of the Indian pueblos of New Mexico and Arizona, with particular reference to the following questions: (a) the relation of the pueblo to its members; (b) the relation of the pueblo to the Federal Government; (c) the relation of the pueblo to the State; and (d) the relation of the pueblo to third parties, i. e., private parties, not members of the pueblo.

These questions are discussed in the following cases which will be analyzed in the course of this opinion:

United States v. Joseph, 94 U. S. 614 (later overruled, in effect);

Zia v. United States, 168 U. S. 198;

United States v. Chavez, 175 U. S. 509;

United States v. Sandoval, 231 U. S. 28;

Lane v. Pueblo of Santa Rosa, 249 U. S. 110;

United States v. Candelaria, 271 U. S. 432;

United States v. Board of National Missions of Presbyterian Church, 37 F. (2d) 272;

Garcia v. United States, 43 F. (2d) 873;

Pueblo de San Juan v. United States, 47 F. (2d) 446;

Pueblo of Picuris v. Abeyta, 50 F. (2d) 12.

I. THE RELATION OF THE PUEBLO TO ITS MEMBERS

It is well settled by the decisions of the Supreme Court that the pueblos of New Mexico are Indian tribes entitled to exercise rights of self-government. Although a distinction was drawn in the case of *United States v. Joseph*, *supra*, between the pueblos and other Indian tribes, this distinction was later dismissed by the Supreme Court as irrelevant to the legal status of the pueblos.

In the case of *United States v. Joseph*, decided in 1876, the pueblos were described in the following terms (at pp. 616-617):

The character and history of these people are not obscure, but occupy a well-known page in the story of Mexico, from the conquest of the country by Cortez to the cession of this part of it to the United States by the treaty of Guadalupe Hidalgo. The subject is tempting and full of interest, but we have only space for a few well-considered sentences of the opinion of the chief justice of the court whose judgment we are reviewing.

"For centuries," he says, "the pueblo Indians have lived in villages, in fixed communities, each having its own municipal or local government. As far as their history can be traced, they have been a pastoral and agricultural people, raising flocks and cultivating the soil. Since the introduction of the Spanish Catholic missionary into the country, they have adopted mainly not only the

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Spanish language, but the religion of a Christian church. In every pueblo is erected a church, dedicated to the worship of God, according to the form of the Roman Catholic religion, and in nearly all is to be found a priest of this church, who is recognized as their spiritual guide and adviser. They manufacture nearly all of their blankets, clothing, agricultural and culinary implements, etc. Integrity and virtue among them is fostered and encouraged. They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, their habits, are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. The criminal records of the courts of the Territory scarcely contain the name of a pueblo Indian. In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof. This description of the pueblo Indians, I think, will be deemed by all who know them as faithful and true in all respects. Such was their character at the time of the acquisition of New Mexico by the United States; such is their character now."

It is clear that the pueblos of the Rio Grande fall within the definition of an Indian tribe given in *Montoya v. United States*, 180 U. S. 261 (at p. 226):

By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory * * *.

With respect to the Zuni and Hopi Pueblos, the association of different groups may give rise to questions as to whether the "tribe" is composed of a village or a number of villages. No attempt is made in this opinion to decide the intricate questions which may be raised by this situation. So far as the pueblos of the Rio Grande are concerned, each pueblo has been recognized as coextensive with a specific reservation.

The case of *United States v. Candelaria, supra*, distinctly holds that the pueblos of New Mexico are "Indian tribes" within the meaning of the Federal statutes.

The governmental powers of an Indian tribe over its own members have been analyzed in a separate opinion (*Powers of Indian Tribes*, 55 I. D. 14) and need not be restated at this point.

The general principle governing this branch of law was first stated by Chief Justice Marshall in the case of *Worcester v. State of Georgia*, 6 Pet. 515, 559:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights. * * * The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.

Following the case of *Worcester v. State of Georgia*, the decisions of the Federal courts uniformly maintain that the right of self-gov-

ernment is vested in the tribe and that the ordinary powers exercised by a State, directly or through municipalities, may be exercised by the recognized political authorities of the tribe, save insofar as tribal action may be restrained or annulled by the Congress of the United States.

The powers of self-government thus reserved to tribal authorities are summarized in the following terms, in the Solicitor's Opinion above referred to:

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

2. To define the conditions of membership within the tribe, to prescribe rules for adoption, to classify the members of the tribe and to grant or withhold the right of suffrage in all matters save those as to which voting qualifications are specifically defined by the Wheeler-Howard Act (that is, the referendum on the act, and votes on acceptance, modification or revocation of constitution, bylaws, or charter), and to make all other necessary rules and regulations governing the membership of the tribe so far as may be consistent with existing acts of Congress governing the enrollment and property rights of members.

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

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

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

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

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

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

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

The relation of the pueblo to its members involves not merely a relation of government but also a relation of land ownership. The

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decided cases uniformly recognized that legal title to "grant" lands and equitable title to "executive order reservation" lands, within each pueblo, lies in the pueblo itself.

Thus in the case of *United States v. Joseph, supra*, the Supreme Court declared (94 U. S. at pp. 617-618) :

If the pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and cannot for that reason be classed with the Indian tribes of whom we have been speaking.

* * * * *

Turning our attention to the tenure by which these communities hold the land on which the settlement of defendant was made, we find that it is wholly different from that of the Indian tribes to whom the act of Congress applies. The United States have not recognized in these latter any other than a passing title with right of use, until by treaty or otherwise that right is extinguished. And the ultimate title has been always held to be in the United States, with no right in the Indians to transfer it, or even their possession, without consent of the government.

* * * * *

The pueblo Indians, on the contrary, hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution—a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants were transferred to the United States.

Again, in the case of *United States v. Sandoval, supra*, the court declared through Mr. Justice Van Devanter (231 U. S. at p. 48) :

It also is said that such legislation cannot be made to include the lands of Pueblos, because the Indians have a fee simple title. It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo * * *.

The case of *United States v. Chavez, supra*, includes an account of the manner in which lands have been granted to or purchased by Indian pueblos.

Under the circumstances the pueblo may exercise the ordinary rights of a landowner, with respect to its own members. The designation suggested by Mr. Justice Van Devanter, "public lands of the pueblo" is significant. The individual Indian's rights of possession are similar to those of a licensee having the authority to use the land. With respect to his occupancy of land, he has no rights as against the pueblo. The pueblo may at any time revoke an individual's right of occupancy either because of his removal from the pueblo, or because of his failure to make proper use of the assigned parcel of land, or for any other reason.

The foregoing analysis does not, however, apply to improvements which an individual may place upon the land assigned to him. In the absence of proof of some contrary custom, it would appear that such improvements are the property of the individual.

The proposition that occupancy of tribal land does not create any vested rights in the occupant as against the tribe is supported by a long line of court decisions:

Sizemore v. Brady, 235 U. S. 441;

Franklin v. Lynch, 233 U. S. 269;

Gritts v. Fisher, 224 U. S. 640;

Journeycake v. Cherokee Nation and United States, 28 Ct. Cls. 281;

Sac and Fox Indians of Iowa v. Sac and Fox Indians of Oklahoma and the United States, 45 Ct. Cls. 287, affd. 220 U. S. 481;

Dukes v. Goodall, 5 Ind. T. 145, 82 S. W. 702;

In re Narragansett Indians, 20 R. I. 715, 40 Atl. 347;

Terrance v. Gray, 156 N. Y. Supp. 916;

Reservation Gas Co. v. Snyder, 88 Misc. 209, 105 N. Y. Supp. 216.

In the case of *Sizemore v. Brady*, *supra*, the Supreme Court declared (p. 446):

* * * lands and funds belonging to the tribe as a community, and not to the members severally or as tenants in common.

Similarly, in *Franklin v. Lynch*, *supra*, the Supreme Court declared (p. 271):

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

The nature of tribal or communal property is clearly set forth in *Journeycake v. Cherokee Nation and United States*, *supra*, where the Court of Claims declared (p. 302):

The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners * * *.

Similarly, in the case of *Hayes v. Barringer*, 168 Fed. 221, the court declared, in considering that status of Choctaw and Chickasaw tribal lands:

* * * At that time these were the lands of the Choctaw and Chickasaw Nations, held by them, as they held all their lands, in trust for the individual members of their tribes, in the sense in which the public property of representative governments is held in trust for its people. But these were public

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

The extent of any individual's rights in tribal property are subject to such limitations as the tribe may see fit to impose. Thus in *Reservation Gas Co. v. Snyder*, *supra*, it was held that an Indian tribe might dispose of minerals on tribal lands which had been assigned to individual Indians for private occupancy, since the individual occupants had never been granted any specific mineral rights by the tribe.

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

The foregoing decisions relate to tribes other than the Pueblos, but the arguments and conclusions therein found are equally applicable to the pueblo lands. Indeed, since a pueblo is recognized as a body corporate, its legal control over lands is even clearer than can be the case with tribes which have no defined legal status. See *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110; *United States v. Lucero*, 1 N. M. 422.

Among the regulations traditionally imposed by the various pueblos upon the use and disposition of tribal land must be listed the common rule that persons abandoning the pueblo forfeit their rights of occupancy. A similar rule has frequently been applied by the United States Government itself in the distribution of tribal lands and funds. Thus in the case of *Sac and Fox Indians of Iowa v. Sac and Fox Indians of Oklahoma and United States*, *supra*, the Court of Claims found that Indians who had voluntarily abandoned the given reservation thereby forfeited all claim to participation in the distribution of tribal funds.

The distinction drawn between rights to improvements and rights to the land itself conforms not only with the established rules of equity, but also with principles of common fairness which have been adopted by the Interior Department and by various Indian tribes in dealing with assignments of tribal land.

In *Journeycake v. Cherokee Nation and United States*, *supra*, the court draws attention to the distinction between tribal land and individual improvements laid down by the Constitution of the Cherokee Nation (adopted September 6, 1839). Section 2 of that Constitution

SEC. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made or may rightfully be in possession of them: *Provided*, That the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in any manner whatever, to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove with his effects out of the limits of this Nation, and become a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: *Provided, nevertheless*, That the national council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission.

Available evidence indicates that this distinction between tribal land and individual improvements is consistent with the established customs and practices of the pueblos.

The following cases support this distinction, with respect to Indian tribal lands:

McGlasson v. State, 130 Pac. 1174;

Rush v. Thompson, 2 Ind. T. 557, 53 S. W. 333.

Even vested rights in individual improvements, however, may be limited by the laws or customs of the Indian tribe. In effect, such laws and customs represent conditions upon the grant of individual occupancy rights, to which the individual is deemed to consent upon receiving such rights. Thus, in *Myers v. Mathis*, 2 Ind. T. 3, 46 S. W. 178, the court upheld the validity of a Chickasaw statute of limitations, whereby an individual Indian suffered a loss of his improvements by reason of his absence for a fixed period.

It is fair to conclude that the right of an individual to remove or otherwise dispose of improvements upon tribal lands is a vested right subject only to such limitations as may be imposed by established tribal rules or customs.

II. THE RELATION OF THE PUEBLO TO THE FEDERAL GOVERNMENT

The relationship between the Indian Pueblos and the United States raises four basic questions: (1) To what extent are the pueblos subject to congressional control; (2) To what extent are the pueblos subject to administrative supervision by the Government; (3) May the pueblos resort to legal proceedings against the United States or its officers; (4) Are the pueblos entitled to the protection of the constitution with respect to acts done under Federal authority.

(1) The first of these questions is fully answered in the case of *United States v. Sandoval, supra*. In that case, it was said (pp. 44-47):

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The question to be considered, then, is, whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood.

There are as many as twenty Indian pueblos scattered over the State, having an aggregate population of over 8,000. The lands belonging to the several pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee simple ownership under grants from the King of Spain made during the Spanish sovereignty and confirmed by Congress since the acquisition of that territory by the United States. 10 Stat. 308, c. 103, Sec. 8; 11 Stat. 374, c. 5. As respects six of the pueblos, one being the Santa Clara, adjacent public lands have been reserved by executive orders for the use and occupancy of the Indians.

The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. * * * Upon the termination of the Spanish sovereignty they were given enlarged political and civil rights by Mexico, but it remains an open question whether they have become citizens of the United States. See treaty of Guadalupe Hidalgo, Articles VIII and IX, 9 Stat. 922, 929; *United States v. Joseph*, 94 U. S. 614, 618; *Ellis v. Wilkins*, 112 U. S. 94. Be this as it may, they have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities. Thus, public moneys have been expended in presenting them with farming implements and utensils, and in their civilization and instruction; agents and superintendents have been provided to guard their interests; central training schools and day schools at the pueblos have been established and maintained for the education of their children; dams and irrigation works have been constructed to encourage and enable them to cultivate their lands and sustain themselves; public lands, as before indicated, have been reserved for their use and occupancy where their own lands were deemed inadequate; a special attorney has been employed since 1898, at an annual cost of \$2,000, to represent them and maintain their rights; and when latterly the Territory undertook to tax their lands and other property, Congress forbade such taxation, saying: "That the lands now held by the various villages or pueblos of Pueblo Indians, or by individual members thereof, within Pueblo reservations or lands, in the Territory of New Mexico, and all personal property furnished said Indians by the United States, or used in cultivating said lands, and any cattle and sheep now possessed or that may hereafter be acquired by said Indians, shall be free and exempt from taxation of any sort whatsoever, including taxes heretofore levied, if any, until Congress shall otherwise provide." 33 Stat. 1048, 1069, c. 1479. An exempting provision was also inserted in Sec. 2 of the Enabling Act. [At pp. 38-40.]

* * * * *

During the Spanish dominion the Indians of the pueblos were treated as wards requiring special protection, were subjected to restraints and official supervision in the alienation of their property, and were the beneficiaries of a law declaring "that in the places and pueblos of the Indians no wine shall enter, nor shall it be sold to them." *Chouteau v. Molony*, 16 How. 203, 237, Laws of the Indies, Book 6, title 1, laws 27 and 36, title 2, law 1; Book 5, title 2, law 7; Book 4, title 12, laws 7, 9, 16-20; Cedula and Decrees shown in Hall's Mexican Law, Secs. 162-171. After the Mexican succession they were elevated to citizenship and civil rights not before enjoyed, but whether the prior tutelage and restrictions were wholly terminated has been the subject of differing opinions. * * *

But it is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within

the limits of the United States may be subjected to its guardianship and protection as dependent wards turns upon other considerations. See *Pollard v. Hagan*, 3 How. 212, 225. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State. As was said by this court in *United States v. Kagama*, 118 U. S. 375, 384: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." In *Tiger v. Western Investment Co.*, 221 U. S. 286, 315, prior decisions were carefully reviewed and it was further said: "Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. *United States v. Holliday*, 3 Wall. 407, 419; *United States v. Rickert*, 188 U. S. 432, 443, 445; *Matter of Heff*, 197 U. S. 488, 499; *Tiger v. Western Investment Co.*, *supra*.

As before indicated, by a uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling. * * *

In view of the foregoing analysis, there can be no doubt that the Pueblos are subject to a general legislative control by Congress, and that Congress may limit, alter, or extend the powers of self-government now vested in the Pueblos.

(2) The second question is less simply answered. Administrative control of activities of the Pueblos, particularly activities affecting third parties, has been clearly defined by court decisions in certain limited fields, but outside these fields there is much room for differences of opinion.

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One of the points on which administrative control is clearly established relates to the disposition of real property. Here the cases hold that the Pueblos have no power to dispose of real property except with the consent of the United States. Such consent may be given expressly by the Secretary of the Interior, or implicitly through a legal action involving pueblo lands. In the latter case the United States must be a party to the action, or else the Pueblos must be represented by an attorney appointed by the United States, if the decree against the Pueblos is to have validity.

These propositions are set forth in the opinion of the Supreme Court delivered by Mr. Justice Van Devanter in *United States v. Candelaria*, *supra*.

The first question certified to the Supreme Court in that case was (p. 438):

1. Are Pueblo Indians in New Mexico in such status of tutelage as to their lands in that State that the United States, as such guardian, is not barred either by a judgment in a suit involving title to such lands begun in the territorial court and passing to judgment after statehood or by a judgment in a similar action in the United States District Court for the District of New Mexico, where, in each of said actions, the United States was not a party nor was the attorney representing such Indians therein authorized so to do by the United States?

This question was answered in the following terms (pp. 441-444):

Many provisions have been enacted by Congress—some general and others special—to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges. One of these provisions, now embodied in section 2116 of the Revised Statutes, declares: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." This provision was originally adopted in 1834, c. 161, sec. 12, 4 Stat. 730, and, with others "regulating trade and intercourse with the Indian tribes," was extended over "the Indian tribes" of New Mexico in 1851, c. 14, sec. 7, 9 Stat. 587.

While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious, and disposed to peace, they are Indians in race, customs, and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term "Indian tribe" was used in the acts of 1834 and 1851 in the sense of "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U. S. 261, 266. In that sense the term easily includes Pueblo Indians.

Under the Spanish law Pueblo Indians, although having full title to their lands, were regarded as in a state of tutelage and could alienate their lands

only under governmental supervision. See *Chouteau v. Molony*, 16 How. 203, 237. Text writers have differed about the situation under the Mexican law; but in *United States v. Pico*, 5 Wall. 536, 540, this Court, speaking through Mr. Justice Field, who was specially informed on the subject, expressly recognized that under the laws of Mexico the government "extended a special guardianship" over Indian pueblos and that a conveyance of pueblo lands to be effective must be "under the supervision and with the approval" of designated authorities. And this was the ruling in *Sunol v. Hepburn*, 1 Cal. 254, 273, *et seq.* Thus it appears that Congress in imposing a restriction on the alienation of these lands, as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such Indians.

* * * * *

With this explanation of the status of the Pueblo Indians and their lands, and of the relation of the United States to both, we come to answer the questions propounded in the certificate.

To the first question we answer that the United States is not barred. Our reasons will be stated. The Indians of the pueblo are wards of the United States and hold their lands subject to the restriction that the same cannot be alienated in any-wise without its consent. A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. The United States has an interest in maintaining and enforcing the restriction which cannot be affected by such a judgment or decree. This Court has said in dealing with a like situation: "It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest. The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent." *Bowling and Miami Improvement Co. v. United States*, 233 U. S. 528, 534. And that ruling has been recognized and given effect in other cases. *Privett v. United States*, 256 U. S. 201, 204; *Sunderland v. United States*, 266 U. S. 226, 232.

But, as it appears that for many years the United States has employed and paid a special attorney to represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit. *Souffront v. Compagnie des Sucreries*, 217 U. S. 475, 486; *Lovejoy v. Murray*, 3 Wall. 1, 18; *Claffin v. Fletcher*, 7 Fed. 851, 852; *Maloy v. Duden*, 86 Fed. 402, 404; *James v. Germania Iron Co.*, 107 Fed. 597, 613.

The decision reached in the *Candelaria* case has been followed in a number of cases arising on appeals from decrees of the Pueblo Lands Board.

As was said in the case of *United States v. Board of National Missions of the Presbyterian Church*, *supra* (p. 274) :

It is now settled that the Pueblo Indians are wards of the government. *United States v. Sandoval*, 231 U. S. 28, 34 S. Ct. 1, 58 L. Ed. 107; *United States v. Candelaria*, 271 U. S. 432, 46 S. Ct. 561, 70 L. Ed. 1023. They are subject to the general rule that "no stipulations, contracts or judgments rendered in suits to which the government is a stranger, can affect its interests." * * *

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Again, in the case of *Garcia v. United States, supra*, the court declared (p. 878) :

It was settled, by the decision in *United States v. Candelaria*, 271 U. S. 432, 46 S. Ct. 561, 70 L. Ed. 1023, that the Pueblo Indians are under the guardianship of the United States, and that they are within the Non-Intercourse Act (Act June 30, 1834, 4 Stat. 730; Act Feb. 27, 1851, 9 Stat. 587), and that title, once vested in the Pueblos, could not be divested without the consent of the United States. * * *

A similar opinion is expressed in *Pueblo of Picuris v. Abeysa, supra*.

The latter two cases arose under the Pueblo Lands Act of June 7, 1924 (43 Stat. 636), which, in effect, put upon the statute books the rule announced in the *Candelaria* case. Section 2116 of the Revised Statutes, cited above and relied upon in the *Candelaria* decision, was followed substantially in section 17 of the Pueblo Lands Act, which reads :

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

The language of this act is broad enough to cover even an assignment of land from a pueblo to one of its members, if such assignment amounts to a transfer of right, title, or interest in real property. Any such assignment, made by the pueblo without the prior approval of the Secretary of the Interior, would be, according to the statute, without validity in law or equity. On the other hand, if an assignment does not convey an interest in the land itself, it does not fall within the scope of the statute cited. It becomes important therefore to distinguish between those transactions which convey an interest in real property and those transactions which, while relating to the use of real property, do not create an interest therein.

This distinction has been considered by the courts in a great variety of cases, which seek to distinguish an interest in land from a mere license. A recent decision in the Circuit Court of Appeals for the Eighth Circuit, *Tips v. United States*, 70 Fed. (2d) 525, 526, holds :

A mere permission to use land, dominion over it remaining in the owner and no interest or exclusive possession of it being given, is but a license. (Citing authorities.)

The essential characteristic of a license to use real property, as distinguished from an interest in real property, is that in the former

case the licensee has no vested right as against the licensor or third parties. He has only a privilege, which the licensor may terminate.

As Justice Holmes pointed out, in *Marrone v. Washington Jockey Club*, 227 U. S. 633, 636: "A contract binds the person of the maker but does not create an interest in the property that it may concern, unless it also operates as a conveyance. * * * But if it did not create such an interest, that is to say, a right *in rem* valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach."

Put in its simplest terms, the rule is that a landowner does not transfer an *interest* in his land by allowing another to *use* the land. Thus, for instance, a member of the landowner's family, inasmuch as he is "a bare licensee of the owner, who has no legal interest in the land," cannot derive from his legal privilege to *use* the land a right against the landowner or against third parties. *Elliott v. Town of Mason*, 81 Atl. 701 (N. H. 1911). See also *Keystone Lumber Co. v. Kolman*, 69 N. W. 165 (Wis. 1896).

The distinction established by the cases between a license and an interest in land is entirely consistent with the purpose of the Pueblo Lands Act of June 7, 1924.

A reading of the legislative history of that act shows that it was designed to stop the loss of pueblo lands by stopping transactions from which a claim against the pueblo might ultimately be derived. Thus if a pueblo, under the guise of making assignments, should in effect grant a life estate or even a leasehold interest to an individual member of the pueblo, there would be a transaction upon which a claim adverse to the pueblo might be founded either by the individual or by a third party to whom he might convey his rights. On the other hand, the action or inaction of the pueblo authorities in permitting a pueblo member to use a designated area of pueblo land would not of itself create any interest in land adverse to the title of the pueblo itself, any more than the decision of a family council to allot certain rooms or buildings to certain members of the family would constitute a transfer of an interest in land.

In between these two extremes difficult "twilight zone" cases may appear. In these cases, the courts have looked to the intention of the parties to determine whether the transaction was intended to create a right against the landowner and against third parties. If it was so intended, the transaction must be regarded as a conveyance of an interest in real property. If not, a mere license relationship is established.

Even the language of leasing will not suffice to create a lease relationship if the transaction leaves complete power over the land in the hands of the landowner. Thus, in the case of *Tips v. United*

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States, 70 F. (2d) 525, the court found that an instrument which used the terms "landlord," "tenant," "lease," etc. was nevertheless a mere license, because the so-called lessor, the War Department, had no power to lease the property or to grant more than a revocable permit to use the property.

Under the foregoing authorities, the meaning to be attached to any assignment that may be made by a Pueblo will depend upon the wishes of the Indians themselves. If they mean to create a bare license to use and enjoy tribal property, there is no statute under which the Secretary of the Interior can prevent the Indian assignee from using such property or prevent the pueblo from peaceably tolerating such use and protecting the assignee against intruders.

It should be equally clear, under the principles above set forth, that the pueblo lacks power to grant more than a mere license and that any oral transaction or written instrument purporting to grant an interest in land valid against the pueblo itself or against third parties would be void at law and in equity unless approved in advance by the Secretary of the Interior.

The cases cited at pages 42-44 above show that the relation between an Indian tribe and its members has regularly been viewed as a relation of license and not of leasehold. Although this would be the presumption in a case arising within a pueblo, the presumption might be rebutted by convincing evidence and each case would have to be decided with reference to the special written or unwritten laws and special customs applicable within the pueblo.

The foregoing authorities establish at least the general principle that the power of the pueblo to dispose of real property is subject to administrative control by the executive branch of the Government.

Apart from such administrative control, those pueblos that have voted to accept the act of June 18, 1934 (48 Stat. 984), are, of course, bound by the prohibitions against the alienation of tribal land which are embodied in section 4 of that act. It should be noted, however, that this prohibition does not extend to exchanges of land of equal value.

The power of the Executive extends to the bringing of suits on behalf of a pueblo in matters affecting pueblo lands and controlling the conduct of such litigation. The basis of such power is set forth in the passage above quoted from *United States v. Candelaria*, in which Mr. Justice Van Devanter said: "The suit was brought on the theory that these Indians are wards of the United States and that it therefore has authority and is under a duty to protect them in the ownership and enjoyment of their lands" (271 U. S., at 437). Under section 1 of the Pueblo Lands Act which provides that "the United States of America, in its sovereign capacity as guardian of said pueblo Indians" shall institute certain actions to quiet title of pueblo

lands, a number of suits have been brought on behalf of Indian pueblos.

See for example *United States v. Board of National Missions of Presbyterian Church, supra*; *Garcia v. United States, supra*; *Pueblo of Picuris v. Abeyta, supra*.

In the last cited case the question was raised whether the pueblo itself was precluded from appealing an adverse decision sustained in an action instituted by the United States on behalf of the pueblo. The court declared (pages 13-14) :

In compliance with this section, the Attorney General brought this action in the name of the United States as guardian of the Indians of the Pueblo of Picuris. The decision in the court below was adverse to the United States as to a portion of the lands in controversy. The Attorney General declined to appeal from said decision, although urged to do so by the pueblo. Thereupon the pueblo filed its petition for appeal, alleging that it is a corporation organized under the laws of the state of New Mexico, and a community of Pueblo Indians, and the owner in fee simple, under a grant from the King of Spain, of the lands in controversy. The petition for appeal alleges that the pueblo was advised that it had no right to intervene in said suit, and did not in fact intervene, but that it did cooperate with the Attorney General in the trial of said cause, and that it is the party beneficially interested in the determination thereof. The trial court declined to allow the appeal, the petitioner not being a party to the litigation; the appeal was allowed by a Circuit Judge for the purpose of permitting the matter to be presented to this court. The appellees now move to dismiss the appeal.

* * * * *

It thus appears that at any time prior to the filing of the field notes and plats by the Secretary of the Interior in the office of the Surveyor General of New Mexico (Pueblo Lands Act, sec. 13, 43 Stat. 640 [25 USCA sec. 331 note]) either the United States or the pueblo may maintain an action involving the title and right to lands of the pueblo; but a decree rendered in a suit brought by the pueblo does not bind the United States, while a decree rendered in a suit brought by the United States does bind the pueblo.

* * * * *

The statutory power of the United States to initiate actions for the Pueblo Indians necessarily involves the power to control such litigation. If the private attorneys of the pueblo could dictate the averments of the bill, or could prevail in questions of judgment in the introduction of evidence, there would be no substance to the guardianship of the United States over the Indians. There cannot be a divided authority in the conduct of litigation; divided authority results in hopeless confusion. If the United States has power to dismiss with prejudice prior to trial, as has been held, it certainly has power to decline to appeal after trial, if it believes the decision of the trial court is without error.

In view of the foregoing authorities it is clear that the United States is empowered by virtue of its relation to the pueblo and pursuant to special legislation based on that relationship to conduct and control litigation on behalf of the pueblos concerned for the protection of pueblo lands.

No attempt will be made in this opinion to analyze exhaustively the realm in which the Executive arm of the Federal Government is em-

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powered to supervise acts of the pueblo government. It is enough for the present to point on the one hand to the foregoing cases upholding such supervision in matters affecting the disposition of pueblo lands and litigation with reference to such lands and to note on the other hand that pueblo rights of self-government in matters internal to the pueblo have been constantly recognized in all the decided cases. In the Constitution of the Santa Clara Pueblo, approved by the Secretary of the Interior on December 20, 1935, an attempt was made to distinguish between matters over which the pueblo has sovereign power, under existing Federal law, and matters over which the Interior Department has final control. This attempt is embodied in the fifth numbered paragraph of Article IV, section 1 of the Pueblo Constitution. This paragraph, dealing with powers which are not specifically enumerated in section 16 of the act of June 18, 1934, but which are comprehended under the general phrase "all powers vested in any Indian tribe or tribal council by existing law," reads as follows:

5. To enact ordinances, not inconsistent with the constitution and bylaws of the pueblo, for the maintenance of law and order within the pueblo and for the punishment of members, and the exclusion of nonmembers violating any such ordinances, for the raising of revenue and the appropriation of available funds for pueblo purposes, for the regulation of trade, inheritance, land-holding, and private dealings in land within the pueblo, for the guidance of the officers of the pueblo in all their duties, and generally for the protection of the welfare of the pueblo and for the execution of all other powers vested in the pueblo by existing law: *Provided*, That any ordinance which affects persons who are not members of the pueblo shall not take effect until it has been approved by the Secretary of the Interior or some officer designated by him.

(3) A third point in the relation of the pueblo to the Federal Government is raised by the question whether the pueblos may resort to legal proceedings against the United States or its officers. While this question is essentially a question of legal procedure, the substantive rights of the pueblos must depend in a very large degree upon the answer given to this question. The question is distinctly and unmistakably answered in the opinion of the Supreme Court read by Mr. Justice Van Devanter in *Lane v. Pueblo of Santa Rosa, supra*. In that case the pueblo of Santa Rosa was recognized as entitled to bring suit against the Secretary of the Interior to enjoin that official from offering, listing, or disposing of, as public lands of the United States, certain lands claimed by the Indian pueblo.

Again, in the case of *Pueblo de San Juan v. United States, supra*, the right of a pueblo to bring suit against the United States, under the Pueblo Lands Act (43 Stat. 637), was upheld.

In accordance with the familiar rule a suit against the United States must be based upon legislation through which the United States permits itself to be sued. Suits against officers of the United States based on alleged illegal acts require no such statutory authority.

(4) A final question which the relation of the pueblo to the Federal Government has raised is the question whether the pueblos are entitled to the protection of the Federal Constitution with respect to acts done under Federal authority.

The opinion of the Supreme Court in the above-cited case of *Lane v. Pueblo of Santa Rosa*, answers this question in the following terms (pp. 113-114) :

The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court, of which *Lone Wolf v. Hitchcock*, 187 U. S. 553, is an illustration.

Again, it was held in the case of *Garcia v. United States*, *supra*, that Congress could not constitutionally deprive a pueblo of the right to plead a New Mexico statute of limitations. The court declared (p. 878) :

We conclude that such Indian pueblos were entitled to the benefits of the New Mexico statutes of limitation and that the United States, as their guardian, may plead such statutes in their behalf.

If this be true, then the Pueblo of Taos, having acquired fee simple title to the Tenorio tract under section 3364, *supra*, prior to the adoption of the Pueblo Lands Act, could not be deprived of that title by legislative fiat.

In accordance with the foregoing decisions it is plain that while the Indian pueblos have been considered for certain purposes as wards of the Federal Government they are entitled not only to bring suit against that Government and its officers but to claim as against such Government and officers the protections guaranteed by the Federal Constitution.

III. THE RELATION OF THE PUEBLO TO THE STATE

A third set of problems affecting the legal status of the pueblos revolves around the relation that the pueblos bear to the States in which they are situated.

As is pointed out in the opinion of Mr. Justice Van Devanter in *United States v. Sandoval*, *supra*, the Enabling Act governing the ad-

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mission of New Mexico into the Union (Sec. 2, Act of June 20, 1910, 36 Stat. 557) specifically provided that New Mexico must recognize "the absolute jurisdiction and control by the Congress of the United States" with respect to lands owned or occupied by the Pueblo Indians.

The pertinent portions of the Enabling Act provide (Vol. 231, p. 37):

SEC. 2. That * * * the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed State, all in the manner and under the conditions contained in this Act. * * *

"And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—

"First. That * * * the sale, barter or giving of intoxicating liquors to Indians and *the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.*

"Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title * * * to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or *any prior sovereignty*, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * * but nothing herein, or in the ordinance herein provided for shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe * * *

"Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to *all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.*"

It appears, therefore, that the Indian pueblos are in general exempt from State jurisdiction and State control.

Two exceptions may be noted to this general rule. In the first place, Congress may consent to State jurisdiction over Indian country for specified purposes and has in fact done so with respect to certain educational and sanitary laws (U. S. C., Tit. 25, sec. 231). In the second place, the State may exercise jurisdiction over non-Indians within an Indian pueblo in matters that do not affect the Indians or the Federal Government (see 55 I. D. 58). Apart from these exceptions the Indian pueblo is not subject to State jurisdiction at any point.

It has occasionally been assumed that where a State has no jurisdiction over the land of an Indian pueblo, the pueblo has no standing in the courts of the State. This assumption is entirely erroneous. Despite the lack of State jurisdiction over pueblo lands, the pueblo may, nevertheless, bring suit in State courts, so far as State law permits, and demand, in other respects, recognition as a public corporation. The judgments and ordinances of a pueblo are entitled to the same sort of recognition that State courts give to the acts of another State or nation. The pueblo as a sovereign body is not subject to suit in State courts, except with its own consent. The pueblo is not for that reason a pariah. It is entitled at the very least to all the rights which a foreigner may assert in the courts of a State.

Thus in the case of *United States v. Candelaria*, *supra*, a suit to quiet title brought by the United States as guardian of the Pueblo of Laguna, the issue was raised whether such suit was barred by an earlier decree of a State court. The court formulated and decided this issue in the following terms (pp. 438-439, 444-445):

In their answer the defendants denied the wardship of the United States and also set up in bar two decrees rendered in prior suits brought against them by the pueblo to quiet the title to the same lands. One suit was described as begun in 1910 in the territorial court and transferred when New Mexico became a State to the succeeding state court, where on final hearing a decree was given for the defendants on the merits. * * * In the replication the United States alleged that it was not a party to either of the prior suits; that it neither authorized the bringing of them nor was represented by the attorney who appeared for the pueblo; and therefore that it was not bound by the decrees.

On the case thus presented the court held that the decrees operated to bar the prosecution of the present suit by the United States, and on that ground the bill was dismissed. An appeal was taken to the Circuit Court of Appeals, which, after outlining the case as just stated, has certified to this Court the following questions:

* * * * *

2. Did the state court of New Mexico have jurisdiction to enter a judgment which would be *res judicata* as to the United States, in an action between Pueblo Indians and opposed claimants concerning title to land, where the result of that judgment would be to disregard a survey made by the United States of a Spanish or Mexican grant pursuant to an act of Congress confirming such grant to said Pueblo Indians?

* * * * *

Coming to the second question, we eliminate so much of it as refers to a possible disregard of a survey made by the United States, for that would have no bearing on the court's jurisdiction or the binding effect of the judgment or decree, but would present only a question of whether error was committed in the course of exercising jurisdiction. With that eliminated, our answer to the question is that the state court had jurisdiction to entertain the suit and proceed to judgment or decree. Whether the outcome would be conclusive on the United States is sufficiently shown by our answer to the first question.

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The proposition that judgments and decrees of the pueblo in matters within its competent jurisdiction are entitled to full faith and credit in the courts of any State is supported by the reported cases which consider the legal status of decisions by tribal courts.

In the case of *Standley v. Roberts*, 59 Fed. 836, app. dism. 17 Sup. Ct. 999, the court declared (p. 845):

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

And in the case of *Raymond v. Raymond*, 83 Fed. 721, the court declared (p. 722):

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

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

An analysis of the legal status of decisions of Indian tribal courts is found in the opinion on "Powers of Indian Tribes" cited above at 55 I. D. 56, and in an illuminating article by Professor W. G. Rice, Jr., on "The Position of the American Indian in the Law of the United States" ((1934) 16 Jour. Comp. Leg. (3d series) part 1, p. 78).

IV. THE RELATION OF THE PUEBLO TO THIRD PARTIES

In dealing with the legal relation of the pueblo to its own members, to the United States, and to the State, we have necessarily covered the basic points which define the legal relation of the pueblo to other persons. The three basic points that define this relation are: (1) the corporate capacity of the pueblo; (2) the ownership of land by the pueblo; and (3) the status of the pueblo as a ward of the United States. A brief summary is offered of the effect of statutes and court decisions on each of these points.

(1) With respect to the corporate status of the pueblo, the following statement is quoted from a memorandum of Acting Solicitor Kirgis, dated June 30, 1936, addressed to the Commissioner of Indian Affairs:

That the Indian pueblos as corporations has long been recognized, not only by the State courts but by the Federal courts as well. As was said by Mr. Justice Van Devanter, in *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, 112:

"* * * During the Spanish, as also the Mexican, dominion it enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property. With much reason this might be

regarded as enabling and entitling it to become a suitor for the purpose of enforcing or defending its property interests. See *School District v. Wood*, 13 Massachusetts, 193, 198; Cooley's Const. Lim., 7th Ed., p. 276; 1 Dillon Munic. Corp., 5th ed., secs. 50, 64, 65. But our decision need not be put on that ground, for there is another which arises out of our own laws and is in itself sufficient. After the Gadsden Treaty Congress made that region part of the Territory of New Mexico and subjected it to 'all the laws' of that Territory. Act August 4, 1854, c. 245, 10 Stat. 575. One of those laws provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be a body corporate and as such capable of suing or defending in respect of such lands. Laws New Mex. 1851-2, pp. 176 and 418. If the plaintiff was not a legal entity and juristic person before, it became such under that law; and it retained that status after Congress included it in the Territory of Arizona, for the Act by which this was done extended to that Territory all legislative enactments of the Territory of New Mexico. Act February 24, 1863, c. 56, 12 Stat. 664. The fact that Arizona has since become a State does not affect the plaintiff's corporate status or its power to sue. See *Kansas Pacific R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co.*, 112 U. S. 414" (Page 112).

As a corporation, a pueblo has capacity to sue and defend in respect of its lands, as well as in other matters. *United States v. Candelaria*, 271 U. S. 432, 442-3; *Pueblo of Zia v. United States*, 168 U. S. 198; *Garcia v. United States*, 43 F. (2d) 873, 878; *Pueblo de San Juan v. United States*, 47 F. (2d) 446.

In *United States v. Candelaria*, *supra*, the Supreme Court commented on the same case as follows (pp. 442-443) :

It was settled in *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, that under territorial laws enacted with congressional sanction each pueblo in New Mexico—meaning the Indians comprising the community—became a juristic person and enabled to sue and defend in respect of its lands. * * * That was a suit brought by the Pueblo of Santa Rosa to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from carrying out what was alleged to be an unauthorized purpose and attempt to dispose of the Pueblo's lands as public lands of the United States. Arizona was formed from part of New Mexico and when in that way the pueblo came to be in the new territory it retained its juristic status. * * *

It is clear that the decided cases leave no room for doubt on the proposition that the pueblos of New Mexico are corporations, with power to bring suit against third parties, and liability to suits brought by third parties.

It is not so clear what manner of corporation the pueblos are. The most explicit characterization found in any of the Federal cases heretofore decided is found in the case of *Garcia v. United States*, *supra*, where the Pueblo of Taos is classified under the category of "municipal or public corporations" (p. 878) :

* * * By the Act of December 1847 Rev. St. N. M. 1855, p. 420, section 69-101, N. M. Stat. Ann., Comp. 1929, the Indian Pueblos were given the status of bodies politic and corporate and, as such, empowered to sue in respect of their lands. *Lane v. Pueblo of Santa Rosa*, 249, U. S. 110, 39 S. Ct. 185, 63 L. Ed. 504. A statute of limitation, in the absence of provision therein to the contrary, runs not only for, but against municipal or public corporations. *Metropolitan R. Co.*

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v. *Dist. of Columbia*, 132 U. S. 1, 11-12, 10 S. Ct. 19, 33 L. Ed. 231; *Little v. Emmett Irr. Dist.*, 45 Idaho, 485, 263 P. 40, 56 A. L. R. 822; *Rosedale S. D. No. 5 v. Towner County*, 56 N. D. 41, 216 N. W. 212, 215. We conclude that such Indian Pueblos were entitled to the benefits of the New Mexico statutes of limitation and that the United States, as their guardian, may plead such statutes in their behalf.

The classification of the pueblos of New Mexico as "municipal or public corporations" falls within the usual definitions of such corporations. One of the most informative and most frequently cited definitions of a municipal corporation is that given by Dillon in the following terms (1 Dillon on Municipal Corporations (5th ed. 1911) sec. 31-32.):

A *municipal corporation*, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. * * * We may, therefore, define a municipal corporation in its historical and strict sense to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper.

The essential feature of local self-government has been discussed under an earlier heading. The fact that the pueblo is a membership corporation rather than a stock corporation is too obvious to call for discussion. The relation of the corporation to a particular area of land and the inhabitants thereof is made clear in the territorial statute establishing the corporate status of the pueblos which has been quoted above.

(It is not necessary at this point to attempt a summary of the legal rights, powers, privileges, and immunities of municipal corporations. These are matters on which many learned volumes have been written. It is enough for our present purposes to note that the legal relations of the pueblo with private parties not members of the pueblo will be governed by the general body of law governing municipal corporations.)

(2) A second basis of the legal relations between a pueblo and third parties, lies in the ownership of land by the pueblo. Technically, the land ownership of the pueblo falls under two categories. There is in the first place, land to which the pueblo holds fee title, either under grants by the Spanish, Mexican, or the United States governments or by reason of purchases made by the pueblo. In the second place, there is land to which legal title is held by the United States, the equitable ownership of which is vested in the pueblo. Such lands include Executive order reservations of lands formerly part of the public domain. Likewise, lands purchased by the United

States for the benefit of the pueblo, whether through the use of pueblo funds or through the use of gratuity appropriations may fall under this category. In its relations to third parties, however, the rights of the pueblo are not substantially affected by this dichotomy. As a legal owner or as an equitable owner, the pueblo has all the ordinary rights of a landowner with respect to third parties except the right of alienation. The pueblo has the right to exclude third parties from its land, and it has the right to qualify this exclusion by specific conditions under which third parties will be permitted to enter upon pueblo lands. As a landowner the pueblo may insist that its licensees pay a sum of money for the privilege of entering the pueblo lands, and that while they are within the pueblo boundaries they refrain from certain types of conduct which the pueblo authorities classify as offensive. As a landowner the pueblo may grant revocable rights of occupancy, grazing permits, or other licenses to nonmembers, provided that no property interest is thereby alienated, and subject to the approval of the Interior Department where such approval is required by existing law. Likewise, the pueblo may lease pueblo lands to outsiders subject to departmental approval. The necessity of obtaining the consent of the United States to any transaction involving alienation of a property interest, whether by sale, mortgage, exchange, gift or lease, is a matter to which we have already given consideration at pages 46-48 above.

The legal authority of the pueblo to exercise the rights of a landowner with respect to third parties does not depend upon the peculiar facts with respect to the legal title of pueblo grant lands. Its rights with respect to third parties are cognate with the rights of other tribes. In 1821 the Attorney General declared with respect to the lands of the Seneca Indians (1. Op. Atty. Gen., pp. 465, 466) :

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

While there are undoubted exceptions to this general rule, in so far as Federal laws have authorized employees of the Federal Government and of State governments to enter upon tribal lands for governmental purposes regardless of the consent of the Indians, the general principle thus formulated by the Attorney General has never been qualified so far as private persons are concerned. As was said in the Solicitor's Opinion on "Powers of Indian Tribes" (55 I. D. 14), which has been referred to in preceding portions of this opinion, "the tribe has all the rights and powers of a property owner with respect to tribal property." The following passages from that opinion make clear the legal basis of such property rights:

The powers of an Indian tribe over tribal property are no less absolute than the powers of any landowner, save as restricted by general acts of Congress

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restricting the alienation or leasing of tribal property, and particular acts of Congress designed to control the disposition of particular funds or lands.

* * * * *

The authority of a tribal council to lease tribal lands is specifically confirmed by U. S. Code, title 25, sections 397, 398, and 402. Although the exercise of such authority is made subject to the approval of the Secretary of the Interior, it has been said that:

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

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

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

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

That the powers of a municipal corporation with respect to the land of the corporation are no less than the powers of a private owner is shown by a number of cases cited in the Solicitor's opinion above referred to:

In *Rainbow v. Young* (161 Fed. 835) the court found that the power to remove nonresidents was incidental to the general powers of a landowner, which the United States was qualified to exercise with respect to Indian lands:

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

See, to the same effect, *United States v. Mullin* (71 Fed. 632); 20 Op. Atty. Gen. 245, holding that an injunction by a State court might properly be disobeyed; 14 Op. Atty. Gen. 451. And with respect to the general power of a government as a landowner to remove intruders see *Camfield v. United States* (167 U. S. 518, 524).

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

"It seems to me there can be no doubt that the Government has all the common-law rights of an individual in respect to deprecations committed on its property, and that where there is no statute making it the duty of any particular official to enforce those rights, it is *ex necessitate rei* made the duty of the Executive Department of the Government to enforce them. (At page 440.)"

What is said here of the rights of the United States Government may be said with equal force of the rights of an Indian tribe. In an unallotted reser-

vation, an Indian tribe occupies the position of a landowner in equity, if not in strict law. (*United States v. Sturgeon*, 6 Sawy. 29, 27 Fed. Cas. No. 16,413.)

Under the foregoing authorities, it is clear that when the pueblo deals with private parties, not members of the pueblo, with respect to pueblo lands, it may invoke all the rights, powers, privileges, and immunities that attend land ownership, save as such powers are qualified by specific acts of Congress for the conservation of Indian land and resources.

(3) The relationship of the pueblo, as a municipal corporation and a landowner, towards third parties is limited, finally, by the status of the pueblo as a ward of the United States.

The fact of wardship is no longer in question.

It was settled by the decision in *United States v. Candelaria*, 271 U. S. 432, 46 S. Ct. 561, 70 L. Ed. 1023, that the Pueblo Indians are under the guardianship of the United States * * *. *Garcia v. United States*, 43 F. (2d) 873.

The incidents of wardship are more uncertain than the fact of wardship. The concept of wardship, applied to an Indian tribe, is at best a helpful analogy from a well-defined relationship in private law to a constitutional relationship between a dominant and a dependent political body. Obviously there are many features of the relationship in private law that cannot be applied to the relationship which Chief Justice Marshall found to exist between the United States and "domestic, dependent nations." A mechanical application of the analogy of wardship may result in the violation of Indian rights, on the one hand, and, on the other hand, in the imposition of extra-constitutional limitations on the powers of Congress. These dangers we may avoid if we recognize certain basic principles of our constitutional law. In the first place, the relations between the Indian tribes and the United States are governed by treaties and laws of Congress. In the second place, it is important to note that, with respect to the pueblos, there are no treaties and no laws of Congress which impose a "wardship status" upon the pueblos, and no such status can be created by judicial decision. There are, however, certain statutes which control the affairs of the pueblos, in such matters, for instance, as land alienation and liquor traffic, in ways parallel to the control which a guardian exercises over the property and person of his ward. It is entirely proper to use the term "wardship" to describe such statutory limitations upon the powers of the pueblo. It would be entirely improper, however, from a constitutional viewpoint, to use the term "wardship" as a source of extra-statutory limitations upon the powers of the pueblo. These considerations serve to emphasize the conclusion expressed at page 40 "that the ordinary powers exercised by a State, directly or through municipalities, may be exercised by the recognized political authorities of the tribe, save in so far as tribal action may be restrained or annulled by the Congress of the United States."

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Bearing these considerations in mind, we may refer, without further comment, to the authorities cited under Part II of this opinion to indicate the limitations which existing statutes impose upon the dealings of a pueblo with third parties. Apart from such limitations, third parties may deal with an Indian pueblo as they deal with an ordinary corporation.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

RAYMOND E. JOHNSON

Decided September 8, 1939

MINERAL SURVEY—JURISDICTION OF CADASTRAL ENGINEER TO DISAPPROVE SURVEY.

It is improper for a cadastral engineer to assume jurisdiction to disapprove a survey of a mining claim because of his opinion that the claim is invalid.

MINERAL SURVEY—LODE MINING CLAIM INTERSECTED BY PATENTED PLACER.

Where a lode mining claim is intersected by a patented placer *Held*: (1) That upon discovery of mineral on the lode, no condition is imposed on the applicant for patent to the lode to show discovery on other portions of the claim outside the placer, (2) there is no presumption that the lode discovered does not pass through the placer to the other portions of the lode, (3) that the rule that a patent may not be issued for both parts of a lode claim intersected by a mill site has no application to a lode intersected by a placer, (4) that when one has performed all the acts essential to a valid location and shown that the apex exists within the claim to some extent, the locator is entitled to the presumption that the lode extends through the length of his claim. *The Vulcano Lode Mining Claim*, 30 L. D. 483; *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U. S. 220; *Larkin v. Upton*, 144 U. S. 19, 23; *The San Miguel Consolidated Gold Mining Co. et al. v. Bonner*, 33 Colo. 207, 79 Pac. 1027; Par. 41, *Mining Regulations*, 38 L. D. 40, cited and applied; *Paul Jones Lode*, 31 L. D. 359; *Mabel Lode*, 26 L. D. 675, distinguished; *Silver Queen Lode*, 16 L. D. 186, overruled.

SLATTERY, Under Secretary:

Raymond E. Johnson made application for the survey of the Robin quartz lode mining claim. Mineral survey thereof, No. 10728, showed that it overlaid the patented O'Connor placer claim which cut it into two parts and that the point of discovery was on the lode line of the westerly part.

The cadastral engineer in the Public Survey Office at Helena, Montana, rejected the survey and withheld approval until the survey should be restricted to the part on which the discovery had been made. The cadastral engineer based his action on the decision of the Department in the case of *Silver Queen Lode*, 16 L. D. 186, which held (syllabus) that:

A lode claim, intersected by a prior placer location, cannot be allowed to include ground not contiguous to that containing the discovery.

On appeal the Commissioner by decision of March 26, 1938, sustained the action of the engineer on the ground that no lode or vein is claimed to exist on the claim east of the intersecting placer and that it could not be presumed merely from the discovery of a vein on the westerly portion that the vein discovered passed through the placer and extended into the ground on the easterly side thereof, in view of the fact that the placer was previously located as containing no known veins or lodes, and that in order for the survey to embrace ground on the easterly side of the placer, due proof of discovery must be shown. This decision was based on the ruling in *Paul Jones Lode*, 31 L. D. 359.

Passing the impropriety of the action of the cadastral engineer in assuming jurisdiction to disapprove a survey because of his opinion as to its invalidity contrary to the provisions of paragraph 162 of the mining regulations, which action in this case worked no harm to the mineral claimant as the Commissioner sustained him, we come to the question of the challenged correctness of the action of the Commissioner.

The decision in *Silver Queen Lode*, *supra*, as well as that in *Correction Lode*, 15 L. D. 67, which is cited and applied therein, was based upon the rulings then in force that under the provisions of section 2322, Revised Statutes, the entering by a junior locator on the claim of a senior for the purposes of marking the boundaries of his claim was inhibited, except as authorized in section 2336, Revised Statutes, as to cross lodes; that the rights of a junior locator did not extend beyond an end line passing through the point where the lode intersected the exterior line of the senior location, and that the survey right as an adjunct to the lode could not extend beyond that point. *Engineer M. & D. Co.*, 8 L. D. 361; *Consolidated Mining Company*, 11 L. D. 250; *Correction Lode*, *supra*; *Stranger Lode*, 28 L. D. 321; *Plevna Lode*, 11 L. D. 236. Subsequently, the Supreme Court in *Del Monte M. & M. Co. v. Last Chance Lode*, 171 U. S. 55, 84, held that a junior locator might, for the purpose of defining an extra-lateral right not secured by prior location, peaceably place his end lines on a senior claim. This doctrine has been extended by the Department to authorize the laying of the lines of a junior location over prior patented lode claims, *The Hidee Gold Mining Company*, 30 L. D. 420, and an agricultural claim, *Alice Lode Mining Claim*, 30 L. D. 481. See Lindley on Mines, Secs. 363, 363a. The *Del Monte* case has been also cited by the Department as authority for the placing by a junior locator of his lines over senior lode locations for the purpose of appropriating detached parcels of free ground. See *Hustler and New Year Lode Claims*, 29 L. D. 668.

In the case of *Vulcano Lode Mining Claim*, 30 L. D. 483, application was made for a patent to the *Vulcano Lode* claim, excluding conflicts

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with other lodes and the subsequently located but previously surveyed Judson placer. The placer did not entirely cross the lode but embraced in part the center of the assumed lode line. The Commissioner applied the ruling in *Silver Queen Lode, supra*, and required the applicant to show cause why his application should not be canceled as to that portion of the claim which extended beyond the point of intersection with the east side line of the excluded Judson placer. The Department reversed this action on the ground that a perfected location of a mineral vein or lode secures to its owners, so long as their possessory title is maintained under the law, exclusive rights with respect to the possession and enjoyment of the surface of their claim, and exclusive rights, intralimital and extralateral, not only with respect to the particular vein or ledge located, but in respect to all other veins or ledges, the tops or apexes of which may be found to lie within the surface of the lines of the location extended downwards vertically. No condition was imposed that the mineral claimant should show discovery on that portion of his vein or elsewhere within the portion of his claim extending beyond the westerly side line of the placer on the theory that the vein could not be presumed to traverse the placer claim.

The case of the *Paul Jones Lode* involved a conflict with a lode and a patented mill site, not a placer, in which the mill site divided the lode into two parts. It was held that the lode might embrace both parts, provided the lode or vein upon which the location is based has been discovered on both parts of the lode. The decision was placed, however, on the ground that the mill site was patented as nonmineral ground and it therefore could not be presumed that the vein discovered on one part of the lode passed through the mill site. The same holding was made in the case of *Mabel Lode*, 26 L. D. 675. A placer patent, however, even though the applicant therefor did not claim any lodes within the ground patented, passes title to all lodes or veins not known to exist at the date of the application for patent, the tops or apexes of which are within the placer limits. *Clipper M. Co. v. Eli M. & L. Co.*, 194 U. S. 220, 229; Lindley on Mines, section 781, and cases there cited. There is no presumption, consequently, that the land so patented does not contain a mineral vein or lode. Any portion of the apex on the course or strike or a vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title, *Larkin v. Upton*, 144 U. S. 19, 23, *Upton v. Larkin*, 6 Pac. 66, 67, and such vein containing a discovery being found on a portion of the claim, no reason is seen why the general rule would not apply that the claim would be valid to the extent of the open and unappropriated ground located. Mr. Lindley has contrived the holding in the *Vulcano Lode* case to the effect that the rule that a patent may not be issued for both parts of a lode claim intersected

by a mill site has no application to a lode claim intersected by a placer claim. See section 338, Lindley on Mines. In this construction the Department concurs.

The existing laws require that the top or apex of the vein, to some extent at least, should be found within the limits of the location, as defined on the surface (*Flagstaff Mining Co. v. Tarbet*, 98 U. S. 463, 467; *Argentine Mining Co. v. Terrible Mining Co.*, 122 U. S. 478, 485), at least as a condition precedent to the exercise of the extra-lateral right. Lindley on Mines, section 364, and cases cited. If a locator through ignorance or carelessness fails to plant his claim along the course of the vein he loses his right to follow the vein on its dip outside his side lines beyond the point where the apex of the vein leaves his side lines, but the Department is not aware of any well-considered case where it is held that under such circumstances the possessory right to the surface located is affected thereby.

The Supreme Court of Colorado has held that when one has performed all the acts essential to a valid location and shown that the apex existed within the claim to some extent, the locator is entitled to the presumption that his lode extends throughout the full length of his claim (*Armstrong v. Lower*, 6 Colo. 581, 586; *Wakeman v. Norton*, 24 Colo. 192, 49 Pac. 283, 286), even where the claim is intersected by a placer. *San Miguel Cons. G. M. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025, 1027. In construing section 41 of the mining regulations approved March 29, 1909, relating to the necessity of describing a vein in an application for patent, the Department said in its instructions of June 11, 1909, 38 L. D. 40:

It seems that the expression, "the extent thereof" is being construed as meaning that the applicant must affirmatively show by proof of exploration that the vein exists in fact throughout the whole length of the claim.

This construction of the paragraph is erroneous. By the words quoted it was intended to require the claimant to show the existence of a vein in such workings as he relied on to establish a discovery. By the extent of the vein was meant its size and quality as disclosed. That being done, the presumption exists that the vein exists on its strike throughout the whole length of the claim as located.

Under the ruling in the *Paul Jones Lode* case, the presumption would be overcome if the lode discovered was intersected by a patented nonmineral claim, and it would seem that the same rule would apply where the intervening ground was merely entered as nonmineral, but that is not the case here.

The decision in the *Silver Queen Lode* case is not in harmony with later departmental decisions that applied to the doctrine in *Del Monte M. & M. Co. v. Last Chance Lode*, *supra*, and is therefore overruled, and for the reasons above set forth the decision of the Commissioner is reversed.

Reversed.

**RESTRICTED INDIAN LANDS SUBJECT TO DESIGNATION
AS TAX-EXEMPT HOMESTEADS**

Opinion, September 12, 1939

**INDIAN LANDS PURCHASED WITH RESTRICTED FUNDS—DESIGNATION AS TAX-
EXEMPT HOMESTEADS UNDER ACT OF JUNE 20, 1936, AS AMENDED—TITLE BY
PARTITION PROCEEDINGS—FRACTIONAL INTERESTS—PART PAYMENT FROM
RESTRICTED FUNDS.**

Tracts of taxable Osage allotted land the title to which has passed to an Osage Indian as a result of partition proceedings (a) may not be selected as tax exempt in the event the only consideration is the interest of the Indian in other lands involved in the partition proceedings, but (b) so much of such land as may be acquired in partition proceedings in excess of the interest of the Indian through the investment of trust or restricted funds may be designated as tax exempt.

Fractional interests in tracts of restricted taxable lands purchased with restricted funds may be selected as tax exempt, and each owner of a fractional interest in agricultural and grazing land is entitled to designate as tax exempt his interest in the land in so far as it does not exceed in terms of acreage the maximum acreage prescribed by the act of May 19, 1937.

Where part of the purchase price for the property has been paid from restricted funds, a fractional part of the property representing the restricted funds used in the payment may be designated as tax exempt.

Where city property costs in excess of \$5,000 a fractional portion of the property may be selected as tax exempt, such fractional portion being the proportion that \$5,000 bears to the entire cost of the property.

Where an Indian purchases town property at a cost of less than \$5,000 and improvements made with restricted funds are placed thereon bringing the original cost of the property and cost of the improvements to more than \$5,000, the improved property may be selected as tax exempt to the extent of \$5,000, provided the improvements were added prior to the act of May 19, 1937.

The benefit of tax exemption of a homestead designated under the act of May 19, 1937, passes to subsequent Indian owners of the property until further legislation of Congress terminating the tax exemption.

MARGOLD, Solicitor:

A number of questions have been formulated by the Indian Office and submitted for my opinion concerning interpretation of section 2 of the act of June 20, 1936 (49 Stat. 1542), as amended by the act of May 19, 1937 (50 Stat. 188), providing for tax exemption of certain Indian lands purchased with trust or restricted funds.

In order that the purpose and meaning of the legislation to be interpreted may be more fully understood, both section 1 and section 2 of the act of June 20, 1936, are quoted in full:

That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of \$25,000, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of

the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

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

The 1937 amendment to section 2 of the above act reads as follows:

All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And Provided Further*, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost \$5,000, to be designated as a homestead.

Since the questions presented by the Indian Office require interpretation of these statutes in order that they may be properly applied to situations not specifically dealt with by the act, the purpose of the 1936 act and the 1937 amendment should be reviewed at the outset to serve as a basis for this opinion.

The evil sought to be remedied by the act of June 20, 1936, is well known. For a long period the Interior Department had advised the Indians that lands purchased with restricted funds would be nontaxable. This advice was based upon a number of early court decisions, and on the basis of this advice restricted funds were widely invested in lands, often after the trust or restricted tax exempt allotments of the Indians had been sold to obtain the necessary funds. However, the lands purchased with restricted funds were later held to be taxable in the Federal court case of *Work v. Mummert*, 29 F. (2d) 393 (C. C. A. 8, 1928), and as a result of that decision many Indians lost their lands or stood in danger of losing their lands through tax sales.

The 1936 act was then passed to establish the tax exemption of the lands purchased with restricted funds under the guidance and direction of the Interior Department as tax exempt lands. After the passage of the act it was found that section 2 had application to such a large quantity of lands that a bill was introduced in Congress for its repeal. This bill was, however, amended on the recommendation of the Senate Committee on Indian Affairs to provide for restricting the tax exemption to homesteads purchased with trust or restricted funds rather than for repealing the tax exemption entirely, and the bill was passed in this amended form. The report of the Senate Committee in

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which this recommendation was made contains the following pertinent statement of the purpose of the 1936 act and the 1937 amendment:

The said act of June 20, 1936 (49 Stat. L. 1542) was designed to bring relief and reimbursement to Indians who by failure to pay taxes have lost or now are in danger of losing lands purchased for them under supervision, advice, and guidance of the Federal Government, which losses were not the fault of the Indians, but were purchased with the understanding and belief on their part and induced by representations of the Government that the lands be nontaxable after purchase. It was intended that such lands would be redeemed out of the fund of \$25,000 authorized to be appropriated under the provisions of said act of June 20, 1936 (49 Stat. L. 1542).

Since the passage of said act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of section 2 thereof would apply to lands and other property purchased by restricted Indian funds, which would exempt from taxation vast quantities of property, such as business buildings, farm lands which are not homesteads, etc.

The Commissioner of Indian Affairs appeared before the committee and suggested the amendment herein proposed, which proposed amendment was adopted and herein recommended by your committee. (Senate Report No. 332, 75th Cong. 1st Sess.).

With this statement of the purpose of the legislation in mind, I turn to a discussion of the questions presented by the Indian Office, in the order of their presentation.

(1) May tracts of taxable Osage allotted land, title to which has passed to an Osage Indian as result of partition proceedings, be selected as tax exempt, (a) in the event no actual money consideration has passed—the only consideration being the interest of the Indian in other lands involved in the partition proceedings, (b) in the event some money considerations, less than the value of the land has passed?

The Osage allotted lands covered by this question were made taxable by the legislation under which the lands were allotted to the Indians (act of June 28, 1906, 34 Stat. 539, amended by the act of April 18, 1912, 37 Stat. 86). Such lands, therefore, have always been in Indian ownership and have always been taxable and been understood to be taxable. In my opinion Congress did not intend to render nontaxable these lands specifically made taxable by the allotment act. While it may be said that when these lands are partitioned among a number of owners having fractional interests in the land, these owners acquire their title by "purchase" (*United States v. Hale*, 51 F. (2d) 629, C. C. A. 10, 1931), it cannot be said that the lands are purchased with trust or restricted funds nor do they otherwise come within the purpose of the legislation here discussed. The Indians were not misled as to the tax exemption of the lands and they did not invest in the lands tax exempt funds or other tax exempt property. If those Osage Indians with fractional interests were permitted to obtain the benefit of the 1936 and 1937 acts merely through the partition of the lands they would enjoy an unfair advantage over the other

Osage Indians who have sole ownership of these allotted taxable lands. Accordingly, question (1) (a) should be answered in the negative.

However, part (b) of this question may be answered in the affirmative where trust or restricted funds have been used for the purchase from the other owners of land in excess of the land to which the Indian was entitled by virtue of his fractional interest. In such case the additional land would represent an investment of trust or restricted funds and its protection from taxation would come within the purpose of the 1937 act. The Indian could in these instances designate as tax exempt a portion of the land acquired by him through partition proceedings which represented the investment of trust or restricted funds.

(2) May fractional interests in tracts of purchased taxable lands be selected as tax exempt? If so, must the fractional interests in agricultural and grazing land be limited to tracts that contain 160 acres or less?

A similar question arose in connection with the interpretation and application of the act of May 10, 1928 (45 Stat. 495), as amended by the act of May 24, 1928 (45 Stat. 733), which provided that an Indian of the Five Civilized Tribes who owned restricted land shall select and designate tracts not exceeding 160 acres to remain exempt from taxation. In the opinion of the Department of April 30, 1929 (M. 25048), it was held that tax exemption certificates might be issued in favor of each of the several Indian heirs or devisees where the land was owned by more than one qualified heir or devisee so long as the tax exempt land of any one such Indian owner did not at any time exceed 160 acres.

I see no reason why this ruling should not be equally appropriate in the interpretation and application of the acts now involved. If it were not held that fractional interests in tracts of purchased taxable lands could be selected as tax exempt, the intent of the act would be frustrated wherever two or more Indians purchased lands in common with their trust or restricted funds or whenever lands purchased with such funds descended to two or more heirs, and the lands were not partitioned.

The second part of this question inquiring as to the quantity of land which may be designated is also answered by the opinion of the Department of April 30, 1929. It was there held, in effect, that each owner of a fractional interest was entitled to designate as tax exempt his interest in the land in so far as it did not amount in acreage to more than 160 acres.

Where the interest of the Indian in lands purchased with restricted funds amounts in terms of acreage to 160 acres or less, he can designate his full interest in the land. Where, however, his interest amounts to more than 160 acres, he may designate only so much of his interest

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as amounts to 160 acres. He may do this either by designating a smaller fractional interest in the entire acreage, or he may designate his full fractional interest in a reduced acreage. Thus, if an Indian owns a one-third interest in 640 acres, he may designate either a one-fourth interest in the 640 acres or a one-third interest in 480 of the 640 acres. The latter course may be preferable in order to avoid confusion as to the fractional interest actually owned by the Indian. Where one Indian owns a fractional interest in a tract amounting to less than a 160-acre interest and another Indian owns more than a 160-acre interest in the same tract, the unused portion of the tax exemption to which the one Indian owner is entitled cannot be transferred to the other Indian owner of the larger fractional interest.

Another situation—If four Indians purchased 160 acres, taking title one-fourth each as tenants in common, all four might execute one certificate exempting the entire tract, in which event, however, each Indian would be charged with only 40 acres and could select for exemption other purchased lands up to the 160-acre limitation fixed by the statute. Or each of the four Indians might execute separate certificates, each certificate covering the undivided one-fourth interest owned by each Indian.

Where an Indian has purchased the entire interest in a tract which he would have been entitled to select under the statute as tax exempt but is prevented from doing so by death, his heirs, if they are Indians, may, for reasons stated in answer to question (6), make the selection. In such a case the selection is made in the right of the ancestor and the question of fractional interest does not arise.

(3) In cases where only a part of the purchase price for the property has been paid from restricted funds, may the fractional part of the property representing the restricted funds used in payment of the consideration be designated as tax exempt?

The answer to this question has been suggested in the answers to questions (1) and (2). In order to effectuate the purpose of Congress to protect as tax exempt restricted lands in so far as they are purchased with trust or restricted funds it must be held that where part of the purchase price of the property has been paid from such funds a fractional part of the property, representing the proportion of the purchase price paid with such funds, may be designated as tax exempt.

(4) Where city property costs in excess of \$5,000, may a fractional portion of the property be selected as tax exempt, such fractional portion being the proportion that \$5,000 bears to the entire cost of the property?

Under the same principles as those involved in the preceding questions, this question may likewise be answered in the affirmative. The question is one of interpretation of that part of the act which provides that the Indian owner shall select the "village, town, or city property, not exceeding in cost \$5,000, to be designated as a homestead." If this

language should be interpreted to mean that where a homestead has cost more than \$5,000 none of the property is tax exempt, the interpretation would create an arbitrary discrimination against those Indians who had invested \$5,500 rather than \$4,500 of their restricted funds in an urban homestead.

It is my opinion that Congress intended to protect an investment of restricted funds up to \$5,000. If more than \$5,000 of such funds were invested, so much of the property as represented the excess would not be protected by the statute. Thus if an urban homestead cost \$8,000 and \$5,000 or more of the price had been paid from restricted funds, the owner would be entitled to a five-eighths nontaxable interest in the property. The remaining three-eighths interest would be taxable and subject to sale for nonpayment of taxes.

This use of fractional interests is similar to, and no more complicated than, the use, discussed above, where Indians own fractional interests in agricultural and grazing land. The method of computation has the advantage of finality in that from the time the property is purchased the extent of taxability is known.

The only alternative interpretation which suggests itself is that the statute in effect provides a tax exemption up to \$5,000 of the assessed valuation of the property. However, the statute speaks of cost, not value, which is a totally different concept. Moreover, such an interpretation would have practical disadvantages in application which it cannot be assumed were intended to occur as part of the functioning of the statute. The valuation of property fluctuates so that property with a \$5,000 tax exemption might sometimes be subject to taxation and sometimes not. Taxing authorities have different bases of taxation and differing degrees of liberality in reducing the assessed value below the market value, thus creating variations in the extent of the tax exemption among the Indian owners and opening the door to changes in the assessment methods in order to reach substantial quantities of Indian property. More serious, Indian owners would not know from year to year whether their property was taxable until after assessment was completed. The conclusion must be that the \$5,000 statutory limitation should be applied to the initial cost of the property rather than to its subsequent value.

(5) Where an Indian purchases town property at a cost of less than \$5,000, and improvements are placed thereon bringing the original cost of the property and cost of the improvements to more than \$5,000, may such property be selected as tax exempt?

The answer to question (4) embraces the answer to question (5) since there is no significant distinction between the investment of not more than \$5,000 in an improved urban homestead and the investment of less than \$5,000 in unimproved city property with the investment later increased to \$5,000 by the addition of improvements.

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So much of the urban property of an Indian as represents an investment of not more than \$5,000 of restricted funds, whether or not such property includes permanent improvements added after the purchase of the land itself, may be designated as tax exempt. There is one qualification of the foregoing. If the improvements were added subsequent to the date of the 1937 act, they would be taxable, even if they did not bring the total cost above \$5,000, since the act protects only the investment of restricted funds prior to its date.

(6) Do the benefits accruing to an Indian owning property designated as tax exempt pass to the Indian heir or devisee, or Indian grantee of the Indian making the selection?

In view of the language in the 1937 act, this question may be answered in the affirmative. The 1937 act provides that homesteads purchased out of trust or restricted funds are "instrumentalities of the Federal Government" and shall be "nontaxable until otherwise directed by Congress." Therefore, the homesteads remain nontaxable so long as they are in Indian ownership until legislation is passed terminating the exemption. This construction of the act is in accord with the construction of other acts providing for tax exemption of Indian lands until otherwise directed by Congress.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

PRACTICE BEFORE DEPARTMENT BY CONCILIATION COMMISSIONER

Opinion, September 14, 1939

ATTORNEYS—PRACTICE BEFORE FEDERAL DEPARTMENTS—CONCILIATION COMMISSIONER—ACT OF MARCH 4, 1909.

Since a conciliation commissioner appointed by a court of bankruptcy pursuant to statutory authority is an officer of the United States within the meaning of section 113 of the act of March 4, 1909 (35 Stat. 1109), and, as such, is prohibited from accepting compensation for services rendered in relation to any proceeding in which the United States is directly or indirectly interested, he can derive no practical benefit from his enrollment as an attorney and it is therefore proper to refuse him admission.

U. S. v. Germaine, 99 U. S. 508 (1878) followed.

ATTORNEYS—PRACTICE BEFORE DEPARTMENT OF INTERIOR.—GRATIS RENDITION OF SERVICES AS ATTORNEY.

Although a conciliation commissioner appointed by a court of bankruptcy is an officer of the United States and as such is prohibited from accepting compensation for services rendered in any proceeding in which the United States is directly or indirectly interested, he may nevertheless be admitted to practice before the Department of the Interior in any special instance

in which he can make a proper showing that he will receive no compensation for representing any party before the Department of the Interior and the parties he intends to represent are so notified.

ATTORNEYS—CONCILIATION COMMISSIONER—PRACTICE BEFORE DEPARTMENT OF INTERIOR.

Although a conciliation commissioner appointed by a court of bankruptcy is an officer of the United States and, as such, is prohibited by statute from receiving compensation for representing any party in a proceeding in which the United States is directly or indirectly interested and for that reason was refused admission to practice before the Department of the Interior, nevertheless, he may become eligible for admission to regular practice before the Department upon termination of his connection with his office of conciliation commissioner.

MARGOLD, *Solicitor*:

On June 20, 1939, Frank F. Kimble filed an application for a certificate to practice before the Department of the Interior. Mr. Kimble is at present a conciliation commissioner appointed by the judge of the United States District Court for the District of Idaho under the provisions of Section 203, Title 11, United States Code. Under this section, bankruptcy courts appoint referees known as "conciliation commissioners" to assist the courts in cases involving agricultural compositions and extensions under the Bankruptcy Act. The question has arisen whether Mr. Kimble's status as conciliation commissioner prevents his admission to practice before the Department of the Interior.

The act of March 4, 1909 (Ch. 321, Sec. 113, 35 Stat. 1109), provides:

Whoever, being * * * the head of a department, or other *officer* or *clerk* in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States. [Italics supplied.]

Although the United States is not a party to all proceedings before the Department, it is certainly interested in them, directly or indirectly. Thus the case of *United States v. Long*, 184 Fed. 184, 186, held it a violation of section 1782 of the Revised Statutes, from which the statute quoted is derived, for a land-office clerk to agree to accept compensation for furnishing information concerning the status of land to one who desired to purchase it under the Timber and Stone Act. The court said:

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An application for the purchase of land from the government under the timber and stone act is, in effect, the inauguration of a proceeding through which to acquire the land from the government, and in which the government is an interested party. It is an interested party in two aspects: First, in its governmental aspect, to see that the laws are enforced and obeyed; and second, in its proprietary right, as the owner of the land the title to which is sought to be acquired from it. But, were the application to purchase land from the government not the inauguration of a proceeding, it is a matter or thing at least, in which the government is an interested party. * * *

Accordingly, if Mr. Kimble is "the head of a department, or other officer or clerk in the employ of the United States" he could receive no compensation for his services in practicing before the Department, and he would derive no practical benefit from his enrollment as an attorney. The Department has previously refused to enroll an attorney under such circumstances and it would therefore be proper to refuse to admit Mr. Kimble. *Loren Ray Pierce*, 49 L. D. 500 (1923); *Harlan D. Heist*, 55 L. D. 215, 217 (1935).

In *United States v. Germaine*, 99 U. S. 508 (1878), the Supreme Court, in holding that a surgeon appointed by the Commissioner of Pensions was not an "officer of the United States," considered what factors render an employee of the Government an officer of the United States. The opinion states (pp. 509-510):

The counsel for defendant insists that art. 2, sect. 2, of the Constitution, prescribing how officers of the United States shall be appointed, is decisive of the case before us. It declares that "the President shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all other officers* of the United States, whose appointments are not *herein* otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments."

The argument is that provision is here made for the appointment of *all* officers of the United States, and that defendant, not being appointed in either of the modes here mentioned, is not an *officer*, though he may be an agent or employe working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.

* * * * *

That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended, as in the sixteenth section of the act of 1846, concerning embezzlement, by which

any officer or agent of the United States, and all persons participating in the act, are made liable. 9 Stat. 59.

* * * * *

The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments.

* * * * *

United States v. Hartwell (6 Wall. 385) is not, as supposed, in conflict with these views. It is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States.

If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case, the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use.

Thus, an employee who is appointed by any of the methods prescribed in the Constitution for the appointment of officers is an officer of the United States. Mr. Kimble has been appointed by a court of law, pursuant to the authority vested in it by act of Congress. On the basis of *United States v. Germaine, supra*, therefore, Mr. Kimble must be considered an "officer." This conclusion is reinforced by the terms of the statute under which he was appointed as conciliation commissioner. That statute specifies that the "conciliation commissioner shall have a *term of office* of one year * * *" and shall receive specified fees "to be paid out of the *Treasury*." Mr. Kimble's employment therefore clearly embraces the ideas of tenure and duration which the Supreme Court in *United States v. Germaine, supra*, stated are implied in the term "officer." In addition, a supervising conciliation commissioner is to receive per diem allowances "in accordance with the law applicable to *officers* of the Department of Justice." Furthermore, "the conciliation commissioner may accept * * * assistance furnished him by *other Federal officials*," and the general orders of the Supreme Court are to govern "the administration of the *office* of conciliation commissioner." [Italics supplied.] Throughout the statute, therefore, the intention of Congress seems to be to treat the position of conciliation commissioner as an "office" and to consider the party holding the position as an "officer."

Being an "officer of the United States," Mr. Kimble clearly falls within the prohibition of section 113 of the act of March 4, 1909 (35 Stat. 1109). Since his appearance as attorney before the Depart-

November 8, 1939

ment would necessarily violate this statute, his application for admission as an attorney for regular practice before the Department should be denied. This opinion is based on the assumption that Mr. Kimble is to receive compensation for his services as attorney before the Department. Should he desire to represent anyone before the Department in any special instances wherein he will not "directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another," he will be permitted to appear before the Department. In applying for such permission, Mr. Kimble must make sufficient showing to satisfy the Department to that effect and the parties he intends to represent should be so notified. Should Mr. Kimble desire to become eligible for admission to regular practice before the Department, he can do so only by termination of his connection with his office as conciliation commissioner.

Approved:

E. K. BURLEW,

First Assistant Secretary.

CLARA EHRHARD

Opinion, November 8, 1939

DAMAGE CLAIMS—IMPUTATION OF NEGLIGENCE—PASSENGER IN PRIVATE CAR.

Negligence of private driver, which would preclude allowance of any claim submitted by him, cannot be imputed to passenger who presents meritorious claim and is shown not to have been engaged in joint enterprise nor involved in directing operation of the private car.

MARGOLD, *Solicitor:*

Mrs. Clara Ehrhard, of Lincoln, Nebraska, has filed a claim against the United States in the amount of \$497.95, representing personal injury in the amount of \$465 and damage to personal property in the sum of \$32.95, as the result of a collision with a Grazing Service truck operated by Lee Price, an enrollee in the Civilian Conservation Corps. The question whether the claim should be paid under section 16 of the act of June 28, 1937 (50 Stat. 321), has been submitted to me for opinion.

The collision occurred on August 24, 1938, on Highway No. 24, at a point nine miles from Palisade, Colorado. The record shows that the claimant was a passenger in the private automobile owned by J. H. Sanneman and operated by his son, Herman Sanneman. Mrs. Ehrhard's description of the accident reads in part:

* * * A Government CCC truck was approaching us from the northeast on the wrong side of the road. The driver of the CCC truck did not respond to a blast of the horn but kept coming right on and crashed into the car in which I was riding, causing it to make one complete turn-over and come to

rest on the bank of a mountain stream. There was nothing to obstruct the CCC driver's view. He admitted and testified at a hearing after the accident that he was looking up at the mountains to see if there was any possibility of a slide and did not see us in time to avoid striking our car, and admitted that he was on the wrong side of the road.

According to the report of F. W. deFriess, superintendent of the Grazing Service camp, it was definitely established at the hearing that both of the drivers were negligent in driving on the wrong side. He says that the Sanneman car had pulled to the right and stopped, after which it backed well out beyond the center of the highway and started ahead again toward the oncoming Government vehicle. This appears to have confused both drivers, Mr. deFriess says, and they attempted to pass each other on the wrong side, neither of them taking the precaution to stop in order to give the other driver time to straighten out. It appears from the record that such repairs as were necessary to place the private car in running condition so that the Sanneman party could proceed on its journey were made at the expense of the Government at the Grazing Service camp, it being agreed that no claim was to be made by Mr. Sanneman for car damages sustained.

The instant claim for personal injury is submitted by Mrs. Ehrhard, who appears to have been a mere passenger in the Sanneman car and not engaged in a joint enterprise or in any way involved in directing the operation of the private car. She bases her claim upon the negligence of the Government driver. The record clearly establishes such negligence. Even assuming that the operator of the Sanneman car, in which the claimant was a passenger, was guilty of contributory negligence, the weight of authority appears to favor the claimant, in that "the negligence of the driver of a conveyance cannot be imputed to a passenger therein." *Colorado Springs & Inter. R. Co. v. Cohn*, 66 Colo. 149, 180 Pac. 307. Also, in *Denver City Tramway Co. v. Armstrong*, 21 Colo. App. 640, 123 Pac. 136, 138, the court said:

And we think it may be safely said that at the present time the great weight, if not the unbroken line, of authority of all of the states in the Union, as well as of the federal courts, is opposed to the imputation of negligence from driver to passenger, either of a public or of a private conveyance, unless it appears that the relation of master and servant, or principal and agent, or association in a common enterprise, exists.

The following is from Babbitt on Motor Vehicle Law (4th ed.) pp. 1149 and 1222:

The passenger has a remedy for any injuries sustained by him, against either the driver of the vehicle of which he is the occupant, or a third person causing the accident, or both, and may recover from the one whose negligence was the proximate cause of his injuries, if he himself was not negligent. * * *

* * * in this country [the United States] the great weight of authority

December 1, 1939

holds that the negligence of the driver of an automobile is not attributable to a passenger, so as to bar the right of the latter against a third driver whose concurrent negligence caused the injuries complained of, in the absence of any showing that they were engaged in a joint enterprise, or that the passenger had anything to do with the operation of the car, or that he had any control over or right to direct the driver in its operation * * *

It having been concluded that the claimant's personal injuries and property damage were the result of negligence on the part of the Government employee, to which negligence she in no way contributed, it is my opinion that Mrs. Ehrhard's claim should be paid to the extent that it is properly supported by authenticated bills for medical and hospital services and by evidence of damage of personal property. She submits verified statements of account from St. Elizabeths Hospital for \$27.50 and from Doctors L. E. and P. D. Marx for \$87.50, a total of \$115. Her sworn statement also indicated that her clothing was damaged to the extent of \$25, and a new suitcase, purchased for the trip at a cost of \$7.95, was also damaged. She states that this property may be inspected at her home in verification of her statement that it was in fact damaged. It therefore appears proper to add the sum of \$32.95 to the item of \$115, making a total of \$147.95 to which the claimant is entitled. The item of \$80 for nursing service should be rejected for the reason that it is not supported by any evidence of expenditure by the claimant. The same is true as to the claim for \$270, which presumably is for pain and suffering. The act of June 28, 1937, *supra*, provides "that the amount allowed on account of personal injury shall be limited to necessary medical and hospital expenses."

Upon acceptance by the claimant of the reduced amount in full settlement of her claim, it should be paid in the sum of \$147.95.

Approved:

JOHN W. FINCH,
Acting Under Secretary.

UTAH OIL REFINING COMPANY

Decided December 1, 1939

PUBLIC LANDS—RIGHTS OF WAY—STATUTORY CONSTRUCTION.

The act of August 21, 1935 (47 Stat. 674), impliedly repealed all preexisting legislation which granted, by its terms, rights of way over the public lands for the transportation of oil. The granting of such rights of way is a matter within the discretion of the Secretary of the Interior.

PUBLIC LANDS—RIGHTS OF WAY—TRESPASS.

The occupancy of the public lands for the construction of a pipe line before approval of the pipe line right of way application constitutes a trespass.

PUBLIC LANDS—TRESPASS—DAMAGES.

Where a right of way over public lands is occupied before the application therefor is approved, the rental for the entire right of way accrues from date of initial entry and the Secretary may impose appropriate conditions to the granting of the application which will indemnify the United States.

ICKES, *Secretary of the Interior*:

The Utah Oil Refining Company, on August 7 and 11, 1939, filed applications for a pipe-line right of way over some 130 miles of the public lands of the United States. These were suspended because incomplete. On or about August 7, and while action upon these applications was in suspense pending the filing of a proper application in the General Land Office, the Company, through its agent, a pipe-line construction contractor, entered upon the public lands involved and began construction of the pipe line, which has since been completed. When these facts were called to my attention, I directed the Company, by a telegram dated November 15, 1939, to cease operations upon the public domain and to refrain from using the pipe line, pending determination of the applications. The Company was thereby further notified that it would be given an opportunity on November 20 to show cause before me why its application should not be denied.

The applicable law is section 28 of the act of February 25, 1920 (41 Stat. 437), as amended by the act of August 21, 1935 (49 Stat. 674). Prior to the amendment of 1935, section 28 read as follows:

Section 28. Rights of way through the public lands * * * *are granted* for pipe-line purposes for the transportation of oil * * * to any applicant possessing the [required] qualifications * * * under such regulations as to survey, location, and use as may be prescribed by the Secretary of the Interior. [Italics supplied.]

Under the 1920 act the practice, acquiesced in by this Department, had been for right-of-way applicants to enter upon the public lands simultaneously with the filing of their applications and without awaiting action thereon.

Section 28 was amended, however, by the act of August 21, 1935 (49 Stat. 674), to read as follows:

Section 28. That rights-of-way through the public lands * * * *may be granted by the Secretary of the Interior* for pipe-line purposes * * * under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior * * * *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil * * * except under and subject to the provisions, limitations, and conditions of this section * * *. [Italics supplied.]

The change in the wording of the section is significant. It is clear that under section 28, as amended, pipe-line rights of way over the public domain are no longer granted as a matter of right but that instead their granting is now a matter within the discretion of the

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Secretary of the Interior. Moreover, it is obvious that the 1935 amendment impliedly repealed any preexisting legislation which granted, by its terms, rights of way over the public lands for the transportation of oil. *Of* act of May 21, 1896 (29 Stat. 127).

Pursuant to section 28 as amended, regulations applicable to pipeline rights-of-way were promulgated on May 23, 1938, and published in the Federal Register on June 1, 1938. 3 Fed. Reg. 1035 (1938); G. L. O. Cir. 1237a, 56 I. D. 533. Relevant paragraphs of these regulations required the Company to file maps showing the survey of the right of way, properly located with respect to the public land surveys, certified copies of its charter or articles of incorporation, etc. Paragraphs 1, 3 and 4, G. L. O. Cir. 1237a. Paragraph 61 of these regulations provides that:

Any occupancy or use of public lands, including reservations, parks, or national forests, without proper authority, constitutes a trespass.

Clearly, the occupancy of the public lands for the construction of the pipe line before the Company's application was approved constituted a trespass. At the hearing before me on November 20 the Company appeared through its authorized representatives and admitted the commission of the trespass. In avoidance it contended at the hearing that it was unaware of the changes which had been effected by the 1935 amendment in the law and practice concerning rights-of-way over the public lands. Further, it showed that it had not itself committed the actual trespass but had retained and relied upon an experienced pipe line construction contractor for the building of the pipe line. The fact that the trespass was committed by its agent and not by the Company does not relieve it of liability therefor. Although the Company apparently had no deliberate intention to violate either the law or the regulations, there was a careless disregard of the rights and interests of the United States. No one has the right to appropriate public lands for private use without specific statutory authority so to do and then only in strict compliance with the terms of such statute and regulations.

Although there was careless wrongdoing in this case, the applications will not be denied because of the trespass committed. However, the facts do warrant the imposition of appropriate conditions to the granting of the application which will indemnify the United States. Accordingly, since it appears from an investigation that the pipe line is in the public interest and will benefit the people of both Wyoming and Utah, the Commissioner of the General Land Office is hereby instructed to grant the application upon condition that the Company pay in advance the rental required by the regulations (G. L. O. Cir. 1459, August 7, 1939), such rental to commence for the entire right of way as of August 7, 1939, the date of original entry

upon the public lands, plus the sum of \$500, this being a fair estimate of the damage and expense caused the United States by the trespass. These conditions are in addition to such other conditions to the granting of the right-of-way as may be appropriate.

So Ordered.

AUTHORITY OF THE DEPARTMENT TO DISSEMINATE INFORMATION BY RADIO

Opinion, December 7, 1939

AUTHORITY OF THE DEPARTMENT TO DISSEMINATE INFORMATION.

The Department and the Secretary of the Interior have authority to disseminate information generally to the public except that (1) a "publicity expert" may not be employed unless specifically authorized by Congress, and (2) any attempt to stir up private citizens to influence Congressional legislation is prohibited. Except as so limited, any method or means which, as a matter of administrative discretion, is determined to be feasible, desirable, or economical may be used to disseminate information.

BROADCASTING—AUTHORITY OF THE DEPARTMENT TO DISSEMINATE INFORMATION.

The Department of the Interior is authorized to disseminate information by means of radio.

APPROPRIATIONS FOR DEPARTMENTAL FUNCTION CONSTITUTES LEGISLATIVE APPROVAL.

Enactment of appropriations for functions of which Congress has been made cognizant constitutes legislative approval of such functions.

STATUTES—ADMINISTRATIVE INTERPRETATION.

An administrative interpretation of a statute, embodied in a long-continued practice by Government agencies, known to and acquiesced in by Congress, has the force and effect of law.

MARGOLD, *Solicitor*:

My opinion has been requested with respect to whether the Secretary of the Interior and the Department of the Interior have authority to disseminate, through the medium of the radio, information pertaining to the various functions of the Department and its constituent bureaus. I am of the opinion that both the Department and the Secretary have such authority, subject to two limitations hereinafter discussed.

No specific statutory authority for departmental broadcasting exists. However, to the extent that the Department has statutory authority to disseminate information generally, it may in its discretion determine the most economical and effective means by which to do so, whether by radio or any other media, and for that purpose may use funds appropriated generally for administrative expenses. (Decision of the Acting Comptroller General, A-82749, Jan. 7, 1937, cited with approval by the Comptroller General in Decision of June 24,

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1939, 18 Comp. Gen. 978 (1939).) It is therefore necessary to determine the extent of authority to disseminate information generally.

By various statutes Congress has specifically imposed upon bureaus of the Department the duty to collect, interpret, distribute, and "disseminate information," and to "promote" the functions for which the bureaus were designed. See act of August 25, 1916, establishing the National Park Service (39 Stat. 535, 16 U. S. C. sec. 1); the Bureau of Mines (30 U. S. C. (1934), secs. 3, 5, 8); Geological Survey (43 U. S. C. (1934), secs. 41, 42, 45; 44 U. S. C. (1934), sec. 266); Office of Indian Affairs (25 U. S. C. (1934), sec. 13).

In addition to these statutes, appropriation acts have regularly included authority and funds to enable the Department to fulfill its duty to keep the people acquainted with its functions. Typical is the Interior Department Appropriation Act of 1940 (53 Stat. 685). Specific provision is made for the "* * * *coordinating and interchange of information* relative to * * * the conservation of oil and gas * * *." The funds appropriated for the National Bituminous Coal Commission are to be spent "for *public instruction and information* deemed necessary * * * in performing the duties imposed by * * * the Bituminous Coal Act of 1937 * * *," which authorizes the performance of all acts "deemed necessary to *promote* the use of coal and its derivatives," and which regulates the "disclosure of information" (50 Stat. 74, secs. 2 (a), 10, 15 U. S. C. (1934), secs. 829, 840). Expenditures are authorized in the appropriation act for the promotion of fire prevention, for the development of agriculture and stock raising among Indians, the conducting of agricultural experiments and demonstrations, the conservation of Indian health including the use of "circulars and pamphlets for use in preventing * * * diseases," objectives often best achieved by education and the dissemination of information. The Bureau of Mines, further, may incur expenditures to "*promote* safety and health * * * and to *teach* mine safety * * * methods * * * and to make statistical *studies and reports* * * * and inquiries and investigations, and the *dissemination of information* * * * including studies and reports * * *." [Italics supplied.]

The National Park Service is similarly authorized to incur expenditures for "motion-picture films * * * and * * * developing the educational work of the National Park Service," including "educational lectures * * *." Funds appropriated for the Virgin Islands may be used for "scientific investigations of plants and plant industries, and diseases of animals; demonstrations in practical farming." And all amounts received by the Alaska Railroad during the fiscal year 1940 are to remain available until expended "for the benefit and development of * * * travel * * *," a result best accomplished by dissemination of informa-

tion. (See Annual Report, Secretary of Interior, year ending June 30, 1937, pp. 350-351.) The 1940 Appropriation Act also makes allotments of printing funds for the distribution of information collected through investigations and surveys by the Bureau of Reclamation, the Geological Survey, and the Bureau of Mines. The use of printing funds for distribution of materials giving information concerning departmental functions has been frequently approved by the Bureau of the Budget. (See letter of Acting Director Bell to the Secretary, March 10, 1938.)

The appropriations for the Bureau of Fisheries and the Biological Survey contain additional authorization for the dissemination of information. The Department of Commerce Appropriation Act of 1940 (53 Stat. 885, 918), which lists the funds appropriated for the Bureau of Fisheries, now in this Department, provided funds "For collecting, publishing, and *distributing, by telegraph, mail, or otherwise, information* on the fishery industry, * * *." The Department of Agriculture Appropriation Act of 1940 (53 Stat. 939, 963), listing the appropriations for the Bureau of Biological Survey, now a part of this Department, provides funds enabling "investigations of enumerated biological phenomena," for "demonstrations" in the control of predatory animals.

Thus, by express language and by requiring the performance of functions which necessitate dissemination of information, Congress has imposed upon the Department the duty to distribute information in connection with numerous departmental functions.

The existence of this duty does not, however, restrict the Department to the distribution of the specific types of information listed above. The history of the Division of Information and its treatment by Congress and the General Accounting Office make it clear that authority exists to use general funds and to maintain a central agency to disseminate departmental information generally.

Since 1935 the Budget has included items for the salary of a Director of Information. In the appropriations for the Department, Congress has provided funds for salaries in the Secretary's Office out of which the salary of the Director has been paid. In 1937 the Division of Information was set up by the Secretary to bring together and disseminate information developed by the research, service, and conservation functions of the Department (Secretary's Order No. 1213, September 24, 1937), and in 1939 and 1940 the Budget included items for the salaries of some 20 or 21 employees for this Division. The functions of the Director and the Division were thoroughly discussed in the House hearings on the appropriations for 1939 and 1940 (hearings, 75th Cong., 3d sess., on Interior Department appropriation bill for 1939, pp. 21-23, January 31, 1938; hearings, 76th Cong., 1st sess., on the Interior Department appro-

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priation bill for 1940, pp. 21-22, January 23, 1939). After this discussion, Congress, in appropriating the consolidated funds for the salaries for the Secretary's Office, included funds out of which have been paid the salaries of the employees in the Division of Information.

Furthermore, during the past few years information has been provided by the Department not only through the Division of Information, but also through the Division of Motion Pictures (in the Division of Information since July 18, 1939, Secretary's Order No. 1404) and through the Office of Exhibits. Moreover, prior to the transfer of the Office of Education to the Federal Security Agency, informational and educational functions were also exercised by the Department through the Office of Education.

Congress was made fully cognizant of all these activities through the reports of the Secretary, through appropriation hearings and estimates, and otherwise, and, with the knowledge thus obtained, continued to make annual appropriations for salaries and expenses from which the salaries for these activities, listed in the Budget, have been paid. Such action by Congress clearly constitutes legislative approval of these information-distributing functions (*United States v. Bowling*, 256 U. S. 484, 489, 65 L. Ed. 1054, 1057 (1921)).

The General Accounting Office, furthermore, has raised no objections to the use of departmental funds to carry on these activities, but has approved the various accounts submitted. Such action, in effect, constitutes a ruling that such expenditures were authorized by Congress. In a recent instance the Secretary requested the opinion of the Comptroller General as to whether the appropriation allotted to the Bonneville project could be utilized for making motion pictures of the construction of the Bonneville project "for informational and instructional purposes." In response, the Comptroller General ruled on May 12, 1939 (18 Comp. Gen. 843 (1939)), that the Secretary, under the terms of an act which permitted expenditures "for such other facilities and services as he may find necessary for the proper administration of this act," had authority to incur the expenditures on motion pictures "for informational and instructional purposes." The Secretary, in the administration of the component parts of the Department, has statutory authority substantially as broad in many instances as in the case of the Bonneville project. (See, e. g., Reclamation Act, June 17, 1902 (c. 1093, 32 Stat. 388, 390, 43 U. S. C. (1934), sec. 373); Taylor Grazing Act, June 28, 1934 (48 Stat. 1269, sec. 2, as amended June 26, 1936 (49 Stat. 1976)); National Park Service Act, August 25, 1916 (39 Stat. 535, sec. 1); Mineral Leasing Act, February 25, 1920 (41 Stat. 437, sec. 32).)

The very functioning of the Department as a whole is closely tied up with the conservation and economic use of our natural re-

sources. This necessarily requires education and the distribution of knowledge concerning the utilization of proper conservation methods. Such an educational program is much more economical than belated and expensive efforts to replace resources, some of which may be irreplaceable.

The authority of the Secretary, however, is not all inclusive. At least two limitations exist. First, the Department may not employ a "publicity expert" unless specifically authorized by Congress (38 Stat. 212, c. 32, sec. 1 (1913), 5 U. S. C. (1934), sec. 54); and, second, the Department may not attempt to stir up private citizens to influence congressional legislation or appropriations (18 U. S. C. sec. 201; 55 I. D. 102, 104 (1934).)

The purpose of the prohibition against employment of "publicity experts" is revealed by its legislative history. From this it clearly appears that the statute was not intended to prohibit dissemination of all information concerning the functions and duties of any governmental agency but only the hiring, without specific congressional sanction, of "press agents" or "publicity experts to extol and exploit" their agency. It was specifically stated by the proponents of the bill that there was no objection to the employment of "experts or editorial writers for the purpose of making * * * bulletins more readable to the public and more practical in their make-up * * * to make available the work of their department * * * to reach the mind of the average reader * * * giving to the country information as to the work of the department" (Congressional Record, September 6, 1913, 63d Cong., 1st sess., pp. 4410-4411).

The Director of Information of this Department coordinates the information-distributing functions of the Department, including publications, announcements, press releases, radio broadcasts, the production of graphic materials, and motion pictures. It is clear therefore that his activities are not condemned by the statute. Administrative interpretation by the other Government agencies supports this conclusion. I have found no congressional authorization for any Government agency to hire a "publicity expert." Yet information offices or divisions are maintained by almost every Government agency whose duties and functions require it to make available to the public information concerning its activities. (See McCamy, *Government Publicity* (1939), p. 250 and *passim*.) This long-continued practice by all these Government agencies, known to and acquiesced in by Congress, has the force and effect of law (*United States v. Midwest Oil Co.*, 236 U. S. 459, 472-474 (1915); *United States v. Philbrick*, 120 U. S. 52, 58-59 (1887); *Hahn v. United States*, 107 U. S. 402, 406 (1882); *Brown v. United States*, 113 U. S. 568, 571 (1885) and cases cited).

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My opinion, therefore, is: (1) The Department and the Secretary of the Interior have authority to disseminate information generally to the public except that (a) a "publicity expert" may not be employed unless specifically authorized by Congress and (b) any attempt to stir up private citizens to influence congressional legislation is prohibited; (2) except as so limited, the radio may be used whenever, as a matter of administrative discretion, it is determined to be most feasible, desirable, or economical for disseminating information.

Approved:

HAROLD L. ICKES,
Secretary of the Interior.

OBLIGATION OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA FOR DAMAGES TO LANDS OF CHEMEHUEVI INDIANS

Opinion, December 15, 1939

INDIAN LANDS—CHEMEHUEVI INDIANS—OCCUPANCY RIGHTS—RECLAMATION WITHDRAWALS—PARKER RESERVOIR—COMPENSATION.

Departmental order of February 2, 1907, withdrawing lands from settlement and entry for the use and benefit of the Chemehuevi Indians, was in confirmation of the Indians' use and occupancy rights therein acquired by long residence, and reclamation withdrawal orders in 1902 and 1903 covering such lands did not extinguish the Indians' rights nor deprive them of their right to compensation for the full value of the lands to be flooded in connection with the Parker Dam.

MARGOLD, *Solicitor:*

My opinion has been requested as to whether the Metropolitan Water District of Southern California, under its contract of February 10, 1933, for the construction of Parker Dam, is obligated to make payments to the United States for the benefit of the Chemehuevi Indians for damages to certain lands in T. 4 N., Rs. 24, 25, and 26 E., S. B. M., which will be flooded by the Parker Reservoir.

It appears that the above-described lands, among others, were included in first and second form reclamation withdrawals under the provisions of the act of June 17, 1902 (32 Stat. 388), by departmental orders of July 2, August 26, and September 15, 1902, and February 5 and September 8, 1903, and that the reclamation withdrawals as to these lands have never been expressly revoked or vacated. It further appears that the Secretary of the Interior, in a letter to the General Land Office dated February 2, 1907, ordered these lands, among others, withdrawn from all form of settlement or entry pending action by Congress authorizing the addition of the lands to various Mission Indian reser-

vations. This latter withdrawal was made pursuant to the recommendation of the Acting Commissioner of Indian Affairs which, in turn, was predicated upon two reports by Special Agent C. E. Kelsey, dated December 27, 1906, and January 3, 1907. Those reports, which were made at the request of the Commissioner of Indian Affairs, indicated that the lands now in question had been occupied for many years by the Chemehuevi Indians and urged that the lands be reserved and set aside for their use.

The contention is made by the Metropolitan Water District, with which the Bureau of Reclamation concurs, that by virtue of the prior reclamation withdrawals, title to the lands is in the United States and payment therefor for the benefit of the Chemehuevi Indians is unnecessary. It is urged by the Indian Office, however, that the "later order withdrawing the land for Indian purposes superseded the prior reclamation orders or modified them to the extent necessary to provide the reservation intended to be set aside for the Indians, and was a confirmation of recognized rights of the Indians to the occupancy and use of the land acquired through long continued habitation in the area."

The point of view of the Metropolitan Water District and the Bureau of Reclamation is based upon the premise that the right of the Chemehuevi Indians to compensation for the taking of the land can be established, if at all, only by reference to the various departmental orders affecting the land. They contend that an examination of these orders can lead to only one conclusion, namely, that the order reserving the land for Indian use was subject to the prior reclamation withdrawals. This construction is given some force by the language contained in three orders, dated July 13, 1911, September 25, 1912, and September 15, 1919, whereby parts of the area covered by the order reserving the land for the Indians were released from the reclamation withdrawals. A proviso in the last two of these orders read:

Provided, That such revocation shall not affect the withdrawal of any other lands by said orders nor affect any other order withdrawing or reserving the lands hereinafter listed.

While there was considerable vacillation on the part of the Department concerning the ultimate use and disposition of the area as a whole, it continued to regard the original reclamation withdrawals as effective against the order reserving the land for the Indians, except for those tracts which were specifically released.

Determination of this question, however, is not decisive of the matter presented for my opinion. At the most it establishes the right of the Bureau of Reclamation to utilize the land for reclamation purposes as and when the need arose. The existence of such a right does not settle the question of compensation for the Indians. The Indian right goes back beyond the original withdrawals so that the question

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would appear to be whether this constituted an interest at that time for the taking of which for reclamation purposes they are entitled to compensation.

The reports made by Special Agent C. E. Kelsey on December 27, 1906, and January 3, 1907, on the condition of the Chemehuevi Indians refer to the long-continued residence of these Indians in Chemehuevi Valley. From the first of these reports it appears that it was originally the intention of the Department to give these Indians allotments on the Colorado River Reservation,

* * * but as the Chimehuevis are of Shoshonean stock and at enmity with the Indians lower down the river, who are of Yuman stock, nothing but the military power of the Government could make them go to the reservation or stay there when moved * * * These Indians have lived remote from civilization in a very primitive way. I doubt if they are ready for allotments.

Mr. Kelsey wrote in his second report:

These Indians regard their present location as their place of origin. I believe there is no question but they have occupied this land since primeval times. I do not know why the land has not been reserved before this, but the place is a remote one in the desert and they were probably overlooked, as a good many other Indians in California have been.

In these reports recommendation was made that the Indians' interests be protected by adding the lands in the valley to the Colorado River Reservation or by otherwise reserving them for Indian use. The reservation of the land from all form of settlement or entry on February 2, 1907, was based upon these findings, reports, and recommendations.

In his annual report for the fiscal year ending June 30, 1907, Special Agent Kelsey confirmed his previous findings. The Chemehuevi Valley, he wrote,

* * * is a deep low valley by the Colorado River and has been occupied from time immemorial by the Chimehuevi Indians. Some years ago the land was reserved from entry in connection with the reclamation service, for which purpose there seems no immediate need or possibility of use. The Chimehuevi Indians are counted among the Indians of the Colorado River reservation, though they have never lived there. The Chimehuevis are of Shoshonean stock and the Indians of the lower river are of Yuman stock. Past centuries of distrust and hatred make it hardly feasible to put the two tribes together, even is (if) there were room among the Mohaves for the Chimehuevis.

These reports indicate that the Chemehuevi Indians had rights arising out of their use and occupancy of the lands where they lived long before the withdrawals for reclamation purposes. The fact that their interests were not evidenced by any patent or title, nor recognized at that time in any agreement between them and the United States, is not significant in this connection. In *Cramer v. United States*, 261 U. S. 219, upholding the rights of occupancy of public lands by individual Indians as being included within the exceptions authorized

by the act of July 25, 1866 (14 Stat. 239), granting odd-numbered sections to the Central Pacific Railway, the Supreme Court referred to the traditional policy of the Government of respecting Indian rights of use and occupancy (*Beecher v. Wetherby*, 95 U. S. 517, 525; *Minnesota v. Hitchcock*, 185 U. S. 373, 385), and wrote,

* * * It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reason for maintaining it in the latter case would seem to be no-less cogent * * *

The Indian rights of use and occupancy, it was held, exist independent of treaty or statute and flow "from a settled governmental policy."

The application of this policy to the Chemehuevi Indians requires the Department to hold that the Indians' use and occupancy of the land which antedated the reclamation withdrawals and was subsequently recognized by the order of February 2, 1907, reserving the land for the Indians, gives them interests in the land which are entitled to protection. The order was based specifically on Special Agent Kelsey's reports describing their long residence in Chemehuevi Valley and merely confirmed their use and occupancy. It did not create any new rights for the Indians. In view of the reclamation withdrawals it could not do so without the land being released from these withdrawals. In order to be regarded as effective, it must be considered, therefore, as having recognized and confirmed the Indians' prior rights of use and occupancy so as to preserve the lands from encroachment by settlers and to provide a basis for allotment in the future.

Even if there existed any doubt as to the correctness of this construction of the order of February 2, 1907, this doubt would have to be resolved in favor of the Indians, in accordance with a familiar rule of construction (*Choate v. Trapp*, 224 U. S. 665; *Alaska Pacific Fisheries v. United States*, 248 U. S. 78; *United States v. Nez Perce County*, 95 F. (2d) 232).

The right of Indian tribes to compensation for lands taken from them by the United States has been the subject of many cases in the Court of Claims and other Federal courts. Without exception this right has been upheld. In *Ute Indians v. United States*, 45 Ct. Cl. 440, judgment was awarded to the Indians in the amount of more than three million dollars for lands ceded to the United States for disposition for their benefit, but which the United States in fact reserved for national forests and other public purposes. A similar claim was recognized by the act of February 13, 1931 (46 Stat. 1092), by which Congress authorized a direct appropriation of more than a million dollars to repay the Uintah, White River, and Uncompahgre Utes for lands withdrawn from entry and sale and included in the Uintah National Forest instead of being disposed of for the benefit of the

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Indians. In *United States v. Klamath and Modoc Tribes of Indians*, 304 U. S. 119, the Supreme Court held that the Indians were entitled to the value of the timber on lands exchanged with the California and Oregon Land Company for lands erroneously conveyed to it under the treaty of October 14, 1864 (16 Stat. 707). The Court said:

While the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others. *Chippewa Indians v. United States*, 301 U. S. 358, 375, and cases cited. * * * The established rule is that the taking of property by the United States in the exercise of its power of eminent domain implies a promise to pay just compensation * * *.

See also *Fort Berthold Indians v. United States*, 71 Ct. Cl. 308, 337.

In refusing to recognize the rights of use and occupancy which were possessed by the Chemehuevi Indians at the time of the reclamation withdrawals and were confirmed by the order of February 2, 1907, the Department would be guilty of a breach of good faith in view of the settled governmental policy of respecting such rights. The withdrawals, while establishing the right of the United States to take and use the land for reclamation purposes, could not destroy these rights nor deprive the Indians of their right to compensation if and when the lands should actually be taken. Any attempt to do so, in the light of the foregoing cases, would probably result in establishing the basis for a suit in the Court of Claims.

In the Court of Claims case of *Duwamish et al. Indians v. United States*, 79 Ct. Cl. 530 (certiorari denied, 295 U. S. 755), recovery for the taking of lands of nontreaty Indians by the United States was denied upon the ground that in the absence of recognition of a definite tribal title thereto in a treaty or act of Congress such Indians possessed no rights sufficiently certain to confer jurisdiction upon the court to hear their claims. Paragraph XXV of the statement of facts reads:

A large area of lands over which the above tribes roamed, and within portions of which they had their villages, was by act of Congress thrown open as part of the public domain to white settlers and taken up by them. The precise extent of the area settled upon, as well as the location of the same within the boundaries of the lands claimed by the tribes by right of occupancy, cannot be definitely determined from the record. Neither by act of Congress nor treaty were any one of the tribes given a delimited reservation for their occupancy, although public appropriations were from time to time made and disbursed for their benefit.

The court held that the power to define original Indian rights of use and occupancy was a political matter to be embodied in treaties or acts of Congress and that in the absence of such recognition of the Indians' rights it had no jurisdiction to determine them. No clear proof,

furthermore, of the existence of such rights had, it was pointed out, been offered to the court. At the same time, the remarks of the court on the obligation of the Government to respect Indian rights of use and occupancy are worthy of mention.

* * * The Indians' right of occupancy has always been a cardinal principle of congressional legislation,

the court said,

* * * we may well suppose that the Government would not intentionally take from Indian tribes their claimed tribal lands without compensation, * * * even though authority to do so existed.

In the instant case, the Indian rights of use and occupancy are not indefinite nor incapable of proof. The order of February 2, 1907, marked off the area claimed and recognized and confirmed the Indian title thereto. While the Chemehuevi Indians were never parties to a treaty with the United States and have not been the beneficiaries of any special acts of Congress recognizing their interests in the lands here involved, the action of the Department in approving the setting aside of the lands for them was, in my opinion, sufficient clearly to differentiate the *Duwamish* case from the present controversy. The authority of the President to create by Executive order Indian reservations in all respects similar to reservations created by treaty or act of Congress is too well established to require argument (34 Op. Atty. Gen. 171, 176; *United States v. Midwest Oil Company*, 236 U. S. 459; *Mason v. United States*, 260 U. S. 545). In this case the order of the Secretary of the Interior is to be deemed the act of the President (*United States v. Walker River Irrigation District*, 104 F. (2d) 334; *Wilcox v. Jackson*, 13 Pet. 498, 513; *Wolsey v. Chapman*, 101 U. S. 755, 769; 45 L. D. 502), effectively confirming the Indians' right to the lands.

Some contention has been made that even though the order of February 2, 1907, is to be construed as confirming the use and occupancy rights of the Indians in the lands covered thereby, these rights have subsequently been lost through abandonment, except as to those lands actually occupied. Assuming without conceding that the Indian title to a lawfully established reservation can be lost by abandonment, the record before me falls far short of supporting a finding of abandonment. The rights recognized and confirmed by the 1907 order were tribal and extended over the entire reserved area. The allotment in severalty of a portion of the reserved area clearly would not extinguish the Indian title to the remaining unallotted area nor would that title be impaired so long as any portion of the reserved lands, allotted or unallotted, continued to be in Indian use and occupancy, such use and occupancy to be determined with reference, not to the white man's conception of these terms, but to the habits and modes of Indian life. I understand that some of the allottees and other members of the band

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have continued to reside in the Chemehuevi Valley. This, in itself, is sufficient to negative the idea of abandonment.

In my opinion, the Chemehuevi Indians are entitled to receive compensation for the lands to be flooded in connection with the Parker Dam. Under the rule set forth in *United States v. Klamath and Modoc Tribes of Indians*, 304 U. S. 119, they should receive the full value of these lands, including any minerals, timber, water rights or other resources therein and any improvements thereon.

Approved:

E. K. BURLEW,

Acting Secretary of the Interior.

RAYMOND M. ROGERS

Decided December 22, 1939

HOMESTEAD ENTRY—HEAD OF FAMILY—UNMARRIED PERSON.

An unmarried person, having his aged and infirm parents under his care and maintenance, who established residence on public land and took his parents to live with him, is the head of a family within the meaning of section 2289, Revised Statutes, and his absence for the purpose of maintaining his family is excusable.

MENDENHALL, Acting Under Secretary:

On June 20, 1933, Raymond M. Rogers filed application to make entry of lots 1, 2, 3, 4, S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 11, T. 13 S., R. 22 E., N. M. P. M., containing 317.05 acres, under the enlarged Homestead Act of February 19, 1909 (35 Stat. 639), as amended, and at the same time filed application under the act of December 29, 1916 (39 Stat. 862), for an additional stock-raising homestead entry to embrace the S $\frac{1}{2}$, same township and range. Both applications were allowed on July 3, 1933. On May 9, 1938, he gave notice of his intention to make 3-year proof, and on July 7, 1938, he filed final proof on both entries. The entryman stated that he established residence on the land on March 1, 1934; that he constructed a habitable three-room house thereon, furnished the house and then moved his aged father and mother into the house. He stated that he had resided on the land for 8 months each year from 1934 to 1936, and for 5 months during 1937. In connection with the question in the proof as to actual residence, he offered the following explanation:

I was a single man until June 7, 1938. I am, and have been the sole means of support for my aged father and mother, who lived on the claim as stated above. My father is practically blind, and unable to work. I had to work away from home to support them. I went to the claim every week end and took them provisions. My parents have depended entirely on me for their support the last past 10 years.

On July 21, 1938, the register notified the entryman that the final proof on the entries was rejected because of insufficient residence, and stated that residence by the father and mother of an entryman is not residence by the entryman. An appeal from the register's action was taken to the Commissioner of the General Land Office, and, by decision of October 18, 1938, the register's action was sustained.

In presenting an appeal to the Department, Rogers states that his parents are 73 years of age; that his father is almost totally blind; and that he has been their sole support for the past 12 years. The appeal is supported by an affidavit by the entryman's father to the effect that he and his wife are without money or property of any kind, and that his son settled upon the land in good faith in an effort to provide a home for himself and family; that his son spent several short periods on the claim each year making improvements, and always came out on Saturday nights or on Sundays and brought supplies. Other affidavits with the record corroborate these statements. Appellant contends that, under the circumstances, his aged and feeble parents, of whom he is the sole support, constitute his family, and that, having established residence, the presence of his father and mother on the land satisfied the residence requirement when it was necessary for him to be absent from the homestead to provide means of support for them.

The homestead law provides that upon the submission of final proof, an entryman must show that he has actually resided upon and cultivated the land for the term of 3 years (43 U. S. C. secs. 164, 231).

In the case of *Harold Paul* (54 I. D. 426), it was shown that the entryman's wife remained on the entry and made it her continuous place of abode while the entryman attended his duties as a member of the police force in a nearby city. He repaired to the land and stayed thereon at week ends and during holidays and vacation. In allowing the final proof submitted by this entryman, the Department stated that:

Where an entryman is a single person without family, the physical occupation and personal presence must be that of himself; but this Department has repeatedly held that the home of an entryman is presumptively where his family resides, and absence from the entry of the entryman for the purpose of maintaining his family, though in some instances covering several unbroken years, is excusable and does not break the continuity of residence where his family continued to reside upon the homestead.

Section 2289, Revised Statutes, provides that every person, otherwise qualified, who is the head of a family shall be entitled to make homestead entry. The law requires that the entryman should personally establish residence (*Puette v. Greer*, 33 L. D. 417), and he

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must have the concurrent intent to maintain it as long as the law requires (*Whaley v. Northern P. Ry.*, 167 Fed. 664; *United States v. Anderson*, 238 Fed. 648; *Gibbs v. Kenny*, 16 L. D. 22). Rogers personally established residence and has submitted final proof. If his infirm parents who rely upon him for support are to be regarded as the family of which he is the head, his absence from the land while his parents continued to reside upon the homestead would not invalidate his proof of residence.

A "family" is defined as a collection of persons living under one roof, having one head or manager, and the head of a family is one who controls, supervises, and manages the affairs of the household. To be the head of a family, one must have a responsibility, at least a natural or moral obligation, to support another member of the family. The term "head of the family" is used with respect to the relation existing between the members of the family as recognized by law and the usage of society. There may be a head of the family when there is no marriage relationship (*McGinnis v. Wood*, 4 Okla. 499; 47 Pac. 492, 495; *In re Morrison*, 110 Fed. 734; *Kelley v. Hastings and Dakota Ry. Co.*, 30 L. D. 306; *Words and Phrases*, vol. 3, p. 1047, Third Series). In the *Kelley* case it was said:

To constitute one the head of a family it is not necessary that he or she should be under a legal obligation to support the family; it is sufficient if, acting from a sense of moral duty, one undertakes the care, attention, support, and maintenance of a family to which he owes such moral duty.

The entryman's aged and infirm parents were under his care and maintenance. He established residence on the land and took his father and mother to live with him. A group of persons living as a household were thus formed. The entryman controlled, supervised, and managed the affairs of the household. He was at least morally obligated to support his parents. We hold, therefore, that he was the head of a family within the meaning of section 2289 (Rev. Stat., 43 U. S. C. 161). It follows that his absence for the purpose of maintaining his family is excusable (*Harold Paul*, 54 I. D. 426).

The decision rejecting the final proof because of insufficient residence is accordingly reversed.

Reversed.

HORACE D. STEWART ET AL. v. EASTERN OREGON LAND CO.
(ON REHEARING)

Decided January 3, 1940

PUBLIC LANDS—GRAZING—EXCHANGES—PUBLIC BENEFIT.

In considering applications for exchanges of privately owned lands for public lands under the provisions of section 8 (b) of the Taylor Grazing

Act, such exchanges may be consummated when public interests will be benefited thereby, and individual cases of hardship or dissatisfaction on the part of persons who have used the public lands selected by the applicants cannot be allowed to sway the Department in reaching a decision.

The hardships resulting in certain instances from the loss by certain livestock operators and ranchers of the use of lands that are now in Federal ownership and that they have long been accustomed to using are outweighed by the benefits to the public interests that are to be derived from the elimination of a "checkerboard" pattern of ownership and the increased facility of control and management of the lands.

In considering applications for exchanges under section 8 (b), the Government is in a similar position to that of a private landowner who may have extensive landholdings and who has permitted adjoining landowners to use his lands free for such time as he has had no other use for them. In such case the landowner's right to sell or otherwise dispose of the lands could not be qualified or limited by the fact that there had been such suffered use.

MENDENHALL, Acting Under Secretary:

A motion for rehearing has been filed by Horace D. Stewart, Mary MacKay Stewart, George MacKay, and Donald and Dora MacLennan, pursuant to the decision rendered on August 7, 1939, by the Department, affirming a decision of the Commissioner of the General Land Office which held grazing lease applications filed by these parties for rejection because of conflict with applications filed by the Eastern Oregon Land Co. to exchange, under the provisions of section 8 (b) of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended, certain lands which it owns for certain public lands in Grant County, Oregon.

The decision of the Department was based to a large extent on a report submitted by a special agent of the Division of Investigations, which showed that the consummation of the exchange would result in the elimination of "checkerboard" land ownership in the areas of the selected and offered lands, and would be conducive of proper administration of the public and privately owned lands in the areas. The decision recognized that some hardships would be visited on the ranchers in the vicinity of the selected lands in that they would no longer be in a position to lease the public lands at the low rental rates established by the Government, and might not be able to lease the lands under any condition, but it was held that these attendant hardships were insufficient to offset the public benefit that would arise by virtue of the ability of the Government to manage and protect its range more efficiently were the exchange to be allowed. The Commissioner's decision was therefore affirmed, without prejudice, however, to the right of the appellants to make further showing tending to controvert the facts and conclusions of the special agent upon which the affirmance was largely based.

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The motion that has been filed is styled as a "motion for reconsideration," but as motions for reconsideration have been abolished (see rule 84 of Practice), it will be treated as a motion for rehearing. The motion reads, in part, as follows:

We are making this motion for the reason that we do believe that there is a good deal of misinformation and misapprehension concerning the whole matter, and that the matter should be settled and settled right once and for all. We notice that the information given to the Commissioner was largely through a special agent who made an investigation. We have never had an opportunity to oppose any of such information. Of course, we do not know what the special agent's report was, except what was indicated in the opinion. We notice the statement that the stockmen in the vicinity of the offered lands are enthusiastically in favor of the exchange. We believe that this is questionable because we have a group of the appellants and others who might have appealed but for the cost, who comprise a goodly portion of the stockmen of that community. It is safe to say that those who are benefited by the change are highly enthusiastic, and those who are injured by the exchange are not so. We believe upon investigation that the Commissioner will find that the little town of Dayville is the median line, and that in general those above are against the exchange and those below in favor of the exchange. It is entirely a matter of self-interest, and their enthusiasm is according to this interest. The statement is made by the special agent that the appellant, George MacKay and Mary MacKay Stewart run their cattle together, and this is not true. They have no partnership arrangement of any kind, nor agreement for operation. The special agent reports that Martin Bros. have a lease on the MacLennan lands. This is not true. At one time Martin Bros. had a lease, but they have no lease at this time and have had none for some considerable time, and certainly not during this appeal. This would carry the inference that Martin Bros., who leased lands from MacLennan, and deraign through him, were in favor, which is entirely erroneous, because Martin Bros. main operations are below the city of Dayville. There is a statement that the agent reports that the applicant is negotiating for the acquisition of lands adjoining on the west. These lands are locally known as the Morris lands, and that the appellant, George MacKay, has also been negotiating for these lands and will very probably purchase the same.

The appellants here have a right to be heard as against the erroneous information submitted by the special agent, and we sincerely hope that the motion for reconsideration will be granted, and that the time be set for the hearing in the vicinity of the exchange for the benefit of witnesses. We submit that this hearing should be held by someone who has heretofore had no connection whatsoever with this matter. We submit that a full and complete hearing is the least that we could ask.

The concluding statement in the Department's decision of August 7, 1939, was to the effect that the Commissioner's decision was affirmed "without prejudice to the right of the appellants within 30 days from notice of this decision to make a further showing tending to controvert the facts and overcome the conclusions of the special agent." Pursuant to this statement the attorney for the moving parties has submitted certain affidavits by residents of the community which tend to show that the report of the special agent upon which

the decision of the Department was largely based, was, as to some particulars, erroneous.

An affidavit by one Anna McCallum recites that she is not in the livestock business, has never discussed the proposed exchange with anyone, and has never made any statement as to whether or not she favored the exchange. In his letter transmitting this affidavit, the attorney states that Anna McCallum is the same person as the "Mae McCullom" referred to in the Department's decision as being an owner of land in the vicinity of the selected lands and as having no objection to the exchange.

An affidavit has also been furnished by one Wayne C. Stewart, who states that he is a rancher and stockman, that he is familiar with the conditions that exist in regard to the proposed exchange, that the ranch lands of Mary MacKay Stewart, Horace Stewart, George MacKay, and D. MacLennan are separated by about five sections of land belonging to the Eastern Oregon Land Co., that these parties have been accustomed to using these five sections and have acquired valuable water rights necessary for the best use of their lands, that the premises of D. MacLennan are mortgaged for approximately \$4,000, and that it would be difficult to retire this mortgage if the present land-ownership pattern is disturbed. He concludes by stating that the exchange should not be allowed.

In an affidavit furnished by D. MacLennan, he states that he was never interviewed by the special agent, that he does not think that the allowance of the exchange and the resultant increase of control of lands by the Eastern Oregon Land Co. in the vicinity of his privately owned lands would be in the interest of good range management, that the statement of the special agent that the land company will rent or sell its lands at reasonable rates is erroneous for the reason that the company rents its land "at a higher than the usual rate," that the statement of the special agent that the land company is negotiating for the "Morris" lands may be true but that the affiant is also negotiating for said land, that the statement that "Mary MacKay Stewart and George MacKay run their cattle together" is erroneous for the reason that "the cattle go on the range together and mix with other cattle at large," that the statement of the special agent that the Martin Bros. have a lease on the MacKay lands is erroneous, that the statement that Mae McCallum, Dan Crouter, and Martin Braga have no objection to the exchange may be true but that it should be considered that Mae McCallum is not in the livestock business, Crouter is an employee of the land company, and Braga does not operate exclusively on the north side of the John Day River but has most of his ranch property on the south side of the river.

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An affidavit by George MacKay is identical to the one furnished by D. MacLennan.

Assuming the correctness of all these allegations in the affidavits which, incidentally, are uncorroborated, it is difficult to see wherein they constitute a basis for a modification of the prior decision of the Department. They do tend to show that in certain particulars the special agent was in error, but it is apparent that these particulars have little or no bearing on the case. This application for exchange was made and is being considered under section 8 (b) of the Taylor Grazing Act of June 28, 1934, *supra*, as amended, and that section provides that exchanges of this type may be consummated "when public interests will be benefited thereby." In considering the possible benefit to the public interest, individual cases of hardship or dissatisfaction alone cannot be allowed to sway the Department in reaching a decision. To hold otherwise would prevent the consummation of most exchanges not made mandatory by statute. Only in cases where such hardship is likely to be so widespread that a large section of the public will be adversely affected would the Department be warranted in taking cognizance thereof.

It is difficult to see how any of the statements in the motion or the supporting affidavits can be interpreted as indicating that the exchange is not in the public interest. The consummation of the exchange will result in the consolidation of the landholdings of the applicant company and the Federal Government. The presently existing "checkerboard" pattern of ownership will be largely eliminated and thus the company and the Government will be able to administer their lands in a better manner. It is recognized that there will be hardships in certain instances resulting from the loss by certain livestock operators and ranchers of the use of lands that are now in Federal ownership and that they have long been accustomed to using, but these factors are outweighed by the public interests benefited.

Without going into a detailed discussion of the various allegations of the motion and the affidavits, it may be stated that they have little or no bearing on the case. For example, the fact that George MacKay and Mary MacKay Stewart may or may not run their cattle together or have any partnership agreement, does not affect the case. The same is true of the question of whether or not the Martin Bros. lease the MacLennan lands or are in favor of or opposed to the exchange. In fact, it may be stated of all of the allegations of the affidavits that, although they may show that the special agent was misinformed as to certain particulars, they were in nowise important for they had no bearing on the question of the sufficiency or insufficiency of the benefit of the exchange to the public interest.

Insofar as the request for a hearing is concerned, it may be stated that neither the statute nor the regulations contain any provision for a hearing on exchanges proposed under section 8 (b). No doubt the Department could order such a hearing if it were considered necessary to a proper disposition of such a proposal but in a case like this little would be gained by such hearing other than to accumulate a record consisting of unqualified approbation of the exchange by the ranchers in the vicinity of the offered lands and equally vehement condemnation of the exchange by the ranchers in the vicinity of the selected lands. Such a record would be of no real assistance to the Department in determining the degree of benefit to the public interest, and hence of no real assistance in disposing of an application. For this reason the Department has provided for investigations by special agents who, by the nature of their employment, are relieved of bias and are capable of that degree of detachment that will enable them to submit reports that will be of real assistance to the Department in disposing of such matters.

Since the filing of the motion for rehearing, the Department has been informally advised of a proposal by the attorney for the moving parties that the exchange be rejected insofar as protests have been filed and approved as to the remainder. It is apparent that this suggestion cannot be made a basis for final disposal of the case. As has been pointed out above, the test of an exchange under section 8 (b) is whether its consummation will be in the public interest and not whether it is objected to by some individual or group of individuals. If it were to be otherwise, and a protest by someone who has been accustomed to using the land selected by the exchange applicant could serve to block the exchange to the extent that he was interested in the selected lands, it would mean that the requirement of the statute that exchanges should be considered in the light of public interest would be set aside, and instead consideration of private interests would become paramount.

The Department considers itself bound to administer the public lands in the interests of all of the people as a whole, and in such manner as will result in the greatest public benefit. In the present case the selected lands are poorly situated from the standpoint of effective control and administration and the exchange, if consummated, will eliminate this difficulty. It is recognized that the neighboring farmers and ranchers have used the selected lands, many of them for years, and are, in varying degrees, dependent thereon for the maintenance of their livestock operations. But this prior use of the lands was only at sufferance of the Federal Government and in no manner served to vest a continued right to such use. Thus when it becomes apparent that the interests of the public at large can best be served by disposing

of these lands in exchange for other lands, the Department feels that it is its duty to do so. In this respect, the Government is in a similar position to that of a private party who may have extensive landholdings and who has permitted adjoining land owners to use his lands free for such time as he has had no other use for them. In such case his right to sell or otherwise dispose of his lands could not be qualified or limited by the fact that there had been such suffered use. This is essentially the situation in the present case where the selected lands have long been used by the protestants or their predecessors in interest and such use is being set up as an argument against the exchange. That it cannot prevail is obvious for, as stated above, the interests of private parties must give way when opposed to dominant public benefits.

There is nothing in the present case to show that the proposed exchange will be otherwise than beneficial to public interests, and no reason appears for the ordering of a hearing or for the modification of the former decision. The former decision is accordingly adhered to and the motion is

Denied.

R. C. CONLY

Opinion, January 20, 1940

DAMAGE CLAIMS—BAILEE.

Private property, in the possession of claimant as bailee, was damaged through the negligence of a Government employee. Since the bailee was responsible to the bailor-owner, who waives in favor of bailee all right of claim against any third party by reason of any collision involving the bailed property, the bailee's interest in the property entitles him to reimbursement under the act of June 28, 1937.

MARGOLD, Solicitor:

Mr. R. C. Conly, of Daingerfield, Tex., has filed a claim in the amount of \$28.20 against the United States for compensation for damage to his Ford sedan as the result of a collision with a National Park Service truck operated by Henry Sadberry, an enrollee in the Civilian Conservation Corps. The question whether the claim should be paid under section 16 of the act of June 28, 1937 (50 Stat. 321), has been submitted to me for opinion.

The collision occurred on May 5, 1939, in Daingerfield State Park, Tex., when the enrollee driver backed the Government truck into the private car. The various statements submitted indicate that the property damage was caused by the negligence of the Government employee, who backed his truck without ascertaining whether the way was clear.

The record discloses that the private car was in the possession of the claimant as bailee when the accident occurred. The bailor-owner, Ted Spencer, submits a notarized waiver agreement, in which he states that R. C. Conly assumed full responsibility for the collection of any claim which might arise against a third party by reason of any collision involving the bailed property, and in which he waives in favor of Conly all rights pertaining to any such claim.

Dobie's "Handbook on the Law of Bailments and Carriers" (1914), section 39, states that a "bailee borrower may maintain, by virtue of his interest, an appropriate action against a third party for the wrongful disturbance of his possessions," citing various cases in different jurisdictions wherein the law has been so applied. *Masterson v. International & G. N. Ry.*, 55 S. W. 577 (not officially reported), and *Panhandle & S. F. Ry. v. Jackson*, 8 S. W. (2d) 256 (not officially reported), both decided by the Court of Civil Appeals of Texas, are cases in point in which the court held that the bailee had the right and authority to institute and maintain suit to recover for the damage to the property involved. The court pointed out in these cases that the bailee was responsible to the owner for the property and that he was therefore a rightful claimant.

In view of Mr. Conly's interest as bailee in the property in the instant case, it is my opinion that the claim is properly payable to him, it having been concluded that the negligence on the part of the Government employee permits payment. The claim is supported by a notarized repair bill made out in the name of the claimant and paid in full by him.

Approved:

W. C. MENDENHALL,
Acting Under Secretary.

ARCHIE LINGO

Decided February 20, 1940

ALASKA—OIL AND GAS LEASES—SECTION 17 OF MINERAL LEASING ACT.

Section 17 of the Mineral Leasing Act, as amended, does not apply to Alaska leases insofar as it prohibits waiver, suspension, or reduction of rental payments on oil and gas leases.

RENTAL PAYMENTS—WAIVER ON ALASKA MINERAL LEASES—SECTION 22 OF MINERAL LEASING ACT.

Rentals on Alaska leases may be waived, in the discretion of the Secretary, under the proviso clause of section 22 of the Mineral Leasing Act of 1920.

CHAPMAN, *Assistant Secretary:*

By decision of February 8, 1939, the Commissioner of the General Land Office directed that Archie Lingo be notified that he would be

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allowed 60 days from notice to pay the first year's annual rental of 25 cents an acre in connection with his oil and gas lease application filed August 12, 1937, for unsurveyed secs. 3, 4, 9, and 10, T. 43 S., R. 58 W., Seward meridian, Alaska, and that for failure to comply his application would be finally rejected.

The applicant filed an appeal and an application for waiver of rentals.

The grounds of appeal are that until the execution of a lease and the approval of a bond no rentals can be due; and that under section 22 of the act of February 25, 1920 (41 Stat. 437), as amended by the act of April 30, 1926 (44 Stat. 373), it becomes the duty of the Secretary of the Interior, for the purpose of encouraging the production of petroleum in Alaska, to waive the payment of any rentals for a period not exceeding the first 5 years of any oil and gas lease in that Territory.

The Supplemental Regulations Affecting Oil and Gas Leases in Alaska, approved July 3, 1937 (Circular No. 1431, 56 I. D. 472), provide that the first year's rental payable on such leases shall be "payable prior to the execution of the lease. * * *" This regulation is fully within the authority of the Secretary, under section 32 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act." It is true that the rental for the first year is required to be paid before the term has commenced and before the lease is granted. But obviously it is not unreasonable to exact the payment in advance as a token of good faith (*Cf. Hardeman v. Witbeck*, 286 U. S. 444 (1932)). The first ground of the appeal is therefore without substance.

The second ground is also without merit. The proviso clause of section 22 of the act of February 25, 1920 (41 Stat. 437), cited by the appellant, specifically provides that waiver of rental payments by the Secretary is "in his discretion." The statute imposes no mandatory duty upon the Secretary to make such waiver.

The applicant, however, has filed an application for waiver of rental payments in which he alleges various factual grounds to induce the Secretary to waive the rental payments. Consideration can be given to the facts alleged only if the Secretary may legally waive such rental payments.

Section 22 of the 1920 Mineral Leasing Act provides:

That leases in Alaska under this act * * * 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.* [Emphasis supplied.]

Section 17 of the amendatory 1935 Mineral Leasing Act provides:

*All lands subject to disposition under this act * * * may be leased by the Secretary of the Interior * * *. Such leases shall be conditioned upon payment by the lessee * * * in advance of a rental to be fixed in the lease of not less than 25 cents per acre per annum, which rental * * * shall not be waived, suspended, or reduced * * *. [Emphasis supplied.]*

The question arises, therefore, whether rentals for Alaska leases are governed by the language emphasized in section 17 or that emphasized in section 22.

The present section 17, as amended in 1935, purports to deal with leases in "all lands subject to disposition under this act," whereas section 22 of the 1920 act deals specifically with oil and gas leases in Alaska. Nevertheless, it is a well-established rule of law that a later statute, general in its terms, will not affect the special provisions of the earlier statute unless a repeal is expressly made or unless the provisions of the general statute are manifestly inconsistent with those of the special statute (*Washington v. Miller*, 235 U. S. 422, 35 S. Ct. 119, 59 L. ed. 295 (1914); *United States v. Nio*, 189 U. S. 199, 23 S. Ct. 495, 47 L. ed. 775 (1903); *Rodgers v. United States*, 185 U. S. 83, 22 S. Ct. 582, 46 L. ed. 816 (1902)). The amendatory act of 1935, however, specifically states that it amends only sections 13, 14, 17, and 28. It seems clear, therefore, that Congress, when it included the above-emphasized language within the new section 17, did not intend to amend or repeal section 22. Furthermore, there is no manifest inconsistency between section 17, as amended, and section 22. Section 17 prohibits waiver of rentals as to all lands except those in Alaska, the latter being subject in this regard to the provisions of section 22. This has been the administrative interpretation of the Department. Circular No. 1431, *supra*, states that "as no amendment was made of section 22 * * * it is apparent that Congress did not intend to make any change in the provisions of the law applicable only to Alaska," and quoting the proviso clause of section 22, expressly declares that, as a part of the 1920 act, it is "especially applicable to Alaska and still in force." Insofar as the prohibition against waiver of rental payments is concerned, therefore, section 17 is not applicable to oil and gas leases in Alaska.

Section 22 clearly does not prohibit relief from rental payments in individual cases where sufficient showing is made to warrant such relief in the discretion of the Department. Whether such relief should be granted by regulation applicable to all or by disposition of individual applications confined to particular persons is a matter of policy and discretion. In determining that question due consideration should be given to the fact that relief from the payment of rental may result in encouragement of the practice of obtaining leases for purely speculative purposes. In any event, there should be a clear showing

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that the waiver will tend to encourage the actual production of petroleum products in Alaska, which is the express purpose of the waiver provision of section 22.

The decision of the Commissioner is affirmed and the case remanded to the General Land Office for consideration on the merits of the application for waiver.

Affirmed and Remanded.

SUSIE E. COCHRAN ET AL. v. EFFIE V. BONEBRAKE ET AL.

Decided February 21, 1940

MINING CLAIM—MINERAL LEASING ACT.

An oil placer mining claim is not valid until there is a discovery of oil or gas within its limits. A qualified person may take possession and hold public land for a reasonable time while prospecting for mineral. Assessment work does not take the place of discovery. It is of no avail on a mere possessory claim. Section 2332, Revised Statutes, has no application to a possessory claim which is not valid through discovery. Section 37 of the act of February 25, 1920 (41 Stat. 437), did not give force or protection to an alleged oil placer mining claim where there had been no discovery of oil or gas and where there was no diligent prosecution of work looking to discovery at the date of said act.

CHAPMAN, Assistant Secretary:

By decision of October 13, 1939, the Commissioner of the General Land Office dismissed the protest of Susie E. Cochran et al. against the issuance of oil and gas leases to Effie V. Bonebrake et al., and the protestants, by their attorney, have appealed. The facts are briefly as follows:

On April 18, 1939, Effie V. Bonebrake, P. L. Bonebrake, Neil S. McCarthy, and J. F. T. O'Connor, holders of oil and gas prospecting permit Los Angeles 043561, granted February 5, 1929, for lands in secs. 6 and 7, T. 4 N., R. 19 W., and sec. 1, T. 4 N., R. 20 W., S. B. M., California, filed application for leases as reward for discovery of oil on the permit land.

On June 30, 1939, Susie E. Cochran, Frances M. Martin, and George Ross Jenkins filed a protest against the issuance of leases and against the permit to the extent that there was conflict with the Elwood placer mining claim. They asked that the permit be canceled to the extent of the conflict, alleging that as the result of a protest and hearing the permit was canceled on December 20, 1934, insofar as there was conflict with the Nellie Bell placer mining claim, and thereafter patent was issued for the said Nellie Bell claim; that the original protest included the Nellie Bell and the Elwood placer claims but at the time of the trial the protest was withdrawn as to the Elwood, *without prejudice* to the right of the protestants to

renew their protest at a future time; that on April 1, 1910, the predecessors in interest of the protestants made and located the Elwood placer mining claim and duly recorded the location; that at all times since April 1, 1910, to wit, over 29 years, the protestants and their predecessors in interest had been in continuous, open, adverse, notorious, and exclusive possession of the land; that each and every year they had duly filed their proofs of annual labor and expenditures required to maintain and hold mining claims, showing that each year there had been expended a minimum of \$100 for the benefit of the Elwood placer; that from April 1, 1910, to February 25, 1920, the date of the passage of the Mineral Leasing Act, there were no adverse locations; that since February 25, 1920, there had been no proceedings of any kind on behalf of the United States which in any form or manner challenged the legal sufficiency of the said Elwood placer; that on February 25, 1920, the protestants held the Elwood placer as a valid mining claim by the terms of section 37 of the said act of February 25, 1920 (41 Stat. 437); and that "by said act the said claim may be perfected under such law in all respects, including discovery."

In his decision the Commissioner stated and held:

No rights to deposits of oil in public lands of the United States can be acquired by adverse possession. In fact, prior to the date of the leasing act, namely, February 25, 1920, the only manner in which oil rights in such lands could be acquired was by location based upon a valid discovery of oil deposits. As the Elwood placer mining claim was located on Government land, the laws of the United States and not the statutes of the State of California are controlling in this case.

The protest contains no allegation or showing that discovery of oil or other minerals on the Elwood placer claim has been made and thus there is no support for the allegation in the protest that the placer claim is a valid one under the United States mining laws.

In the appeal it is alleged that the Commissioner erred, (1) in refusing to order a hearing; (2) in refusing to recognize the claims of the protestants; (3) in dismissing the protest; (4) in requiring that the protestants should show that they had made a discovery of oil or other minerals on the Elwood placer; (5) in holding that there was no support for the allegations in the protest that the Elwood placer was valid under the United States mining laws; and (6) in his statement of facts. It was further alleged that the decision was contrary to law and contrary to the settled judicial interpretations respecting the mining laws of the United States.

In his brief on appeal the protestants' attorney quotes section 37 of the act of February 25, 1920, *supra*, and contends that the placer claimants may maintain their rights under a location without discovery providing that they continue in prosecution of work looking to discovery and that when discovery is made it relates back

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to the initial act of location; that the failure of locators, under such circumstances, to continue diligently in the prosecution of work looking to discovery does not *ipso facto* forfeit their rights, the only penalty accruing against them, under such circumstances, being that an adverse locator, himself without discovery, might assume possession and thereafter begin work looking to discovery; that this principle is well established in the cases of *Wilbur v. United States*, 280 U. S. 318, and *Ickes v. Virginia-Colorado Development Corporation*, 295 U. S. 639; that in section 37 of the Mineral Leasing Act, Congress has recognized that a placer mining claim could be valid without a discovery and distinctly gave the right to perfect the claim by a discovery thereafter, without imposing any specific time when such discovery must be made; that the protestants have alleged that they held the premises beyond the term of the statute of limitations under the laws of California and in doing so they have followed the terms of section 2332 of the Revised Statutes; and that it has thus been shown that the Commissioner erred; his decision should be reversed and a hearing ordered.

The protestants did not allege that they or their predecessors in interest had made any discovery of oil or other mineral on the Elwood placer.

In the case of *United States v. Ohio Oil Company*, 240 Fed. 996, the court held that a location of a mining claim was not valid until there was a discovery, in the case of a lode claim, of a vein or lode containing mineral, or, in case of a placer claim, a discovery of petroleum or other mineral within its limits. This is so well established that no further citations are necessary.

A qualified person may take possession and hold public land for a reasonable time while prospecting for mineral. In the case of *Union Oil Company v. Smith*, 249 U. S. 337, 346, the court said:

It is clear that in order to create valid rights or initiate a title against the United States a discovery of mineral is essential. Nevertheless, section 2319 extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals, systematic exploration, legal recognition of the *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled—at least for a reasonable time—to be protected against forcible, fraudulent, and clandestine intrusions upon his possession.

And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential in the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened.

In the California courts the right of a locator before discovery while in possession of his claim and prosecuting exploration work is recognized as a substantial interest, extending not only as far as the *pedis possessio* but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, such person has the right to maintain possession as against violent, fraudulent, and surreptitious intrusions so long as he continues to occupy the land to the exclusion of others and diligently and in good faith prosecutes the work of endeavoring to discover mineral thereon.

* * * * *

Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral.

The allegation of annual expenditure for the benefit of the Elwood placer is without merit. In the case of *Cole v. Ralph*, 252 U. S. 286, 296, the court said:

Nor does assessment work take the place of discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has nothing to do with the locating or holding a claim before discovery.

The cited section 2332, Revised Statutes, has no application whatsoever in this case because it contemplates perfected and valid mining claims. Section 2320 provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The doctrine of *pedis possessio* is a judicial interpretation and, as we have seen, such possession is no more than a tenancy at will.

The cited cases of *Wilbur v. United States* and *Iokes v. Virginia-Colorado Development Corporation* are not apposite because in those cases perfected mining claims were involved and no mere possessory rights without discovery.

In the case of *United States v. Hurliman* (51 L. D. 258), the Department held that the Land Department could properly allow a stockraising homestead entry for land in the actual possession of an alleged lode mining claimant who had made no discovery and was not in diligent prosecution of work leading to discovery.

The protestants allege that they located the Elwood placer in 1910. Do they wish to represent that they or others in their behalf have

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been engaged for 29 years "in persistent and diligent prosecution of work looking to the discovery of mineral" within the Elwood placer? They certainly have made no specific allegation of that kind. In fact, their allegation is that their proofs of annual labor show that each year "there has been expended for the benefit of said Elwood Placer Mining Claim an amount in the minimum of \$100 as required by said Mining Laws." The indications are that nothing persistent was done on the Elwood. On the adjoining Nellie Bell placer the protestants did drill to discovery and obtained patent, but work on that claim, or elsewhere than on the Elwood, gave no right to continued possession of the Elwood.

The protestants have failed to show that they were helped by section 37 of the Mineral Leasing Act. So far as shown they were not in diligent prosecution of work on the Elwood looking to discovery of oil or other mineral on February 25, 1920, and thereafter there was nothing to prevent the Land Department from granting an oil and gas prospecting permit for the land. In the case of *Mountain States Development Company v. Taylor* (50 L. D. 348), the Department held that the exception clause of the said section 37 did not confer upon a claimant of a group of placer claims of oil and gas lands, upon which no discovery of mineral had been made, a right to retain them unless he had been in actual continuous possession of each claim and in diligent prosecution of prospecting thereon up to the time of the passage of that act. In the case of *McGee v. Wootton* (48 L. D. 147), the Department held that in view of the provisions of said section 37—

* * * no oil placer mining claim can be passed to patent under the provisions of the placer mining laws unless (a) it shall be shown to have been supported at the date of the leasing act by a sufficient discovery; or (b) discovery being at that time absent, it shall be established that work leading to discovery was then being diligently prosecuted by or for the claimants thereof and thereafter diligently continued to discovery.

As hereinbefore stated, the oil and gas prospecting permit was granted in 1929, the protestants filed a protest in 1932 which they withdrew as to the Elwood placer in 1933. More than 6 years later, when the permittees had drilled and discovered oil on the permit land, which included the Elwood placer, the protestants filed another protest without alleging discovery of mineral and without alleging diligent prosecution of work on the Elwood looking to discovery. Upon the allegations which have been made the Department finds that the protestants have no rights to the land covered by the Elwood placer. There is no basis for a hearing because the protest allegations can be admitted as true without affecting the validity of the permit.

The decision appealed from is affirmed.

Affirmed

AUGUSTE NICOLAS

Decided March 4, 1940

PUBLIC LANDS—GRAZING—LICENSES—BASE PROPERTY—DEPENDENCY BY USE.

In construing the requirement of section 2, paragraph (g) of the Federal Range Code, that lands shall have had 3 years or 2 consecutive years' use in connection with the same part of the public domain during the 5-year period prior to June 28, 1934, in order to qualify as dependent by use, the doctrine of reasonableness should apply and the amount of use of the public domain in any 1 year must have been substantial in relation to the extent of the grazing season. A use of the public domain for 1 or 2 days out of a season extending in the average year from July 1 to September 1 is not substantial within that construction.

WIRTZ, Under Secretary:

Auguste Nicolas has appealed from a decision of an examiner of the Grazing Service which affirmed a decision of the regional grazier which rejected an application by Nicolas for a 1939 grazing license in Colorado grazing districts Nos. 3 and 4.

Nicolas' short-form application, dated November 29, 1938, requested a license to graze 8,000 sheep from July 1 to September 10, 1939, and by letter of January 22, 1939, he was advised by the acting regional grazier that the advisory board had recommended that his application be rejected for the reason that the applicant's base property was not dependent by use. Nicolas protested, and after consideration of the protest by the advisory board, the acting regional grazier advised him that the board had recommended that the former action be sustained, and that his application was accordingly rejected. Nicolas appealed and the case was set for hearing on June 14, 1939, at Montrose, Colorado, at which time and place he appeared and was represented by counsel.

At the hearing it was stipulated that the sole issue was whether or not the appellant had made any use of the public range in the American Flats area in 1934. It appears that there was no question but that Nicolas had used this area in grazing his sheep during the summer grazing season of 1933 and his position appears to have been that, if it were established that he had made similar use of that range in 1934, prior to the passage of the Taylor Grazing Act on June 28 of that year, his base property would be dependent by use. On June 26, 1939, the examiner rendered a decision wherein he found that the appellant had failed to prove that he had made any use of the range in the American Flats area prior to June 28, 1934, and accordingly sustained the decision of the regional grazier. It is from that decision that the present appeal has been taken.

A review of the testimony serves to support the findings of the examiner so far as he has concluded that the appellant *did not prove*

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that he made use of the range in question during the part of the 1934 grazing season prior to June 28 of that year. The appellant gave testimony to the effect that he reached the range with his sheep some time on the 26th or 27th of June 1934 and, therefore, used the range in question for 1 or possibly 2 days before the passage of the Taylor Grazing Act. The evidence on this point is conflicting and it would be difficult to determine, with absolute certainty, the date on which the sheep actually reached the American Flats area. Suffice to say that there is nothing in the record that would warrant the conclusion that the examiner was in error when he found that there had been no use made of the range in that area prior to June 28, 1934.

But irrespective of whether or not the appellant made use of the range during the 1 or 2 days alleged, it is the opinion of the Department that the decision of the examiner should be sustained.

The Federal Range Code, as revised, provides in section 2, paragraph (g) as follows:

Land dependent by use means forage land which was used in livestock operations in connection with the same part of the public domain, which part is now Federal range, for any three years or for any two consecutive years in the 5-year period immediately preceding June 28, 1934, and which is offered as base property in an application for a grazing license or a permit filed before June 28, 1938. Land will be considered dependent by use only to the extent of that part of it necessary to maintain the average number of livestock grazed on the public domain in connection with it for any three years or for any two consecutive years, whichever is the more favorable to the applicant, during the 5-year period immediately preceding June 28, 1934.

Stated otherwise, this rule or regulation provides that if the land offered as base property by an applicant for a grazing license was the base or headquarters for a livestock operation that involved the use of the same range for any 2 consecutive years or any 3 years during the 5-year period immediately preceding June 28, 1934 (commonly referred to as the "priority" period), then that land shall be considered as having the attribute of dependency by use. In construing this provision it is proper to inquire as to the nature and extent of the use that an applicant has made of the range during the years when such use is alleged to have been made.

The purpose of the regulation was to provide for the acquisition of grazing privileges by those operators whose use of the public grazing lands during the 5-year priority period was of so constant a nature and of sufficient extent to entitle them to consideration as established and stable livestock operators who are entitled to a continued use of the public grazing lands. It was thought that the ownership or control of land that had been used as a base for a livestock operation involving the use of public grazing lands for any 2 consecutive years or any 3 years during the priority period should be considered a sufficient qualification for such operators.

The question in this case then is whether or not the use of the range for 1 or 2 days of a grazing season plus an acknowledged use during the entire preceding season is sufficient to satisfy the requirement of the regulation, and the Department is of the opinion that this question should be answered in the negative.

The Department feels that the doctrine of reasonableness should apply in a situation of this kind and that the use during any season of the priority period must have been a substantial one in order to meet the requirement of the regulation. In other words, the use must have been such as, taken by itself, would indicate that it was a necessary adjunct to the proper use of the base property as established by the conduct of the livestock operations during the priority period. To hold otherwise would be to disregard the only proper and reasonable conception of the term "dependent by use."

The use made of the range by Nicolas during the 1934 season cannot be considered substantial. According to the record, the grazing season in the area in question extended in the average year from about July 1 to September 10. In other seasons the range may have been accessible and usable from an earlier to a later date. It appears that in 1934 the Forest Service permitted the national forest to be crossed by livestock as early as June 24 and it may safely be stated that the grazing season in the region in question opened on that date. But irrespective of the actual date of opening it is apparent that a use of the range for 1 or possibly 2 days during that season was totally inconsequential to constitute a use of the range during that year, as contemplated by the Federal Range Code.

Accordingly, the Department rules, as a proper interpretation of the regulation in question, that the use of the range for grazing during the 2 consecutive years or the 3 years mentioned in the regulation must in each year have been a substantial one, that in the present case the use of the range for 1 or 2 days during the 1934 season was so inconsequential in relation to the entire season that it cannot be considered substantial, that the base property offered by the applicant is accordingly not dependent by use, and that the decision of the examiner should be affirmed.

It is recognized that the above ruling may result in some difficulty in applying the Federal Range Code so far as it may be necessary to determine whether, in various circumstances, particular periods of use may have been "substantial," but such situations will need to be met as they arise and dealt with in the light of the basic purposes of the Taylor Grazing Act.

At least it is not felt that the ruling is unnecessarily harsh especially when it is considered that no regulation or construction thereof could have obviated the necessity for the curtailment or total elimination of some livestock operations on the public lands, because

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of the insufficiency of available range to satisfy the needs or desires of all persons. The scarcity of range has made it necessary to eliminate some operators entirely and the regulations have been so drafted as to eliminate, in the majority of cases, those operators who used the range only during one season of the priority period. The Department has heard little complaint against such eliminations and the present ruling which denies the application of one who is able to show a use of the range for an entire season and only 1 or 2 days of another season is no more harsh than in the case of those applicants who are able to show use during an entire season but not an additional 1 or 2 days of use during some other year.

The Department feels that the decision of the examiner was proper and it is accordingly affirmed and the appeal is dismissed.

Affirmed.

WALTER K. ELLIS

Decided March 4, 1940

PUBLIC LANDS—GRAZING—LICENSES—BASE PROPERTY—DEPENDENCY BY USE.

The requirement of section 2, paragraph (g) of the Federal Range Code that land having dependency by use shall lose such attribute if the land is not offered as base property in an application for a grazing license or permit filed before June 28, 1938, is not unreasonable and is a regulatory provision that does not constitute an abuse by the Secretary of the Interior of his authority to administer the Taylor Grazing Act.

PUBLIC LANDS—GRAZING—LICENSES—APPEALS.

If, upon rejection of an application for a grazing license and an appeal from such ruling, the regional grazier then issues a "temporary license" for the number of livestock and period of time originally applied for, such appeal becomes moot, and the examiner should be advised of this subsequent action in order that he may note the abatement of the appeal.

WIRTZ, Under Secretary:

On January 24, 1939, Walter K. Ellis, of Lander, Wyoming, filed an application for a license to graze 15 head of cattle from May 1 to October 15, 1939, in Wyoming grazing district No. 2 and for a non-use license for 125 sheep from May 1 to November 1, 1939. On January 27, 1939, the regional grazier notified Ellis that the advisory board, after consideration of his application, had recommended that it be disapproved "because it is determined that your land will be classed as dependent by use only and was not on file with the Division of Grazing by June 28, 1938, as required by the Federal Range Code."

It appears that the land offered as base property by the applicant had only recently been acquired by him and the recommendation of the advisory board was to the effect that this land was not dependent

by location within the meaning of section 2, paragraph (h) of the Federal Range Code, and that although the land had had sufficient use during the priority period to entitle it to classification as dependent by use as defined by section 2, paragraph (g) of the code, it could not be so considered for the reason that it had not been offered in an application for a license prior to June 28, 1938.

The applicant appealed from the decision of the regional grazier and the case was set for hearing. No actual hearing was had but the case was submitted to the examiner upon a stipulation by the regional grazier and the appellant of the material facts involved. The sum and substance of the stipulation was to the effect that the land offered had been used as a base for a cattle grazing operation upon public lands during the years 1930 to 1934, inclusive, that such use had been sufficient to establish a dependency by use or "priority" for 38 head of cattle, and that the land had never been offered as base property in an application for grazing privileges until so offered in the application filed by the appellant on January 24, 1939. Upon consideration of these facts, the examiner affirmed the ruling of the regional grazier and Ellis has appealed to the Department.

The provision of the Federal Range Code which governs in this case is contained in section 2, paragraph (g) thereof, which reads as follows:

Land dependent by use means forage land which was used in livestock operations in connection with the same part of the public domain, which part is now Federal range, for any three years or for any two consecutive years in the 5-year period immediately preceding June 28, 1934, and which is offered as base property in an application for a grazing license or a permit filed before June 28, 1938. Land will be considered dependent by use only to the extent of that part of it necessary to maintain the average number of livestock grazed on the public domain in connection with it for any three years or for any two consecutive years, whichever is the more favorable to the applicant, during the 5-year period immediately preceding June 28, 1934. [Emphasis supplied.]

Putting aside for the moment the propriety of entertaining this appeal and certain contentions of the appeal which are not thought to be important, the main point in issue appears to be the authority of the Secretary of the Interior, under the Taylor Grazing Act, to issue a regulation which serves to deny to an applicant the right to obtain a grazing license because of a failure to offer land in an application filed prior to June 28, 1938, when that land in fact has had sufficient use during the priority period otherwise to entitle it to consideration as dependent by use.

There can be no doubt, and the appellant agrees, that the Secretary of the Interior has authority to administer the Taylor Grazing Act and grant grazing privileges under such reasonable rules and regu-

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lations as he may prescribe. The sole question then is whether or not the particular provision setting out the dead-line date for the acquisition of grazing privileges based on land with dependency by use constitutes an abuse of such authority. The Department is clearly of the opinion that it does not.

In the preamble of the Taylor Grazing Act, it is stated that the purpose of the act is, among other things, to provide for the orderly use of the public grazing lands and to stabilize the livestock industry dependent thereon. Again, in section 2 of the act, it is provided that the Secretary of the Interior shall do any and all things necessary to provide for the orderly use of the range. It is readily apparent that, if the livestock industry is to be stabilized and the orderly use of the range is to be accomplished, there must be some determination of the extent of the grazing privileges that the livestock operators are to enjoy on the Federal range. Since the inception of the administration of the Taylor Grazing Act, the efforts of the Grazing Service have been bent on the determination of the extent of such privileges. Manifestly there is insufficient Federal range to allow all persons to partake of its use to whatever extent they may desire. Consequently it has been necessary to apportion the range and its forage products and, as this apportionment has proceeded, the use of the range has become more orderly and the element of stability has more and more injected itself into the various livestock operations. This stability results largely from the fact that the various livestock operators now know, within certain limits, the amount of range that will be available to them in the future and thus will be able to plan their operations accordingly.

It is apparent that such orderly use of the range and the stabilization of the livestock industry cannot proceed if there are constantly to be injected into the picture new livestock operations for which allowance was not and could not have been made during the period of adjustment. Therefore, it has been necessary to set some limit to the time when additional lands would be recognized as a basis for the granting of grazing privileges. Accordingly, June 28, 1938, a date which is 4 years subsequent to the passage of the Taylor Grazing Act, has been set.

In the opinion of the Department, there is no ground for valid complaint by this applicant that he has been unduly prejudiced by the operation of the provision which sets the dead-line date of June 28, 1938. The grazing district in which he seeks grazing privileges has been established since October 31, 1936, and at any time from that date on and until June 28, 1938, the land now offered could have been offered as base property. That this has not been done does not alter the case.

Furthermore, it does not appear that the failure to obtain grazing privileges on the basis of the ownership of the land will work an unwarranted hardship on the appellant. If he had purchased the land before June 28, 1938, for the purpose of obtaining such grazing privileges and had then failed, for reasons over which he had no control, to offer the land before the dead-line date, there would be reason to question the propriety of a strict application of the rule. However, Ellis first acquired an interest in the land under a contract to purchase, dated some time in October 1938, at which time he could have learned by inquiry addressed to the regional grazier whether or not ownership of the land would entitle him to grazing privileges. It appears reasonable to hold that the appellant should suffer the consequences of his failure to have made such inquiry.

Insofar as it is contended in the appeal that the appellant had no notice of the dead-line date, it is sufficient to point out that the provision of the Federal Range Code which established this date was approved on March 16, 1938, and published in the Federal Register on March 22, 1938, thus affording to all persons constructive notice of the fact that such a regulation had been promulgated.

Before concluding, it appears that attention should be directed to the procedure that has been followed in this case by the acting regional grazier. Upon Ellis' appeal from the decision rejecting his application, and prior to the date set for the hearing of the appeal, the acting regional grazier addressed letters to the various members of the district advisory board, asking the members whether or not, in view of the appeal, they would recommend the issuance of a license which would be "temporary for this season only, pending the outcome of [the] appeal." The members were asked to indicate their recommendation on the bottom of the letter and return it. Nearly all of the members recommended that such a temporary license be granted and accordingly a license was granted, subject to the provision inserted on the face of the license to the effect that it was "temporary for *this season* only, pending the outcome of your appeal." [Emphasis supplied.] It should be noted that, inasmuch as the appeal involved only the application for 1939 grazing privileges, the issuance of a license for the full 1939 season in effect rendered the appeal moot. Apparently the acting regional grazier was in doubt as to the action taken pursuant to Ellis' application, although it is difficult to see why this should be true in the face of the clear and unequivocal wording of section 2, paragraph (g) of the Federal Range Code. However, assuming that he was in doubt, the matter should not have proceeded by way of an appeal after the temporary license had been granted, for the granting of the license removed the grounds for the appeal. Instead, the acting regional grazier should have withheld his decision on the application until he had obtained

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advice in the matter from the examiner, the Washington office of the Grazing Service, or if necessary, from the Department. As the matter now stands, the present decision of the Department is not a true decision on an appeal, but is really an advisory opinion approving an advisory opinion of the examiner.

In situations of the type here involved, wherein a regional grazier is doubtful of the action that should be taken pursuant to an application, or feels that the action that he has taken may be improper, he should promptly request an advisory opinion from the proper source or sources or, once having arrived at a decision, should not reverse that decision unless he has given notice of such reversal to the examiner and allowed him to note the abatement of the appeal.

So Ordered.

AUTHORITY OF THE DEPARTMENT TO MAKE PUBLIC BUREAU OF MINES REPORT CONCERNING MINE DISASTER

Opinion, March 6, 1940

BUREAU OF MINES—AUTHORITY TO MAKE PUBLIC A REPORT OF A MINE DISASTER.

The publication of a report of the Bureau of Mines concerning the nature and cause of an individual mine disaster may be made public. Section 3 of the act of February 25, 1913 (37 Stat. 681), which is held to authorize such publication, is not limited by section 4 of that act. Solicitor's opinion of November 18, 1935 (M. 28219), insofar as inconsistent with this opinion, overruled.

MARGOLD, *Solicitor:*

My opinion has been requested on the question of whether the report of the Bureau of Mines concerning the nature and cause of the recent Bartley, West Virginia, mine disaster may be made public. The report contains recommendations as to the improvement of conditions, methods, and equipment, with particular reference to the use of electricity, safety methods, and appliances.

Publication of the report in question has been forestalled by a Solicitor's opinion rendered by me on November 18, 1935 (M. 28219). In that opinion I stated, in response to a general question, that Congress apparently had not intended by the act of February 25, 1913 (37 Stat. 681), to empower the Bureau of Mines to publish reports of individual mine disasters. This statement was based upon the seeming conflict between the restrictive language of section 4 of that act that—

In conducting inquiries and investigations authorized by this act neither the director nor any member of the Bureau of Mines shall * * * issue any report as to the valuation or the management of any mine or other private mineral property: * * *

and the general terms of section 3:

That the director of said bureau shall prepare and publish subject to the direction of the Secretary of the Interior, under the appropriations made from time to time by Congress, reports of inquiries and investigations, with appropriate recommendations of the bureau, concerning the nature, causes, and prevention of accidents, and the improvements of conditions, methods, and equipment, with special reference to health, safety, and prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; the use of explosives and electricity, safety methods and appliances, and rescue and first-aid work in said industries; the causes and prevention of mine fires; and other subjects included under the provisions of this act.

It was thought that the proper reconciliation of the two sections was to read section 3 as authorizing publication only of reports of a general nature.

I had considerable doubt as to the validity of this conclusion, and for that reason the question was submitted to the Attorney General. In reply, the Attorney General expressed no clear opinion but stated only that—

The publication of information obtained from investigations made in privately owned mines * * * does not appear to be governed by statute except as it may be affected by the statutory provision that the Bureau shall not "issue any report as to the valuation or management of any mine or other private mineral property."

Under the interpretation of section 4 adopted in the 1935 opinion this Department would have no authority to publish the Bartley report, despite the resultant suppression of information of great public importance as to which the 1913 act directs the fullest publicity. This inevitably would tend to defeat not only the declared policy of Congress but the basic objective of the statute, which was to further the cause of safety in mines. Such consequences should not be permitted to follow from a general opinion without a reexamination of the question.

Considered alone, section 3 clearly authorizes the publication of the Bartley report, inasmuch as that report is the result of an investigation concerning "the nature and causes of a [mine] accident." The report, moreover, contains "recommendations of the bureau" as to "the improvement of conditions, methods, and equipment" and "the use of electricity, safety methods, and appliances." The question is, therefore, whether the broad provisions of section 3 are narrowed by any other provision of the act so as to preclude the publication of this particular report. The only provision of the statute which could conceivably be construed to restrict section 3 in this manner is the prohibition contained in section 4 against the publication of "any report as to the valuation or management of any mine."

Therefore, if section 4 is applicable to reports authorized by section 3, and if the Bartley report can properly be classified as a

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report on "valuation" or "management," as those terms are used in section 4, it may not be made public. Patently, a report on the causes and means of prevention of an accident is not a report on "valuation." "Management" as used in section 4 is not defined in the statute and since the term possesses several different meanings it provides, at best, an ambiguous criterion of the type of report prohibited. It may refer to (1) the managers or directors collectively, or to (2) the art or act of conducting business affairs. Webster's New International Dictionary (1939 ed.). Clearly, if the first meaning is the proper one section 4 has no application to the type of report authorized by section 3. And if the second meaning is the one intended by Congress, and the prohibition does apply to section 3, there is some doubt if the publication of a report on a specific thing or happening, such as the Bartley report, is forbidden thereby merely because it may be said to bear some relation to management. The act does not reveal with certainty, therefore, whether Congress intended the prohibition against publication of reports on management to extend so far as to suppress reports of the nature of the instant report. Consequently, that intention may be sought in the legislative history of the act.

The reports of the House and Senate Committees on Mines and Mining are illuminating. They show not only that investigations and reports of safety conditions in private mines were contemplated but also that section 4 was not written into the act as a limitation upon the general authority granted by section 3. It is apparent from the committee reports that the one purpose of section 4 was to prevent the expenditure of public funds for the benefit of private mining interests.

The report of the House Committee on Mines and Mining on the act in question had this to say about section 4 (H. Rept. 243, 62d Cong., 2d sess. (1912) 6):

Section 4 of this bill is new. It is intended to prevent the employees of the Bureau of Mines from undertaking investigations in behalf of private properties or processes or operations, * * *

And the report of the Senate Committee on Mines and Mining on this legislation read in part as follows (S. Rept. 951, 62d Cong., 2d sess. (1912) 5):

In framing the provisions of section 4 of the pending bill, the committee has kept in view the fact that the purpose of Congress in creating a Bureau of Mines and providing for its investigations, is not the promotion of any private interest, but the public welfare. In the bureau's inquiries and investigations with a view to safeguarding the lives of miners, the purpose is not the safety of any individual miner, but the development of such improvements in mine conditions as will better safeguard the lives of all miners; and in its investigations into "mining, and the preparation, treatment, and utilization of mineral substances," the purpose is not to develop any

private property or to promote any private interest, but to aid in the upbuilding and maintenance of the mining industry and to protect and advance the public welfare.

It must be remembered, however, that in these safety investigations it is necessary that the employees of the bureau enter and examine the conditions in mines owned and operated by private individuals; and that, for the most part, in conducting its investigations with a view to the upbuilding of the industry through the improvement in mining conditions and the prevention of waste, the bureau must examine coal, ores, and other mineral substances belonging to private parties, because of the fact that the mines of the country are not being operated by the Government, but by private parties.

The floor debate in the House, participated in by members of the Committee on Mines and Mining, and particularly by Representative Foster, who managed the bill for that committee, clearly shows that publication of reports, such as the Bartley report, was expected to bring to bear the force of public opinion to compel the adoption of adequate safety standards:

Mr. MILLER. * * * Illinois has a mining law, and Pennsylvania has some law for protecting miners. Assuming, however, that the State of Indiana, for instance, has not such a mining law, and there is a condition in a coal mine in that State that the workmen feel is entirely unsafe and unhealthy. Now, a mining corporation is under no requirement of law to make changes, but if there should be an investigation, not for the benefit of the mining company, but for the benefit of the miners themselves—an investigation by the Government—and a report to show to the world that the mining conditions there were not healthy and safe, would that not be a wise and good thing to do?

Mr. FOSTER. I think the gentleman is entirely right about that.

In the light of the legislative history of this statute it is clear that publication of reports such as the Bartley report is not precluded by the prohibition against the publication of reports on the "management of any mine." On the contrary, the legislative history shows that section 4 was not intended as a limitation upon section 3 but, instead, upon section 2, which provides:

That it shall be the province and duty of the Bureau of Mines, subject to the approval of the Secretary of the Interior, to conduct inquiries and scientific and technologic investigations concerning mining, and the preparation, treatment, and utilization of mineral substances with a view to improving health conditions, and increasing safety, efficiency, economic development, and conserving resources through the prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; to inquire into the economic conditions affecting these industries; to investigate explosives and peat; and on behalf of the Government to investigate the mineral fuels and unfinished mineral products belonging to, or for the use of, the United States, with a view to their most efficient mining, preparation, treatment, and use; and to disseminate information concerning these subjects in such manner as will best carry out the purposes of this act.

The investigations authorized by section 2 are for the benefit of the mining industry in that they seek a wider market for its products, increased efficiency and economy in its operations, and an under-

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standing of the economic conditions affecting it. A report on such subjects, made with reference to a single mine, would in the ordinary case tend to benefit the owner of that mine rather than to promote the public welfare. And the committee reports expressly state that it was to prevent this that section 4 was written into the act. Conversely, a report on the cause and prevention of a mine disaster, by focusing public attention upon the need for the observance of proper safety standards, would tend, primarily, to promote the public welfare and not private interests.

For the reasons herein set forth, it is my opinion that the act of February 25, 1913, authorizes the publication of the Bartley report. The Solicitor's opinion of November 18, 1935 (M. 28219), insofar as it is inconsistent herewith, is hereby overruled.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

HENRY BURLAND (RESTRICTED INDIAN)

Opinion, March 23, 1940

DAMAGE CLAIMS—NEGLIGENCE—RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* may be applied where claimant's horse was killed as result of coming in contact with a fallen high-tension electric line belonging to the Office of Indian Affairs. Although the references by district counsel throughout the record to negligence of Government employees in failing safely to maintain the power line are not supported by evidence as to any specific acts of negligence, the proof of the accident and of the surrounding circumstances are such as to leave no reasonable conclusion other than that the mishap occurred because of the negligence of the Government.

DAMAGE CLAIMS—RESTRICTED INDIAN AS CLAIMANT—DISPOSITION OF AWARD.

Where the claimant, a restricted Indian, has died during the interim between the date of filing claim and the award of damages, payment of the award should be made in accordance with the act of February 25, 1933 (47 Stat. 907), which provides that any money accruing from a governmental agency to Indians who are recognized wards of the Government, for whom no legal guardians or other fiduciaries have been appointed, may be paid to such superintendent or other bonded officer of the Indian Service as the Secretary of the Interior shall designate, to be handled, disbursed to proper payees, and accounted for by him with other moneys under his control, in accordance with existing law and the regulations of the Department.

DAMAGE CLAIMS—INDEBTEDNESS OF CLAIMANT TO GOVERNMENT.

Where claimant was still indebted to the Government for part of the purchase price of the subject matter of the claim, under a specific reimbursable agreement, the superintendent or other bonded officer of the Indian Service, to be determined by the Secretary of the Interior, to whom payment will

be made under the act of February 25, 1933, *supra*, should be governed by the Reimbursable Regulations in order to protect the interests of the Government in the matter of the unpaid account.

MARGOLD, *Solicitor*:

Henry Burland, a restricted Indian of the Flathead Agency, filed a claim in the latter part of December 1938 in the amount of \$75 against the United States for compensation for the loss of his horse which was killed when it came in contact with a fallen high-tension electric line belonging to the Office of Indian Affairs. The question whether the claim should be allowed and certified to the Congress under the act of December 28, 1922 (42 Stat. 1066), has been submitted to me for opinion.

H. E. Bixby, the Government power superintendent, describes the accident as follows:

* * * During the night of October 11, a high wind in the vicinity of Ronan, Mont., caused the breaking off of three power transmission poles. The poles carried wires charged with 16,500 volts of electricity. These three poles with wires and other appurtenances fell to the ground in the county roadway * * * while at least one wire was still charged and carrying its normal voltage, a horse belonging to Henry Burland was electrocuted by coming into contact with the wire and ground.

* * * The three poles were several years old, but under normal conditions still had 3 to 4 years of useful life. * * *

The horse was an average of the work type, estimated to be 7 years of age, weighing approximately 1,200 pounds. It is estimated that \$75.00 will replace the horse, and it is the recommendation of the power superintendent that such claim be allowed.

The record contains copies of letters written by the district counsel, the acting power superintendent and the general foreman of the Flathead project. Throughout the record the opinion is expressed by Mr. Simmons, the district counsel, that the loss of the privately owned property was caused by the negligence of employees of the Government in failing safely to maintain the power line in question. Mr. Wingfield, the acting power superintendent, says in part:

* * * From time to time the pole butts are inspected as to their mechanical soundness and if found to be in an unsound condition they are stubbed with an 11-foot stub of ample mechanical strength to support the pole projecting above the ground length. * * * The three poles broke off at the ground line between periodic inspection at a time when a high velocity wind overcame the mechanical resistance which in turn, unfortunately, caused damages to private property. This I feel should not be construed as negligence on the part of the power system employees for failure to maintain the power system.

In his letter of November 9, addressed to the acting power superintendent, Mr. Waugh, the general foreman, states in part that the storm which broke the poles off was not an unusual one for that locality, since "this portion of the valley experienced several such storms throughout the year and in several instances in the past year

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a number of poles have been broken off at various places over the system."

The facts in this case appear to be in point with those in *Mayer v. Kansas City Power and Light Company*, 121 Kans. 648, wherein the court held that proof of the falling of a globe of a street light, injuring a pedestrian, shows negligent construction and maintenance under the doctrine of *res ipsa loquitur*, the proof of the accident and of the surrounding circumstances being such as to leave no reasonable conclusion other than that the mishap occurred because of the negligence of the defendant.

Upon the record as presented, I am of the opinion that the doctrine of *res ipsa loquitur* may be applied in the instant case. This conclusion is supported by decisions of the Department based on facts somewhat similar, the most recent of which is the case of *Homer Elliott* (M. 30480), decided January 17, 1940. The Burland claim therefore should be allowed to the extent that it is shown to be reasonable. The horse which was killed was one of a team sold to him by the Government under reimbursable agreement No. 566, the cost prices of the two horses being \$100. In anticipation of the possibility of having to pay more than \$50 for another horse to replace the one killed, the \$25 over the cost price was added, making the amount claimed \$75. In the circumstances, it appears that \$50 is the proper amount to be allowed.

It is noted from a letter of L. W. Shotwell, superintendent of the Flathead Agency, dated January 27, addressed to the Commissioner of Indian Affairs, that since the filing of the claim, Henry Burland, the claimant, has died. Payment should accordingly be made in accordance with the act of February 25, 1933 (47 Stat. 907), which provides as follows:

That any money accruing from the Veterans' Administration or other governmental agency to incompetent adult Indians, or minor Indians, who are recognized wards of the Federal Government, for whom no legal guardians or other fiduciaries have been appointed may be paid, in the discretion of the Administrator of Veterans' Affairs, or other head of a governmental bureau or agency, having such funds for payment, to such superintendent or other bonded officer of the Indian Service as the Secretary of the Interior shall designate, for the use of such beneficiaries, or to be paid to or used for, the heirs of such deceased beneficiaries, to be handled and accounted for by him with other moneys under his control, in accordance with existing law and the regulations of the Department of the Interior.

The record indicates that Henry Burland was still indebted to the Government for part of the purchase price of this horse, under reimbursable agreement No. 566 ("Industry Among Indians, 1931, symbol No. 41723"). The superintendent or other bonded officer of the Indian Service, to be determined by the Secretary of the Interior, to whom payment will be made under the provisions of the above-

quoted section of the code, should be governed by the Reimbursable Regulations in order to protect the interests of the Government in the matter of this unpaid account.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

APPLICATION OF STATE SALES TAX LAWS TO TRADE WITH INDIANS

Opinion, May 8, 1940

ARIZONA SALES TAX LAW—APPLICATION TO TRADERS ON INDIAN RESERVATIONS—TRADE WITH INDIANS OUTSIDE INDIAN RESERVATIONS—SALES BY TRADERS WHO ARE INDIAN.

Traders on Indian reservations, if they are Indians, or in so far as they trade with Indians, are not subject to the sales tax laws of Arizona, but traders who are non-Indians are subject to such laws in so far as they deal with non-Indians.

Traders outside of Indian reservations are subject to the sales tax laws of Arizona whether or not they are Indians or dealing with Indians.

Sales to Indians made within Indian reservations are not subject to the sales tax laws of Arizona.

Sales to Indians made outside of Indian reservations are not subject to the sales tax laws of Arizona if the purchase is made with restricted funds or if the purchase is part of a specific plan for economic rehabilitation of the Indians approved and supervised by the Federal Government.

KIRGIS, First Assistant Solicitor:

Question has arisen as to how far Indians and persons trading with Indians are subject to the sales taxes imposed by Arizona law. Since the problem is a general one and the Arizona statutes in question are not dissimilar in substance from the sales tax laws of other States, and since the subject has been previously covered only in informal memoranda, I have determined to treat the question in a formal opinion.

There are two Arizona statutes particularly involved, each of which is illustrative of a type of sales tax law. The Excise Revenue Act of 1935, Chapter 77, Laws Regular Session 1935, as amended by Chapter 2, Laws of First Special Session 1937, places an annual privilege tax on the business of selling at retail measured by the gross proceeds or the gross income from the business. Provision is made by the law for the use of tokens by purchasers to reimburse the dealers for the tax applicable to any sale. The other statute in question, Chapter 78, Laws Regular Session 1935, as amended in 1936, 1937 and 1939, places a tax on certain designated luxuries to be paid by stamps to be affixed to the articles by the dealers. Both statutes contain, as a method of enforcement, the requirement that all dealers shall take out

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State licenses. Both statutes provide for an exemption from the tax of businesses and transactions not subject to tax under the United States Constitution, and provide for refund to the dealer of the tax paid by him when proof is made that the transactions and articles taxed were not subject to tax under the law. In both statutes the tax is, on its face, a tax to be paid by dealers, whether wholesalers or retailers, and to be enforced against them, although both acts contemplate that the amount of the tax shall be added to the price paid by the consumer.

1. APPLICATION OF STATE TAXES TO PERSONS TRADING WITH INDIANS

The question of the application of these taxes to persons trading with Indians is subject to different answers depending upon the location of the trade and upon whether the traders or the persons dealt with are Indians. The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to the Indians. (Sections 261 through 266, Title 25 of the United States Code.) These statutes, by their terms or by judicial construction, are limited in their application to Indian reservations. *United States v. Taylor*, 44 F. (2d) 537 (C. C. A. 9, 1930), cert. den. 283 U. S. 820; *Rider v. La Clair*, 77 Wash. 488, 138 Pac. 3; *United States v. Certain Property*, 25 Pac. 517 (Ariz. 1871). Congress has not exercised its power to regulate trade with the Indians in so far as trade off the reservation is concerned except in the case of traffic in liquor.

(a) Where Congress has exercised its authority it is axiomatic that the field is closed to State action. *Sperry Oil and Gas Co. v. Chisholm*, 264 U. S. 488. Therefore, persons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate or tax such transactions. However, it should be emphasized that it is trade with the Indians which is removed from State interference and not the trader himself, if the trader is a white person and is dealing with other white persons, even though such transactions occur on a reservation.

The Supreme Court has repeatedly permitted the taxation by the State of the property of white persons located on Indian reservations on the theory that such taxation did not interfere with the exercise of Federal authority within the reservation. *Thomas v. Gay*, 169 U. S. 264; *Wagoner v. Evans*, 170 U. S. 588; *Catholic Missions v. Missoula County*, 200 U. S. 118. This principle has been carried by the State

courts to the extent of permitting State taxation of the property of Indian traders, including their stock in trade. *Moore v. Beason*, 7 Wyo. 292, 51 Pac. 875; *Cosier v. McMillan*, 22 Mont. 484, 56 Pac. 965; *Noble v. Amoretti*, 71 Pac. 879 (Wyo. 1903). In the review of the relationship between the Federal Government and the State government on an Indian reservation, in *Surplus Trading Co. v. Cook*, 281 U. S. 647, the Supreme Court stated that the jurisdiction of the State over the reservation is full and complete save as to the Indians and their property.

In view of this jurisdiction of the State I held in my memorandum to the Commissioner of Indian Affairs of February 4, 1938, that white traders in their dealings with non-Indians must comply with the State laws, including those imposing sales taxes. I believe this ruling was correct. Traders on Indian reservations who are non-Indians are, in my opinion, required to take out licenses under the Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians. They are not required to account to the State authorities for their transactions with Indians on the reservations, but are, if they do deal with the Indians, required to conform with the licensing provisions in the Federal statutes regulating trade with Indians. Traders who are themselves Indians are not subject to the State laws whether they deal with Indians or non-Indians.

(b) Where traders are not located on Indian reservations they are, in my opinion, responsible for the State taxes and subject to license whether or not they are Indians and whether or not they deal with Indians. Since Congress has not attempted to regulate such trade and since such trade has been carried on subject to State laws for a long number of years, there is no ground for exemption of such trade in the absence of congressional authority, except in the special types of Indian purchases discussed in part 2 (b) of this opinion.

2. APPLICATION OF STATE TAXES TO SALES TO INDIANS

This subject falls into two parts—sales to Indians, on the reservation and sales to Indians off the reservation.

(a) The preceding part of this opinion demonstrates that sales to Indians on the reservation are not subject to State taxation and Indian purchasers are not required to pay the additional cost which is added to the price of the article to cover the tax. Such additions to the price of articles by State action are clearly interferences with the authority of the Commissioner of Indian Affairs to regulate the prices at which goods shall be sold to the Indians.

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(b) The preceding part of this opinion likewise demonstrates that when Indians purchase goods off the reservation they are not exempt from sales taxes on the ground of State interference with Federal regulation of Indian trade. However, certain purchases by Indians may be exempt on the ground that these purchases are instrumentalities of the Federal Government used to improve the economic conditions of its wards. Where this is the case, the purchase may be considered not subject to State taxation under the principle that the State, through the use of its taxing power, cannot hinder or interfere with an instrumentality of the Federal Government.

Property purchased with restricted funds and property issued to the Indians by the Government and the increase therefrom have been described in numerous cases as instrumentalities of the Federal Government used as part of a plan of the Government to advance the interests of the Indians, and held not subject to State property taxes. *United States v. Rickert*, 188 U. S. 432; *Dewey County v. United States*, 26 F. (2d) 434 (C. C. A. 8, 1928), affirming *United States v. Dewey County*, 14 F. (2d) 784 (D. C. S. D. 1926); *United States v. Pearson*, 231 Fed. 270 (D. C. S. D. 1916); *Olmey v. McNair*, 177 Pac. 641 (Wash. 1919). For the same reason that property purchased by Indians with restricted funds or property issued to the Indians by the Government are Government instrumentalities, property purchased by the Indians pursuant to a specific plan for economic rehabilitation approved by the Government and carried out under Government supervision should likewise be recognized as a Government instrumentality. The purchase of property by the Indians themselves in accordance with an economic plan worked out with the Government is supplanting, as a method of assuring the possession by Indians of productive property, the old method of the Government's issuing such property to the Indians. From a legal viewpoint the purpose and concern of the Government are identical whether the plow or the cattle are bought by the Indian with Individual Indian Moneys, the expenditure of which has been approved by the Superintendent, or bought by the Indians with revolving loan funds or judgment fund money, pursuant to a plan of rehabilitation approved by the Superintendent, or bought by the Superintendent with gratuity funds and issued to the Indians. The reasoning of the courts applies equally to these procedures, except that in the cases above cited the Government had an ownership interest as the title to the property was found to be in the United States. The form of title, while indicative of the interest of the Government, is not, in my opinion, the determining factor. The important factor is the acquisition and use of the property in execution of a government plan for the Indians.

Assuming, therefore, that property acquired by Indians in execution of a Government plan for their advancement is a Federal instrumentality, there remains the question whether a State tax upon the acquisition of such property places an unconstitutional burden upon a Federal instrumentality.

The Supreme Court has held that the application of a State tax on the selling of gasoline to sales of gasoline to the United States is unconstitutional as placing a direct burden on the Federal Government. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218; *Graves v. Texas Co.*, 298 U. S. 393. However, in *James v. Dravo Contracting Co.*, 302 U. S. 134, the Supreme Court said that the *Panhandle* and *Graves* cases had been distinguished and should be limited to their particular facts. In the *James* case a State tax on the gross proceeds of a contractor on Government work was held constitutional as having only an indirect effect on the Federal Government. That case is representative of the recent Supreme Court cases tending to restrict the tax immunity of agencies of Government where the burden on the Government was not clear and direct. *Helvering v. Mountain Producers Corp.*, 303 U. S. 376; *Helvering v. Gerhardt*, 304 U. S. 405.

In reliance upon the restrictive tendency exhibited in the *James* case a California court has now held that the California sales tax law is a tax solely on the dealers and must be paid by them whether or not the sale in question is made to a Government agency. *Western Lithograph Co. v. State Board*, 78 P. (2d) 731 (Calif. 1938). However, this decision is in conflict with the earlier California case of *M. L. West Co. v. Johnson*, 66 P. (2d) 1211 (Calif. App. 1937), in which, subsequent to the *James* case, certiorari was denied by the Supreme Court (303 U. S. 666). It is also a reiteration of the position of the State courts in the *Panhandle* and *Graves* cases which was repudiated by the Supreme Court. So far, the Supreme Court has not withdrawn its exemption of purchases made by Federal authority from State sales tax laws. Whether such sales tax laws are designated as privilege, occupation or excise taxes, as a general rule they contemplate and even necessitate the assumption of the tax by the purchaser and do impose, in actuality therefore, a direct burden upon the purchaser.

Although the law on the question is in a state of flux, the proper holding at the present time is, in my opinion, that where purchases are made either by the Indians themselves or by Government agents in carrying out a specific economic program for the Indians approved and supervised by the Federal Government, or where such purchases are made with restricted funds, the purchases are not subject to the State sales taxes even though they are made off the reservation.

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1. Persons trading with the Indians on Indian reservations are not subject to the Arizona sales tax laws. However, where such traders are non-Indians, they are subject to the sales tax laws on so much of their business as is carried on with other non-Indians. Traders off an Indian reservation are subject to the State sales tax laws whether or not they are Indians or dealing with Indians.

2. Purchases made by Indians on Indian reservations are not subject to the Arizona sales taxes nor are purchases made by Indians or Government agents off the reservation where they are made with restricted funds or in carrying out a specific program for the economic rehabilitation of the Indians approved and supervised by the Federal Government.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

APPLICATION OF FEDERAL AND STATE SALES TAXES TO ACTIVITIES OF MENOMINEE INDIAN MILLS

Opinion, May 31, 1940

FEDERAL AND STATE GASOLINE SALES TAXES—MENOMINEE INDIAN MILLS—PURCHASE AND SALE OF GASOLINE FOR AND BY MILLS—STATE TOBACCO SALES TAX—TOBACCO SALES BY MENOMINEE INDIAN MILLS COMMISSARY.

Federal and State gasoline sales taxes (a) do not apply to sales of gasoline to the Menominee Indian Mills for use in the operations of the mills, but (b) do apply to sales of gasoline to the mills for resale through the commissary of the mills to employees and the general public.

The State tax on the selling of tobacco products does not apply to the selling of such products by the commissary of the Menominee Indian Mills to employees and the general public.

MARGOLD, *Solicitor:*

There have been referred to me for an opinion several questions raised by the Indian Office concerning the imposition of certain Federal and State taxes on sales made to and by the Menominee Indian Mills on the Menominee Indian Reservation in Wisconsin. The taxes in question are (1) the Federal excise tax on sales of gasoline, levied pursuant to section 617 of Title IV of the Revenue Act of 1932 establishing manufacturers' excise taxes, which appears in Title 26 of the United States Code following section 1481, and as chapter 29 of the Internal Revenue Code approved February 10, 1939 (53 Stat. 409); (2) the State excise tax on the sale of gasoline, levied under chapter 78 of the Wisconsin Statutes of 1937; and (3) the State occupational tax on the sale of tobacco products, levied under chapters 443 and 518 of the Laws of Wisconsin, 1939.

The questions concerning these taxes may be formulated as follows:

1. Are the Menominee Indian Mills exempt from the Federal excise tax on sales to them of gasoline (a) for use in operation of the mills, and (b) for resale to employees and the public through the commissary maintained by the mills?
2. Are the Menominee Indian Mills exempt from the State excise tax on sales to them of gasoline (a) for use in operation of the mills, and (b) for resale to employees and the public through the commissary?
3. Are the mills exempt from the State occupation tax on the selling of tobacco products in the case of sales to employees and the public through the commissary?

These three questions raise distinct problems and will be treated in order.

I. APPLICATION OF THE FEDERAL GASOLINE SALES TAX

Section 617 of Title IV of the Revenue Act of 1932 places a tax on gasoline sold by any producer or importer, but section 620 (as amended, August 30, 1935, 49 Stat. 1025) exempts sales "for the exclusive use of the United States." The mechanics for such an exemption are set forth in section 621 which provides for a credit or refund to the producer for taxes paid by him where the gasoline was "resold for the exclusive use of the United States." Section 624 contains the only reference to Indians. It provides that no tax shall be imposed under Title IV "on any article of native Indian handicraft manufactured or produced by Indians on Indian reservations, or in Indian schools, or by Indians under the jurisdiction of the United States Government in Alaska." However, the only subjects taxed by Title IV which could have relevance to section 624 are articles made of fur and articles of jewelry.

The regulations established by the Bureau of Internal Revenue under Title IV provide for an exemption from the tax of gasoline sold "for the exclusive use of the United States * * *" (sec. 314.24 of Regulations 44, under ch. 29, subch. A of the Internal Revenue Code). The exemption certificate required to be used consists of a certification by an officer of the United States that the articles are purchased for the exclusive use of the designated governmental unit. The certificate contains the express agreement that if the articles purchased tax free under the certificate are used otherwise than for the exclusive use of the United States or are sold to employees or others, the fact will be reported by the officer to the manufacturer of the article covered by the certificate.

(a) *Purchases of gasoline for the operation of the mills.*

Under these statutory provisions and the regulations, the first question is whether sales of gasoline for use in the operations of the Menominee Indian Mills are sales of gasoline "for the exclusive use of the United States." The answer to this question requires an analysis

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of the status of the Menominee Mills and their relationship to the Federal Government.

The Menominee Indian Mills were established under the act of March 28, 1908 (35 Stat. 51), which authorized the Secretary of the Interior to cause to be cut and sold the lumber of the Menominee Reservation and to cause to be established sawmills for that purpose. All proceeds of the operations were to be deposited in the United States Treasury for the benefit of the Menominee Tribe and all expenses of the establishment and the operations were to be borne from the Menominee tribal funds and the proceeds of the operations. The amendment to that act of January 27, 1925 (43 Stat. 793), provided that the mills should be exempt from the requirements of sections 3709 and 3744 of the Revised Statutes, regulating the making of Government purchases and contracts. A further significant amendment was carried in the act of June 15, 1934 (48 Stat. 964), which required all expenditures in the operations of the mills to receive the advance review and approval of the tribal council or its authorized committee.

In the exercise of his administrative authority under the 1908 act the Secretary of the Interior appoints the manager and all the office personnel of the mills and has delegated to the manager the employment of all the mill workers, who are hired on a day-to-day or month-to-month basis. Some of the office personnel are civil service employees and most of them are classified under the Classification Act. All employees are paid from tribal funds. The manager is responsible to the Secretary of the Interior for the operations of the mills but is required to keep within the budget approved by the advisory board, in accordance with the 1934 amendment. Government forms are used in the disbursement and accounting of the funds of the mills, Government regulations followed, and the accounts audited by the General Accounting Office, in the same manner as in the case of Indian Service operations generally.

Since the Menominee mills have represented a peculiar combination of tribal and Federal activities, they have been the subject of a number of rulings by various administrative agencies. In the first year of their operation, the Attorney General held that the Federal law providing an 8-hour day for Federal employees did not apply to employees of the Menominee mills. He described the mills as "an essentially private enterprise" in which the United States had invested the trust property of its wards for the benefit of those wards; also as a cooperative enterprise in which the tribe supplied the capital, the raw material and the labor, and the United States supplied the management (27 Atty. Gen. 139 (1909)).

In a letter dated November 16, 1933, to the Secretary of the Interior, the Comptroller General held that the Federal Economy Act did not

apply to the employees of the mills. An analysis of the Interior Department's letter referring the question to the Comptroller General, upon which his reply was based, indicates that the ruling related only to the "irregular employees," meaning the employees hired by the manager and not the supervisory personnel employed by the Secretary of the Interior. After this ruling, the supervisory personnel continued subject to the Federal Economy Act.

A related ruling was made by the Employees Compensation Commission on September 18, 1936, to the effect that the Federal Employees Compensation Act did not apply to the "employees of the mill." This reversed an administrative practice of the Commission of 20 years' standing. It does not appear whether a distinction has been observed in this connection between the supervisory employees and the laborers in the mill. Congress has, however, restored the original situation and confirmed the Federal aspect of the mills by the act of April 11, 1940 (54 Stat. 105), which specifically defines "employees" of the United States as including the employees in timber operations on the Menominee Reservation.

The most recent ruling involves the application of the Wages and Hours Act. This office, in the Solicitor's Opinion of November 28, 1938 (M. 29999), held that, until otherwise advised by the appropriate administrative agency, the Wages and Hours Act should be considered as applying to the Menominee mills since they could not be said to be exempted under the exemption of the "United States" as an employer. This ruling was confirmed by the Administrator of the Wages and Hours Administration in a letter to this Department of July 10, 1939, holding that the Wages and Hours Act was deemed to apply to all employees of the mills except those employees hired by the Secretary of the Interior and performing supervisory functions.

The foregoing administrative decisions lead to the conclusion that the employees of the Menominee mills, at least the nonsupervisory employees, are covered by Federal laws regulating employment in private industry and are not covered by Federal laws regulating employment in the Government itself unless clearly intended. This conclusion may be the logical one and correct in law and policy but still not determine the question whether gasoline purchased for the operations of the mills is exempt as for the use of the Federal Government. The mills must be recognized as having a dual capacity. On the one hand they are a profit-making enterprise for the particular benefit of an individual tribe and on the other hand they are an agency of the Federal Government through which the United States seeks to fulfill its obligation of advancing its Indian wards. One aspect of the enterprise should not be observed to the exclusion of

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the other. Neither law nor logic requires adherence to one view of the character of the mills. In any case involving the application of a Federal law to these mills, the question is one of finding the intent of Congress in the particular circumstance. The determination of this question is the function primarily of this Department and such other administrative agencies as may be concerned with the enforcement of the particular law in question.

In this instance, it is my opinion that the aspect of the mills as a Government agency predominates over their aspect as a private industry and that the mills are exempt from the Federal tax on purchases for their operations for the following reasons:

(1) The exemption from the Federal sales tax of gasoline purchased for the operations of the mills has been accepted thus far without question by all the administrative agencies concerned. The purchase of gasoline for this purpose has been constantly referred to as the purchase of gasoline for "governmental operations." The practice of using exemption certificates for such purchases follows the customary Indian Service practice in Indian Service operations, whether or not the particular operations are being paid for from tribal funds. The purchasing is carried on according to governmental regulations and with the use of Government forms for disbursement and accounting. The exemption of the mills from compliance with certain statutes governing the execution of Government contracts indicates that Congress recognized that the mills were operated as a Government operation.

(2) The management and supervision of the mills is clearly an Indian Service operation. From a practical viewpoint it would not be possible to separate the gasoline consumed in supervisory functions from the gasoline consumed for strictly productive purposes.

(3) A tax on the sale of gasoline for the operations of the mills is a tax on the operations of an agency of the Government and is not a tax on the income to any Indians resulting from such operations. The case of *Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U. S. 418, holding that the Federal income tax applied to the income of Indians received from investment by the Government of the Indians' property, in no way indorses taxation of the processes of the investment of such property by the Government. The recent Supreme Court cases upholding Federal and State income taxes on the employees of each other (*Helvering v. Gerhardt*, 304 U. S. 405; *Graves v. New York*, 306 U. S. 466), distinguish a tax upon the income of employees from a tax on the operations of the Government itself. While these cases involve the relation between dual sovereignties, they illustrate a distinction useful in a case such

as this, where an enterprise has the dual aspect of a Government function and a private business.

(4) The proceeds from the operations of the mills are not wholly devoted to per capita payments but large sums are used to carry on Government functions on the Menominee Reservation which otherwise would be paid for from Government funds, particularly the operations of the Keshena Agency and the construction of such buildings as quarters for Government employees, a hospital and jail. Federal use of the proceeds of the operations is significant in determining the application to the operation of a Federal Tax, which reduces such proceeds, although it might not have such weight in determining the application of Federal laws regulating the method of operations:

(5) Even if the Menominee mills are considered solely as a private tribal enterprise, it is doubtful whether Congress intended that the Internal Revenue Act of 1932 should apply to gasoline purchased for tribal enterprises. The time-honored principle that general laws of Congress should not be so construed as to apply to Indians, if such application would adversely affect them (*McCandless v. United States*, 25 F. (2d) 71 (C. C. A. 3, 1928)), has been so far modified as to permit the application of the general Federal income tax law to the income of individual Indians (*Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue, supra*). However, it has not yet been modified by the courts to apply general tax laws to the tribes and to tribal enterprises. This was pointed out in my opinion of June 30, 1937 (M. 29156), holding that the taxes imposed by the Social Security Act upon employers did not apply to Indian tribes operating enterprises under a trust agreement with the Government for the handling of Indian rehabilitation funds. This opinion, however, does not answer the present question since in that case the exemption provided by the statute in favor of the Government was broad enough to include agencies and instrumentalities of the Government. Until a court has required the application of such general tax laws to Indian tribes or clearly indicated their application, this Department should refrain, I believe, from enunciating such a legal conclusion.

(6) In considering the application of general Federal laws to Indian tribes and tribal enterprises, I believe it is reasonable and essential for a distinction to be made between Federal laws providing for the regulation of interstate commerce and Federal laws providing solely for the raising of revenue. In the case of the regulation of interstate commerce, it is important for the act to reach all industries producing goods which flow in interstate commerce. For that reason, it may be said that tribal enterprises with interstate operations come within the policy of such Federal regulation. With that considera-

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tion in mind, I held in my opinion of November 28, 1938 (M. 29999), that the Wages and Hours Act should be considered as applying to the Menominee Indian Mills. In implied recognition of this policy the Menominee mills operated under the National Industrial Recovery Act and joined with other lumber enterprises in the lumber code. The same considerations do not, however, apply to general Federal laws for the raising of revenue. The exemption of tribal enterprises from such acts would not be an obstacle to the effectuation of the purposes of the act. On the other hand, the application of such acts would have a detrimental effect upon the operations of the tribal enterprise and this would be inconsistent with the purpose of Congress to foster and protect such tribal enterprises and the tribal funds used in the furtherance of such enterprises.

In this connection, the inclusion in Title IV of the 1932 Revenue Act of an express exemption of Indian handicrafts indicates an intent, not completely expressed, not to have the act affect Indian enterprises.

(7) An opinion upholding the exemption from the Federal sales tax of purchases of gasoline for the operation of these mills would follow the repeated decisions of this Department holding various tribal enterprises established, managed, and supervised by the United States as part of its program for Indian welfare not subject to this Federal tax. In a letter to the Superintendent of the Great Lakes Indian Agency, approved in the Department June 21, 1938, he was informed that purchases of gasoline for the sawmill established by the Lac du Flambeau Tribe under a rehabilitation loan could be made with exemption certificates exempting the purchase from this Federal sales tax. Again, in my memoranda to the Commissioner of Indian Affairs of December 3, 1938, and June 21, 1939, I held that such exemption certificates and Government license tags could be used in connection with the operations of the corporate hay enterprise carried on by the Chippewa Cree Tribe with revolving loan funds. I see no fundamental distinction between these tribal enterprises and the Menominee Indian Mills, and no reason which induces me to change the ruling in connection with these other tribal enterprises, at least until so advised by the Bureau of Internal Revenue. Whether or not this Department should take the initiative in presenting the question to that Bureau is an administrative question primarily for the consideration of the Indian Office.

There remains the question whether this conclusion should be changed in view of the recent case of *United States v. Algoma Lumber Co.*, 305 U. S. 415. That case was a suit by the lumber company in the Court of Claims to recover from the United States for overpayment made under a contract for the cutting of timber on the

Klamath Indian Reservation. The contract had been executed by the Superintendent under the authority given to the Interior Department to provide for the sale of Indian timber under departmental regulations. The precise question in the case was whether the contract was a contract of the Government within the jurisdiction of the Court of Claims over contracts "with the Government of the United States" (28 U. S. C. A. sec. 250). The court held that the contract was not a contract of the United States but one made through an agency of the Government on behalf of the Indians, adding that the exercise by Congress of its power to manage and dispose of Indian property did not necessarily involve an assumption by the Government of contractual obligations. This holding was undoubtedly necessitated by the fact that the payments made under the contract were made for the benefit of the tribe and deposited in tribal funds. It recognizes, rather than denies, the fact that the management of the tribal timber was a Government operation. While a party to an Indian timber contract may not recover from the United States itself for money paid for the benefit of the Indians, in the contrary situation the United States may sue to recover on a breach of such a timber contract from the party to the contract for money due to the Indians (*United States v. Harris*, 100 F. (2d) 268 (C. C. A. 9, 1939)). The interest of the United States in contracts made in carrying on tribal timber operations is sufficiently great, in my opinion, to protect a purchase made in such operations through the agency of the Government from the tax here in question.

(b) *Purchases of gasoline for resale to employees and the general public.*

Where the Menominee Indian Mills purchase gasoline under an exemption certificate, such certificate may not cover gasoline which is purchased for resale through the commissary to employees and the general public. This is established beyond doubt by the language of Title IV of the Internal Revenue Act of 1932, by the provisions of the regulations of the Internal Revenue Bureau and by the wording of the exemption certificate itself. The fact that some of the employees to whom the gasoline may be resold are Indians is immaterial in the question of the application of a Federal tax. As previously pointed out, individual Indians are not exempt from Federal taxation simply because they are Indians or wards of the Federal Government (*Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue, supra*). Similarly, the fact that the gasoline may be resold within the Indian Reservation is immaterial in considering the application of a Federal, as distinct from a State, tax. Under the

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statute and regulations, the mills are responsible for the payment of the Federal tax on so much of the gasoline purchased as is used for resale to private persons.

II. APPLICATION OF THE STATE GASOLINE SALES TAX

The Wisconsin statute in question (ch. 78, Wisconsin Statutes 1937), places an excise or license tax on all motor fuel sold, used and distributed in the State, with the exception of fuel sold to the United States or any of its agencies except "as permitted by the Constitution or laws of the United States." The tax is enforced through a system of licenses on wholesalers who are responsible for the payment of the tax to the State.

The application of this act to purchases by the Menominee Indian Mills should be considered in the light of the act of Congress of June 16, 1936 (49 Stat. 1521, 23 U. S. C. A., sec. 55a). Because of the importance of this act it is quoted in full:

(a) All taxes levied by any State, Territory or the District of Columbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied shall be paid to the proper taxing authorities of the State, Territory or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month.

(a) *Purchases of gasoline for the operation of the mills.*

The State tax on the purchase of gasoline does not, in my opinion, apply to purchases of gasoline by the Menominee Indian Mills for their own operations. This conclusion is reached in the light of the following considerations:

(1) The State statute expressly exempts sales to "agencies" of the United States. In view of the discussion in relation to Question 1, and the frequent holding by this office that Indian tribes carrying on enterprises under the management of the United States are Federal agencies, the Menominee Indian Mills would come within the exemption accorded by the State statute.

(2) Regardless, however, of the wording of the State statute, it is recognized that a State cannot tax the operations of a Federal agency.

The tax in question would impose a direct burden on the operations of the agency. It is not remote in its effect on the agency, as has been found in the case of income taxes placed upon employees of an agency (*Helvering v. Gerhardt, supra*). These legal propositions have been the basis for several holdings by the Department that State gasoline taxes need not be paid in connection with purchases of gasoline for tribal enterprises (letter to the Superintendent of the Great Lakes Agency approved by the Department June 21, 1938; departmental telegram to the Navajo Agency of August 1, 1938; memoranda to the Commissioner of Indian Affairs from the Solicitor, of December 3, 1938 and June 21, 1939).

(3) The Act of Congress of June 16, 1936, above quoted, does not change this conclusion since, in the first place, it applies only to gasoline sold through commissaries and like agencies on the reservation. It does not appear that the gasoline purchased from wholesalers and dealers for the operations of the mills is sold to the mills through the commissary or any like agency on the Menominee Reservation. In the second place, even if such gasoline were sold to the mills on the reservation, the gasoline purchased for the operations of the mills would come within the exception in the Federal act for gasoline sold "for the exclusive use of the United States." If my conclusion is correct under Question 1 (a), *supra*, it has equal application in this instance as the exemption clause in this 1936 statute is identical with that appearing in the 1932 Revenue Act, as amended.

(4) This conclusion seems to be in accord with the construction of the statute made by the State authorities since the State does not claim taxes for gasoline purchased for the operations of the mills. Its claim is related solely to gasoline resold by the mills through the commissary to private persons.

(b) *Purchase of gasoline for resale through the commissary to private persons.*

In the absence of the Federal statute above quoted, it would be my opinion that the State tax would not apply to sales made by a Federal agency or a tribal enterprise on an Indian reservation. My reasons for this conclusion appear more fully in my response to Question III. The principal reason is, however, that the State could not enforce such a tax against such an agency or enterprise since neither is subject to license or revocation of license by the State. The statute clearly subjects the sales made through the Government agencies specified to State gasoline sales taxes and provides the method by which such taxes shall be collected. It is not clear, however, whether the Government agencies specified are intended to include such a Federal agency as the

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Menominee tribal enterprise and whether the reference to reservations includes Indian reservations.

The legislative history of the statute supplies three indications that the words "United States military or other reservations" were meant to include Indian reservations. (1) The statute in question was introduced as an amendment to the Federal Aid Highway Act of 1936 and the brief discussion surrounding it indicates that it was intended to permit the application of local sales taxes wherever they were not then collected because the sales were made on a reservation (Cong. Rec. Vol. 80, part 6, p. 6913; part 8, p. 8701). (2) In the same statute, there was a section devoted to roadways on Indian reservations indicating that attention was called in the consideration of the act to Indian reservations. (3) Moreover, when the amendment in question was introduced, the agencies enumerated did not include licensed traders and filling stations. The addition of these agencies by the conference committee indicates an intent to broaden the application of the statute, and the reference to "licensed traders" is particularly suggestive of Indian reservations. These indications, while slight, are sufficient to give ground for considering the broad language of the statute as including Indian reservations.

The language of the statute and the relevant legislative history I have reviewed distinguish this situation from that discussed in my memorandum for the Assistant Secretary of October 20, 1936, in which I held that the act of June 25, 1936 (49 Stat. 1938), extending State workmen's compensation laws over "lands and premises owned or held by the United States" did not extend Wisconsin's workmen's compensation laws over the Menominee Indian Reservation, and, in particular, over the Menominee Indian Mills. In that case I found that the language of the statute "given its ordinary meaning seems to embrace lands and property owned absolutely by the United States to the exclusion of other lands such as Indian reservations, the full beneficial ownership of which is in the Indian tribes * * *." The statute now in question significantly refers to reservations rather than to land ownership. Moreover, the argument and policy in the two cases lead to opposite conclusions in respect to the application of the statute to the Menominee mills.

Finally, I believe that the designation in the statute of the agencies embraced by its terms must be interpreted to include such an agency as the Menominee Indian Mills. The statute uses the term "commissary" and it is the commissary of the mills which makes the resales. Secondly, the mills cannot claim exemption from Federal and State taxes as a Federal agency and then claim not to have sufficient character as a Federal agency to be covered by the intent of this statute.

While I am of the opinion, therefore, that the act of June 16, 1936, subjects to the State gasoline tax sales made through the commissary to private persons, there remains the question whether the statute also removes the immunity from such taxes of Indians making purchases on Indian reservations. In my memorandum for the Commissioner of Indian Affairs of February 4, 1938, and my Opinion of May 8, 1940 (57 I. D. 124) I held that State sales taxes did not apply to purchases *from* or *by* Indians on Indian reservations. Although the immunity of purchases from an Indian commissary might be removed by the Federal statute, purchases made by the Indians on the reservation might nevertheless be exempt. However, I think that this would not be the proper conclusion in view of the purpose of the statute to permit State taxes of all sales on reservations not previously subjected to such taxes, and of the wording of the statute, permitting taxes to be levied "in the same manner and to the same extent" as upon sales outside the reservation. Indians making purchases of gasoline outside the reservation must pay the sales tax in the same manner as other persons.

III. APPLICATION OF STATE SALES TAX ON TOBACCO PRODUCTS

The Wisconsin laws of 1939 (chs. 433, 518) place an occupational tax on the sale or other disposition of tobacco products except in the case of sales "for shipment in interstate or foreign commerce." Manufacturers and wholesalers are required to pay the tax by purchasing and affixing State stamps on the tobacco products. The statute makes it unlawful for other than registered salesmen to sell tobacco products in the State or to purchase such products from other than licensed wholesalers. Under this law the State authorities claim from the Menominee Indian Mills several hundred dollars in taxes based on the inventory of tobacco products on hand in the mills' commissary as of the date of the passage of the act.

The Menominee Indian Mills are not liable, in my opinion, for the payment of this tax for the following reasons:

(1) The application of this tax to the mills would constitute State regulation and taxation of a Federal agency in violation of the United States Constitution. The tax could not be enforced without State interference with the operations of the mills, as the procedure for enforcement of the State act through licenses, arrests and penalties clearly indicates. The act of Congress of June 16, 1936, permitting the collection of State gasoline sales taxes on Government reservations from Government agencies is sufficient illustration of the fact that such taxes are not collectible in the absence of congressional permission.

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(2) The application of this tax to the Menominee Indian Mills would constitute a regulation of trade with the Indians which is beyond the power of the State. Commerce with Indian tribes might have been included in the exceptions provided in the State law along with the exception of sales in interstate and foreign commerce, since all three such types of commerce are placed by the Constitution under the regulatory power of Congress. In my memorandum of February 4, 1938, *supra*, holding that State sales taxes did not apply to purchases made by or from Indians on Indian reservations, I referred to the fact that it was well established that Indians are not amenable to State laws while on their reservations unless expressly subjected to those laws by Congress. *The Kansas Indians*, 5 Wall. 737, 755, 756; *United States v. Kagama*, 118 U. S. 375; *United States v. Rickert*, 188 U. S. 432; *United States v. Quiver*, 241 U. S. 602; *United States v. Hamilton*, 233 Fed. 685; *In re Blackbird*, 109 Fed. 139; *In re Lincoln*, 129 Fed. 247; *State v. Rufus*, 237 N. W. 67.

Congress has not only not subjected the Indians to taxes in this case but has exercised its authority by granting to the Commissioner of Indian Affairs "the sole power and authority" to regulate trade with the Indians and to specify the prices at which goods shall be sold to the Indians (25 U. S. C. A., sec. 261). A sales tax placed upon sales by Indian enterprises or to Indians on the reservation or on the business of making such sales would be an interference with the regulation of trade and prices by the Commissioner. The question whether Indians should pay State sales taxes is a political question for the ultimate determination of Congress.

The conclusions reached in response to the foregoing questions may be summarized as follows:

1. The Menominee Indian Mills are liable for Federal and State sales taxes on gasoline sold to employees and the public through the commissary operated by the mills. The liability of the mills for the State tax in this instance is due to an act of Congress.

2. The Menominee Indian Mills are not liable for the Federal or State sales tax on gasoline purchased for the operations of the mills.

3. The Menominee Indian Mills are not liable for the State tax placed on tobacco products, where tobacco products are sold through the commissary of the mills, whether the products are sold to Indians or to other persons.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

STATE OF CALIFORNIA ET AL. v. UNITED STATES

*Decided June 19, 1940**Motion for Rehearing September 18, 1940*

SCHOOL LAND GRANT—MINERAL LAND—EVIDENCE—DETERMINATIVE TEST—JOINT RESOLUTION OF CONGRESS APPROVED FEBRUARY 21, 1924.

While, without more, the drilling of two dry holes on a section of public land would be persuasive evidence of the absence of oil and gas to the depth probed, circumstances showing that such drilling did not produce fair test wells dispel such persuasion.

Drilling of two holes by leading oil companies strongly indicates the opinion of experienced oil men as to the value of the section for oil.

In determining whether or not land is of mineral (oil) character, as contemplated by the public land laws, and, therefore, excepted from a grant of public land, knowledge of actual mineral content need not be shown, it being sufficient if known conditions are shown from which mineral character reasonably can be inferred.

ICKES, *Secretary of the Interior:*

The General Petroleum Corporation of California, Thomas A. O'Donnell, and Hamer I. Tupman have appealed from a decision of the Commissioner of the General Land Office, dated March 24, 1938. The decision affirmed a decision of the Register in favor of the United States dated February 27, 1937, in adverse proceedings brought against the State of California, the General Petroleum Corporation of California, Thomas A. O'Donnell, Hamer I. Tupman, and the Potter Oil Company, involving Sec. 16, T. 30 S., R. 23 E., M. D. M.

This proceeding was initiated December 6, 1935, pursuant to a joint resolution of Congress approved February 21, 1924 (43 Stat. 16), upon charges by the Secretary of the Interior:

(1) That Sec. 16 is mineral in character, containing valuable deposits of petroleum and natural gas.

(2) That the land was known to be mineral in character on and prior to the date of the acceptance of the plat of survey by the General Land Office, January 26, 1903, and that therefore title did not vest in the State of California under the act of March 3, 1853 (10 Stat. 244), which granted Secs. 16 and 36 in each township to the State in aid of public schools, but remained in the United States.

The contestees were duly served with notice of the filing of the charges. The General Petroleum Corporation of California, Hamer I. Tupman, and Thomas A. O'Donnell answered, denying the charges and alleging that Sec. 16 is not now mineral in character and was not known to be mineral in character on January 26, 1903. The Potter Oil Company, through its successor, the Barnsdall Oil Company, filed a disclaimer of any interest in the land. No appearance on behalf of the State of California has been made.

Hearings were held at Los Angeles, beginning March 23, 1936, before a duly commissioned notary public. The evidence submitted

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consisted of the testimony of 12 witnesses, a number of exhibits, and, by stipulation between the parties, the entire record of the case of *United States v. State of California et al.*, Sacramento Contest No. 1679 (formerly Visalia Contest No. 1645) hereinafter referred to as the "Section 36 case".¹ The record of the proceedings was transmitted to the Register who, on February 27, 1937, entered his decision holding that the charges made by the United States had been sustained. His decision was affirmed by the Commissioner of the General Land Office on March 24, 1938. Thereupon this appeal was taken. Oral argument before the Secretary was not requested and the appeal was submitted on briefs.

The issues involved in this proceeding are substantially the same as those presented by the "Section 36 case". Section 16 and Section 36 are in the same township and both are located on the same anticlinal dome. The chief difference between the two cases is that there has been no discovery of oil or gas on Sec. 16 whereas there had been discovery on Sec. 36. Two dry holes have been drilled on Sec. 16. While, without more, the drilling of two dry holes would be persuasive of the absence of oil and gas to the depth probed, the record shows that the circumstances surrounding the drilling were such as to preclude treating either as a fair test well. The record further shows that it would take many more than two tests to prove or disprove the oil productivity of Sec. 16. Moreover, the drilling of the two holes by the General Petroleum Corporation of California and the Potter Oil Company is a strong indication of the opinion of prudent and experienced oil men as to the value of the section for oil.

The absence of a discovery of oil or gas is without particular significance for, as the Circuit Court of Appeals said in the "Section 36 case", 107 F. (2d) 414-415 (C. C. A. 9, 1939):

In the Southern Pacific case [251 U. S. 1, 40 S. Ct. 49, 64 L. Ed. 97], following the Diamond Coal & Coke Co. decision, the test was stated to be whether "the known conditions [at the time of patent] were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end." In applying such a test, rather than that of actual discovery, it is obvious that a wide field of inquiry is opened up. It was not necessary to show that appellants themselves, in 1903, believed the land to be valuable for oil, or that there was unanimity of contemporary opinion to that effect. The erection of such standards would require, in the one case, proof of fraud, and, in the

¹ The "Section 36 case" was decided by the Secretary of the Interior on February 24, 1935. *United States v. State of California et al.*, 55 I. D. 121 (1935). Thereupon, an action was filed by the United States against the Standard Oil Company of California and others to quiet title to the land involved and for an accounting for the oil and gas removed therefrom. A decree was entered in favor of the United States. *United States v. Standard Oil Co. of California et al.*, 21 F. Supp. 645 (D. C. S. D. Calif., N. D., 1937). This decision was affirmed by the Circuit Court of Appeals. *Standard Oil Co. of California et al. v. United States*, 107 F. (2d) 402 (1939), certiorari denied January 29, 1940, 309 U. S. 654.

other, proof of conditions pointing so unerringly to the existence of valuable oil deposits as to be the equivalent of actual discovery. Nor, as we understand the rule laid down in the controlling decisions, need it be shown that contemporary belief was such as to prompt a willingness immediately to risk money in the exploitation of the land.

The record in the "Section 36 case" has been reviewed for the purposes of this decision and the additional evidence and exhibits introduced at the 1936 hearing have been carefully examined and weighed. Upon a full consideration of all of this evidence I find no difference between this case and the "Section 36 case" which would justify a departure from the principles announced therein. On the basis of the facts disclosed in the record, I find that:

(1) Section 16, T. 30 S., R. 23 E., M. D. M., is mineral in character, containing valuable deposits of petroleum and natural gas.

(2) Section 16 was known to be mineral in character at and prior to the date of acceptance of the survey by the General Land Office on January 26, 1903.

It follows from these findings of fact that title to this section has never vested in the State of California or its transferees, but has remained and now is in the United States.

The decision of the Commissioner is, accordingly

Affirmed.

MOTION FOR REHEARING

The General Petroleum Corporation of California, Thomas A. O'Donnell and Hamer I. Tupman have filed a petition for rehearing of the departmental decision of June 19, 1940, which affirmed a decision of the General Land Office dated March 24, 1938. The decision of the General Land Office affirmed a decision of the register in favor of the United States dated February 27, 1937, in adverse proceedings brought against the State of California, the General Petroleum Corporation of California, Thomas A. O'Donnell, Hamer I. Tupman, and the Potter Oil Company, involving Sec. 16, T. 30 S., R. 23 E., M. D. M.

Petitioners attack the statement made in the departmental decision that "the drilling of the two holes by the General Petroleum Corporation of California and the Potter Oil Company is a strong indication of the opinion of prudent and experienced oil men as to the value of the section [Sec. 16] for oil." It is contended that the fact that the section was drilled in 1919 has no significance with respect to whether Sec. 16 was of known mineral character in 1903.

Two findings of fact were made in the decision of June 19, 1940: that Sec. 16 is mineral in character, containing valuable deposits of petroleum and natural gas, and that Sec. 16 was known to be mineral in character prior to the acceptance of the survey on January 26, 1903.

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Apparently petitioners misapprehend what was said in the opinion. The finding that Sec. 16 was known to be mineral in character prior to 1903 was not predicated in any way upon the inferences arising from the action of prudent and experienced oil men in 1919 in drilling on the section. It was not suggested that this action in 1919 was of any probative force whatsoever with respect to the state of opinion in 1903 as to the mineral character of Sec. 16. The statement attacked was made in passing in the course of the discussion as to whether the drilling, in 1919, of two dry holes sufficiently established the non-mineral character of the land to warrant the Secretary finding that thereafter the section could no longer be considered of mineral character. Read in its context, it is manifest that the statement had no reference whatsoever to the period before 1919.

It is also pointed out by the petitioners that the wells were drilled on Sec. 16 only after discovery had been made on Sec. 36, and it is alleged that until that discovery "no one gave a thought to" Sec. 16 as a potential oil field. This allegation does no more than to contravert the finding of fact made in the decision of June 19, 1940, that the section was known to be mineral in character prior to 1903.

In the petition and in the brief in support thereof petitioners have not advanced any arguments not considered and disposed of in the decision of June 19, 1940. The entire record has, however, been carefully reviewed and the Department finds no ground for reversing or modifying the decision complained of.

The motion for rehearing is accordingly

Denied.

ELIGIBILITY OF INDIAN TRIBES FOR LOANS AND GRANTS UNDER NATIONAL HOUSING ACT OF 1937

Opinion, August 6, 1940

INDIAN TRIBES AS GOVERNMENTAL ENTITIES—AUTHORITY OF ORGANIZED INDIAN TRIBES TO ENGAGE IN HOUSING PROJECTS—INDIAN TRIBES AS PUBLIC HOUSING AGENCIES—NATIONAL HOUSING ACT OF 1937.

An Indian tribe is a governmental entity or public body capable of undertaking tribal housing projects, and where a tribe is incorporated under the Indian Reorganization Act it is clearly authorized to engage in the low-rent housing and slum clearance projects contemplated by the National Housing Act, and, therefore, such a tribe comes within the terms of that act as a public housing agency eligible to obtain the assistance and benefits of that act.

KIRGIS, Acting Solicitor:

The Indian Office, in consultation with the United States Housing Authority, is giving consideration to the possibility that Indian

tribes may take advantage of the benefits afforded by the National Housing Act (act of September 1, 1937, 50 Stat. 888, 42 U. S. C. A. ch. 8). This act establishes a housing authority with power to make loans and grants on certain conditions to public housing agencies for the erection of low-rent housing and for slum clearance. The legal question whether Indian tribes come within the terms of the act has been referred to me for opinion.

The crucial question, in my opinion, is whether an Indian tribe is covered by the definition of a "public housing agency" in section 2 (11) of the act. If an Indian tribe does come within this definition, there remains only the administrative question whether a particular tribe can meet the conditions required for assistance in housing enterprises. The fact that the act does not mention Indians or Indian tribes is not material in the consideration of a law such as this which provides benefits to all who come within the definitions and standards established by the act. It has previously been recognized by this office and by the administrative agencies concerned that Federal general welfare and relief acts are available to the Indians, although not mentioned therein, since these laws apply to all eligible persons without regard to race or status, whether of wardship or otherwise. (See Memorandum of the Solicitor of the Interior Department, April 22, 1936, concerning the eligibility of Indians for benefits under the Social Security Act.)¹

The United States Housing Authority has suggested in certain correspondence that the act is not applicable to Indian tribes as they do not come within the definition of a "State" in section 2 (12) of the act. This provision defines the term "State" as including "the States of the Union, the District of Columbia, and the Territories, dependencies and possessions of the United States." This definition is, in my opinion, a description of the geographical area within which the National Housing Act applies and is not a description of the body or agency to which loans and grants may be made. Geographically, Indian reservations are, of course, within the States. However, it may be said parenthetically that if it were necessary to bring an Indian tribe within this definition of a State it would be possible to support the assertion that Indian tribes may be characterized as dependencies of the United States. A dependency has been described as a dependent nation, State or country, controlled in all its foreign relations by the superior government upon which it is dependent, usually as a result of treaties between the two, and incorporated into the dominion of the superior government, while nevertheless retaining local self-government. (See *United States v. Nancy*, 27 Fed. Cas. 69; 18 C. J. 493.) This description of a dependency fits with peculiar perfection the

¹ In files of Solicitor's Office. [Ed.]

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historic position of an Indian tribe held since the early decisions of *Cherokee Nation v. Georgia*, 5 Pet. 1, and *Worcester v. Georgia*, 6 Pet. 515, and reaffirmed in numerous Supreme Court cases, including *Kagama v. United States*, 118 U. S. 375; *Choctaw Nation v. United States*, 119 U. S. 1, and *United States v. Sandoval*, 231 U. S. 45. These cases recognize an Indian tribe as a "domestic dependent nation" dependent upon the United States for protection, controlled by the United States in its relations with outsiders and brought within the dominion of the United States by treaties, but nevertheless retaining the right of local self-government.

I place my opinion that Indian tribes come within the provisions of the National Housing Act on the broad definition of the term "public housing agency." Section 2 (11), setting forth this definition is as follows:

The term "public housing agency" means any State, county, municipality, or other governmental entity or public body (excluding the Authority), which is authorized to engage in the development or administration of low-rent housing or slum clearance.

In the first place it should be noted that a public housing agency does not need to be an agency or entity of a State government. This is apparent on the face of the definition and, if for no other reason, from the specific reference to the Authority, which is an agency of the Federal Government. The definition embraces any governmental entity within the geographical area covered by the National Housing Act.

An Indian tribe is both a governmental entity and a public body. This is a fundamental statement in Indian law. After the passage of the Indian Reorganization Act (act of June 18, 1934, 48 Stat. 984), this office made an exhaustive analysis of the status of an Indian tribe as a governmental entity and of its powers of local self-government over Indians on Indian reservations. (Solicitor's opinion, October 25, 1934, 55 I. D. 14.) The following quotations from the statements and citations within that opinion illustrate the findings:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: An Indian tribe possesses, in the first instance, all the powers of any sovereign State. Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e. g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i. e.*, its powers of local self-government. These powers are subject to be qualified by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government. [55 I. D. at 22.]

* * * * *

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

"From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descents, and the punishment for crimes committed against each other. They have been excused from all allegiance to the municipal laws of the whites as precedents or otherwise in relation to tribal affairs, subject, however, to such restraints as were from time to time deemed necessary for their own protection, and for the protection of the whites adjacent to them. *Cherokee Nat. v. Georgia*, 5 Pet. 1, 16, 17; *Jackson v. Goodell*, 20 Johns. 193. (At p. 329.)" [55 I. D. at 26.]

* * * * *

The acknowledgment of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but outmoded theory. The doctrine has been followed through the most recent cases, and from time to time carried to new implications. Moreover, it has been administered by the courts in a spirit of whole-hearted sympathy and respect. The painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the *Cherokee Intermarriage Cases* (203 U. S. 706) is typical, and exhibits a degree of respect proper to the laws of a sovereign state. [55 I. D. at 26.]

* * * * *

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

* * * * *

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

"At all times the rights which belong to self-government have been recognized as vested in these Indians. (At p. 173.)" [55 I. D. 29.]

And in the case of *Raymond v. Raymond*, *supra* [83 Fed. 721], the court declared:

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

See, also, *Noftre v. United States* (164 U. S. 657); *Mehlin v. Ice* (56 Fed. 12). [55 I. D. 56.]

The governmental powers of Indian tribes have been incorporated in the 100 or so constitutions adopted by Indian tribes under section 16 of the Indian Reorganization Act. Since the Blackfeet Tribe has been considered by the Indian Office and the United States Housing Authority as the most likely applicant for the benefits of the act, the powers of that tribe under its tribal constitution are used as illustration. That constitution, which was adopted "for the government, protection, and common welfare of the said tribe and members

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thereof," places in the council of the tribe the tribal powers, among others, of managing the tribal land, safeguarding the peace and safety of residents of the reservation, establishing a judicial system, regulating property, requisitioning community labor for public purposes, and levying assessments for public purposes.

While an Indian tribe is a governmental entity so long as it retains its character as a tribe, even though it may not be organized in the manner provided by the Indian Reorganization Act, its character as a governmental entity is conclusively established and takes practical form when the tribe is organized under a constitution under section 16 of that act and incorporated as a Federal corporation under section 17.

Since an Indian tribe is a governmental entity, it may likewise be described as a "public body." That term may refer to a public agency with less governmental power than that of a governmental entity. It undoubtedly contemplates such public corporations as are established for the purpose of carrying on particular public enterprises and which are endowed with limited governmental powers. An Indian tribe fulfills the concept of a public body as a local government similar to a municipality or, when the tribe is incorporated, as a public corporation carrying on public enterprises. The charter of every tribe incorporates such tribe as a "body politic and corporate of the United States of America."

The remaining question is whether an Indian tribe is a governmental entity or public body "authorized to engage in the development or administration of low-rent housing or slum clearance." The management of tribal property and the carrying on of tribal business enterprises are governmental powers which have been recognized by Congress and by this Department as within the authority of an Indian tribe. This recognition has already included the undertaking by the tribes of housing enterprises under the supervision of this Department. Since 1935 Indian tribes have been recognized agencies for the carrying out of rehabilitation projects upon the Indian reservations, and, under grants from rehabilitation funds appropriated to the Indian Office, they have undertaken housing projects for the benefits of their members.

However, only those tribes which are incorporated under the Indian Reorganization Act may be said with assurance to have express authority, both from their membership and from Congress, to engage in the low-rent and slum clearance projects contemplated by the National Housing Act. Incorporated tribes have specific authority in their charters to engage in any business that will further the economic well-being of the members of the tribe, to make and perform contracts with

any person, association, or corporation, to sue and be sued, to borrow funds from any governmental agency, and to pledge tribal assets (excluding tribal lands) for the purpose of obtaining such a loan, certain of such powers being subject, according to the extent of their exercise, to the approval of the Secretary of the Interior. A tribe which has not been incorporated cannot be said to have authority, without Congressional sanction, to enter into the undertakings probably required for engaging in low-rent and slum clearance projects, particularly the authority to sue and be sued and to make contracts involving interests in tribal lands and the proceeds therefrom. It would, therefore, be a serious question whether the United States Housing Authority would find, as an administrative matter, that such a tribe was an agency to which it could properly loan housing funds.

In summary, therefore, it is my opinion that an Indian tribe is a governmental entity or public body capable of undertaking tribal housing projects, and that where a tribe is incorporated under the Indian Reorganization Act it is clearly authorized to engage in the low-rent housing and slum clearance projects contemplated by the National Housing Act, and, therefore, such a tribe comes within the terms of that act as a public housing agency eligible to obtain the assistance and benefits of that act.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

LEGALITY OF PROPOSED BOND ISSUE OF PUERTO RICO

Opinion, August 27, 1940

PUERTO RICO—BONDS—TAXATION—UNIFORMITY—EQUAL PROTECTION.

The proposed issuance of certain bonds under Act No. 22 of the Second Special Session of the Fourteenth Legislature of Puerto Rico, approved June 18, 1939, probably violates the equal protection and uniformity of taxation requirements of the Organic Act of Puerto Rico, since it remits all delinquent property taxes, up to \$400, for the fiscal years preceding 1938-39, but makes no provision for refunding the taxes collected for those years.

PUERTO RICO—BONDS—STATUTES—SEPARABILITY.

While the invalidity of a portion of a statute will not necessarily invalidate other portions thereof which are separable from the invalid part, such is not true in the case of the present statute, the invalidity of a portion of which has the result of frustrating the cardinal purposes for which the bonds are to be issued.

PUERTO RICO—TAXES—DELINQUENT—CANCELATION—LEGALITY—LIEN.

Despite the fact that under Act No. 22 the delinquent taxes are declared by the statute to be canceled prior to the time of possible flotation of the bond

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issue authorized thereby, a liberal view would entail the conclusion that although such action may be illegal it could not have the effect of precluding the issuance of the bonds, but at most would have the effect of continuing the lien of the delinquent taxes until such time as the bond proceeds could be obtained.

PUERTO RICO—MUNICIPAL BUDGETS—APPROPRIATIONS—COMMITMENTS—CONTRACTS—IMPAIRMENT OF OBLIGATION.

The Legislature of Puerto Rico in enacting legislation not only providing for the remission of delinquent taxes up to \$400, but also providing for the contracting of an Insular loan to compensate the municipalities for taxes lost to them because of the contemplated remission, no doubt acted so as not to imperil the payment of outstanding municipal commitments against revenues appropriated in past municipal budgets. Otherwise, the tax remission features of Act No. 22 would quite probably have violated the prohibition of the Organic Act against impairment of contractual obligations, because of the numerous outstanding and unpaid claims against the general funds of the municipalities existing at the time of the enactment of Act No. 22 and still remaining unpaid.

PUERTO RICO—MUNICIPAL BUDGETS—APPROPRIATIONS—COMMITMENTS—LIQUIDATION.

Commitments cannot be made beyond amounts appropriated in the budgets, and delinquent taxes and penalties and interest, if collected and not necessary to liquidate commitments of prior years, can only be counted upon as cash surpluses allocable to separate new supplementary budgets to be formed for the special purpose of disposing of such surpluses.

KIRGIS, Acting Solicitor:

My opinion has been requested as to the legality of a proposed bond issue of The People of Puerto Rico. The bonds are to be in the denomination of \$1,000 each; are to be in coupon form; are to be payable to bearer; are to be dated January 1, 1940; are to bear interest from January 1, 1940, at the lowest rate permitting purchasers to offer par for the bonds, but in any event not to exceed 4½ percent per annum, the interest to be payable July 1, 1940, and semi-annually thereafter on January 1 and July 1 of each year; are to be designated "Puerto Rico ----- % Loan of 1940 (1941-45) Remittance of Property Taxes"; are to mature in five series, each totaling \$300,000 and each falling due, in equal annual installments, on January 1, 1941-1945, inclusive; are to be special obligations of The People of Puerto Rico, payable, both as to principal and interest, at the Treasury of the United States, out of an internal revenue tax of 50 cents collected on each thousand cigarettes brought into or manufactured, sold or consumed in Puerto Rico, the proceeds of the said tax to constitute a special fund, applicable in whole or in part, as may be necessary, to the payment of the bonds and the interest thereon.

The authority for the issuance of the bonds is found in Act No. 22 of the Second Special Session of the Fourteenth Legislature of Puerto Rico, approved June 18, 1939, and more generally, in section 3 of

the Organic Act of Puerto Rico (39 Stat. 951, 953), as variously amended and supplemented.

The object of Act No. 22 is the remission, up to the amount of \$400, of delinquent property taxes for the fiscal year 1937-38 and for earlier fiscal years. The act provides that the portion of the property taxes lost to the municipalities of Puerto Rico by virtue of the remission shall be reimbursed to them out of the proceeds of the proposed bond issue.

The statute is prefaced by a "Statement of Motives" which sets forth, in substance, that agricultural collapses resulting from hurricanes, low market prices or lack of farm credits have a profoundly depressing effect upon business and life in the Island, as well as upon the development and credit of the various municipal corporations of Puerto Rico; that powerful reasons impel the Legislature to take measures to mitigate the despair and unrest prevailing among the property owners, particularly the farmers, and to lessen "the anxiety that hounds them as some horrible nightmare" that their property may be sold for delinquent taxes or foreclosed upon by the Federal Land Bank or the Hurricane Relief Commission; that the embarrassing situation of the municipalities would be relieved by a solution of the tax problem while, at the same time, the proposed sacrifice entailed to the general public, divided as it would be "pro rata" among the people, would be small in comparison with the good accomplished; that the remission of taxes owing on real and personal property would stimulate encouragement of faith, and keep alive the hope of maintaining Puerto Ricans in the ownership of their land; that the measure contemplated is unique in the history of Puerto Rico and is "sensible and decisive" for agricultural, industrial and commercial "balance"; that the means of compensating the municipalities for the ninety-one hundredths of one percent of the basic tax rate on delinquent taxes (such amount being the amount to which the municipalities are entitled by law) are simple and not productive of any special hardship.

Section 1 provides that taxes due and pending collection on real and personal property which may be owed by taxpayers whose tax indebtedness, up to June 30, 1938, exclusive of surcharges, interest and costs, does not exceed \$400, are remitted, together with all surcharges, interest and costs on such overdue taxes.

Section 2 provides that if the taxes on real and personal property, up to June 30, 1938, exceed \$400, such taxes are reduced by the sum of \$400, and "the surcharges, interest and costs owing on said [sic] taxes up to June 30, 1938 are likewise canceled."

Section 3 directs the Treasurer of Puerto Rico to cancel such tax receipts on real and personal property for the fiscal year 1937-38

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and preceding years (including receipts for taxes deferred pursuant to laws relating to the deferment of taxes) as may pertain to the obligations remitted by section 1. Section 3 also directs the Treasurer to dissolve all attachments levied and recorded in the Registry of Property which may affect the property upon which the taxes referred to in section 1 are due.

Section 4 provides that all property which, prior to the approval of the act and subsequent to January 1, 1929, may have been sold at auction and adjudicated to The People of Puerto Rico for nonpayment of any of the taxes remitted by section 1, shall, if in the possession of The People of Puerto Rico, and not in use by the Insular, municipal, or Federal governments, be reconveyed to the person who possessed the same at the time of the auction sale. Section 4 also provides that the charges arising from such sale and adjudication shall be canceled.

Section 5 conditions the remission provided for by section 1 upon payment by the taxpayer to the Insular Treasury, on or before December 1, 1939, of all taxes levied on the same property for the fiscal year 1938-39 and the first half of the fiscal year 1939-40; and also provides that payment of the total tax indebtedness due up to June 30, 1938, exclusive of the sum of \$400 and surcharges, interest and costs thereon, shall constitute a condition precedent to the remission.

Section 6 provides that the Treasurer shall contract a loan with a natural or artificial person in the amount of \$2,250,000, or such part thereof as may be necessary, and that the loan shall be repayable in not to exceed 13 years at a rate of interest not to exceed 4½ percent per annum. Section 6 also provides that the Treasurer "with the amount of said loan * * * shall reimburse to each municipality, the ninety-hundredths of the basic tax rate belonging to it out of the taxes hereby remitted."

Section 7 provides that the principal of, and the interest on, the loan contracted shall be payable from the proceeds of the tax levied by section 8.

Section 8 provides that, in addition to the tax on cigarettes levied by paragraph 2, section 16 of Act No. 85, approved August 20, 1925, as amended, there shall be levied an additional revenue tax of 50 cents on each thousand cigarettes brought into or manufactured, sold or consumed, in Puerto Rico. Section 8 also provides other details as to the collection of the new tax imposed; directs the Treasurer to impound the revenue derived from the said new tax in a special fund to be applied wholly or partly, as may be necessary, to the loan to be contracted; and states that, after the payment of the loan and the interest thereon, the tax shall be used to increase the general funds of

the Insular government "for the improvement of the public service thereof and for the establishment of the new services that may be necessary."

Section 9 imposes an additional limitation upon the stipulated tax remission by providing that payment must be made without default of all taxes due for two consecutive fiscal years and by adding that unless the taxpayer presents to the Treasurer of Puerto Rico satisfactory proof of inability to pay the taxes assessed for such two fiscal years, he shall be obliged to pay to the Insular Treasury, together with the taxes for the two years in default, "50 percent of the total taxes remitted in his case."

In considering the validity of Act No. 22 two specific objections must be considered at the outset; the first, that it violates the contract clause (section 2, clause 5) of the Organic Act; the second, that it violates the equal protection clause (section 2, clause 2) and—what is another aspect of the same question for the particular purposes of this case—the uniformity of taxation requirement (section 2, clause 22) of the Organic Act.

I have come to the conclusion that the statute does *not* have the effect of impairing contractual obligations; but I have come to the conclusion that, because it remits only all unpaid taxes and does so without requiring any showing of hardship or of inability to pay or collect, the statute *does* deny the equal protection of the laws to certain classes of taxpayers and *does* create a rule of taxation which is not uniform. My reasons for believing that Act No. 22 does not impair contractual obligations but that it is invalid because of its unequal and nonuniform effect among taxpayers follow.

IMPAIRMENT OF CONTRACTUAL OBLIGATIONS

With the view in mind, no doubt, of acting so as not to imperil the payment of outstanding municipal commitments against revenues appropriated in past municipal budgets, the Legislature of Puerto Rico, in enacting Act No. 22, not only provided for the remission of delinquent taxes up to the amount of \$400, but also provided for the contracting of an Insular loan to compensate the municipalities for the taxes lost to them because of the contemplated remission. There can be no doubt that the Legislature was well advised in acting to reimburse the municipalities for the amounts lost to them by reason of the cancelation of the taxes, as otherwise the tax remission features of Act No. 22 would quite probably have violated the prohibition of the Organic Act against impairment of contractual obligations. See *Moore v. Branch*, 5 Fed. Supp. 1011, and cases therein cited. This is true because of the very numerous outstanding and unpaid claims

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against the general funds of the municipalities, claims existing at the time of the enactment of Act No. 22 which still remain unpaid. These claims, as has been indicated, were originally made payable out of amounts budgeted in past years against the municipal share of the general property taxes, and have remained unpaid largely because the said taxes were not collected.¹ Since provision has been made by the statute for reimbursement to the municipalities, it seems clear, however, that Act No. 22 (certainly, in any event, to the extent of moneys reimbursed) does not have the effect of impairing contractual obligations. Although the statute is silent upon the point, it is to be presumed that the amounts to be reimbursed to the municipalities out of the loan to be contracted would be subject to the same existing appropriations and commitments as the original taxes (*cf. Guardian Savings & Trust Co. v. Dillard*, 15 F. (2d) 996), there being no rule of law which is better established than that a construction of a statute which will render it immune to constitutional attack will be adhered to if possible. In this connection it is to be noted that the statute does not substitute other assets not the equivalent of cash for the delinquent taxes. Instead it substitutes the cash obtained from the sale of the proposed bonds for such delinquent taxes. Assuming that the bonds can be sold, it is evident that such an arrangement would greatly benefit rather than harm the municipal creditors; and, despite the fact that the delinquent taxes are declared by the statute to be canceled prior to the time of the possible flotation of the bond issue, I am of the opinion that, although this may be illegal, a liberal view of the matter would entail the conclusion that such illegality could not have the effect of precluding the issuance of the bonds, but at most would have the effect of continuing the lien of the delinquent taxes until such time as the bond proceeds could be obtained.

The fact that Act No. 22 remits not only taxes up to the amount of \$400 but also penalties and interest on such taxes does not render the statute objectionable on the ground of impairing contractual obligations. Municipal commitments cannot be specifically made with respect to anticipated penalties and interest, at least not without at the same time making provision for devoting other and sufficient funds to their payment. As pointed out in Part I of the Appendix, commitments cannot be made beyond amounts appropriated in the budgets. Delinquent taxes and penalties and interest correspond to past budgets, and, if collected and not necessary to liquidate commit-

¹ See Part I of Appendix* as to budgetary laws and regulations in Puerto Rico making it possible for commitments against taxes which later become delinquent to remain unbenefited by new appropriations made in later fiscal years.

*Appendices and attachments referred to in this opinion may be found in the files of the Solicitor's Office. [Editor.]

ments of prior years (which commitments can only have been made against nondelinquent levied taxes and other funds receivable for such past fiscal years, and not, of course, against penalties and interest estimated to be receivable during those years in connection with such taxation), they can only be counted upon as cash surpluses allocable to separate new supplementary budgets to be framed for the special purpose of disposing of such surpluses. See section 45 of the Municipal Law, Act No. 53, Laws of 1928, as amended. On the other hand, if such items, i. e., delinquent taxes, penalties, and interest, are not collected and are not necessary to liquidate past commitments, they cannot be contracted against without immediately creating an indebtedness chargeable against the organic debt limit of the municipalities (see *State ex rel. Umatilla County v. Davis*, 161 Ore. 127, 85 P. (2d) 379, 88 P. (2d) 314); whence it follows, according to section 42 of the Municipal Law, that funds pertaining to the fiscal year in which such contracts are made would have to be appropriated in any case to the payment of indebtednesses so created. See Part I of the Appendix. It is believed, therefore, that the Legislature is competent to cancel penalties and interest on the taxes without providing any reimbursement therefor to the municipalities. Distinguish such cases as *Islais Co. v. Matheson*, 3 Calif. (2d) 657, 45 P. (2d) 326, holding that penalties and interest may not be remitted *where they constitute part of a statutory fund pledged to secure obligations incurred*.

As to the remitted part of those fractions of the property tax other than the .90 percent tax belonging to the municipalities, together with penalties and interest thereon, it is to be observed that although Act No. 22 does not provide for the restoration or reimbursement of any of such remitted part, the failure in this respect to provide reimbursement will not apparently have the effect of prejudicing the payment of any municipal or Insular obligation. As pointed out in Part II of the Appendix, those fractions of the tax to which reference is made consist of the so-called *additional taxes*, of the so-called *school taxes*, and of certain taxes devoted to general and special Insular uses including the repayment of loans contracted at various times past. It is believed that there are no municipal loans or other commitments which are now in default and are payable out of uncollected additional taxes, and it is also believed that the Insular Government has never failed to meet faithfully any of its own financial obligations payable out of the property taxes. The remission of the additional taxes and of the Insular share of the property taxes affects only the years preceding the fiscal year 1938-39, and *has no application to future years*, but rather only to years for which the debt service of outstanding obligations has already been met. It is true that the ordinances and laws authorizing the incurring of municipal and Insular obligations payable out of that

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part of the property taxes other than the .90 percent belonging to the municipalities uniformly recite that a tax of a specified percent shall be levied and collected upon all *taxable* property for the purpose of meeting the particular obligation authorized. And most of the loan obligations also contain covenants to the effect that any special tax surplus collected in any fiscal year in excess of the amount necessary to meet the debt service of that year shall be placed in a sinking fund for the purpose of guaranteeing the payment of the obligation. Cf. section 2, clause 23 of the Organic Act. However, *assuming that none of the obligations in question was in default at the time of the enactment of Act No. 22*,² it would seem that the Legislature of Puerto Rico, having the power to declare what shall constitute *taxable* property, has the power, from the standpoint of contractual impairment, to exempt generally from taxation (even *after* the liability has accrued, see *Asplund v. Alarid*, 29 N. Mex. 129, 219 Pac. 786) so much property as might, over a period of years, have given rise to a tax liability of \$400. See *Gilman v. Sheboygan*, 2 Black. 510; *Arkansas S. R. Co. v. Louisiana & A. R. Co.*, 218 U. S. 431; *State v. Parker*, 33 N. J. L. 312, and annotation in 109 A. L. R., page 817.³ In this connection it should be noted that the remitted taxes under consideration have not been *collected* and that therefore the action of the Legislature is not directed to diverting funds already collected which belong, by contract, to the municipal and Insular loan creditors. The last is a thing which, as pointed out in my opinion of June 17, 1940 (M. 30572), dealing with the so-called Rio Blanco bonds of The People of Puerto Rico, could not be done.

EQUAL PROTECTION OF LAWS; UNIFORMITY OF TAXATION

But, though it may be concluded, in view of what has been said, that Act No. 22 does not have the effect of impairing contractual obligations, a grave probability nevertheless exists that the statute violates the equal protection and uniformity of taxation requirements of the Organic Act. It is to be noted that Act No. 22 remits all delinquent property taxes, up to the amount of \$400, for the fiscal years preceding 1938-39, but makes no provision for refunding the taxes levied for those years. Compare with *Apokaa Sugar Co. v. Wilder*, 21 Hawaii 571. Nor does it confine itself to remitting penalties and interest on accrued taxes. Compare with *State ex rel. Pierce*

² This is the distinction between these obligations and the municipal obligations payable out of the .90 percent tax. It has been pointed out herein that the taxes levied to pay for the latter could not have been remitted without reimbursement.

³ The Florida cases mentioned in the A. L. R. annotation seeming to sustain a contrary doctrine are not in reality opposed. Cf. *Boatright v. Jacksonville*, 117 Fla. 477, 158 So. 42, and note that the Organic Act does not define what property shall be exempt from taxation.

v. *Coos County*, 115 Ore. 300, 237 Pac. 678; *State ex rel. Outcalt v. Guckenberger*, 134 Ohio St. 457, 17 N. E. (2d) 743. Nor, again, does it seek to remit the taxes of those who cannot pay or of those who would be subjected to grave hardship if they paid. Compare with *Bridgeport v. First National Bank and Trust Co.*, 125 Conn. 623, 7 Atl. (2d) 839; *Garrott v. Buckner*, 5 Ky. L. Rep. 56; *In re Calhoun Beach Holding Co.*, 205 Minn. 582, 287 N. W. 317. Nor, yet, does it make provision for the compromise or extension of tax claims based upon considerations touching the ability of the Insular Government to obtain the tax. Compare with *McHenry v. Alford*, 168 U. S. 651; *State v. State Investment Co.*, 30 N. Mex. 491, 239 Pac. 741. Nor, finally, does it attempt to condone, in favor of certain unarbitrarily defined classes of taxpayers, taxes from which such classes might have originally been exempted. Compare with *Demoval v. Davidson County*, 87 Tenn. 214, 10 S. W. 353; *Mobile & G. R. Co. v. Peebles*, 47 Ala. 317. On the contrary, it remits the taxes of all persons who did not pay, regardless of whether such persons failed to pay because they could not or because they would not, and therefore the statute seems to be arbitrarily discriminatory in its effect upon taxpayers who actually paid their taxes.

In *State ex rel. Hostetter v. Hunt*, 132 Ohio St. 568, 9 N. E. (2d) 676, affirming 56 Ohio App. 120, 10 N. E. (2d) 155, it was unanimously held by the Supreme Court of Ohio that a statute which remitted all delinquent taxes for certain named years upon payment by the delinquent taxpayers of taxes payable for the year 1932, was unconstitutional for the reason that it offended the equal protection clause of the Ohio Constitution. The Ohio court, after citing various cases for the proposition that the statute was invalid, made the following statement:

* * * In such a case can it be said that the taxpayer who met his obligations for all five years is on the same footing with the delinquent taxpayer who is not only being forgiven the penalty on the taxes but the entire amount thereof? For it must be remembered that we have here a situation dealing not with penalties alone but with the remission of the entire amount of the tax. "It is a generally recognized principle of the law of taxation that a statute authorizing the acceptance, directly or indirectly, of a part of the tax in satisfaction of the whole, is unconstitutional as a denial of the equal protection of the laws and as a disregard of the equality and uniformity of treatment of all taxpayers, where it may be applied as a favoritism extended to the property owner, or some one acting for him, and not as a permission to the local officers to accept less than the full amount due only because actual test has demonstrated that no more can be obtained." *Ranger Realty Co. v. Miller*, 102 Fla. 378, 136 So. 546, 547.

While the classification amendment, effective January 1, 1931, gave the General Assembly the authority to classify personal property for the purpose of taxation, it did not give the Legislature the power to classify taxpayers so as to distribute the burdens of taxation unequally. The statute under consideration

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does attempt to divide taxpayers into two classes. In one class are placed all those who met their just obligations with reference to personal property taxes from 1926 to 1930, inclusive, and in the other class are placed those who did not. To the latter class it gave a remission and cancellation of all obligations for those years merely by the act of complying with the personal property tax law in 1932. To sanction such legislation enacted in violation of Section 2 of Article 1 of the Constitution would be an injudicious construction of constitutional law. To say that such classification comes within the taxation or equal protection clauses of the Constitution is to misunderstand their true purpose [9 N. E. (2d) 676, 683].

And in *State ex rel. Matteson v. Luecke*, 194 Minn. 246, 260 N. W. 206, it was held by the Supreme Court of Minnesota that a statute permitting delinquent taxes to be satisfied by payment of a part thereof violated those provisions of the Minnesota Constitution which guaranteed uniformity of taxation. The Minnesota court made the following statement:

It is clear to us that the statute being considered (and the similar provision of Laws 1931, c. 129, sec. 2) is violative of this provision of our Constitution. The classification of subjects here attempted is unreasonable and fanciful. Realty owners are divided into two classes; those who pay taxes promptly and those who do not. The latter pay a smaller amount than the former. No reasonable basis founded on essential differences of nature or circumstances suggests itself for this classification. In determining the reasonableness of the classification set up by the Legislature, the court will not concern itself with the question of public policy involved and the expediency of the measure. *Reed v. Bjornson* (1934), 191 Minn. 254, 253 N. W. 102. Yet, in determining the reasonableness of a classification, a legitimate object for the court's consideration is the practical effect the classification is bound to have on business and organized society generally. In this connection it readily can be seen that the statute here concerned encourages and fosters tax delinquencies in the state. Taxpayers are prompted to allow taxes to become delinquent in order thereafter to be able to satisfy them in full by the payment of a fraction of the amount originally assessed. Such result is not desirable, and demonstrates the unreasonableness of the classification. While several courts have determined that statutes remitting interest and penalties on delinquent taxes before the period of redemption has passed are constitutional, *State ex rel. v. Coos County*, 115 Or. 300, 237 P. 678; *Jones v. Williams*, 121 Tex. 94, 45 S. W. (2d) 130, 79 A. L. R. 983; *State v. Koelm*, 332 Mo. 1229, 61 S. W. (2d) 750; *contra, Sanderson v. Bateman*, 78 Mont. 235, 253 P. 1100, such cases are based on the grounds that the interest is not payment for the use of money, but rather a penalty, and that, since a penalty is not part of the tax, the uniformity requirement did not apply to remissions thereof. [260 N. W. 206, 208, 209.]

Other courts have held statutes or ordinances which closely approach Act No. 22 in purpose and effect to be invalid because of considerations of equal protection and uniformity of taxation or because of considerations of due process. On the other hand, in no case that I have been able to discover has the validity of a statute like Act No. 22 been upheld. Thus, for example, in *State v. Hannibal & Saint Joseph Ry. Co.*, 75 Mo. 208, it was held that the remission or commutation of taxes by a

municipal corporation violated the equality and uniformity provisions of the Constitution of Missouri. And in *State ex rel. Coe v. Fyler*, an early Connecticut case, 48 Conn. 145, it was said that an abatement of taxes would necessarily result in the imposition of additional assessments upon others and hence would violate the fundamental concept of taxation that taxes should bear equally upon all. And see also *Wilson v. Sutter Co.*, 47 Calif. 91; *Thompson v. Auditor General*, 261 Mich. 624; 247 N. W. 360, and valuable discussion in 99 A. L. R. at page 1068.

Attention is also invited to *Simpson v. Warren*, 106 Fla. 688, 143 So. 602, 144 So. 324, wherein the Florida court made the following statement:

Where a statute which provides for the collection of a particular tax is valid, and taxes from some have been collected under it, the Legislature is without power to unconstitutionally discriminate against, and deny the equal protection of the laws to, the class of taxpayers who have already paid such tax while the statute was in force, by arbitrarily remitting or wiping out by repeal of the statute or otherwise the liability of those who have by their delinquency evaded or postponed payment for the time being. [143 So. 603.]

Reference may be also had to *Berman v. Board of Education of City of Chicago*, 360 Ill. 535, 196 N. E. 464, holding that a statute authorizing a school district to issue bonds for the purpose of paying tax anticipation warrants, where the taxes anticipated were not collected and where the warrants did not represent a general obligation of the district, was void inasmuch as the said statute violated the due process clause of the Illinois Constitution. The Illinois court made the following apposite remarks in the course of its opinion:

Another constitutional limitation upon the power of the General Assembly to vest the proposed taxing power in the corporate authorities here is found in the due process clause; section 2 of article 2. This section is violated if a citizen's money is taken from him under the guise of a tax for any other than a public purpose. *Chicago Motor Club v. Kinney*, 329 Ill. 120, 160 N. E. 163. Under this section a law must be binding upon and affect alike each member of the community of the same class. *People v. Rathje*, 333 Ill. 304, 164 N. E. 696. A statute violates also the due process clause of the Constitution if it results in taxation for other than corporate purposes, as prohibited by section 9 of article 9. *Mathews v. Board of Education, City of Chicago*, 342 Ill. 120, 174 N. E. 35. The appellant here paid her taxes and had every reason to believe, both on legal and moral grounds, that she would not again be taxed for the same purposes and for the same year under the guise of a bond issue which, in effect, was to pay the debt of certain defaulting taxpayers. The effect of this statute was to impose an unjust and unequal burden upon many taxpayers who had paid their taxes, requiring them to pay twice for the same object, and likewise discriminating in favor of those defaulting citizens who either failed or deliberately refused to carry their just share of the tax burden. It must be borne in mind that a certain moral obligation rests upon a municipality to protect its nondefaulting taxpayers from unjust and unequal tax burdens, such as would be imposed by the

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authorization of the bond issue in this case. The act contains no provision which allows a credit to all persons who had paid their taxes for the years in question. This omission (*Fairfield v. People*, 94 Ill. 244), and the obvious lack of uniformity as between persons and property of the same class or under similar circumstances, clearly renders the act unconstitutional. *People v. Rathje*, supra. [196 N. E. 465, 468.]

If it is true that Act No. 22 is invalid because it works a denial of the equal protection of the laws and sets up a rule of taxation which is not uniform, then I cannot approve the bonds which the statute authorizes to be issued. While it is true that the invalidity of a portion of a statute will not necessarily invalidate other portions thereof which are separable from the invalid part, in the case of this particular statute the invalidity has the result of frustrating the cardinal purpose for which the bonds are to be issued. It seems obvious that if the Legislature of Puerto Rico had known that the remission could not have been accomplished, it would not have authorized the issuance of the bonds. Indeed, the purpose of the bond issue, as expressed in the statute itself, is *to reimburse the municipalities for the money lost to them by the remission.*

It is not without considerable reluctance that I find myself compelled to express the view that Act No. 22 is invalid. I realize the seriousness of the problems which may conceivably arise if it is finally held by the courts that the statute is void. Since I feel, however, after considerable study of the matter, that the statute will be invalidated if it is attacked in the proper manner,⁴ I have no alternative but to express my opinion without reservation. In advancing my conclusions at the present time I leave unanswered all questions concerning the effect of the distinction made by Act No. 22 between lands adjudicated to the Insular Government by reason of tax delinquencies and lands adjudicated to private individuals for the same reason. *Cf.* annotation in 89 A. L. R., page 966. I also leave unanswered the question of whether Act No. 22 would have been valid had it merely confined its operation to deferring or even canceling, in appropriate cases, the payment of the property taxes (*cf.* Act No. 23, Laws of 1936, Special Session, as amended), as well as the further question of whether *forfeited* properties could be resold to the former owners at a discount. *Cf. State v. Hubbard*, 203 Minn. 111, 280 N. W. 9.

On September 9, 1940, the Attorney General, expressing general concurrence with the foregoing views, declined to approve the proposed bond issue. [Editor.]

⁴ See *Vance Lumber Co. v. King County*, 184 Wash. 402, 51 P. (2d) 623, as to the correct method of attacking a statute very similar to Act No. 22.

**ENFORCEMENT OF FLORIDA DEER REMOVAL AND QUARANTINE
LAW ON SEMINOLE INDIAN RESERVATION**

Opinion, September 4, 1940

APPLICATION OF STATE GAME LAW TO INDIAN RESERVATION—CONGRESSIONAL
AUTHORIZATION FOR APPLICATION OF STATE QUARANTINE LAWS—CONDITIONAL
CONSENT BY SECRETARY OF THE INTERIOR.

The State of Florida is without power to enforce Chapter 19860, Laws of Florida, Special Acts, 1939, within the Seminole Indian Reservation in Hendry County, without the authorization of Congress, but in so far as the Florida law is a quarantine measure, it may be enforced within the reservation, under the Congressional authorization in the act of February 15, 1929 (45 Stat. 1185), upon such conditions as the Secretary of the Interior may prescribe.

KIRGIS, Acting Solicitor:

My opinion has been requested on the right of the State of Florida to enforce Chapter 19860, Laws of Florida, Special Acts, 1939, within the Seminole Indian Reservation in Hendry County.

The purpose of the Florida law is to effect the removal from the county of the wild deer on the theory that the deer are tick-infested and propagate a cattle fever. To this end the State law provides a comprehensive scheme. The State Live Stock Sanitary Board is directed to prescribe quarantine districts and to remove from such districts by slaughter or otherwise such portion of the deer as may be necessary. The Board is granted police power and authorized to enter all premises, public or private, to carry out the act. The State Commission of Game and Fresh Water Fish is authorized to police the quarantine districts to enforce the provisions of the game laws protecting other animals than wild deer, and persons desiring to hunt in the quarantined area are to be permitted to purchase regular hunting licenses. The violation of any provisions of the act or the regulations adopted thereunder is made a misdemeanor. The State law, as thus outlined, may be described as both a quarantine and a game law adopted under the police power of the State and enforced by criminal sanctions.

The question presented should be answered in two parts: (a) the application of such a law to Indian reservations generally, and (b) the effect, if any, of the status of the Hendry County reservation on the application of the law.

The answer to part (a) must start with the fundamental proposition that without Congressional sanction State laws have no force on Indian reservations in matters affecting Indians (*Worcester v. Georgia*, 6 Pet. 515; *United States v. Kagama*, 118 U. S. 375). The other side of this proposition is that State laws do apply on Indian reservations in so far as they do not affect the Indians (*Thomas v. Gay*, 169 U. S. 264). In my opinion of December 11, 1936 (56 I. D. 38), after citing these

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propositions, I concluded that the State could not send officers on an Indian reservation to search for game thought to be possessed by Indians as this would be an interference with the person and property of Indians and could not be supported without Federal statutory authority.

There are numerous cases which hold that the State cannot enforce game laws against the Indians on Indian reservations (*In re Blackbird*, 109 Fed. 139, D. C. Wis., 1901; *In re Lincoln*, 129 Fed. 247, N. D. Calif., 1904; *United States v. Hamilton*, 233 Fed. 685, W. D. N. Y., 1915; see *State v. Johnson*, 249 N. W. 284, 288, Wis., 1933). In so far as the present law is a game law, it could not be enforced against the Indians on Indian reservations. The State officials claim, however, that the deer belong to the State; that the law in question is directed only against the presence of the deer and not against conduct of the Indians; and that the removal of the deer would not interfere with the Indians or Indian property, or with Federal functions on the reservation.

It is true, as a general statement, that the game within the borders of a State belongs, in so far as it is capable of ownership, to the State in its sovereign capacity for the benefit of the people of the State and that, by virtue of such ownership, the State may regulate the taking and use of the game (*Lacoste v. Department of Conservation*, 263 U. S. 545). It does not necessarily follow, however, that the game in an Indian reservation is likewise owned by the State. In fact, the contrary was found to be true in *Mason v. Sams*, 5 F. (2d) 255 (W. D. Wash., 1925). The court there decided that the fish in the streams of the Quinaielt Reservation did not belong to the State nor to the United States but to the Indians of the reservation. While this reservation was set apart for the use of the Indians under a treaty, under the principles discussed in part (b) of this opinion the decision of the court may be argued to have equal application to a reservation set apart for Indians by other methods, including that of purchase.

The ultimate ownership of the game is a question, however, which need not be decided for the purposes of this opinion as, in my judgment, a State statute providing for removal of game from an Indian reservation is an interference with the rights of the Indians and of the Federal Government and may not be effectuated without Congressional authorization. This is a different principle from that involved in the enforcement of State game laws against Indians on a reservation, which is primarily a matter of criminal jurisdiction. It is the principle of protecting the interest of the Indians and of the Federal Government on a reservation from interference.

The right of occupancy of a reservation includes the exclusive right to hunt and fish thereon (*United States v. Winans*, 198 U. S. 371;

Alaska Pacific Fisheries v. United States, 248 U. S. 78; *United States v. Sturgeon*, 27 Fed. Cas. No. 16413, D. C. Nev., 1879; *Mason v. Sams*, *supra*). These cases and various others recognize that Indians are generally hunters and fishermen and often depend for a livelihood on wild game, and that the United States has an interest in setting apart for them lands which may be used for hunting and fishing to the exclusion of all outside interference. The protection and the guarantee by the United States of hunting and fishing rights has been typically one of the cardinal provisions of treaties with the Indians. Illustration is found in the early treaties with the Seminoles (August 7, 1790, 7 Stat. 35; September 18, 1823, 7 Stat. 224). The statute forbidding hunting by outsiders in the territory of tribes with which the United States has treaties (Rev. Stat., sec. 2137, 25 U. S. C. A., sec. 216) is further demonstration of the interest of the United States in protecting Indian hunting on Indian reservations.

In recognition of this principle the *Sturgeon* case, *supra*, held that white persons could not fish on the Pyramid Lake Indian Reservation, which was set apart for the Indians by Executive order, on the reasoning that anything which deprives the Indians of the use of the reservation set apart for them is contrary to law. In the *Alaska Pacific Fisheries* case, *supra*, it was similarly held that outsiders had no right to fish within the area found to be part of the Annette Islands Indian Reservation set apart for the Indians by statute.

This protection extends equally against State interference as against interference by private persons. This Department in the Solicitor's opinion of May 14, 1928 (M. 24358), denied any right in the State of Washington to control the use of boats on the navigable waters within the Quinaielt Indian Reservation as such control would be an interference with the use of the waters by the Indians for fishing. In the opinion of June 30, 1936 (M. 28107), the Department held that the State of Minnesota had no right to interfere with the exclusive right of the Red Lake Indians to fish in the lakes within the Red Lake Reservation, although the State owned the submerged lands. In a recent case, *United States v. 4450.72 Acres of Land*, 27 Fed. Supp. 167 (D. C. Minn., 1939), the interest of the United States in protecting the livelihood of the Chippewa Indians by creating a reservation around a wild rice lake was held paramount over the interest of the State in establishing a hunting reserve in the same area. There the court found that wild rice was a source of livelihood of the Indians, not only as food but as an article of commerce, and was peculiarly under Federal protection under the power of the Federal Government over commerce with Indian tribes. The court emphasized that a State cannot restrict the Federal Government in carrying out its efforts to prevent the Indians from becoming indigent and pauperized.

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These arguments have particular applicability to the immediate question. Hunting is recognized to be the chief means of livelihood of the Seminole Indians in Florida, both as a source of food and as a means of commerce with the surrounding population (see, for example, Survey of the Seminole Indians of Florida, S. Doc. 314, 71st Cong., 3d sess.). Moreover, the chief utility and benefit of the Indian reservation in Hendry County has been demonstrated to be as a hunting reserve for the Indians. Much of the reservation, being within the Everglades area, is subject to overflow, making it unfit, except in small portions, for farming or for livestock enterprises. Recent reports reveal that the entire program of the Government centers around the use and development of the reservation as a protected hunting area, since the reservation is unfit for other economic use (letters of the Superintendent of the Seminole Indian Agency to the Commissioner of Indian Affairs, November 10, 1939, and December 14, 1939). The removal by a State of a major asset of an Indian reservation would be a flagrant example of the type of interference with the interest of the Indians and of the Federal Government on an Indian reservation which is beyond the power of the State without Congressional sanction.

Part (b) of the question presented remains for consideration, namely, whether the Hendry County Indian reservation is excepted from the foregoing principles because of its status. The reservation consists of lands purchased under appropriation acts providing funds "for procuring permanent homes for the Seminoles of Florida." These acts are the acts of August 15, 1894 (29 Stat. 303); March 2, 1894 (23 Stat. 892); June 10, 1896 (29 Stat. 337); June 7, 1897 (30 Stat. 78); March 1, 1899 (30 Stat. 988); and June 6, 1900 (31 Stat. 302). The area purchased under these appropriations was filled in and expanded by recent purchases under the Indian Reorganization Act (act of June 18, 1934, 48 Stat. 984). In all the purchases title was taken by the United States in trust for the Seminole Indians of Florida. The lands purchased under the Indian Reorganization Act, which purchases are not entirely completed, have not yet been formally declared a reservation under section 7 of that act.

In my opinion it is clear, since the decision in the case of *United States v. McGowan*, 302 U. S. 535, that the principle forbidding State interference with the interests of the Indians and of the Federal Government on Indian reservations applies with equal force to lands acquired for the Indians by purchase as to lands set apart for their use by any other method. The question in that case was the application to the Reno Indian Colony of the Indian liquor laws which by their terms apply to the "Indian country." The Reno Indian Colony was acquired by the United States by purchase under appropriations for

procuring farm and home sites for the non-reservation Indians of Nevada and for the Washoe Tribe. The lower Federal courts held that the Indian liquor laws did not apply within this Colony since the lands were not lands in the immemorial possession of the Indians, or lands set apart from the public domain, or lands purchased from the State with a grant from the State to the Federal Government of exclusive jurisdiction, and also since the lands had not been designated an Indian reservation.

The Supreme Court swept aside distinctions based on the manner of acquisition of the land and on its previous character, saying that what must be regarded as Indian country must be considered in relation to the changes which have taken place, that the protection of the United States is extended over all dependent Indian communities within its borders, that the fundamental consideration of both Congress and the Department of the Interior in establishing this Colony was the protection of a dependent people, that the Indians in this Colony were afforded the same protection as that given Indians in other settlements known as reservations, that it is immaterial whether Congress designates a settlement as a reservation or a colony, that land may be an Indian reservation simply because it is set apart for the use of the Indians under the superintendence of the Government, as occurred in the case of the Reno Indian Colony, and that, while the State may retain sovereignty over the territory its laws cannot conflict with Federal enactments passed to protect and guard its Indian wards.

This decision was foundation for my memorandum to the Assistant Secretary of February 17, 1939, advising that lands purchased under the Indian Reorganization Act but not yet proclaimed a reservation may nevertheless be treated as a reservation and that section 7 of that act contemplated a formal declaration of status rather than a change in status of the lands. The fact that the newly purchased lands in the Hendry County reservation have not been declared a reservation would not seem to be significant or place them in a different category from any other lands of the reservation. All the lands have been set apart for the use of the Indians, under the superintendence of the Government.

No distinction as to the protection of the right of the Indians to enjoy the natural resources of an Indian reservation can be made at the present time on the basis of the manner of the acquisition of the reservation. In the *Sturgeon* case the land was set apart by Executive order; in the *Alaska Pacific Fisheries* case the land was set apart by statute; in the recent *Wild Rice* case the land was to be acquired by purchase and by condemnation of State-owned and private lands; the *McGowan* case permits no distinction in Federal protection of dependent Indian communities on purchased land, and acknowledges no

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greater interference by the State over purchased lands than over any other type of Indian lands. In this regard it follows the famous dictum in *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650, to the effect that State laws may apply on lands owned by the United States and set apart for public purposes, but they may not embarrass the United States in its use of the lands.

On the basis of these considerations I conclude that Chapter 19860 of the Laws of Florida, Special Acts of 1939, cannot be enforced within the Hendry County Indian reservation without the sanction of the Federal Government.

There is a Federal statute which, by its language and the fact of its passage, confirms the principles of this decision and opens the door to enforcement of State sanitation and quarantine measures on Indian reservations in the discretion of administrative officers. This statute is the act of February 15, 1929 (45 Stat. 1185, 25 U. S. C. A., sec. 231), 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 shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or to enforce compulsory school attendance of Indian pupils, as provided by the law of the State, under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

The law of Florida, except for its provisions for the enforcement of the State game laws, comes within the provisions of this statute as a sanitation and quarantine law, and, therefore, the Secretary of the Interior may permit the enforcement of the sanitation and quarantine provisions of the law on such conditions as he may prescribe.

The Federal statute gives the Secretary of the Interior discretion as to whether the sanitation and quarantine laws of a State shall be enforced within an Indian reservation and, if so, the extent and manner of the enforcement. It is true that the statute provides that the Secretary "shall permit" the agents of the State to enter Indian lands. However, under applicable rules of statutory construction, the word "shall" should be construed as "may" in this instance. The word "shall" is normally construed as directory and not mandatory where the statute relates to the performance of a public duty and does not affect any private right and where such construction effectuates the intent of the statute when read as a whole. Among the numerous authorities to this effect, the following cases particularly express and apply this rule: *West Wisconsin Railway Co. v. Foley*, 94 U. S. 100; *Railroad Company v. Hecht*, 95 U. S. 168; *Richbourg Motor Company v. United States*, 281 U. S. 528; *People v. San Bernardino High School*

District, 62 Calif. App. 67, 216 Pac. 959; *Apgar v. Wilkinson*, 95 Fla. 457, 116 So. 78; *Tosti v. Sbrano*, 170 Misc. 828, 11 N. Y. S. (2d) 321. The Federal statute relates solely to the performance of the public duty resting upon the Secretary of the Interior to protect Indians on Indian reservations; it does not affect any private right, and the provision for action by the Secretary of the Interior under such regulations and conditions as he may prescribe shows the intent of the statute to vest the Secretary with discretion in acting under it.

Moreover, this construction is the established interpretation of the statute by this Department. The regulations governing hospital and medical care of Indians, 25 C. F. R., subch. K, contain the following section on the enforcement of State health laws which was adopted under the authority of the statute in question.

84.78 *Enforcement of State health laws.* State health authorities are authorized to enter upon Indian tribal lands, reservations or allotments within the respective States for the purpose of making inspection of health conditions looking to the enforcement, *except as hereinafter provided*, of sanitation and quarantine regulations of the particular State in like manner as such regulations are enforced in the surrounding territory. In connection with and prior to such proposed enforcement, the physician in charge of each reservation shall schedule the State sanitation and quarantine regulations which *ought to be enforced upon the reservation, together with a statement of any limitations and conditions which should govern the application of such State regulations. Tribal authorities and individual Indians shall be afforded ample opportunity to submit protests or recommendations with respect to specific State regulations thus proposed for extension to the reservation.* It shall be the duty of the Superintendent to transmit to the Secretary of the Interior through the Commissioner of Indian Affairs, the schedule of State regulations thus posted, *together with any protests or criticisms made by the Indians with respect thereto.* Such State regulations *as are approved by the Secretary of the Interior* shall thereafter be in force upon the reservation *subject to such conditions as the Secretary may prescribe. No State law shall be applied within the jurisdiction of any organized tribe which is in conflict with any ordinance or resolution of the tribe.* [Italics supplied.]

This regulation embodies the principle that the determination of whether and in what manner a State health law shall be enforced upon an Indian reservation depends upon the suitability of the law on the reservation, its effect on the Indians, and the attitude of the Indians toward its enforcement. These factors are essential for the Department to consider in order properly to exercise its authority under the Federal statute.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

UNITED STATES v. JOHN C. BROWN

*Decided September 4, 1940**Motion for Rehearing January 30, 1941***HOMESTEAD ENTRY—QUALIFICATIONS—INTEREST OF AN OWNER IN COMMON.**

In determining the acreage owned by an owner of an undivided interest in common for the purpose of ascertaining whether he was disqualified to make homestead entry because of his ownership of more than 160 acres in violation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161), he should be credited with the number of acres proportionate to his undivided interest since it will be presumed that upon partition he would be entitled to that number of acres.

HOMESTEAD ENTRY—TIME OF DETERMINING QUALIFICATIONS.

Where an entryman makes a second stock-raising entry, his qualifications must be determined, not as of the date when he made his first entry, but as of the date of his second entry, and it is therefore no defense to contest proceedings, instituted on the ground that he was disqualified by ownership of more than 160 acres of land in violation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161), that he was not so disqualified at the time he made his first entry.

HOMESTEAD ENTRY—QUALIFICATIONS—LATER DISPOSAL OF EXCESS LAND HOLDINGS.

Where an entryman, at the time of making a second stock-raising homestead entry, is disqualified by ownership of more than 160 acres of land in violation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161), his disqualification is not removed by later disposal of his land holdings.

HOMESTEAD ENTRY—QUALIFICATIONS—OWNERSHIP OF MORE THAN 160 ACRES.

Neither the entryman's good faith nor the fact that the Department might have been aware of his other landholdings at the time he made his homestead entry are material on the issue whether he was disqualified by virtue of ownership of more than 160 acres of land in violation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161).

WITHDRAWAL ORDER—QUALIFICATIONS OF HOMESTEAD ENTRYMAN.

Where a homestead entryman was legally disqualified from acquiring any right under the homestead law, he could not, upon removal of his disqualifications, acquire an interest in lands which had, in the interim, been withdrawn from entry by a withdrawal order.

PRACTICE—APPEALS BY THE GOVERNMENT.

The rules governing proceedings upon special agents' reports expressly provide for appeals by the Division of Investigations from decisions of the Commissioner of the General Land Office (43 CFR 222.13).

WORDS AND PHRASES.

The word "unappropriated" in Executive order of withdrawal (No. 6910) of November 26, 1934, can hardly be applied to land other than that which has not been lawfully appropriated and a homestead entry allowed on misrepresentation of the entryman that he was not the proprietor of more than 160 acres can in no sense be considered a lawful appropriation.

WITHDRAWAL—VALID EXISTING RIGHTS.

The exception in the withdrawal of November 26, 1934, of "existing valid rights" cannot reasonably be held to apply to entries void *ab initio*.

PRACTICE—RIGHT TO HEARING.

If an entryman in his answer to charges admits all that is essential to show that his entry is invalid and fails to show that the charges are immaterial, there is no issue of fact that requires a hearing.

CHAPMAN, *Assistant Secretary*:

This is an appeal by the United States, acting through its special agent in charge, from the decision of the General Land Office, dated August 17, 1939, dismissing adverse proceedings, contest 7623, which had been instituted on May 25, 1939, against John C. Brown's second stock-raising homestead entry, Salt Lake 049885, for the S½ sec. 25, SE¼ sec. 26, NE¼ sec. 35, T. 4 S., R. 8 W., Salt Lake meridian, Utah, on the following charges:

That the entryman was not qualified to make homestead entry on April 15, 1931, the date he filed his application therefor, is not now and has not been since date qualified to make entry, for the reason that he was on that date, and is now the owner and proprietor of more than 160 acres of land in the United States, to wit, five tracts of land in Twp. 4 and 6 S., R. 8 W., S. L. M., 259.56 acres.

The following facts appear from the record: Brown's first entry on the land embraced in his application had been made in 1917 and was allowed in 1920. Upon the death of his father, he received, in 1924, interests in various parcels of land as his proportionate share of his father's ranch. In 1925, proof was submitted on his entry and a final certificate issued, but the entry was canceled for failure to comply with residence and improvement requirements. *United States v. Brown*, "C", November 4, 1930, Salt Lake 019176; affirmed March 3, 1931, A-15539.

Brown thereupon made this second stock-raising homestead entry on April 15, 1931, which was allowed on April 29, 1932, pursuant to departmental decision of March 3, 1932, A-16218. Final proof was submitted on May 29, 1937, but action thereon was withheld at the request of the special agent in charge pending field investigation and report. On December 16 and 22, 1937, Brown conveyed to the Brown Livestock Co. the interests in land which he had inherited from his father. These adverse proceedings were then instituted against Brown's entry on May 25, 1939.

On July 1, 1939, Brown filed an answer to the charge and a motion for reconsideration. In his answer Brown denied the allegation of the charge and requested a hearing. In support of his motion for reconsideration he stated that he had taken the entry in good faith; that at the time he filed his original entry in 1917 he owned only

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9 acres of land; that this homestead entry adjoins the Brown ranch, part of which he had inherited in 1924; that the Department at the time he made his second entry was "fully advised" of his interests in the land he inherited; that on December 16 and 22, 1937, he had deeded his interests in the land he had inherited to the Brown Livestock Co., which had been formed to take over his and his brothers' interests in the Brown ranch and other lands and that he had received stock in the corporation; that any defect there may have been in his entry or any disqualification at the time his application was filed was cured when he disposed of his land holdings; that he had acted in good faith at all times, had made an honest effort to perfect his entry, had met the required residence and improvement requirements on his second entry and had believed he had fully complied with the law; and that this homestead is necessary to support his livestock operations. On August 17, 1939, the General Land Office dismissed the adverse proceedings on the following ground:

* * * since there is no other adverse charge against the entry except that of disqualification charged in office decision of May 25, 1939, and since the disqualification of the entryman has been removed and the Department has frequently held that it will not allow its rules to stand in the way of substantial justice being administered, and as it now appears from the facts that the natural equities are towards the entryman who has shown by his proof that he fully complied with the requirements of the law, it is deemed proper to now dismiss the adverse proceedings and accept the proof as satisfactory, subject to confirmation by the Board of Equitable Adjudication because it was submitted after the expiration of the statutory period.

The assumption implicit in the decision of the General Land Office that the entryman is disqualified solely by any rules of the Department is erroneous. The act of December 29, 1916 (39 Stat. 862, 43 U. S. Code, sec. 291), under which Brown made his entry, confers rights only on persons "qualified to make entry under the homestead laws of the United States." This provision incorporates the provisions of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161), to the effect that "no person who is the proprietor of more than 160 acres of land in any State or Territory shall acquire any right under the homestead law." See *Charles Makela*, 46 L. D. 509, 510 (1918); Instructions of September 22, 1922, 49 L. D. 308, 309 (1922). Furthermore, since Brown's qualifications must meet statutory specifications, neither Brown's good faith nor the fact that this Department might have been aware of his other landholdings at the time he made his second stock-raising homestead entry can be material on the issue whether he was disqualified by virtue of ownership of more than 160 acres of land.

From 1924 until 1937, according to the record, Brown was the owner of various interests in land. These interests consisted of full

fee ownership in four tracts aggregating 162.56 acres and an undivided one-seventh fee interest in a 680-acre tract. Since Brown would have been entitled, in event of a partition of the latter tract, to one-seventh of 680 acres, or about 97 acres plus, we must consider Brown not as the owner of merely 162.56 acres but as the owner of 259.56 acres. *Heirs of DeWolf v. Moore*, 37 L. D. 110, 112 (1908); *Thomas H. B. Glaspie*, 53 I. D. 577 (1932). Consequently the rule of approximation cannot be utilized to exempt Brown from the operation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161). See *Amidon v. Hegdale*, 39 L. D. 131 (1910); *Kermode v. Dankwardt*, 42 L. D. 557 (1913); *Roy Axtell*, 49 L. D. 647 (1923).

The statutory provisions are explicit and mandatory that no right may be "acquired" under the act of December 29, 1916, unless the person was "qualified to make entry under the homestead laws of the United States." It is clear that his qualifications must be shown as of the date of entry. *Mathison v. Colquhoun*, 36 L. D. 82 (1907); *Jones v. Briggs*, 39 L. D. 189, 190 (1910); *Hattie Fisher Hall*, 43 L. D. 471 (1914); *Alfred R. Thomas*, 46 L. D. 290 (1918); *Lucinda Gibson et al.*, 45 L. D. 219, 223 (1916); *Cf. Arthur J. Abbott*, 34 L. D. 502 (1906). But since Brown's first entry was canceled, his qualifications to "acquire" any rights on the lands embraced within his application must be determined, not as of 1917 when he made his first entry, but as of April 15, 1931, when he made his second stock-raising homestead entry. *Cf. Mast v. Kuhn*, 44 L. D. 72 (1915). Since he was the owner of more than 160 acres at that time, it would seem to follow that he could acquire no rights by his entry.

Brown, however, contends: "any defect * * * in my entry or any disqualification at the time my application was filed was cured * * * when my land holdings were disposed of." But that contention is contrary to the express language of the statutes and is without merit. He was unquestionably disqualified at the time of his entry and the fact that he later disposed of his holdings would not operate to cure his disqualification at the time of his entry. *Siestreem v. Korn*, 43 L. D. 200 (1914); *Vance v. Skeen*, 44 L. D. 52, 53 (1915). *Cf. Aulker v. Young*, 37 L. D. 176 (1908); *Jones v. Burch*, 39 L. D. 418 (1910). The purpose of the statutory restriction obviously was to prevent the acquisition of rights in public lands by persons already owning land in excess of 160 acres. If such persons could, as Brown contends, make entry on public lands and later remove their disqualifications merely by selling their prior landholdings, the purpose of the statute would clearly be frustrated. But even if Brown's contention were the law, it could not avail him. Until December 1937, when he disposed of his holdings, Brown could not have acquired any right to the lands em-

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braced in his application. *Shepherd v. Fast*, 16 L. D. 267, 269 (1893). Until that time, however, the latter lands were, in legal contemplation, "vacant, unreserved and unappropriated public land" within the meaning of the First General Order of Withdrawal (Exec. Order 6910, November 26, 1934, 43 C. F. R. 297.12). Consequently any rights Brown might allege he acquired in December 1937 could not, because of the Withdrawal Order, become effective. *George Herriott et al.*, 10 L. D. 513 (1890); *Siestreem v. Korn*, 43 L. D. 200 (1914); *Vance v. Skeen*, 44 L. D. 52, 53 (1915). Cf. *Jones v. Burch*, 39 L. D. 418 (1910).

No equities which may exist in this case can alter the mandatory effect of the statutory prohibitions and the Withdrawal Order.

The decision of the General Land Office dismissing the contest proceedings was erroneous and therefore is herewith reversed with directions to reinstate the adverse proceedings.

Reversed.

MOTION FOR REHEARING

John C. Brown has filed a motion for rehearing of departmental decision of September 4, 1940, which reversed the decision of the Commissioner of the General Land Office dismissing adverse proceedings brought against his second stockraising homestead entry, Salt Lake City, 049885, of certain lands, and directed reinstatement of the proceedings.

It was charged in the proceedings:

That the entryman was not qualified to make homestead entry on April 15, 1931, the date he filed his application therefor, is not now and has not been since date qualified to make entry, for the reason that he was on that date, and is now the owner and proprietor of more than 160 acres of land in the United States, to wit, five tracts of land in Twps. 4 and 6 S., R. 8 W., S. L. M., 259.56 acres.

The decision of the Department was on appeal by the Division of Investigations assigning error of law. As set forth more particularly in the decision of the Department, the first entry of Brown was canceled in consequence of a final decision of the Department holding, after full hearing, that he had not complied with the residence and improvement requirements of the applicable homestead acts. Brown in answer to the above-quoted charge denied the allegations of contest in general terms. Nevertheless, in his statement made a part thereof and intended to show that the charges were immaterial, he admitted that he acquired the land referred to in the charge by inheritance from his father, but in December 1937 he conveyed such land by deed to the Brown Livestock Co. for certain stock of the company.

He contends that any disqualification to make entry or any defect therein when the entry was made was cured when he disposed of such lands; that the Department was aware of his land holdings when his second entry was allowed.

The Department held that the qualifications of Brown to make entry must be determined not as of 1917 when he made his first entry, but as of April 15, 1931, when he made his second entry; that the provision in Revised Statutes, section 2289, that, "no person who is the proprietor of more than 160 acres of land in any State or Territory shall acquire any right under the homestead law," was explicit and mandatory; that Brown, being the owner of more than 160 acres of land at the time of second entry, was unquestionably disqualified to make entry at that time and the fact that he later disposed of his holdings would not operate to cure his disqualification at the time of entry; that since Brown's qualifications must meet the statutory specifications, neither his good faith nor the fact that the Department might have been aware of his other land holdings at the time he made his second entry was material on the issue whether he was disqualified by virtue of ownership of more than 160 acres of land; that if Brown's contention that by disposing of his land holdings he removed his disqualifications were the law, it would not avail him, for until December 1937 he could not have acquired any rights to the land embraced in his entry and until that time such land was in legal contemplation "vacant, unreserved and unappropriated public land" within the meaning of the First General Order of Withdrawal (43 CFR 297.11) and whatever rights Brown might allege that he acquired in December 1937 could not, because of the withdrawal order, become effective; that no equities that may exist can alter the mandatory effect of the statutory prohibition and the withdrawal order.

It is idle for Brown to contend, as he does in his motion, that he substantially complied with the homestead law under his first entry in the face of final decision to the contrary. That question is *res judicata*. As to his contention that such residence as he made on his first should be credited on his second entry, it is sufficient to say that the matter of sufficient residence is not involved, and does not affect the validity of the charge and, therefore, requires no notice.

His contention that there is no authority of law or rule of the Department that permits appeals by the Division of Investigations from decisions of the Commissioner of the General Land Office is apparently made without knowledge of the rules governing proceedings upon the reports of special agents which expressly provide for such appeals (54 I. D. 214, 43 CFR 222.13).

He further contends that the land was not vacant, unappropriated land as he has had a possessory title to the same since 1917, held it under final certificate upon his first entry and paid taxes thereon; that he has lived upon the land and complied with the law in every particular and has been in possession and exercising "jurisdiction"

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over the same since said date. Whatever may have been the status of the land during the existence of Brown's first entry, in the present case the status of the land on November 26, 1934, alone is material. Upon the cancelation of the first entry Brown's right of possession ceased. At the time of said withdrawal he was in possession of the land under an entry made in express violation of the provision above quoted in section 2289, Revised Statutes. The general rule of law is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer. *Waskey v. Hammer*, 223 U. S. 85, 94. The plain object of the prohibition was to restrict the bounty of the Government to citizens owning not more than 160 acres of land, and clearly the general rule applies. The word "unappropriated" in the order of withdrawal can hardly be held to apply to land other than that which has not been lawfully appropriated, and Brown's entry, allowed upon the misrepresentation by him in his application that he was not the proprietor of more than 160 acres, can in no sense be considered a lawful appropriation. Moreover, the withdrawal order excepted "existing valid rights" from its operation. Under this exception all valid entries and prior applications substantially complete are protected (Opinion of the Solicitor, 55 I. D. 205, 210; *State of Arizona*, 55 I. D. 249, 253), but it cannot reasonably be held to extend to entries void *ab initio*. In this view the land in Brown's entry fell within the spell of the withdrawal.

Brown invites attention to the fact that his disposal of the land owned by him, which removed his disqualification to make entry, occurred before the adverse proceedings were filed, and he relies upon the case of *Jones v. Burch*, 39 L. D. 418, in support of his contention that upon disposal of his interest in the property he owned before the date of adverse proceedings, the disqualification to make entry was removed and the entry should be considered effective from the date he became so qualified.

In *Jones v. Burch*, *supra*, the entryman consummated a purchase of 480 acres of land after he filed his application but before it was received in the land office. Before a contest was filed alleging he was not a qualified entryman, he disposed of said land. In declining to entertain a second contest against a homestead entry, charging that the entryman was disqualified by reason of the ownership of more than 160 acres of land on the ground that the question had been decided in the first contest, the Department approved a statement made by the local officers in the first contest as follows:

Technically, we think the defendant Burch was not a qualified entryman at the time this entry was made. We think, however, that the defendant Burch at the time he made this entry believed himself to be a qualified entryman, and he did not intentionally commit any fraud against the United States

in acquiring this entry * * *. The defendant having not intentionally made this entry when he was disqualified, and having in good faith become a qualified entryman before the contest was initiated, we think his entry became a valid entry, and we therefore recommend that this contest be and the same is hereby dismissed.

It may be that action taken in accordance with the above-quoted view would tend to thwart the policy of the statute forbidding entry by those who at the time owned more than 160 acres. See *Prosser v. Finn*, 208 U. S. 67, and *Lowe v. Dickson*, 274 U. S. 23, 26, 28. But whether *Jones v. Burch* should now or hereafter be followed as an authority it is unnecessary now to decide, since the withdrawal of the land from entry November 26, 1934, intervened before his disability was removed and his entry cannot be held validated thereafter. By withdrawing the land the Government is considered as asserting a right adverse in character. *Interstate Oil Corporation and Frank O. Chittenden*, 50 L. D. 262, 264.

Brown further contends that:

* * * if there is any question as to my qualifications to make second entry, this land should most certainly be given the status of a pending application or entry during the period of my possession and occupation of said lands and credit should be granted for residence and improvements upon said land prior to 1937, the same as credit is allowed to any homestead entryman after he has filed application and petitions for designation and prior to allowance of his entry. * * *

There is no merit in this contention. Brown's application as well as his entry had no force or validity because of his disqualification. His occupation of the land cannot be considered as a valid settlement as it is an elementary principle in the administration of the public lands that a settler must have the qualifications of a homesteader in order to make a valid settlement.

* * * It is true, as a general proposition, that the rights of a prior settler are no greater than his rights as an entryman, and if he is disqualified as the latter he becomes a mere trespasser when attempting to assert the former, * * *.

* * * * * * * * *

* * * In other words, one disqualified to initiate a valid settlement right can not claim the privilege of having his status as an entryman determined as of the date of his application to protect such invalid settlement right. The right will only be protected from the date the impediment to its initiation is removed, and the right attaches. If before the disqualification to make settlement is removed a superior right intervenes, such right, in all equity and justice, will be recognized and protected. *Short v. Bowman*, 35 L. D. 70, 73, 74, 76.

Nor is there any factual basis for the allegation that the Land Department was advised of appellant's interests in his father's estate when his second entry was allowed and the fault in allowing it was not entirely that of entryman, the Department being mostly responsible. While there is some reference incidentally in the proceedings

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relating to the first entry and in connection with the second, to the interest of Brown in his deceased father's ranch property, there is nothing therein that charges the Land Department with any knowledge that at date of the application for second entry Brown was the owner of more than 160 acres of land. Brown specifically alleged in said application that he was not the proprietor of more than 160 acres of land. The Land Department was under no obligation to seek grounds to doubt his statement. He is, in effect, now asserting that the Government should not have believed him, and discredited or challenged his statement.

For the reasons above stated, the decision of the Department reversing dismissal of the proceedings will not be disturbed and the motion to that extent is denied. The Commissioner's decision, however, dismissing the proceedings was not final and it is proper for the Department to determine whether or not the charges have been sustained. Under paragraph 5, Circular 460 (43 CFR 222.5) the charges are accepted as true unless the entryman or claimant denies them under oath or submits a statement of facts rendering the charges immaterial or fails to appear at the hearing. The entryman admits in his motion that he acquired the property which he is charged with owning by inheritance from his father in 1924, and he has also admitted that he did not dispose of it until 1937.

In view of the law expressed by the Department, the fact that he does not now own the property is immaterial and so much of the charge as alleges such present ownership is mere surplusage. Having admitted all that is essential to show that his entry is invalid and of no effect, and having failed to show that the charges are immaterial, there is no issue of fact that requires a hearing. The charges are therefore held sustained and the entry should be canceled.

We should point out that the only agency which can afford the appellant any relief is Congress.

As above modified the previous departmental decision is affirmed.

Modified.

GILA PROJECT LANDS—VETERANS PREFERENCE PROVISION OF BOULDER CANYON ACT

Opinion, September 21, 1940

RECLAMATION—HOMESTEAD—SOLDIERS' PREFERENCE.

Lands in the Gila Project, Arizona, are not subject to the veterans' preference provision of section 9 of the Boulder Canyon Act of December 21, 1928 (45 Stat. 1057), although that act was adopted by the item of appropriation for the Gila Project in the Interior Department Appropriation Act, 1938 (act of August 9, 1937, 50 Stat. 564, 595).

KIRGIS, *Acting Solicitor*:

The question whether public land entries on lands included within the Gila Project, Arizona, are subject to the veterans' preference provision of section 9 of the Boulder Canyon Act of December 21, 1928 (45 Stat. 1057), has been submitted to me for opinion.

The Interior Department Appropriation Act, 1938 (act of August 9, 1937, 50 Stat. 564, 595), contains the following item concerning the Gila Project:

Gila project, Arizona, \$700,000; said Gila project, including the waters to be diverted and used thereby and the lands and structures for the diversion and storage thereof, to be subject to the provisions of the Boulder Canyon Project Act of December 21, 1928, and subject to and controlled by the provisions of the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922.

Section 9 of the Boulder Canyon Project Act, *supra*, provides as follows:

That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided*, That all persons who have served in the United States Army, Navy, or Marine Corps during the war with Germany, the war with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Navy Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4, act of December 5, 1924 (Forty-third Statutes at Large, page 702); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this act: * * *

Thus it appears that Congress, in making the appropriation for the Gila project in the 1938 act, adopted the Boulder Canyon Act. When a statute is so adopted, only such portion is adopted as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto. 2 Lewis' Sutherland Statutory Construction, Sections 404, 405. *Gadd v. McGuire*, 69 Cal. App. 347, 231 Pac. 754; *State v. Marion County*, 170 Ind. 595, 85 N. E. 513; *State v. Board of Commissioners*, 83 Kans. 199, 110 Pac. 92; *Gillesby v. Board of Commissioners*, 17 Idaho 586, 107 Pac. 71.

It will be noted that the second sentence of section 9 of the Boulder Canyon Act provides for the opening of certain lands for entry.

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Manifestly, the provision applies only to such lands as are subject to reclamation and irrigation by the All-American Canal and appurtenant works, for the payment to be made by any entryman is limited to "an equitable share in accordance with the benefits received * * * of the construction cost of said canal and appurtenant structures * * *." Irrespective of the adopting statute, this provision of the Boulder Canyon Act cannot be held to have been carried over into the 1938 Appropriation Act, for if an attempt were made to make it applicable to lands in the Gila project, it would mean that the payments to be made by entrymen of lands in that project would be limited by the benefits they receive from the All-American Canal, and as the entrymen of Gila lands receive no benefits from that canal, no payments would be required of them. Such a construction of the statutes would be absurd, for in no instance has Congress provided for the reclamation of lands without imposing a requirement that the entrymen thereof shall make some payment therefor.

Not only does the element of absurdity militate against a conclusion that the clause in question is applicable to Gila lands, but the fallacy of such a conclusion is further demonstrated by reference to the principle of statutory construction which dictates that where an adopted statute is referred to merely by words describing its general character, only those parts of it which are of a general nature, or which particularly relate to the subject of the adopting statute, will be construed as adopted into the latter, in the absence of a clear intention to adopt the whole act. *Hutto v. Walker County*, 185 Ala. 505, 64 So. 313. As has been pointed out above, the provision of section 9 which provides for the entry of land under certain conditions is not a general one, but applies only to lands irrigated from the All-American Canal. It does not relate to Gila lands, the subject of the adopting statute, and any attempt to establish such relation gives rise to an absurd conclusion. Finally, there is no evidence that Congress intended to adopt the entire Boulder Canyon Act, for not only the provision relating to payment for the lands, but other provisions of the act as well, are impossible of application to the Gila project.

Accordingly, it is clear that the provision of section 9 relating to entry and payment for the lands in the Boulder Canyon project is neither applicable nor appropriate to the Gila project and cannot be held to have been adopted.

The clause in section 9 which provides for a preference right of entry for war veterans is a proviso to the provision which, as has just been shown, fails of adoption. The adoption of the antecedent clause having thus failed, the adoption of the proviso must likewise fail.

Accordingly, it is my opinion that the veterans' preference provision of the Boulder Canyon Act was not adopted by the Interior De-

partment Appropriation Act for 1938 and, as there is no other statute that would serve to extend such preference, it follows that the lands in the Gila project are not subject thereto.

Approved:

A. J. WIRTZ,
Under Secretary.

CITIZENSHIP STATUS OF INDIAN EMPLOYEE

Opinion, October 21, 1940

FEDERAL EMPLOYEES—INDIANS—CITIZENSHIP—NATURALIZATION.

A foreign-born Indian, an enrolled member of an American Indian tribe and the son of an alien father and a citizen mother who obtained her citizenship on June 2, 1924, while he was a minor, is a citizen of the United States, provided he was residing in the United States on June 2, 1924, or established his permanent residence therein prior to attaining majority.

KIRGIS, First Assistant Solicitor:

You [First Assistant Secretary] have requested once again my advice as to whether Harry W. Ritchie, an enrolled Indian member of the Wisconsin Potawatomi and an employee of the Office of Indian Affairs at the Great Lakes Indian Agency, Ashland, Wisconsin, can be legally compensated out of funds appropriated by the Interior Department Appropriation Act, 1941.

It is my opinion that Harry W. Ritchie is a citizen of the United States, provided that he was residing in the United States on June 2, 1924, or else that he had established a permanent residence therein at some time subsequent to June 2, 1924, but prior to November 15, 1925.

In a memorandum to you dated August 27, I expressed the opinion that Harry W. Ritchie

* * * was not a person in the service of the United States on June 18, 1940, who being eligible for citizenship had theretofore filed a declaration of intention to become a citizen, that he does not owe allegiance to the United States, and that he therefore cannot be compensated out of the Interior Department appropriation of 1940-41.

However, in that memorandum I expressly qualified the conclusion reached by stating that "a contrary result might be reached if it could be shown that Mr. Ritchie's mother was living on June 2, 1924, and that she was an Indian woman born within the territorial limits of the United States."

It now appears from an affidavit executed at Crandon, Forest County, Wisconsin, by Henry Ritchie, father of Harry W. Ritchie, that the former

* * * was married to one Clara Henry, a member of the Ottawa Indian Tribe, who was born at Pinconning, in the State of Michigan, in the year 1882; that there was born of said marriage the following children: Valentine Ritchie,

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Born March 5, 1902; Harry Wilford Ritchie, Born November 15, 1904, who reside in Town of Lincoln, Forest County, State of Wisconsin.

That the said Clara Henry Ritchie, his wife, was an Indian woman born in the United States and living on June 2, 1924, she having died October 25, 1930, at said Town of Lincoln, and is now buried in the Cemetery at the Town of Laona, Forest County, Wisconsin.

The act of April 14, 1802 (2 Stat. 155), incorporated into the Revised Statutes as Revised Statutes, section 2172, reads in part as follows:

The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; * * *

Section 5 of the act of March 2, 1907 (34 Stat. 1229), provided the following:

A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent, where such naturalization or resumption takes place during the minority of such child. The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

Section 2 of the act of May 24, 1934 (48 Stat. 797), amended the act of March 2, 1907, in the following manner:

A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: *Provided*, That such naturalization or resumption shall take place during the minority of such child: And *Provided further*: That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States.

It has been judicially declared that both Revised Statutes, section 2172, and section 5 of the act of March 2, 1907, prior to its amendment in 1934, were operative and that the first section was applicable to foreign-born minor children dwelling in the United States at the time of the naturalization of the parents, while the second applied to children who were absent from the United States when the parent was naturalized but who later came to the United States during their minority. *United States ex rel. Patton v. Tod*, 297 Fed. 385 (C. C. A. 2, 1924); see also 38 Op. Atty. Gen. 217, 38 Op. Atty. Gen. 397.

In the case of *In re Citizenship Status of Minor Children Where Mother Alone Becomes Citizen Through Naturalization*, 25 F. (2d) 210 (D. C. N. J.), it was held that the provisions of the act of September 22, 1922 (42 Stat. 1021), enabling married women to become naturalized independently of their husbands, did not mean that the words "parents" in Revised Statutes, section 2172, and "parent" in

section 5 of the act of March 2, 1907, were to be understood to include the mother where the husband and wife were living together and the wife secured citizenship prior to the husband. In that case it was held that in the circumstances above mentioned the citizenship of the minor child continued to be governed by the citizenship of the father. The conclusion reached in this case was followed for many years by both the State Department and the Department of Labor, and in 36 Op. Atty. Gen. 197, the doctrine of the case was expressly recognized and approved. However, where the mother was the sole living parent or had been divorced and awarded the custody of the child, it was consistently held before 1934 that she was the "parent" within the meaning of Revised Statutes, section 2172, and of the act of March 2, 1907. See *Petition of Drysdale*, 20 F. (2d) 957 (D. C. S. D. Mich.); *In re Lazarus*, 24 F. (2d) 243 (D. C. N. D. Ga.); *Roa v. Collector of Customs*, 23 Phil. Rept. 315; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N. E. 232; Van Dyne on Citizenship, p. 118.

Despite the *Citizenship Status* case, *supra*, which was decided in 1928, it has been held that section 2 of the act of May 24, 1934, hereinbefore quoted, by substituting the words "father or mother" for the word "parent" in the 1907 statute, had the effect, not of changing the meaning of the act of March 2, 1907, but rather of clarifying the earlier law. It was accordingly decided in 1936 in *United States ex rel. Guest v. Perkins*, 17 F. Supp. 177 (D. C. Dist. Col.), that the naturalization of a mother prior to 1934 conferred citizenship upon her minor son even though the marital tie of the mother with the child's father had not been terminated. It is to be noted that in the *Guest* case Revised Statutes, section 2172, was not discussed and that the court applied the amended act of 1907 to the petitioner despite the fact that the latter was permanently residing in the United States at the time when his mother became a citizen and that therefore, according to the *Tod* case, Revised Statutes, section 2172, rather than the amended act of 1907, should have been applied. Nevertheless, assuming that Revised Statutes, section 2172, and not the amended act of 1907, is the statute which is properly applicable to the situation of a minor residing in the United States at the time of the naturalization of the parent, it would appear that, even so, such a minor becomes a citizen by virtue of his mother's naturalization albeit the latter may have occurred during the continuance of the marital status. It seems clear that the reasoning in the *Guest* case, although Revised Statutes, section 2172, as distinguished from the act of March 2, 1907, was not specifically amended by the act of May 24, 1934, must logically be extended to the construction of the word "parents" in Revised Statutes, section 2172. I will not pursue this line of argument further, however, for it is my understanding that the Bureau of Immigration and Naturalization, both before and since its transfer to the Department of Justice from the Department of La-

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bor, has followed the actual ruling in the *Guest* case and now recognizes that the naturalization of the mother prior to 1934—at least where the child is not living away from the mother and in the sole custody of its alien father—has the same effect upon the status of the child as does the naturalization of the father.

Accepting, therefore, as I do, the authority of the decision in *United States ex rel. Guest v. Perkins, supra*, and of the ruling of the Bureau of Immigration and Naturalization, I am of the opinion that Harry W. Ritchie, who was a minor on June 24, 1924 (see Wis. Stat. of 1939, sec. 319.01), is a citizen of the United States. It must appear, of course, that Mr. Ritchie was dwelling in the United States on June 2, 1924, or, in the alternative, that he had established a permanent residence in the United States at some time between June 2, 1924, and November 15, 1925.

In expressing my opinion as to the citizenship of Harry W. Ritchie, it is to be understood that the views expressed do not refer to, or include, the case of Valentine Ritchie, the elder brother of Harry W. Ritchie.

UNITED STATES v. FRANK HERVOL
(ON REHEARING)

Decided October 26, 1940

HOMESTEADS—RESIDENCE REQUIREMENTS.

Since the homestead law contemplates that the entryman establish his home on the entry, his mere personal presence thereon is not alone sufficient to comply with the homestead law when he maintains a family home elsewhere.

PRACTICE—MOTION FOR REHEARING.

Motion for rehearing will not be granted where there is no showing that a new question of vital importance is involved, or that fair minds could not, from the testimony previously adduced, come to the conclusion complained of, or where, without any reason for not then presenting such facts, no facts are alleged in support of the motion that could affect the decision complained of that might not have been presented at the previous hearing.

MENDENHALL, Acting Assistant Secretary:

By decision A. 22168 of April 26, 1940, the Assistant Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office holding for cancellation Frank Hervol's original stock-raising homestead entry, Las Cruces 050244, under the act of December 29, 1916 (39 Stat. 862), on Sec. 14, T. 27 S., R. 11 W., N. M. P. M., New Mexico, on the grounds that Hervol had failed to establish and maintain residence on the land at least seven months each year for three years and to establish and there maintain his home as required by the homestead act (Rev. Stat. sec. 2291, 43 U. S. C. secs. 162, 164, 231).

Hervol's undated letter addressed to the Secretary of the Interior and received on August 7, 1940, is here treated as an informal belated motion for rehearing. In that letter, Hervol stated:

I want to prove to you about my land on "C" No. 050244 that I did establish my residence in January 1935 and lived on it from Jan. 6 until March the 11th. And from June the 10th until November 15 all in 1935, and I returned on January the 8th in 1936 and remained until August 2th which I did not get credit for. And I returned on January 15th 1937 and remained until October 24.

The reason my wife and children stayed in Texas was because I had 6 children in school. My home is 30 miles from school and I could not send them from here. I did not farm in Texas as they tried to prove. I have not done any farm work since 1912 because of my health.

We have put every thing in the land we had. Which was 27,000 [2,700?] dollars and I cannot give it up now.

The entire record has again been carefully reviewed. The weight of the evidence produced at the hearing tends to support the contention of the Government that Hervol was not present on the homestead for a least 7 months each year for 3 years. But even if Hervol was actually present on the land during the periods he mentions in his letter, the evidence is clear and he fully admits that his wife and family remained in Texas where he had farmed for some 13 years. His family never lived on the entry; at periodic intervals he returned to the family farm in Texas to help his wife and minor children market the crops; as late as 1937, the third year of his alleged residence on the homestead entry in the State of New Mexico, his automobile bore a license issued by the State of Texas; and he admitted voting in Texas subsequent to filing his entry on the homestead. In short, the evidence fully warrants the conclusion that his home, despite his assertions that it was on his entry, was with his family in Texas.

It has long been uniformly held by this Department that the homestead law contemplates that the entry shall constitute the entryman's home and family homestead. It is manifest that the entryman did not maintain a home on his land to the exclusion of a home elsewhere, as required by the homestead law. The personal presence on an entry of the entryman is not alone sufficient to comply with the requirements of the homestead law when he maintains a family residence elsewhere. Nor is a claim of domiciliary residence consistent with the substantial maintenance of a home elsewhere. *Benjamin Chainey*, 42 L. D. 510, 511 (1913); *Van Gordon v. Ems*, 6 L. D. 422 (1887); *Spalding v. Colfer*, 8 L. D. 615 (1889); *Bates v. Bissell*, 9 L. D. 546 (1889). The fact that his children were still going to school and therefore made it necessary for his family to remain on his farm in Texas is an understandable, but not a legally sufficient reason for his failure to take them to the land on which he made

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entry and there establish his familial home in compliance with the homestead law. *Cf. Spalding v. Colfer*, 8 L. D. 615, 617 (1889).

There are other reasons for denying the motion for rehearing. The Department may in its discretion grant such a motion in the public interest or to correct a substantial injustice or error. But it does not lightly do so. Hervol's motion should be denied for the following reasons:

(1) It does not present any vital or controlling question that was not fully and carefully considered at the time the decision complained of was rendered. *Cobb v. Crowther*, 46 L. D. 473 (1918); *Shields v. McDonald*, 18 L. D. 478 (1894); *Walk v. Beatty*, 26 L. D. 377 (1898).

(2) There is no showing that fair minds might not, from the testimony adduced at the previous hearing, reasonably come to the conclusion reached by the Commissioner of the General Land Office, or that the decision complained of is clearly wrong and against the palpable preponderance of the evidence. *Cobb v. Crowther*, 46 L. D. 473 (1918); *Dickinson v. Capen*, 14 L. D. 426 (1892); *Guthrie Townsite v. Paine*, 13 L. D. 562 (1891); *Seitz v. Wallace*, 6 L. D. 299 (1887).

(3) The facts Hervol now states in his letter are precisely the contentions he advanced at the previous hearing. No facts are alleged in support of the motion for rehearing that could affect the decision complained of that might not have been presented at the previous hearing and no reasons are given for not presenting any such facts at that time. *Van Gordon v. Ems*, 6 L. D. 422 (1887); *Guthrie Townsite v. Paine*, 13 L. D. 562 (1891).

Accordingly, Hervol's motion for rehearing is denied.

Denied.

GEORGE I. THORNE

Decided October 31, 1940

FINAL PROOF—AMBIGUITY IN ENTRYMAN'S FINAL PROOF.

Where a homestead entryman's final proof is ambiguous so that it is not clear whether or not he had complied with the homestead law, and where he may have, in fact, fully complied, he will be given an opportunity to make a proper showing as to whether he actually had complied.

HOMESTEAD RESIDENCE—FAILURE TO FILE NOTICE OF ABSENCE FROM THE LAND.

The purpose of 43 CFR 166.38, requiring an entryman to file notice at the local land office of the time he departs from and returns to his entry, is to assist the General Land Office in supervising pending homestead entries. Failure to file such notice on taking leave of absence may impose a heavier burden on the entryman in making a convincing showing as to his resi-

dence, but it will not, in the ordinary case, forfeit his privilege of taking proper leaves of absence.

HOMESTEAD ENTRY—COMPUTATION OF RESIDENCE—DATE OF ALLOWANCE OF ENTRY.

An entryman is under no obligation to establish residence until 6 months after the date his entry is allowed. Hence, where an entryman established residence in August 1932, but his entry was not allowed until May 1933, his residence may properly be counted from the allowance of his entry and he need not be charged with any absences between August 1932 and May 1933.

HOMESTEAD RESIDENCE—MILITARY CREDIT.

An entryman who has served between 90 days and 7 months in the Federal military forces in connection with World War I is entitled to a residence credit by deducting the period of his Federal service from the third residence year.

HOMESTEAD ENTRY—RESIDENCE—MAINTENANCE OF A HOME ON THE ENTRY TO THE EXCLUSION OF A HOME ELSEWHERE.

An entryman must establish and maintain his home on his entry to the exclusion of a home elsewhere in order to comply with the homestead law.

MENDENHALL, Acting Assistant Secretary:

This is an appeal from a decision of the General Land Office rejecting an entryman's offer of final proof on a second stock-raising homestead entry and ordering the cancelation of his entry. I agree with the decision insofar as it holds the final proof, as it now appears in the record, to be insufficient to merit issuance of a patent. But I think that the ambiguities existing in the final proof testimony with regard to the entryman's residence did not warrant cancelation of the entry and that the General Land Office should instead have required him to make an additional showing in order to clarify those ambiguities.

On August 12, 1932, George I. Thorne filed an application for a second stock-raising homestead entry (Sacramento 027902) under the act of December 29, 1916 (39 Stat. 862). His entry was allowed on May 19, 1933. He submitted final proof on his entry on March 2, 1939, pursuant to a decision of the General Land Office, dated February 7, 1939, reinstating his entry and revoking the decision of the General Land Office, dated December 28, 1938, which had canceled his entry for failure to submit final proof within the 5-year period required by statute (act of June 6, 1912, 37 Stat. 123, 43 U. S. C. secs. 164, 169, 218; 43 CFR 168.1).

Thorne's final proof statement, sworn to before the register of the Sacramento district land office, states that he established residence on the land in August 1932, and that he resided on the land during the following periods:

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1932—August (?) to November 1;

1933—May 1 to July 15;

September 1 to December 31;

1934—March 1 to August 1;

September 1 to November 1; and about six months each year from February 15, 1935, to March 1939.

He further stated that his absences were "due to the fact that I had been taking care of an adjoining tract of land and had to divide my time between the two places." One of his final proof witnesses stated that Thorne's residence was "practically continuous," listing the latter's residence each year as continuing "all year," while the other final proof witness stated that Thorne had been "absent some of the time," listing the latter's residence as "six months" each year. The estimates by Thorne and his two witnesses as to the value of Thorne's improvements are, respectively, \$1,050, \$500, and \$710. The report of the Division of Investigations states that according to a neighbor of Thorne, Thorne had made the entry his home for over five years. The land is in an isolated area and is rough and mountainous. Thorne has a 1-room habitable house, comfortably furnished, and has made various improvements, estimated by the special agent as being worth \$1,200. Thorne stated, also, that he has various household goods and machinery on his other tract of land.

By decision of January 8, 1940, the General Land Office rejected Thorne's final proof and held his entry for cancelation on the ground that the proof showed compliance with the residence requirements of the homestead laws for only 1 residence year and hence did not fully comply with the homestead laws. From this decision Thorne filed his appeal on January 26, 1940, alleging that his testimony either was not understood or was misconstrued when reduced to writing at the Sacramento district land office. He states that when he gave his testimony he presented his record as a soldier in the United States Army, showing that he served about 3½ months, and that in addition he then stated that he was on his homestead in 1934 for not less than 6 months from and after February 15, 1934. He avers that since March 2, 1939, when he made his final proof, he resided on the land continuously to September 15, 1939, and that during that period he has, as evidence of his good faith, made about \$500 worth of permanent improvements on the homestead.

Under the public land laws and the regulations of this Department an entryman must establish residence within 6 months after the date of his entry. (43 U. S. C. sec. 169; 43 CFR 166.24, 168.1.) Such residence must be for at least 7 months per year since an entryman is entitled to the privilege of absenting himself from the land for 5 months, provided he files notice at the local land office of the time

he departs from and returns to the land. (43 U. S. C. secs. 164, 231; 43 CFR 166.38, 168.1.) There is nothing in the record to indicate that Thorne, at any time when he absented himself from the land, filed any such notices. This notice requirement, however, should not be inexorably applied. Its purpose is to assist the General Land Office in supervising pending homestead entries. Failure to file such notice on taking leave of absence may impose a heavier burden on the entryman on final proof in making a convincing showing as to his residence. But such failure ought not, in the ordinary case, be held to forfeit the entryman's privilege of taking proper leaves of absence. Consequently, if Thorne actually resided on the land 7 months each year for 3 years, this Department will hold that Thorne fulfilled the residence requirements of the homestead law.

In computing the number of months during which Thorne resided on his entry, it should be noted that he claims a 3½ months' residence credit by virtue of his military service. From a copy of his discharge certificate it appears that Thorne was enlisted in the United States Army on August 3, 1917, and was in the Federal service from August 5, 1917, until he was honorably discharged on November 17, 1917, by reason of dependency. By statute, soldiers who rendered military service for not less than 90 days in the military forces of the United States in connection with World War I are entitled to have the term of their service, not exceeding 2 years, deducted from the 3 years' residence required under the homestead laws. Act of February 25, 1919 (40 Stat. 1161, 43 U. S. C. sec. 272), as amended by act of April 6, 1922 (42 Stat. 491, 43 U. S. C. secs. 272, 272a); see 43 CFR 181.1. Thorne was in the Federal service for 105 days. A soldier whose military service, as above specified, was between 90 days and 7 months must reside on the land for 7 months each year for the first and second years and, during the third year, for as many months as, added to his service, will equal 7 months. 43 CFR 181.2; *Mary Elizabeth Toland*, 48 L. D. 236 (1921). Thorne is clearly entitled to be credited with 105 days, or 3½ months, of residence in fulfillment of the residence requirements for his third residence year.

Thorne stated that he established residence on the land in August 1932. But he was under no obligation to establish his residence until 6 months after May 19, 1933, the date his entry was allowed. *Alcorn v. Barlow*, 26 L. D. 588 (1898); *Shook v. Douglas*, 26 L. D. 219 (1898); *Baker v. Rambo*, 23 L. D. 475 (1896); *Abbott v. Kelley*, 20 L. D. 295 (1895); *McNamara v. Orr*, 18 L. D. 504, 506 (1894); *Fletcher v. Breverton*, 14 L. D. 554 (1892).

His residence may therefore properly be counted from May 19, 1933, and he need not be charged with any absences between August 1932 and May 19, 1933. Simple calculation, based on Thorne's state-

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ments on final proof, shows that he was on the land during the first year (May 19, 1933, to May 18, 1934) for $8\frac{1}{2}$ months.

As to his second residence year (May 19, 1934, to May 19, 1935), Thorne's final proof stated that he was on the land in 1934 from March 1 to August 1, from September 1 to November 1, and about 6 months each year from February 15, 1935, to March 1939. Thus, from May 19, 1934, to August 1, 1934, is 2 months, 13 days, and from September 1, 1934, to November 1, 1934, is 2 months. It does not appear from the record, however, whether, between the dates of February 15, 1935, and May 18, 1935, Thorne resided on the land for the additional 2 months and 17 days which would be necessary to total 7 months for Thorne's second residence year. Neither Thorne's final proof statement that he resided on the land during 1935 "about 6 months a year" nor his allegation on appeal that he was on his homestead in 1934 for not less than 6 months from and after February 15, 1934, is sufficient to obviate this ambiguity and Thorne should have been required to clarify it.

A similar ambiguity exists with regard to his third residence year (May 19, 1935, to May 18, 1936). It is not clear from his final proof statements whether any part of his "six months a year" residence occurred within his third residence year so that he could receive the necessary $3\frac{1}{2}$ months residence credit which, when added to his $3\frac{1}{2}$ months of military service, will constitute the required seven months of residence credit which must be shown on his third residence year.

It should further be noted that Thorne's present final proof requires further clarification not only with regard to the dates of his actual residence but also with regard to whether or not the house on the entry was his "home." In view of his statements that he divided his time between the homestead entry and another tract of land, and that he has household goods on that other tract, Thorne should be required to show that he established and maintained his home on the entry to the exclusion of a home elsewhere, as required by the homestead law. Rev. Stat. sec. 2291, 43 U. S. C. secs. 162, 164; see *United States v. Frank Hervol*, A. 22168, April 26, 1940; *Bensamin Chainey*, 42 L. D. 510, 511 (1913).

The ambiguities in Thorne's final proof are such that it is not now clear whether or not he had in fact complied with the homestead law. For all that appears in the record, however, he may have, in fact, fully complied. Hence, in view thereof and in view of his allegation on appeal that his testimony may have been misunderstood when he made his final proof, I am of the opinion that he ought to be given the opportunity to clarify the ambiguities now present in his final proof. Instead of rejecting Thorne's final proof and canceling his

entry, the General Land Office should have required Thorne to make further showing to clarify the aforementioned doubts. Its decision is accordingly reversed with directions to require Thorne, under penalty of rejection of his final proof and cancelation of his entry, to make the showing herein specified.

Reversed.

JOSE DEL CASTILLO

Decided November 7, 1940

Motion for Rehearing January 30, 1941

PHILIPPINE ISLANDS—TREATY OF DECEMBER 10, 1898 (30 Stat. 1754)—CITIZENSHIP OF FILIPINO.

The treaty of December 10, 1898 (30 Stat. 1754), did not make the Philippine Islands an integral part of the United States. Under that treaty the native inhabitants of the Philippine Islands were impliedly denied American citizenship until Congress by further action should signify assent thereto.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—CITIZENSHIP OF FILIPINO.

The Fourteenth Amendment to the Constitution of the United States does not make a Filipino *ipso facto* a citizen of the United States. Nor does it follow from the fact that a Filipino enjoys certain civil rights under the Constitution and owes allegiance to the United States that he is a citizen thereof.

QUALIFICATIONS OF HOMESTEAD ENTRYMAN—CITIZENSHIP OF FILIPINO.

A person born in the Philippine Islands of Filipino parentage is not a citizen of the United States and, if he has not filed his declaration of intention to become a citizen of the United States in the manner prescribed by the naturalization laws, is not qualified under section 2289, Revised Statutes, 43 U. S. C. secs. 161, 218a, to make an entry under the Enlarged Homestead Act (act of February 19, 1909, 35 Stat. 639, 43 U. S. C. sec. 218).

Decided by MENDENHALL, *Acting Assistant Secretary*:

Rehearing denied by CHAPMAN, *Assistant Secretary*:

Jose del Castillo has appealed from a decision of the Commissioner of the General Land Office rendered February 1, 1940, which held for rejection his application, Phoenix 079396, to make enlarged homestead entry of the E $\frac{1}{2}$ Sec. 35, T. 14 S., R. 12 E., G. & S. R. M.

Under the provisions of section 2289, Revised Statutes, 43 U. S. C., secs. 161, 218a, only a person who is a citizen of the United States, or who has filed his declaration of intention to become a citizen, is qualified to acquire any right in public lands under the enlarged homestead law.

The applicant alleged in his application, "I am a citizen of the United States, born in the United States territory of the Philippines." Based upon information from the Immigration and Naturalization Service to the effect that a person of the Filipino race born in the Philippine Islands does not acquire citizenship at birth unless his

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father was a citizen of the United States at the time of his birth in the Philippines, in which event he may have acquired citizenship under the provisions of Revised Statutes, sec. 1993, the Commissioner required the applicant to show the citizenship of his father, and if his father is a citizen of the United States, whether or not he was a citizen at the time of applicant's birth.

The applicant has appealed. In his showings on appeal, the applicant states that he was born in the Philippines on March 26, 1903; that "He belongs to the *post-nati* class of Filipinos who were born after the civil government of the Philippines was established * * *." It must be inferred, therefore, that the applicant and his parents are native Filipinos. The applicant does not pretend that he has declared his intention to become a citizen in the manner required by the naturalization laws.

The applicant has formulated certain propositions of law and assertions of fact and contends from these that he is a citizen of the United States and entitled to make homestead entry under the public land laws. These are as follows:

I. The appellant is a citizen of the United States by birth under the Fourteenth Amendment to the Constitution.

II. A Filipino, not citizen of the United States, is an American national owing absolute allegiance only to the United States and is entitled like a citizen of the United States to a homestead entry in an open public land.

III. The policy and practice of the Federal Government admit the right of Filipinos to the right and privileges and immunities of the citizens of the United States, including ownership of land.

IV. The statutes governing the disposal and granting of title to the public land of the United States extend to the Philippines.

V. Allotment to native Filipinos of United States public lands in the Philippines by acts of Congress implies a right to an allotment of public land wherever it is located, especially in States carved out of ceded territories.

VI. To deny Filipinos right to a homestead entry or title to public land in the continental United States is to admit the right of the Philippine Government or the Island Legislature to deny United States citizens rights to homestead, lease, and to mining claims in the Philippine Territory.

VII. The right of United States citizens to homestead entry, to mining claims, to gas and oil leases in the public lands in the Philippines carries with it a mutual obligation of reciprocity to Filipinos in the continental United States.

Administrative acts of the executive and administrative departments of the United States government consider, recognize and treat Filipinos born in the Philippines or any territory or possession of the United States as born in the United States.

The Philippine Islands were ceded by Spain to the United States by Article III of the treaty of December 10, 1898 (30 Stat. 1754). The territory ceded by this treaty did not become an integral part of the United States. *Downes v. Bidwell* (per Justices White, Shiras, and McKenna), 182 U. S. 244, 287 to 344 (1901). Article IX of the treaty provides that:

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

Speaking of this clause in the treaty and clauses of other treaties, Justice Brown in *Downes v. Bidwell* (p. 280) said:

In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

By the act of March 2, 1917 (39 Stat. 951), as amended by the act of June 27, 1934 (48 Stat. 1245), persons born after April 11, 1899, in Puerto Rico, with certain exceptions, were declared to be citizens of the United States, but the Department is not aware of any law or statute, nor is any cited, conferring American citizenship on the native inhabitants of the Philippines. In fact, as is well known, Congress has provided for the recognition of the independence of the Philippines, and the relinquishment of control, sovereignty and jurisdiction there-over after a certain lapse of time. Act of January 17, 1933 (47 Stat. 761, 768).

The argument of the appellant that he is a citizen of the United States and comes within the purview of the Fourteenth Amendment of the Constitution with respect to citizenship, declaring that "All persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" (italics supplied), for the reason that he was born in territory subject to the jurisdiction of the United States, is unsound. The court in *Downes v. Bidwell*, *supra*, speaking through Justice Brown (p. 251), said of the words above quoted,

Here there is a limitation to persons born or naturalized in the United States which is not extended to persons born in any place "subject to their jurisdiction."

In *United States v. Wong-Kim Ark*, 169 U. S. 649, 682 (1898), the court said:

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. *Calvin's Case*, 7 Rep. 1, 18b; *Cockburn on Nationality*, 7; *Dacey Conflict of Laws*, 177; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 155; 2 Kent Com. 39, 42.

The other propositions of the appellant do not require extended discussion. It suffices to say it does not follow from the fact that the appellant as a Filipino enjoys certain civil rights under the Constitution and owes allegiance to the United States that he is a citizen

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thereof; that it is not true that the public land laws of the United States extend to the Philippines; that the Department is not aware of any policy or practice, nor has any been brought to its attention by the appellant, where the Federal Government has considered and dealt with Filipinos as having the status of citizens of the United States. In 23 Op. Atty. Gen. 370, 371 (1901), it is said:

The undisputed attitude of the executive and legislative departments of the Government has been and is that the native inhabitants of Porto Rico and the Philippine Islands did not become citizens of the United States by virtue of the cession of the islands by Spain by means of the treaty of Paris. * * *

The Attorney General has also held (23 Op. Atty. Gen. 400, 402 (1901) that a Filipino seaman is in no sense a citizen of the United States.

The fact that in the Census of 1940 a question is framed reading, "If born in the United States, give State, Territory, or possession" implies no judgment that a Filipino is a citizen, as the question may well be considered as applying to those possessions where the status of citizenship has been conferred on its inhabitants, as in the case of Puerto Rico. Even if such an implication is permissible, it has no force against the considered opinion of the Supreme Court.

Under the admissions of the applicant as to his race and nativity, Revised Statutes, sec. 1993 has no application to the case.

The applicant is not qualified to make homestead entry, and his application should be finally rejected.

As modified, the decision of the Commissioner is affirmed.

Modified.

MOTION FOR REHEARING

This is a motion for rehearing of the Department's decision of November 7, 1940, upon an appeal from a decision of the General Land Office. The Department's decision directed that Castillo's application (Phoenix 079396) for an enlarged homestead entry on the E $\frac{1}{2}$ Sec. 35, T. 14 S., R. 12 E., G. & S. R. M., Arizona, be finally rejected on the ground that the applicant, born in the Philippine Islands of Filipino parents, is not a citizen of the United States and therefore is not qualified to acquire any right in public lands under the enlarged homestead law (act of February 19, 1909, 35 Stat. 639, 43 U. S. C., sec. 218).

Before examining the merits of Castillo's motion for rehearing, I take note of the fact that it was not presented to the Secretary of the Interior within the time limits prescribed by Rule 83 of the Departmental Rules of Practice (43 CFR 221.81). The Department's decision was served on Castillo on November 25, 1940. Castillo's motion for rehearing was not received by this Department until December 30, 1940, 35 days after his receipt of notice of the departmental decision. To be sure, Castillo dated his motion for rehearing "December 20, 1940." But Rule 83 provides that "Motions for rehearing

before the Secretary must be filed within 30 days after receipt of notice of the decision complained of * * *." No reason or excuse for the delay in filing the motion is apparent. In the exercise of my discretion, however, I shall not base my decision on the technicality of Castillo's failure to file his motion for rehearing within the prescribed time limits but shall render my decision on the merits of his motion for rehearing.

The issue in this case is whether or not, under section 2289, Revised Statutes, 43 United States Code, sections 161, 218a, Castillo is qualified, as a citizen of the United States or as one who has filed his declaration of intention to become a citizen, to acquire any right in public lands in Arizona under the enlarged homestead law, *supra*.

In support of his motion for rehearing, Castillo has filed a massive 13-page brief contending that he is qualified to make such entry. I have carefully examined and studied his numerous and often inconsistent allegations, contentions, arguments, propositions of law and citations of authorities. Most of them are completely irrelevant to the issue in this case. His only relevant contentions are those in which he urges (1) that he is a citizen of the United States, and (2) that even if he were not a citizen of the United States he is as much entitled to make an enlarged homestead entry on public lands in the United States as is a citizen of the United States or one who has filed his declaration of intention to become one.

Castillo states that he was born in the Philippine Islands of Filipino parentage. He does not allege that he has filed his declaration of intention to become a citizen or that either he or his parents have become or were at any time citizens of the United States by virtue of procedure under the naturalization laws of the United States or by virtue of birth within the continental United States.

Castillo's first proposition is clearly without merit. It is settled beyond dispute that inhabitants of the Philippine Islands are not, by virtue of that fact alone, citizens of the United States. To be sure, inhabitants of the Philippine Islands who were subjects of Spain on April 11, 1899, who did not elect to preserve their allegiance to Spain in accordance with the provisions of the treaty of peace between the United States and Spain signed at Paris on December 10, 1898, and who have not since become citizens of some other country, are citizens of the Philippines. Act of August 29, 1916, ch. 416, sec. 2, 39 Stat. 545, 546, 48 U. S. C. sec. 1002. They owe allegiance to the United States. Act of March 24, 1934, sec. 2 (a) (1), 48 Stat. 456, 48 U. S. C. sec. 1232 (a) (1). And they are subject to the protection of the United States. Act of March 24, 1934, sec. 2 (a) (14), 48 Stat. 456, 457, 48 U. S. C. sec. 1232 (a) (14). BUT, they are *not* citizens of the United States. 39 Op. Atty. Gen. No. 15, July 16, 1937; see 8 U. S. C. sec. 388.

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The facts that Castillo enjoys certain rights under the Constitution and laws of the United States and owes allegiance to the United States, or that Castillo's parents may have fought against Spain during the Spanish American War or may have become citizens of the Philippines, does not make him or them citizens of the United States.

Equally clearly, Castillo's second proposition is wholly devoid of merit since it is contrary to the express provisions of section 2289, Revised Statutes, 43 United States Code, sections 161, 218a.

No error appears in the Department's decision of November 7, 1940, which would in any way warrant granting Castillo's motion for rehearing. His motion is therefore denied and the decision is made final.

Denied.

"INDIANS NOT TAXED"—INTERPRETATION OF CONSTITUTIONAL PROVISION

Opinion, November 7, 1940

"INDIANS NOT TAXED"—UNITED STATES CONSTITUTION—METHOD OF DETERMINING WHO ARE

"Indians not taxed" are Indians not subject to taxation. Since all Indians are today subject to Federal taxation, there are no more "Indians not taxed" within the meaning of that phrase as it is used in Article I, section 2, clause 3 of the Constitution and section 2 of the Fourteenth Amendment.

MARGOLD, *Solicitor.*

My opinion has been requested as to the method of determining who are "Indians not taxed" within the meaning of the Constitution and the Fourteenth Amendment thereto. Article I, section 2, clause 3 of the Constitution provides that:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. * * *

The expression, excluding Indians not taxed, is found in the Fourteenth Amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. It appears therein as follows:

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. * * *

The meaning of this phrase as it was used in the Constitution must be deduced largely from our knowledge concerning the purpose of the clause and the relationship which the Indian tribes bore to the Federal

Government at the time of the adoption of the Constitution. In the debates of the Federal convention of 1787 we find no discussion which would throw any direct light upon the meaning of the phrase nor do we, upon examination of the writings of Madison and the other participants in the convention, find other than the merest reference to the existence of such a phrase. On the other hand, the problems of apportionment of representatives and direct taxes were the cause of great debate and extensive writings. In view of this, it is only reasonable to assume that the delegates to the convention were so clearly cognizant of the meaning of the phrase "Indians not taxed" as to render any consideration of it unnecessary.

In the debates over the apportionment of representatives in the lower house two principal methods were urged with great vigor. One would have apportioned the representation of the States according to the relative property of each, thus making property the basis of representation. This commended itself to some persons, because it would introduce a salutary check into the legislature in regard to taxation, by securing in some measure, an equalization of the public burdens by the voice of those who were called to give more towards the common contribution. Story on the Constitution (5th ed., p. 465); 4 Elliot's Debates (Yate's Minutes), 68, 69; Journal of Convention, 11th June, 111; *Id.* 5th July, 158; *Id.* 11th July, 169. It reflected a favorite theory of the American people that taxation ought to go hand in hand with representation. But, since an apportionment based upon property did not commend itself for a variety of reasons to the convention, it was dropped in favor of an apportionment, based on numbers, which secured at the same time against unequal and oppressive direct taxation. This was accomplished by providing that direct taxes, as representation, should be apportioned on a basis of numbers. The theory underlying this method of apportionment was that the number of people in each State should be the standard for regulating the proportion of those who are to represent the people of each State. The Federalist, No. 54.

The apparent intention of the convention was that representation in the lower branch of the Congress be apportioned according to the number of people who constituted the community of people of the United States. This community included noncitizens, among whom were aliens, persons bound to service, Indians subject to the laws of the Government and slaves, as well as citizens. Since all were within the United States and were subject to the laws of the Government of the United States, all were considered as entitled to be represented in that Government. Indians, members of sovereign and separate communities or tribes were outside of the community of people of the United States even though they might be located within the geogra-

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phical boundaries of a State. Their status was well described by Chancellor Kent when in 1823 he said:

Though born within our territorial limits, the *Indians* are considered as born under the dominion of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities. In this situation we stood in relation to each other, at the commencement of our revolution. The *American* congress held a treaty with the six nations, in *August, 1775*, in the name and on behalf of the United Colonies, and a convention of neutrality was made between them. "This is a family quarrel between us and old *England*," said the agents, in the name of the colonies; "you *Indians* are not concerned in it. We desire you to remain at home, and not join either side." Again, in 1776, congress tendered protection and friendship to the *Indians*, and resolved, that no *Indians* should be employed as soldiers in the armies of the *United States*, before the tribe, to which they belonged, should, in a national council, have consented thereunto, nor then, without the express approbation of congress. What acts of government could more clearly and strongly designate these *Indians* as totally detached from our bodies politic, and as separate and independent communities. *Goodell v. Jackson*, 20 Johns. 693, 711.

To describe these *Indians* who were not a part of the community of people of the *United States* the phrase "Indians not taxed" was chosen. The reasons for the choice of the particular phrase are easily surmised. It reflected, first, the prevalent notion that taxation and representation should go hand in hand. It reflected secondly the fact that in a less complex system of Government taxation is the principal criterion of governmental authority. No more significant attribute of the condition of the *Indian* living in his separate and independent community could have been chosen. Being outside the control of either State or Federal Government, he was an "Indian not taxed"; and since he did not bear the financial burden of the Government, he was not entitled to representation therein. *United States v. Kagama*, 118 U. S. 375, 378.

The condition of these *Indians* as a people separate from the community of people of the *United States* had not changed, by the time of the adoption of the Fourteenth Amendment. Their exemption from the application of State laws had been affirmed by the Supreme Court on more than one occasion. *Worcester v. Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737. In treaty and statute their character as a separate, independent people had been observed by the Federal Government. As said by Chief Justice Marshall:

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the *Indians*, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several *Indian* nations as distinct political com-

munities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. *Worcester v. Georgia*, 6 Pet. 515, 556.

At the same session of the Congress which approved the Fourteenth Amendment and which submitted it to the States for adoption, the Civil Rights Bill of 1866 was passed. Act of April 9, 1866 (14 Stat. 27). It provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."

In the bill as originally reported from the Judiciary Committee there were no words excluding "Indians not taxed" from the citizenship proposed to be granted. Attention being called to this fact, the friends of the measure disclaimed any purpose to make citizens of those who were in tribal relations with governments of their own. In order to meet that objection, while conforming to the wishes of those desiring to invest with citizenship all Indians permanently separated from their tribes, and who, by reason of their residence away from their tribes, constituted a part of the people under the jurisdiction of the United States, Mr. Trumbull, who reported the bill, modified it by inserting the words "excluding Indians not taxed." What was intended by that modification appears from the following language used by him in debate:

* * * Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted. The Constitution of the United States excludes them from the enumeration of the population of the United States, when it says that Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United States, excluding Indians not taxed, and not subject to any foreign Power, shall be deemed citizens of the United States." (Cong. Globe, 1st sess., 39th Cong., p. 527.)

The understanding of the Congress as to the meaning of the phrase as it appeared in the Constitution was expressed by Mr. Trumbull: "It is a constitutional term used by the men who made the Constitution itself to designate * * * a class of persons who were not a part of our population." (*Ibid.*, p. 572.)

It is not surprising then to find the following statement in a report of the Judiciary Committee to the Senate of the United States on the 14th of December, 1870, in obedience to an instruction to inquire as to the effect of the Fourteenth Amendment upon the treaties which the United States had with various Indian tribes of the country:

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During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause "three-fifths of all other persons" is wholly omitted; but the clause "excluding the Indians not taxed" is retained.

The inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. They were excluded by the original constitution, and in the same terms are excluded by the amendment from the constituent body, the people. (Italics supplied.)

The exclusion of the Indians from the constituent body, the people, was reflected too in their exclusion from the operation of both State and Federal tax laws. As at the time of the adoption of the Constitution these Indians were not subject to taxation, so too were they not subject to taxation at the time of the adoption of the Fourteenth Amendment. This attribute of their status remained the same and it was retained as descriptive of a status which likewise had remained the same.

Though the States may have desired to tax the Indians within their borders and though they did, on more than one occasion, attempt it, they were effectively precluded from doing so by decisions of the Supreme Court. *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761. The effect of these decisions and of other decisions which enunciated the doctrine that Indian affairs are subject to the control of the Federal Government rather than that of the States (*Worcester v. Georgia*, 6 Pet. 515), has been to exclude Indians while in their separate communities or on reservations from the application of State laws except as the Federal Government may confer upon the States power over certain subjects.

Until recent years the Federal Government, though it possessed the power to tax the Indians, never exercised it. On the contrary, it had always evidenced throughout its negotiations with them an intention to exempt them from taxation. Surveying the treaties made with the Indians, one finds both guarantees of total exemption (Treaty of September 29, 1817, with the Wyandots and others, 7 Stat. 160) and guarantees that the Indians should be forever undisturbed in the peaceful possession of their domain (Treaty of May 6, 1828, with the Cherokee Nation, 7 Stat. 311). This expressed intention is particularly significant in view of the fact that contemporaneously with the making of these treaties the Federal Government was establishing a comprehensive system of internal revenue applicable to all people resident in the United States.

As early as 1798 the Federal Government had imposed a direct tax upon real estate and slaves. Act of July 14, 1798 (1 Stat. 597). In the summer of 1813 a direct tax was again assessed on real estate and slaves and Congress laid duties on carriages, a duty on refined

sugar, a license tax upon distillers of spirituous liquors, stamp duties, an auction tax, and license tax upon retailers of wines and spirituous liquors. (Dewey, Financial History of the United States, p. 139.) By 1862 so many internal revenue taxes were being laid by the Federal Government that one writer concisely described the revenue measure of that year as follows:

Wherever you find an article, a product, a trade, a profession, or a source of income, tax it. Wells, Practical Economics, New York, 1885.)

In 1861 the first Federal income tax was authorized to be levied "upon the annual income of every person residing in the United States, * * * derived * * * from any * * * source whatever." Act of August 5, 1861 (12 Stat. 292, 309). The tax was increased in 1862 and in 1865, decreased in 1867 and finally abolished in 1872. (Dewey, Financial History of the United States, p. 305.)

What is of special significance is that in no instance were any of these numerous taxes applied to Indians living in their separate tribal communities, even though, as in the case of the income tax, it was by its provisions intended to apply to "every person residing in the United States." The reason for the nonapplication of such a tax to Indians was the same as the reason for the nonapplication of all laws of general application to Indians. They were considered a people separate from the community of people of the United States and thus it was not to be inferred, in the absence of clear and unambiguous language to the contrary, that Congress intended to subject them to a law which by its terms applied to every person residing in the United States. *Elk v. Wilkins*, 112 U. S. 94. The extent of Indian exemption from taxation and the reasons therefor are expressed in an opinion of the Attorney General rendered in 1870:

The questions which seem to me to be proper for my consideration at this time, upon the case and facts as stated, are contained in the third and fourth questions so propounded by the Commissioner. These two questions may very well be condensed into the following: Whether cotton raised in the Choctaw nation, by an Indian of that nation, can be taxed in any collection district of the United States outside of the Choctaw country whilst *in transitu* and in the hands of the original owner, or in any collection district in which it may be sold by the original owner?

Our internal revenue system has not in any instance or for any purpose been extended over the Indian country.

Collection districts have been extended over all the States of the Union and over all the organized Territories. But as to Indian territory held under treaty between the separate tribes and the United States, whether that Indian territory is situated within the limits of a State of this Union or an organized Territory of the Union, or, as is the case with the Choctaw territory, lying outside of any State or any organized Territory of the United States, there

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is no instance in which it has been laid out into districts for the collection of internal revenue,

* * * * *

I am clearly satisfied that the omission in the various internal revenue laws to provide for the organization of collection districts over the Indian territory was not fortuitous or accidental, and that it was the settled purpose of Congress not to subject the persons or the productions of Indians, existing under their regular tribal associations, to liability for any tax imposed by the acts. If the provisions as to the specific article of cotton apply to Indian territory, I see no reason why all the other forms of tax provided for in these acts are not equally applicable to Indian territory.

We must consequently, make them subject to taxation in reference to stamps, income, and descents in succession, as well as for other purposes.

The intent of Congress not to include them in any sort of taxation I think is clear enough from the language of the acts themselves. But all other considerations which apply to them equally forbid this idea of federal taxation. Their rights are defined by treaties. They have some of the characteristics of independent sovereignties.

They are in a state of tutelage and protection under the United States. The general laws of the United States, in which they are not mentioned, are never understood to apply to them. Even when these Indians and their territory are situated within the bounds of a State of the Union, they are not subject to State taxation.

In recent cases before the Supreme Court of the United States, at its December term, 1866, speaking of the condition of Indian tribes under treaty with the United States, the court use this language: "The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians.

"In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture; from a levy and sale for taxes, as well as the ordinary judicial levy and sale."

Again the court say, in reference to the tribal association of the Shawnees, that "they are a people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by Government of the Union. If under the control of Congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, "but until they are clothed with the rights and bound by all the duties of citizens" they enjoy the privilege of total immunity from State taxation. And again "As long as the United States recognize their national character, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State law."

Such is the well established policy of the United States with regard to the total exemption of the Indian tribes from State taxation. The tenor of all the treaties shows that the idea of subjecting them to taxation by the General Government was never entertained, and certainly hitherto it has never been attempted.

I am therefore clearly of opinion, that the particular cotton in question was not liable to taxation under our internal revenue laws, either while in the Indian country or in transit through any collection district of the United States, or in the collection district where it may have been found or may have been sold. (12 Op. Atty. Gen. 209-210, 213-215.)

The Supreme Court in a decision rendered subsequent to the quoted opinion of the Attorney General entertained a contrary opinion concerning the application of a Federal excise tax to tobacco owned by an Indian in the Cherokee Nation. *The Cherokee Tobacco*, 11 Wall. 616. The value of the case as authority has, however, been seriously questioned by the Supreme Court in a later decision (*United States v. Forty-Three Gallons of Whiskey*, 108 U. S. 491), wherein a unanimous court emphasized the fact that the decision in *The Cherokee Tobacco* was a four-to-two decision with three members of the court not hearing argument.

Between the date of the Fourteenth Amendment and the present, the Indian's status has undergone a marked change. This change is itself no more than a reflection of a changed attitude on the part of Congress and the Court. This attitude has found expression, first, in legislation which expressly subjected Indians to particular laws of general application, secondly, in the law granting them citizenship and, therefore, the same civil and political rights as other citizens, and, thirdly, in the recent recognition on the part of the Supreme Court that Indians are included within the application of a Federal revenue law which by its terms applies to every person in the United States.

Of these three expressions of a changing attitude the first is perhaps best exemplified by two statutes, one passed in 1885, the other in 1887. Under the 1885 statute it was made a Federal crime for one Indian to murder another Indian on an Indian reservation. Act of March 3, 1885 (23 Stat. 385, 18 U. S. C. A. 548). This law also prohibited manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. In later years notorious cases of robbery, incest, and assault with a dangerous weapon resulted in the piece-meal addition of these three offenses to the Federal Code of Indian Crimes. Act of March 4, 1909, (35 Stat. 1151), Act of June 28, 1932, (47 Stat. 336). The 1887 statute, known as the General Allotment Act, provided, among other things, that when tribal lands have been individualized the individual parcels shall be inherited in accordance with the laws of the State. Act of February 8, 1887, (24 Stat. 388, 25 U. S. C. A. 331, *et seq.*).

The citizenship act of 1924 gave fuller and more decisive expression to the rapidly changing attitude toward these once alien people. All Indians born in the United States are by that act declared to be citizens of the United States and of the State in which they reside. As citizens they are entitled to the rights of suffrage guaranteed by the Fifteenth Amendment and they are likewise entitled to hold public office, to sue, to make contracts, and to enjoy all the civil liberties guaranteed to their fellow citizens. Brown, *The Indian Problem and the Law*, 1930, 39 Yale L. J. 307, 314, and cases cited.

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A final significant change in attitude, which has a particular bearing upon the question now in issue, was effectuated by the Supreme Court in a decision rendered in 1935. *Superintendent v. Commissioner*, 295 U. S. 418. Until that year Attorneys General and courts had concluded as the Attorney General did in 1870 that Federal revenue laws did not apply to those Indians who were under the protection of the Federal Government, 34 Op. Atty. Gen. 275 (1924); 34 Op. Atty. Gen. 302 (1924); 34 Op. Atty. Gen. 439 (1925); 35 Op. Atty. Gen. 1 (1925); *Blackbird v. Commissioner*, 38 F. (2d) 976 (1930). By its recent decision the Supreme Court has so far modified that time-honored principle as to permit the application of the general Federal income tax law to the income of individual Indians. That the decision represents a fundamental change in attitude is illustrated by the fact that the income tax law of 1928 applied by its terms as did the income tax law of 1861 to the "income of every person residing in the United States" and to income "from whatever source derived." In 1861, however, Indians were not considered part of the people of the United States, whereas, in 1935, according to the Supreme Court, they were.

If the fact that all Indians are today subject to Federal taxation satisfies the criterion established by the phrase "Indians not taxed," then all are certainly entitled to be counted in the apportionment of representatives. Whether this criterion has been satisfied depends upon the determination of two questions which may be formulated as follows:

1. Does the phrase "Indians not taxed" mean Indians not actually paying taxes or Indians not subject to taxation?
2. Does the phrase "Indians not taxed" refer to a particular taxing authority?

These two questions will be treated in order.

I. DOES THE PHRASE "INDIANS NOT TAXED" MEAN INDIANS NOT ACTUALLY PAYING TAXES OR INDIANS NOT SUBJECT TO TAXATION?

If the phrase means Indians not actually paying taxes it indicates an intention on the part of the Federal convention to consider propertied Indians as entitled to become a part of the community of people of the United States and non-propertied Indians as not entitled to become a part of that community.

The fallacy of such a construction cannot be more clearly demonstrated than by analogy to the Indians who resided within the States and were subject to the laws of the Government at the time of the adoption of the Constitution. They are the so-called Indians taxed as differentiated from "Indians not taxed." If the phrase meant Indians not paying taxes, only those Indians within a State who actually paid taxes would have been counted for apportionment purposes. In other words, only the wealthy or propertied Indians

would have been counted. There is, however, no indication that these Indians were regarded differently than their fellow whites in so far as apportionment was concerned. The whites were counted regardless of whether they paid taxes as were also the Indians. The distinction between these two groups and the "Indians not taxed" group was that the former were subject to the tax laws of the Government whereas the latter were not.

This seems clearly to have been the understanding of the Bureau of the Census. In a "Report on Indians Taxed and Indians Not Taxed in the United States at the Eleventh Census: 1890," I find the following statement:

Indians taxed and Indians not taxed are terms that can not be rigidly interpreted, as Indian citizens, like white citizens, frequently have nothing to tax. Indians subject to tax and Indians not subject to tax might more closely express the distinction. * * *

* * * * *

It is to be constantly borne in mind that Indians living scattered among whites were counted in the general census, while Indians on reservations, under the care of the government, the Six Nations of New York and the Five Civilized Tribes of the Indian territory, were not counted in the general census but in a special Indian census.

As recently as the census of 1930 the Bureau of the Census again reiterated its understanding of the phrase "Indians not taxed" as meaning "Indians not subject to taxation."

This interpretation of the phrase is not only the reasonable one but is, in addition, the only interpretation which can be practically administered. If the phrase were taken to mean Indians actually paying taxes, the census enumerator would be faced with a problem of determining at what point between census periods the payment of a tax entitled an Indian to be counted. For example, suppose a particular Indian had paid a tax in 1932 but had paid no other taxes between 1932 and 1940. Suppose in fact he had paid the tax in 1932 and then returned to his reservation and remained there continuously from 1932 until the census enumeration of 1940. Or, suppose that though a tax had been levied upon the property of this Indian he was not obliged to pay the tax until 10 days after the date of the enumeration. These hypothetical questions are but a few of the many which would arise to plague the census enumerator in the event the phrase were construed to mean Indians actually paying taxes. In order to administer the phrase as thus interpreted it would be necessary in view of the many problems that would arise to read into the phrase a great variety of implications. This might be countenanced only if such an interpretation reflected the object of the Constitution but here the object is not in doubt. It is reflected in the circumstances which prevailed at the time of the adoption of the Constitution. It has been administratively interpreted

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in the light of those circumstances and it has been so understood by subsequent legislators.

In the debate in Congress on the Civil Rights Bill, the objection was made that the amendment to the bill "excluding Indians not taxed" from citizenship would require an Indian to have property upon which a tax was levied before he could become a citizen. To this objection Mr. Trumbull, author of the amendment, replied.

* * * The Senator from Missouri understands it to be a property qualification to become a citizen. Not at all. It is a constitutional term used by the men who made the Constitution itself to designate * * * a class of persons who were not a part of our population. * * *

* * * It is not intended as a property qualification. That is not the meaning of it. The Senator wants to know why, if an Indian cannot be a citizen without being taxed, should a white man or a negro be a citizen without being taxed. If the negro or white man belonged to a foreign Government he would not be a citizen; we do not propose that he should be; and that is all that the words "Indians not taxed," in that connection, mean. (Cong. Globe, 39th Cong., 1st sess., p. 572.)

Significantly I find the following paragraph in President Johnson's message to Congress vetoing the Civil Rights Bill:

By the first section of the bill, all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific States, *Indians subject to taxation*, the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is by the bill made a citizen of the United States. It does not purport to declare or confer any other right of citizenship than Federal citizenship. * * * [Italics supplied.] (Cong. Globe, 1st sess., 39th Cong., p. 1679.)

To him, as to Justice Harlan in the case of *Elk v. Wilkins*, 112 U. S. 94, "Indians not taxed" meant Indians not subject to taxation.

In view of the foregoing, I am clearly of the opinion that "Indians not taxed" means Indians not subject to taxation.

II. DOES THE PHRASE "INDIANS NOT TAXED" REFER TO A PARTICULAR TAXING AUTHORITY?

It has been suggested that the phrase "Indians not taxed" refers only to taxation by the States. I find that neither reason nor decision supports this conclusion.

The suggested construction serves to restrict the meaning of the phrase. As such it violates a cardinal principle of constitutional construction that words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted. *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601, 618. The restriction might be countenanced only if it were in consonance with the object of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1. It is not. As we

have seen, "Indians not taxed," was a phrase used to describe individuals who were outside the community of people of the United States and hence not entitled to be counted in the apportionment of representatives. The object was not to exclude a particular group from representation but to include all who could reasonably be denominated members of this community of people. Thus, express provision was made for the inclusion of subject Indians, as well as of slaves and persons bound to service for a term of years. If the phrase is restricted to taxation by the State it means that unless a reservation Indian subjects himself to the tax laws of the State, either by settling or by purchasing property within its jurisdiction, he cannot be regarded as a member of the community of people of the United States, even though he is a citizen and as such entitled to the same civil and political status as other citizens.

The restricted interpretation can be founded only upon the argument that the State has the exclusive right to determine who within its borders shall be counted among its numbers for apportionment purposes. The argument, however, is fallacious. It confuses a Federal rule for the determination of the aggregate number of representatives with a State right to prescribe the qualifications of those who would vote for the representatives. As observed by the Federalist:

It is a fundamental principle of the proposed constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule, *founded on the aggregate number of inhabitants*, so the right of choosing this allotted number in each state is to be exercised by such part of the inhabitants as the State itself may designate. [Italics supplied.] The Federalist, No. 54.

The power to recognize a person as a member of the community of people of the United States resides in the Federal Government as well as in the States. In fact, it resides, in the most important instance, exclusively within the power of the Federal Government. I refer to the admission and naturalization of aliens. The Federal Government may admit aliens and may provide for their becoming citizens of the United States as well as of the States wherein they reside. Thus, by Federal action alone, an individual may be recognized as a member of the community of people of the United States, and as an inhabitant of a State entitled to be counted among its numbers for apportionment purposes. Where, as in this case, the Constitution of the United States directs that all people comprising the community of people of the United States shall be counted for the purpose of apportioning representatives, and where, as here, the criterion for determining whether a person is a member of the community of people of the United States is made to depend on whether he is or is not subject to taxation, and where it has been shown that the Federal Government has the power to admit a person to the com-

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munity of the people of the United States and of the State, it is only reasonable to assume in the absence of a contrary constitutional provision or legislative intent, that the phrase "Indians not taxed" refers to the exercise of Federal as well as State power.

In the Constitution, provision is made for the establishment of a system of internal revenue by the Federal Government. Had there been any expression or intention on the part of the Federal Government to subject Indians to taxation at that time or had there been any indication that Indians were within the scope of the taxing jurisdiction of the Federal Government, we should have cause to believe that only State taxation was referred to by the phrase "Indians not taxed." For if the phrase referred to Federal taxation as well as State taxation, and if at the time of the adoption of the Constitution Indians were subject to Federal taxation, the phrase would be meaningless as there would have been no "Indians not taxed." But, as I have pointed out earlier, the exact contrary was the case. The treaties made by the Federal Government with the Indian tribes guaranteed them the peaceful and uninterrupted possession of their domain. Many of the treaties guaranteed total exemption from taxation. And, though the Federal Government passed both direct and indirect taxes, they were not considered as having any application to Indians living in their tribal communities.

In view of the foregoing I can only conclude that the phrase "Indians not taxed" refers to Federal as well as to State taxation. The question which has been propounded to me may then be formulated as follows: What Indians are not subject to taxation?

Since all Indians are today subject to taxation by the Federal Government (*Superintendent v. Commissioner*, 295 U. S. 418), there are no longer Indians not subject to taxation. The criterion for their recognition as members of the community of people of the United States has been satisfied and they are all entitled to be counted in the apportionment of representatives. That some may still be not subject to State taxes does not alter the conclusion. The position of such Indians is analogous in this regard to that of members of the United States army who while stationed at a military reservation within a State are counted inhabitants of the State for apportionment purposes, notwithstanding the fact that they are not subject to the tax laws of the State. I perceive no reason in either the Constitution or the apportionment process for assuming that Indians should be regarded differently.

Approved:

W. C. MENDENHALL,

Acting Assistant Secretary.

LENA M. BEAN, WENDELL C. BEAN, JAMES SHELTON,
MORTGAGEE AND PROTESTANT

Decided November 12, 1940

ENTRY—REINSTATEMENT.

Bean made homestead entry May 1, 1930, and obtained an extension of time to submit final proof until May 1, 1937. Relinquishment of the entry was filed July 7, 1937, together with an application to make homestead entry of the land by the son of Bean. Shelton filed petition for reinstatement of the entry and a protest against the application of Bean's son, alleging that he held a recorded mortgage on the land executed by Bean to secure the payment of her promissory note for \$650 with interest. Shelton alleged that Bean had fully complied with the homestead requirements and the relinquishment and application was for the purpose of defrauding him. Shelton had filed no notice of his encumbrance on the land as required by Rule 98 of Practice. Bean had filed an affidavit in 1935 admitting that she had never established residence on the land. *Held*, (1) that Shelton, not having filed any notice of his lien, had no basis for his complaint that he had no notice of the relinquishment; (2) that a transferee or mortgagee, prior to patent or prior to submission of final proof acquires no greater right or estate than exists in the homesteader; (3) that had Shelton received notice of the relinquishment he would have been in no better position to oppose the relinquishment than now, as Bean could not show that she maintained the residence required within the statutory life of the entry and the entry would have to be canceled, and, therefore, there was no basis for its reinstatement.

MORTGAGE—HOMESTEAD.

One who takes a mortgage from an entryman who holds but an inceptive title to the entry has a precarious and uncertain security as the entry is subject to forfeiture for noncompliance with the homestead requirements and his lien would not become enforceable unless and until the entryman had made acceptable final proof and obtained equitable title to the land.

MORTGAGE—NOTICE.

A subsequent applicant for homestead entry, with notice of the existence of a mortgage on a prior, unperfected entry on the land that had been relinquished, is not charged with the notice of a valid lien on the land for none such exists.

CHAPMAN, *Assistant Secretary*:

Lena C. Bean made enlarged homestead entry, Great Falls 076319, for the NE $\frac{1}{4}$ sec. 10, T. 29 N., R. 1 E., M. M. Montana, on May 1, 1930. On March 8, 1935, the Commissioner of the General Land Office denied her application for extension of time to submit final proof on the ground that it was shown that she had not established or maintained residence on the land; that she would not be able to comply with the requirements of the homestead law if extension was granted; that there was no authority of law for granting the extension of time in cases where the statutory period expired after December 31, 1934.

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Upon appeal, she alleged that her deceased husband had perfected an entry of adjoining land; that she paid one James Shelton \$750 for obtaining a relinquishment of a prior entry and attending to all the details in connection with obtaining the entry; that Shelton had advised her that it would not be necessary for her to reside on the land because her husband had proved up on an original homestead many years before and that Shelton being a land locator, she relied upon his advice until otherwise informed on inquiry of the local land office; that she had resided on the entry of her husband and had broken about 80 acres on her entry and had two miles of fence thereon. She promised to comply with the homestead requirements if the extension was allowed.

By decision of September 20, 1935, the Department taking notice of her allegations of crop failure in 1934 and of the provisions of the act of July 26, 1935 (49 Stat. 504), permitting extensions of time for two years on proof falling due before December 31, 1935, and believing from her allegations that she was a deserving homesteader, extended her time to make final proof until May 1, 1937, on the ground that before the end of such period it would be possible for the entrywoman to establish and maintain residence, and to comply with the other requirements of law for a sufficient time to make commutation proof and in view of the possibility that Congress might enact further legislation authorizing the granting of additional time to make final proof.

July 7, 1937, relinquishment of the entry was filed, together with application 082664, for classification and homestead entry of the land by Wendell C. Bean.

March 11, 1938, James Shelton filed a protest against the application of Wendell C. Bean and a petition for reinstatement of the entry of Lena M. Bean. The protest sets forth:

2. That your petitioner verily believes and therefore states on information and belief that the homestead laws and regulations of the department have been fully complied with by the entrywoman and that she could have made final proof upon the land and procured a patent, but failed to do so for the reasons hereinafter mentioned.

3. That heretofore, on or about the 7th day of July, 1937, the entrywoman relinquished the entry in order that an application for homestead entry might be filed by her son, Wendell C. Bean, and the latter party did thereupon make application for entry upon the land and in that connection filed a petition setting forth that the land was more valuable for agricultural use rather than for any other purpose.

4. That the land has been filed upon previous to the entry by said Lena M. Bean but the former entryman had relinquished; that the former entryman was indebted to your petitioner, and eighty acres of the land had been broken and the land partially improved at the time same was relinquished by the former entryman and the said Lena M. Bean, in connection therewith, assumed

the indebtedness owing to your petitioner by the former entryman, and as evidence of such indebtedness made, executed and delivered to petitioner her certain negotiable note dated April 28, 1930 for the sum of \$650.00, payable in six months with interest at 8% per annum from date until paid; and further at the same time and place made, executed and delivered to your petitioner her certain preliminary first mortgage upon the premises hereinbefore described to secure the payment of said note according to its tenor; that the mortgage was duly acknowledged and certified to and filed for record in the office of the County Clerk and Recorder of Toole County, Montana, in which county the land is situated, and the original of said instrument is filed herewith as evidence of said obligation.

5. That your petitioner has at all times been and is now the owner and holder of the note aforesaid and mortgage securing the same, and no part thereof has been paid, principal or interest.

6. Your petitioner further states that to the best of his knowledge, information and belief, full compliance with the homestead requirements have been made by the entrywoman above mentioned; that eighty acres of the land was in cultivation at the time she made entry, and has been kept in cultivation ever since; that the necessary improvements have been placed upon the land, including a house and the residence requirements have been fulfilled; but your petitioner verily believes and therefore alleges on information and belief that the entrywoman let the period expire within which proof should have been made, and relinquished the entry in favor of her son with the design and for the purpose of defrauding your petitioner, and defeating his rights under the note and mortgage and in that way acquiring the land to and in the name of her son, free and clear of the lien of your petitioner's mortgage. Your petitioner further alleges on information and belief that further extensions of time were obtained within which to make proof in order that the son might become of sufficient age to make entry.

7. Your petitioner further states that through oversight he failed to give notice to the department or to the local land office of his lien upon the land, and as a result that he had no notice of the relinquishment and had assumed that the mortgagee would in due time make proof within the required period, and just recently learned that she had relinquished the entry in favor of her son; and upon learning this fact, your petitioner thereupon promptly, and with reasonable diligence, prepared to protest the allowance of the son's entry, and petition this department for re-instatement of the former entry and for further time within which to make proof.

8. Your petitioner further represents and states that if given time therefor, if the necessary proof is not submitted by the entrywoman, your petitioner will submit necessary proofs of compliance with the requirements of the laws pertaining thereto; and if the proofs are in any respect insufficient with regard to cultivation or improvements, such requirements will be met by your petitioner; however, as evidence of compliance by the entrywoman, your petitioner respectfully refers the Honorable Commissioner to the various applications for further time filed with the department by the entrywoman.

WHEREFORE, your petitioner does hereby protest the allowance by the department of Entry, Great Falls Serial 082664, made by the son of the former entrywoman, namely, by Wendell C. Bean; and further asks that the application of the said son be denied and rejected; that the entry of Lena M. Bean be reinstated and that his mortgage and his rights as mortgagee be protected and further time be granted within which final proof may be submitted; and in

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event the same is not submitted by the entrywoman that your petitioner may submit the necessary proof and that thereupon a patent to the land be issued direct to him.

The mortgage and mortgage note described in the petition is filed therewith.

The Commissioner of the General Land Office considered the protest, and adverting to the fact that Shelton never had filed notice of his mortgage in the local office; that the entrywoman had admitted in an affidavit executed April 25, 1935, that she had never established residence on the land, and to her version of her transactions with Shelton held that as he had not filed notice of his interest as a mortgagee in the local office he could not have expected notice of the relinquishment and opportunity to oppose it; that as it was clear entryman had never earned equitable title and cannot now meet the residence requirements as the time to which the life of the entry had been extended had expired, no ground existed for reinstating the entry. Accordingly the petition was denied and the protest dismissed.

Rule 98 of Practice provides, that

Transferees and encumbrancers of land the title to which is claimed or is in process of acquisition under any public land law shall, upon filing notice of the transfer or encumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original entryman or claimant. * * *

It further provides that any transfer or encumbrance shall be noted on the records and reported to the General Land Office and that such transferee or encumbrancer as well as the entryman must be made a party defendant to any proceeding against the entry. Protestant not having filed any notice of his lien has no basis for complaint that he had no notice of the relinquishment. And it may be observed that under the circumstances of this case, had protestant received such notice, he would have been in no better position to oppose the relinquishment than now. A transferee or mortgagee prior to patent or prior to the submission of final proof acquires no greater estate or right than exists in the homesteader (Instructions of March 11, 1922, 48 L. D. 582) and if entry 076319 were reinstated, as neither commutation proof was filed nor any law passed authorizing the granting of additional time to make final proof, the entry would have to be canceled as the entrywoman could not show that she maintained residence within the statutory life of the entry for the periods of 7 months each year for 3 years. Of course the protestant could not show by other evidence what the entrywoman could not show, even assuming that after the extension she established and maintained residence as to which there is no proof. The rule frequently applied by the department that an encumbrancer or transferee is entitled to

avail himself of every right that his debtor had to perfect title to the land on which he has a security, is confined to cases where the entryman has relinquished after full compliance with the law and the patent has been rightfully earned. See cases cited in the Instructions of March 11, 1922, *supra*; *Robert E. Boyd*, 56 I. D. 343. No sufficient ground, therefore, exists for reinstatement of the entry for the purpose of protecting the protestant's mortgage.

As to the protestant's alternative request that in the event the entry of Mrs. Bean cannot be reinstated the entry of her son, Wendell, if allowed, be impressed with a trust in his favor to the extent of the mortgage debt for the reason that the relinquishment was in pursuance of conspiracy to defraud him of his security, sufficient basis is not seen for such action. It is true that the Department has repeatedly held that where an entry is relinquished *after equitable title thereto has been earned* and the county records show at the date of relinquishment the existence of a mortgage, a trust will be declared against a subsequent entry for the benefit of the mortgagee to the extent of the mortgage. *Lacher v. Mort*, 50 L. D. 431. The reason of this rule is that the recorded encumbrance is notice to all the world of a lien on a perfected entry, and the subsequent entryman is charged with such knowledge. In this case it appears that the mortgage debt represents the purchase price for the relinquishment and improvements of the prior entryman. The protestee took a precarious and unstable security for the payment of the purchase price in a mortgage from the entryman who held but an inceptive title, subject to forfeiture by noncompliance with the homestead requirements. He took the risk of the entryman's failure to perfect his claim (*Hawley v. Diller*, 178 U. S. 476), and his lien would not become enforceable unless and until entrywoman has made acceptable final proof and obtained equitable title to the land. A subsequent applicant although he may have had either actual or constructive notice of the existence of such a mortgage upon the prior relinquished entry could not be charged with notice of a valid lien on the property for none such existed. Furthermore, whether the action of the entrywoman in relinquishing the entry was motivated by a fraudulent intent or not, her action would not be the sole cause of the loss of protestant's lien, as the entry was subject to cancelation for failure to comply with the homestead law, and such cancelation would have effected the same result.

For the reasons stated, the decision of the Commissioner is

Affirmed.

ESTATE of J. N. WELLS

Decided November 20, 1940

PUBLIC LANDS—GRAZING DISTRICTS—LICENSES.

In adjudicating applications for grazing licenses, the base properties of applicants are classified, and the demand for the use of Federal range which is thus created falls in classes 1, 2, and 3, but the Federal range which is used to satisfy such demand is not thus classified.

In determining the right of any applicant to the use of certain range, the range that he will be permitted to use depends not on any "classification" of the range, but on the classification of his base property.

PUBLIC LANDS—GRAZING DISTRICTS—LICENSES—BASE PROPERTIES.

The Class 1 demand of any water which is offered as base property is limited to the greatest number of livestock that were properly grazed from the water during the priority period, and thus would not include the number grazed on a stock driveway created under section 10 of the stock-raising homestead act.

Where two waters which would otherwise be in class 2 have overlapping service areas, the water developed latest in point of time becomes a class 3 water as to the area of overlap, and the grazing privileges on the area go to the offeror of the earlier developed water. The decision in the case of *Roman C. and Serapio Nunez*, 56 I. D. 363, and certain unreported decisions, are overruled to the extent that they are inconsistent herewith.

BURLEW, *First Assistant Secretary*:

An appeal has been taken on behalf of the estate of J. N. Wells from a decision of an examiner of the Grazing Service which affirmed the decision of the regional grazier on the application by the then-living J. N. Wells for a 1938-39 grazing license in New Mexico Grazing District No. 6. The examiner's decision was dated September 28, 1938, and was rendered on the basis of testimony adduced at a hearing held at Roswell, New Mexico, on September 20, 1938, and at a prior hearing on an appeal by Wells from a decision by the regional grazier on his application for a 1937 grazing license. At both hearings H. A. and Bert Price, grazing licensees, holding allotments adjoining the Wells allotment, were permitted to intervene.

The sole issue presented involves the use by the parties of the grazing facilities afforded by certain lands that are now Federal range but which were, during the priority period from June 28, 1929, to June 28, 1934, embraced in a stock driveway created under authority of section 10 of the stock-raising homestead act. It appears that, in adjudicating the applications of the various parties to this case, the officers of the Grazing Service have considered the appellants and the interveners as having equal claims to the use of these lands. A like assumption on the part of the appellant and the interveners is evident from the record. Both counsel for the appellant and for the interveners offered statements during the 1938

hearing to the effect that these lands are "Class 2 lands." It should be noted that such statements fail to reflect a proper understanding of the classification provisions of the Federal Range Code. Under such provisions, the Federal range is not classified, but only the base properties of applicants for grazing licenses.

Base properties may qualify the applicant for grazing privileges, and the demand for the use of Federal range which is thus created falls into classes 1, 2, or 3. After a determination of the demands created by the various base properties, they are satisfied so far as range may be available, but the range itself does not thus become "classified." It is true that certain range may be used to satisfy a demand arising from, say, the class 2 rating of a base property, but such use does not serve to make that range available only for the satisfaction of class 2 demand. In an ensuing year, that same range might conceivably be used to satisfy class 1 demand.

Thus in determining the right of any applicant to the use of certain range, the determination of the range that he will be permitted to use depends not on any "classification" of the range, but on the classification of the base property itself.

It follows from this that the right to the use of the lands formerly embraced in the stock driveway will depend on the classification of the base properties of the appellants and the adjoining licensees. Inasmuch as the use of range in this region is entirely dependent upon the control or ownership of waters that will service such range, only waters are considered as base properties.

At the 1938 hearing it was stipulated by the parties that the water owned or controlled by the appellants and which serviced the former stock-driveway lands was full-time water, i. e., water which is defined by section 2 (k) of the Federal Range Code as "water which is suitable for consumption by livestock and available, accessible, and adequate for a given number of livestock during those months in the year for which the range is classified as suitable for use." Apparently the water is adequate for any number of livestock that could be grazed within its service area.

It is also clear from the record that the Prices have at least one well and possibly two that are capable of servicing the lands involved in the controversy, and that they are not only full-time waters, but also "prior," in that they were "used to service certain range for a given number of livestock during the 5-year period immediately preceding June 28, 1934," as so defined by section 2 (l) of the Federal Range Code.

At no time during the "priority" period (June 28, 1939, to June 27, 1934, inclusive) did the Wells' have water facilities that were adequate to furnish water for a year-long livestock operation. In 1936

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a well was completed by Wells, and it is this water facility which is stipulated to be a full-time water.

Section 4, paragraph *a* of the Code, provides for the classification of base properties in the following manner:

Class 1. Forage land dependent by both location and use, and full-time prior water.

Class 2. Forage land dependent by use only, and full-time water.

Class 3. Forage land dependent by location only, and full-time water which otherwise would be in class 2 but which was developed later than other water servicing a part or all of the same area.

The same section and paragraph provide that "In computing the service value of water in class 3, there will also be deducted therefrom the carrying capacity of any portion of its service area which is serviceable from any other full-time water antedating it in development."

The Wells' water being only "full-time," and not "prior," the demand arising from this water is at best class 2. The Prices' waters are "full-time" and, to the extent that they were used to service certain range during the priority period, they are class 1. This class 1 demand is limited to the greatest number of livestock that were *properly* grazed from the waters during the priority period, and thus would not include the number grazed on the stock-driveway lands, for this number was not properly grazed. (See sec. 2, par. (1) of the Code.) To the extent of such improper grazing, the demand arising from the Price waters could be no better than class 2.

The Federal Range Code also provides, in section 6, paragraph *b*, for the issuance of licenses or permits in the following reference order and amounts:

(1) To applicants owning or controlling land in class 1, licenses or permits for the number of livestock for which such base lands are rated for a period of time which when added to the period of use allowed on the Federal range for such livestock will equal 12 months; and to applicants owning or controlling water in class 1, licenses or permits to the extent of the service value of such water.

(2) To applicants owning or controlling base properties in class 2, licenses or permits computed in the same manner as those issued under subparagraph (1), above.

(3) To applicants owning or controlling base properties in class 3, licenses or permits computed in the same manner as those issued under subparagraphs (1) and (2), above.

The record does not clearly disclose the extent to which the Price well is "prior" and therefore it is impossible to determine the extent to which the Prices are entitled to use the former stock-driveway lands in satisfaction of their Class 1 demand. However, this is immaterial, for even though their Class 1 demand did not entitle the Prices to the use of any of those lands, they were clearly entitled

to the inclusion of all of them in their allotment by reason of the date of development of their waters.

It will be noted, from the above-quoted provisions of the Code, that where two waters service the same area of Federal range, and the demand of both waters would fall in class 2, the water which was developed latest in point of time becomes a class 3 water so far as it competes with the earlier developed waters. Under the provisions of section 6, paragraph *b*, of the Code, *supra*, a class 3 base property cannot compete with a property in class 2.

The Prices' water was developed before that of Wells. Assuming that the Prices' class 1 demand has already been satisfied by an allotment of other Federal range, the watering facilities of both the Wellses and the Prices are in a lower class so far as the stock-drive-way lands are concerned. The Prices' water having been developed first, it is in class 2 so far as it competes with the Wells' water, which automatically falls in class 3. Accordingly, so far as the Wellses and the Prices are concerned, the Prices are entitled to the use of all of the former stock-drive-way lands.

The appeal is accordingly dismissed with instructions that the regional grazer shall immediately amend the outstanding licenses and allotments of the parties hereto in accordance with the above discussion.

It will be noted that the interpretation herein given of the provisions of the Federal Range Code which relate to the adjudication of applications for grazing licenses based on ownership or control of water differs from that announced in prior decisions of the Department in the cases of *Roman C. and Serapio Nunez*, 56 I. D. 363, *W. H. Brittain*, (A. 21088), decided August 4, 1938, and *Sam L. Smith* (A. 21337), also decided August 4, 1938. However, upon a thorough reconsideration of the provisions in question, the Department is firmly of the opinion that the interpretation herein given is right and proper and that the interpretation announced in the cited prior decisions is incorrect. Accordingly, those decisions, so far as their rulings are inconsistent with this decision, are overruled.

Dismissed.

ROBERT E. O'KEEFE
(ON REHEARING)

Decided November 30, 1940

OIL AND GAS LEASE—DEFAULT—SURRENDER.

Default in the payment of rent is not, under the provisions of the lease, a surrender or evidence of an intention to surrender the lease.

November 30, 1940

OIL AND GAS LEASE—RENT PAYABLE UPON CANCELATION.

The cancelation of the lease by the Secretary of the Interior after a 30-day period of default in payment of yearly rent following notice to lessee of default, does not excuse the lessee from payment of rent due and payable in advance on the first day of the term.

CHAPMAN, *Assistant Secretary*:

A motion has been filed by the lessee, oil and gas lease Great Falls 081768, for a rehearing of departmental decision dated September 24, 1940, affirming the decision of the Commissioner of the General Land Office dated May 9, 1940, which held that unless the lessee paid the rental of \$40 due and payable in advance March 1, 1940, for the third lease year his lease would be canceled and proceedings instituted for the collection of the rent due.

It is argued in the motion for rehearing that the Government

* * * had the right of election of one of two remedies, i. e. (1) to treat the lease as continuing in force and the rental obligation for the following term of one year as a debt owing to the Government, secured by the bond; or (2) cancel the lease. The Government had the right of election, but could not pursue both remedies,—it could not say to the Lessee that rent is owing for the next term of one year on a lease which the Government has elected to consider no longer in force.

It is not believed that the covenants of the lease provide for or authorize the election of remedies and the alternative actions suggested by the appellant. By section 2 (d) of the lease the lessee agreed to pay rent in advance for each lease year. Section 5 of the lease makes provision for surrender of the lease in the following language:

The lessee may, on consent of the Secretary of the Interior, first had and obtained in writing, surrender and terminate this lease upon payment of all rents, royalties, and other obligations due and payable to the lessor, and upon payment of all wages and moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property; upon like consent had and obtained the lessee may surrender any legal subdivisions of the area included herein.

Section 7 of the lease, covering default, provides that

If the lessee shall fail to comply with the provisions of the Act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof and such default shall continue for a period of 30 days after service of written notice thereof by the lessor, the lease may be canceled by the Secretary of the Interior in accordance with section 17 of the Act, as amended, and all materials, tools, machinery, appliances, structures, equipment, and wells shall thereupon become the property of the lessor, except that if said lease was earned as a preference right pursuant to section 14 of the Act or covers lands known to contain valuable deposits of oil or gas, the lease may be canceled only by judicial proceedings in the manner provided in section 31 of the Act; but this provision shall not be construed to prevent the exercise by

the lessor of any legal or equitable remedy which the lessor might otherwise have. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

Pursuant to section 7 of the lease the following action has been taken: May 9, 1940, notice was sent by registered mail to the lessee that he was in default and that unless he paid within 30 days from receipt of the notice the lease would be canceled and appropriate proceedings instituted to collect the money due and payable under the lease. The lessee received this notice May 17, 1940. June 14, 1940, the lessee filed an appeal denying responsibility for the payment of the rent for the third year, due and payable in advance March 1, 1940, and waived any claim under the lease. By decision of September 24, 1940, the Department held that "* * * the accrued rental became a debt due the United States and this Department is not authorized to waive payment."

Under the circumstances of this case it is apparent that the lease was in full force and effect on the date when the rent became due and payable. No action had been taken by the lessee prior to that date nor on that date which would indicate that he intended to surrender the lease. There is nothing in the provisions of the lease covering "surrender" or "default" which indicates that a failure to pay rent on the due date may be considered a surrender or evidence of an intention to surrender. Quite the contrary, it is provided in section 5 that the lessee must first obtain the written consent of the Secretary of the Interior in order to effect a surrender. Such consent was neither sought nor obtained prior to or on the rent due date. Consequently, the Commissioner of the General Land Office properly took action under the default clause of the lease. The fact that under the provisions of section 7 the Secretary is authorized to cancel the lease after a 30-day period of default following notice does not excuse the lessee from payment of rent due and payable in advance on the first day of the term. *Barkeley v. McCue*, 55 N. Y. Supp. 608; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820.

In the *Grommes* case the Supreme Court of Illinois said (35 N. E. 820, 822):

* * * There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain, notwithstanding there has been a re-entry for default; and, if the parties choose to make such an agreement, we see no reason why it should not be held to be valid as against both the tenant and his sureties. The guarantors in this case agreed that the tenant should pay all rents to be by him paid "according to the terms and conditions of said lease, for and during the entire term thereof." It may not be strictly accurate or correct to call the money to be paid after re-entry "rent," or to treat the lease as in force after a re-entry. But the parties have a right to fix the amount of the rent to accrue according to the terms of

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the lease as the amount of damages to be paid by the tenant in case of a breach of his covenants. It can make but little practical difference whether the sum agreed to be paid be called "rent" or "damages." * * *

The motion for rehearing is denied.

Denied.

AUTHORITY OF SECRETARY OF THE INTERIOR TO ENTER INTO AGREEMENT FIXING BOUNDARIES OF TRIBAL, ALLOTTED, AND CEDED INDIAN LANDS

Opinion, December 13, 1940

INDIAN TRIBAL LANDS—AUTHORITY OF SECRETARY OF THE INTERIOR—BOUNDARIES—WIND RIVER RESERVATION—SHOSHONE INDIANS—ALLOTTED LANDS—CEDED INDIAN LANDS—INDIAN RESERVATIONS.

The Secretary of the Interior is without authority to enter into an agreement with owners of land bordering on the Big Wind River, Wyoming, by the terms of which agreement the common boundary lines of lots or parcels of land adjoining the river would be fixed, where the land covered by the proposed agreement would include fee patented lands, allotted and tribal lands of the Shoshone Indians and lands ceded by the Shoshone Indians to the United States.

An agreement to fix the boundary lines of the allotted, tribal and ceded lands would change the boundary of the Wind River Indian Reservation contrary to the provisions of the act of Congress approved March 3, 1927 (44 Stat. 1347, 25 U. S. C. sec. 398D).

The Secretary of the Interior is prohibited by the act of Congress approved June 12, 1906 (34 Stat. 255, 41 U. S. C. sec. 11), from entering into such an agreement.

The Secretary of the Interior may not dispose of Indian tribal lands except by express statutory authority.

The Secretary is bound by the limitations imposed by the act of Congress approved March 3, 1905 (33 Stat. 1016), as amended by the act of Congress approved August 21, 1916 (39 Stat. 519), when disposing of lands ceded by the Shoshone Indians to the United States.

MARGOLD, *Solicitor*:

You [Secretary of the Interior] have requested my opinion regarding your authority to enter into an agreement with certain owners of land bordering on the Big Wind River, Wyoming, by the terms of which agreement the common boundary lines of all lots or parcels of land adjoining the river in Secs. 21, 22, 27, and 28, T. 3 N., R. 1 W., W. R. M., would be fixed at the center of Big Wind River, as shown by the official 1890 survey map approved April 15, 1891. The side lines of such lots would be a line drawn as nearly at right angles as possible from the bank of said river to the center line thereof. Under the agreement the boundary, so fixed, would remain the boundary for all time regardless of any changes which might have taken place in the course of the river or which might occur in the future. By the agree-

ment, all parties thereto would convey so much of any present interest they might have in the lands as would be necessary to effectuate the purposes thereof.

Included in the area which would be affected by the proposed agreement are fee patented lands, allotted and tribal lands of the Shoshone Indians of the Wind River Indian Reservation, Wyoming, and lands ceded by the Shoshone Indians to the United States by the agreement dated April 21, 1904, ratified March 3, 1905 (33 Stat. 1016), on the latter of which there are certain outstanding oil and gas leases issued under the authority of the act of Congress approved August 21, 1916 (39 Stat. 519), entitled "An Act to authorize the Secretary of the Interior to lease, for production of oil and gas, ceded lands of the Shoshone or Wind River Indian Reservation in the State of Wyoming."

The agreement was suggested by the Superior Oil Company and the British American Oil Producing Company, which companies are lessees of a major portion of the land adjoining the river in the above sections. Oil production in the Pilot Butte field, of which the land in question is a part, has declined and the companies desire to make a deep test of the area. The companies will not proceed with the test until they are satisfied as to the boundaries of the lots adjoining Big Wind River on which they hold leases. The companies have expressed the view that because of the lack of definite information as to where title to a portion of these lands lies, the practical solution of the problem is an agreement such as here proposed. Because title to that portion of the land involved which is allotted, tribal, and ceded is held by the United States for the benefit of the individual Indians or the tribe, the companies desire that you, as the representative of the United States under whose jurisdiction matters relating to Indian affairs have been placed, be a party to the proposed agreement.

Before discussing your authority to enter into such an agreement, I shall set out briefly the circumstances which brought about the existing uncertainty regarding the boundary lines in question.

By treaty with the Shoshone (Eastern Band) the Bannock Tribes of Indians dated July 3, 1868, and ratified on February 16, 1869 (15 Stat. 673), the United States agreed that the following land:

* * * commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie rivers; thence along the crest of said divide and the summit of Wind River mountains to the longitude of North Fork of Wind river; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl creek and along middle of channel of Owl creek to place of beginning, * * *

should be set apart for the absolute and undisturbed use and occupation of the Shoshone Indians. The Big Wind River flows diagonally

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across the territory so set apart by this treaty. The lands in the township in question were originally surveyed in 1890, and while meander lines were run along the shores of the Big Wind River, certain islands which apparently existed in the river at that time were not surveyed.

The State of Wyoming, in which the lands in question are located, was admitted to the Union in the year 1890. The Constitution of Wyoming contains the following provision relating to public lands:

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; * * *. [Art. XXI, sec. 26.]

At that time all lands on both sides of the river in the township in question were in the exclusive possession of the Indians and remained in such exclusive possession until by the ratification of the agreement dated April 21, 1904, by the Congress on March 3, 1905, *supra*, the Indians ceded, granted, and relinquished to the United States all their right, title, and interest in all the lands embraced within the reservation except the land within and bounded by the following described lines:

* * * Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one, township two south, range one west; thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning: * * *

In consideration of this cession, the United States agreed to dispose of the ceded land for the benefit of the Indians under the provisions of the homestead, town site, coal and mineral land laws of the United States or by sale for cash and in accordance with particular provisions for the disposition thereof set out in the agreement and act of ratification. No provision was made in the agreement for a survey of the lands ceded. However, section 3 of the act of ratification appropriated \$35,000, which sum was to be reimbursed from the proceeds of the sale of said land,

* * * for the survey and field and office examination of the unsurveyed portion of the ceded lands, and the survey and marking of the outboundaries of the diminished reservation, where the same is not a natural water boundary; * * *. [P. 1021.]

On June 4, 1906, an allotment schedule was approved for certain lands in Sec. 22 of the above township, within the ceded portion of the reservation, and on April 29, 1907, an allotment schedule was approved covering lands in Secs. 21, 27, and 28 of the township, within the diminished portion of the reservation. The first schedule was approved in accordance with the agreement ratified by the Congress on March 3, 1905, and the second schedule was approved pursuant to the act of Congress dated February 8, 1887 (24 Stat. 388), referred to as the General Allotment Act. These allotments were all based on the 1890 survey.

In 1916, as a result of an application for an oil and gas lease on certain islands within the Big Wind River in the sections which would be affected by the proposed agreement, the Department caused an investigation to be made of the character of these islands in order to determine whether or not title thereto was vested in the tribe or in the owners of allotted and patented lands along the banks of the river. It was determined by this investigation that the islands were permanent bodies of land which were in existence at the time of the 1890 survey, although unsurveyed at that time.

On October 25, 1916, the Department determined that the mid-channel of the river, which is the dividing line between the ceded land and the diminished reservation, lay to the north of the islands and that, therefore, the islands were within the diminished reservation. The Department decided further that title to the islands was vested in the tribe rather than in the riparian owners of the land on the adjoining bank of the river. This latter determination was based on the fact that the islands were not within the meander lines of the 1890 survey and the conclusion was reached that at the time allotments were made covering the land on the bank of the river, it was the intention of the Government that the allotments terminate at the meander lines. Support for this decision was found in the fact that when the allotments on the bank of the river were made the acreage included in each allotment was specified, such acreage being figured to the meander lines. As a result of this determination the islands were leased as tribal property for a period of 10 years. The lease expired by its own terms in 1926, and the Department thereafter refused to approve leases of the islands, basing its refusal on the condition of the oil and gas industry at that time and upon the conservation policy of the Department. Prior to this refusal, the General Land Office had caused a field examination to be made of the islands covered by

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the above lease, and the official plat of the islands was approved by the General Land Office on February 15, 1928.

In January 1930 the Department was informed that the State of Wyoming had issued an oil lease on a portion of the bed of Big Wind River which runs through the sections now under consideration. This lease covered the bed of the river adjacent to certain unrestricted land, certain restricted allotments, tribal lands, and vacant ceded lands, the latter of which were subject to lease for oil and gas mining purposes by the Secretary of the Interior under the authority of the act of August 21, 1916, *supra*. In order to determine what action should be taken in connection with this lease, the General Land Office was requested for an opinion as to the navigability of the river, and on February 10, 1930, that office stated that in the opinion of the engineer who had made the last survey of the islands, the river was nonnavigable at that point. The General Land Office was careful to point out, however, that the question of navigability was one of fact and that such a question was not within its province to determine. The matter was then referred to the Department of Justice with the request that appropriate action be taken to cancel the parts of the lease covering lands under the jurisdiction of this Department and to clear title to the lands covered thereby. Prior to the institution of any legal proceedings to accomplish these purposes, the lease in question expired by its own terms, and since no other lease issued by the State was outstanding at that time, no further action was taken in the matter by the Department of Justice.

Subsequently, the State of Wyoming issued other oil and gas leases covering the bed of the river, on the ground that the river is navigable. The District Counsel for the Irrigation Service of the Office of Indian Affairs states that one such lease, issued in 1938, involving lands in the sections under discussion was cancelled by the State because it did not wish to become involved in litigation with the owners of adjoining lands. On June 21, 1940, the Department, in a letter addressed to the Superintendent of the Wind River Agency, stated:

The information tends to indicate that the river at this point is non-navigable. This is a question of fact. The evidence at hand is believed to justify this Department in treating the river as non-navigable, but if the question should ever be brought before the courts it must be recognized that any holding by this Department would not be binding upon the courts.

Aside from the question of your authority to enter into an agreement arbitrarily fixing the boundary of the lots in question, certain other questions arise out of the foregoing statement of facts. I shall discuss these questions in the order in which they are presented by the record.

First: Does the State of Wyoming have any interest in the bed of the Big Wind River at the point in question?

The answer to this question may depend upon (a) whether or not the particular part of the river here in question was navigable when Wyoming was admitted into the Union; (b) upon the power of the Congress to grant away the bed of a navigable stream prior to such admission and while the land is still held in the status of a territory; and (c) upon whether or not, if title was retained by the United States at such admission, such title has been lost through any acts of the United States or the tribe.

(a) It is well settled that title to the beds of all rivers navigable at the time of the admission of a State into the Union passes to the State upon its admission, while title to the beds of nonnavigable rivers remains in the United States, *United States v. State of Utah*, 283 U. S. 64. The companies proposing the agreement to settle the boundary dispute took the question of the navigability of the river up with the State officials and they have submitted an opinion from the Attorney General of Wyoming dated April 25, 1940, in which he stated that the bed of the Big Wind River would be the property of the State of Wyoming provided the river was navigable at the time Wyoming was admitted into the Union. He also expressed the opinion that the river was not navigable at that time and that, therefore, title to the river bed remained in the United States.

While the Department has already taken the position that the river is nonnavigable and the State of Wyoming is apparently not disposed at this time to assert any claim to the bed thereof, it should be pointed out that the opinions of neither the Department nor the Attorney General of the State of Wyoming have any binding effect upon the question and if at any time a question should be raised as to whether or not title to the bed of the river passed to the State of Wyoming upon her admission into the Union or remained in the United States the question would be cognizable in the Federal courts. See *Brewer-Elliott Oil and Gas Company et al. v. United States et al.*, 260 U. S. 77; and *United States v. State of Utah*, *supra*. If such a controversy arose, any agreement such as here proposed would be null and void in so far as it related to any interests which the State of Wyoming might be determined to have in the bed of the river.

(b) That the Congress has the power to make grants of lands below high water mark of navigable waters in a territory of the United States to carry out certain public purposes is settled by the United States Supreme Court in the case of *Shively v. Bowlby*, 152 U. S. 1, 48, wherein it was said:

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States,

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or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

See also *Brewer-Elliott Oil and Gas Company et al. v. United States et al.*, *supra*.

In the case of the Shoshone Indians, the land on both sides of the river was set apart by treaty for their use and occupancy long prior to the date of the admission of the State of Wyoming into the Union. As the United States then owned the bed of the river, a reasonable construction of the treaty would require that the river, whether navigable or not, be considered as included within the reservation. *Donnelly v. United States*, 228 U. S. 243.

(c) Assuming title to have been retained by the United States in 1890 irrespective of the navigability of the river, the navigability or nonnavigability of the river may nevertheless be important in determining the rights of the State. If the river were nonnavigable in 1890, no subsequent action taken by either the United States or the tribe short of a grant of the riparian land in question could vest title to the river bed in the State. If the river were navigable in 1890 but title remained away from the State because the river bed had been reserved as a part of the Indian reservation, the question might well arise whether such reservation of the river bed title was intended to be effective only during the period of Indian ownership so that the State's title might attach as upland disposals were made pursuant to the cession in 1904 of the Indian title to the United States.

Second: Is the survey made in 1890 the proper basis for determining the boundary between the lands ceded to the United States and those retained by the tribe under the agreement of 1904 as ratified in 1905?

The river was not surveyed at the time of the ratification of the agreement but certain subsequent surveys made by the Department tend to establish the fact that between the years 1890 and 1905 certain avulsive changes in the bed of the river took place and that the survey may have been erroneous. The usual rule of law is that when the course of a river which is the boundary between parcels of land changes gradually and imperceptibly, the river in its changed course remains the boundary and owners of the land on the banks thereof benefit thereby as alluvial formations are deposited on their land. Likewise, owners of the land adjacent to a river lose title to any part of their land which may be washed away by the same means which may add to their territory. *Nebraska v. Iowa*, 143 U. S. 359. Further, where a stream which is a boundary, from any cause, suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that boundary remains as it was, in the center of the old channel.

These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the old channel.

* * * * *
 * * * The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream [*Nebraska v. Iowa*, pp. 361 and 370; see also the cases cited therein].

Can it be assumed that the Congress in ratifying the cession and in providing for a survey and marking of the boundaries other than natural water boundaries and by not providing for a survey of the lands bounded by water, intended that a survey made 15 years prior thereto be used in marking the natural water boundary, thus depriving both parties to the agreement of any benefits which may have accrued to them between the date of the survey and the ratification?

Third: As the disposals of land by allotment or otherwise were based on the 1890 survey, a serious question arises as to the acreage conveyed by such disposals in view of the changes which had already taken place or which have thereafter taken place in the course of the river. See *Oklahoma v. Texas*, 258 U. S. 574, 597.

Fourth: Did the Department err in determining that certain islands in the river, which subsequent surveys of the Department show to have been in existence in 1890, were within the diminished portion of the reservation and therefore tribal lands? If it be established as a fact that these islands lay north of the midchannel of the river in 1905, were they not, then, included in the cession?

While the answers to the above questions may not be necessary to a determination of the question as to your authority to enter into the proposed agreement, answers to some of them would clearly be necessary before you could give intelligent consideration to the agreement. The companies proposing the agreement have not submitted, and I do not find in the record, any facts upon which you could determine how such an agreement would affect the interests of any individual Indians, the tribe, or the United States. In other words, you do not know how much land would be gained or lost by reason of the agreement, or the value thereof.

Turning to the question presented, there are certain statutory limitations which, in my opinion, specifically prohibit your entering into the proposed agreement.

The first of these is found in the act of June 12, 1906 (34 Stat. 255, 41 U. S. C. sec. 11):

* * * No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence,

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forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year: * * *

Agreements for the development of oil reserves on the public domain with provision for exchange of royalties for fuel depots and pipe lines and agreements for the exchange of royalty oil for fuel oil and storage facilities have been determined to be contracts falling within the prohibition of this section. *Mammoth Oil Co. et al. v. United States*, 275 U. S. 13, and *Pan-American Petroleum & Transport Co. et al. v. United States*, 273 U. S. 456. See also 15 Op. Atty. Gen. 236; 19 Op. Atty. Gen. 650; and *Chase v. United States*, 44 Fed. 732, *aff'd* 155 U. S. 489. A contract such as here proposed, involving as it does the title to lands held in trust by the United States for Indians, falls equally within the prohibition.

A further limitation upon your authority to execute the proposed agreement is section 4 of the act of Congress approved March 3, 1927 (44 Stat. 1347, 25 U. S. C. sec. 398D), which provides:

That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior.

The words of this statute are too plain and explicit to require interpretation.

In my opinion, the true boundary as it exists today between the Indian reservation and the ceded lands, some of which ceded lands having been allotted to individual Indians, some having been fee patented and some apparently still being held by the United States and leased under the authority of the 1916 act, *supra*, is the midchannel of the Big Wind River as fixed by the agreement of cession, as such midchannel may have changed by a slow and imperceptible process.

While I am not in a position to determine, and it is not my function to do so, what changes may have occurred in the line of the midchannel of the Big Wind River between 1905 and the present time or by what process such changes took place, certainly the center line of the river as it existed in 1890 is not the boundary of the reservation as it exists today. As the agreement would effect a change in the boundary of the reservation, I am of the opinion that you are without authority to enter into such an agreement in view of the clear prohibition of the act of March 3, 1927, *supra*.

Aside from this specific limitation, it is my opinion that when Congress has itself determined where the boundary of an Indian reservation shall be, there is no residue of authority left in the Secretary of the Interior to alter that determination.

Further, the agreement might have the effect of disposing of tribal, allotted and ceded lands. While you may approve conveyances of

land allotted to individual Indians of such tribes as have not accepted the provisions of the act of Congress approved June 18, 1934 (48 Stat. 984), commonly referred to as the Indian Reorganization Act (and the Indians of the Wind River Agency have not accepted the provisions of this act), I am aware of no general statutory authority vested in you to dispose of Indian tribal lands. As the agreement might conceivably work out to deprive the tribe of lands vested in it by reasons of its inherent right to accreted land, you would be unauthorized to make such a disposition of that land in the absence of express statutory authority. Further, your authority to deal with that part of the land covered by the proposed agreement which represents undisposed of ceded land is limited by the act of 1905, *supra*, ratifying the cession, and by the act of 1916, *supra*, neither of which permits such a disposition of lands as proposed in the agreement submitted.

In conclusion, I am of the opinion that you have not been authorized by law to enter into the proposed agreement.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

STATE of WASHINGTON

Decided December 14, 1940

NAVIGABLE STREAM—BOUNDARY.

The question of the boundary between the land below and above ordinary high water mark in a navigable stream is necessarily a federal question. *Boraw, Ltd. v. Los Angeles*, 296 U. S. 10, cited and applied.

SUPREMACY OF FEDERAL LAW—STATE RESTRICTIONS.

The laws of the United States alone control the disposition of title to its lands and the States are powerless to place any limitations or restrictions on that control. *United States v. Oregon*, 295 U. S. 1, cited and applied.

BOUNDARY—ORDINARY HIGH WATER MARK.

The line of ordinary high water mark in a navigable stream does not mean the height reached by unusual floods, nor by great annual rises in the stream, but the line which ordinary high water usually reaches. *Cedar Rapids v. Marshall*, 203 N. W. 932; *Welch v. Browning*, 87 N. W. 430, cited and applied.

SURVEY—ISLANDS IN NAVIGABLE STREAM.

The acceptance of the survey of islands in a navigable stream does not preclude the State or its grantees from showing in an appropriate judicial proceeding that the survey was inaccurate and embraced land which the United States had no power over. *Boraw, Ltd. v. Los Angeles*, 296 U. S. 10, cited and applied.

December 14, 1946

CHAPMAN, *Assistant Secretary:*

The State of Washington through its Commissioner, Department of Public Lands, has appealed from a decision of the Commissioner of the General Land Office rendered May 20, 1940, which dismissed its protest against the survey of certain islands in the Columbia River in T. 2 N., Rs. 13, 14, and 15 E., Willamette meridian. The record shows the surveys were made from September 5 to October 3, 1939, inclusive. The plats of survey were accepted April 20, 1940. According to the plats, seven islands varying in area from a small fraction of an acre to approximately 20 acres principally in Sec. 19, T. 2 N., R. 15 E., and two islands a little less than a half acre each in Sec. 36, T. 2 N., R. 13 E., are all in the State of Washington, the remainder of those surveyed being in Oregon.

It is reported that the islands are situated in the Columbia River gorge and are surrounded by dangerous and turbulent waters; that the banks of the islands are sheer basaltic bluffs falling precipitously into the water; that the flood stage usually occurs in the month of June. Information obtained from the War Department is to the effect that the islands are the accustomed and ancient fishing places of the Indians, and the surveyor secured a number of affidavits from aged Indians attesting to the fact that the islands have been in existence in the same form in all the years of their memory which appears to extend far back of November 11, 1889, the date of the admission of Washington to the Union, and earlier than the original surveys of 1859 to 1861 of the townships in question, which did not include them. The assumption is made by the district cadastral engineer that as the early appropriations and authorizations for public-land surveys in the territory of Oregon restricted subdivisional surveys to lands subject to and adaptable for agriculture, and the surveyors at that time had probably no means of reaching them with safety, the islands were omitted from the survey.

In the instructions for the survey of the islands, the surveyor was directed to determine the existence of the islands above the ordinary high water mark. The instructions were accompanied by a hydrograph prepared by the United States Engineer's Office of the War Department showing the daily discharge of the Columbia River in second-foot at Cascade Locks, Oregon, covering a period from October 1, 1878, to December 1936, from which the engineers assumed ordinary high water mark to be the surface elevation above mean sea level, when the river is discharging at the rate of 400,000 second-feet, at which time the surface elevation of the mean high water at the upper end of the group of islands in "Three Mile Rapids" has been found

to be 97.5 feet and at the lower end 78 feet above sea level, and that the islands are from 110 to 130 feet above mean sea level.

The reasons of the Commissioner for the dismissal of the protest are as follows:

Islands in navigable waters may be considered public land of the United States if they existed above ordinary high water mark in the year the State in which they are situated was admitted into the Union, and in non-navigable waters if they were in existence at the date of survey and disposition of the adjacent shore lands. However, if they have formed since the above mentioned dates, they are not regarded as public land, and the question of ownership is controlled by the laws of the State in which they are situated.

The returns of the survey of the islands in question have now been received and examined in this office, and the Engineer, after an exhaustive investigation, finds that the islands are principally hard basaltic rock with shore lines that are vertical cliffs ranging up to 30 feet in height above the water; that the islands are above mean high water mark; that they have existed for many years in their present form, and that they existed in 1889, when the State of Washington was admitted into the Union.

In the letter of the Commissioner of Public Lands for the State of Washington of June 7, 1940, which has been treated as an appeal, it is stated:

We sent our field examiners to make a preliminary report and according to that report the lands, which are proposed to be surveyed, are under water at the time of high water in the Columbia River. According to the laws of this State, the State of Washington claims title to the beds and shores of all navigable waters lying between the line of ordinary high water and the line of navigation. Our courts have interpreted this to mean that in any navigable water course if there are islands that are covered by water, they are actually shore lands of the river and not uplands.

A protest was entered in this case, and the Acting Commissioner of the General Land Office has now denied our protest subject to the right of appeal. We are therefore requesting that further consideration be given this matter inasmuch as our own reports indicate that the area proposed to be surveyed consists of islands in the river that are at certain times of the year under water and come under the provisions of the state ownership as part of the bed of the river.

It may be observed in the first place that the Department has no reason to question the claim of the State to the title to the beds and shores of all navigable waters of the State below the ordinary high-water mark. The surveys of the islands in question were made under instructions that recognized that principle as a criterion for determining what was or what was not unsurveyed public lands, and with no purpose to assert any right contradictory to Article XVII, section 1 of the constitution of the State, which provides that:

The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including

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the line of ordinary high water within the banks of all navigable rivers and lakes: * * *

The Department is aware of the decisions of the Supreme Court of the State declaring in substance that title to lands in navigable waters up to the line of ordinary high-water mark belong to the State. See *Van Sieten v. Muir*, 89 Pac. 188; *Gifford v. Horton*, 103 Pac. 988; *Grays Harbor Boom Co. v. Lownsdale*, 102 Pac. 1041; *State v. Sturtevant*, 135 Pac. 1035. But it is aware of no decision by that court, and none is cited, which holds that islands in a navigable river "that are at certain times of the year under water" are part of the bed of the river and are State owned. If there be such a decision or one of similar import, it could not be considered as binding on the Department.

The question of the boundary between the land above and below ordinary high-water mark in a navigable stream, that above being the property of the United States and that below being the property of the State, is necessarily a Federal question; it involves the essential basis of a right asserted under Federal law. See *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, 22. The laws of the United States alone control the disposition of title to its lands and the States are powerless to place any limitations or restrictions on that control. *United States v. Oregon*, and cases there cited, 295 U. S. 1, 27, 28.

As to what is meant by the "ordinary high water mark," no clear definition is encountered in the decisions of the Supreme Court of Washington. In construing section 1 of article XVII, *supra*, the Court said in *Van Sieten v. Muir, supra*, that it includes all land lying between the boundary line of the upland and low water and may include the land lying between such boundary line and water of sufficient depth for ordinary navigation. This decision is not illuminating as the question here in fact is what is the line of the upland.

In *Pacific Milling & Elevator Co. v. City of Portland*, 65 Oreg. 349, 133 Pac. 72, it was said that:

The line of ordinary high water is the line to which the water rises in the seasons of ordinary high water or the line at which the presence of water is continued for such length of time as to mark upon the soil and vegetation a distinct character. * * *

In some jurisdictions it is held that the State owns the bed of the river to the ordinary high water mark and this mark is to be found by ascertaining where the presence and action of the water are so usual and long-continued in ordinary years as to mark upon the soil a character distinct from that of the banks in respect to the vegetation and nature of the soil (17 Ann. Cases, 149, 150). It is not the line marked by unusual floods but the line which ordinary high water usually reaches. *City of Cedar Rapids v. Marshall*, 199 Iowa 1262,

203 N. W. 932. The line of ordinary high water does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river which cover in places lands valuable for agricultural purposes. *Welch v. Browning*, 115 Iowa 690, 87 N. W. 430.

Applying the definitions of the words "ordinary high water" as interpreted by the courts, the statements of the Commissioner of Public Lands as to what his investigators ascertained are insufficient to disturb or cause any inquiry as to the correctness and propriety of the survey. The inference naturally arising from the silence of the original notes and plats that the islands were not there at the time of survey is refuted by the reports of their stable formation, elevation, size and appearance and prima facie demonstrates that the islands were in their present condition when Washington became a State. See *Moss v. Ramey*, 239 U. S. 538, 546.

Even if the State had made any contention implying that the Department had caused to be surveyed land below the ordinary high water mark, in view of the survey returns showing that the elevation of the islands is above high water, the contention should be buttressed by such factual data which, if established, would overcome the returns of the cadastral engineer. The authority of the Land Department to make surveys extends only to public lands. The acceptance of the survey would not preclude the State or its grantees from showing in an appropriate judicial proceeding that the survey was inaccurate and embraced land which the United States had no power over. *Borax, Ltd. v. Los Angeles*, *supra* (pp. 16-18).

For the reasons stated the decision appealed from is affirmed without prejudice to the right of the State to make such further showing in writing as will tend to prove that the islands it claims were below the line of ordinary high water at the date of the admission of the State into the Union. Upon failure of the State to take any action within 60 days from the rendition of this decision, it will be presumed that the State desires no longer to contest the survey.

Affirmed.

L. S. MANSFIELD ET AL.

Decided January 24, 1941

PUBLIC LANDS—EQUITABLE INTEREST.

Requirement of an oil and gas waiver where, due to mistake of 1.5 percent in computing the sale price of land, patent has not issued after 110 years from the date of the issuance of the cash receipt.

An entryman who has done everything which is necessary to entitle him to receive a patent for public lands has, even before patent is actually issued by the General Land Office, a complete equitable estate in the land which he can sell and convey, mortgage or lease.

January 24, 1941

MISTAKE OF GOVERNMENT OFFICIALS.

A mistake made by Government officials of approximately 1.5 in computing the acreage and the sale price of a specific tract of land is not of such a material nature as to vitiate the contract and does not except the transaction from the general rule that equitable title passes to the purchaser of public land upon the issuance and delivery to him of the cash certificate.

AVOIDANCE OF CONTRACT FOR SALE OF LAND.

A contract for the sale of a specific tract of land cannot be avoided where it is possible by compensation to the party injured by the mistake to put him in as good a position as if the transaction had been what he supposed it to be, and such compensation is given.

BINDING FORCE OF CONTRACTS UPON THE GOVERNMENT.

The United States is as much bound by its contracts as are individuals.

MISTAKES OR LACHES OF GOVERNMENT OFFICERS.

The general rule that the Government is not chargeable with the mistakes or laches of its officers cannot be expanded to the point of allowing the Government, after a lapse of 110 years, to alter or avoid a contract for the sale of a specific tract of public land which it could not have altered or avoided if a timely disclosure of the error had been made to the vendees.

NO OIL AND GAS WAIVER AFTER PASSING OF EQUITABLE TITLE.

An oil and gas waiver cannot be required where the United States has been divested of its equitable estate in the land.

CHAPMAN, *Assistant Secretary*:

On November 6, 1939, L. S. Mansfield, Mrs. Lillian S. Mansfield, and J. R. Williams, by their attorney, filed an application for the issuance of patent for the E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 9, T. 9 N., R. 3 W., Choctaw meridian, Mississippi. They alleged that they were the owners of the land and had been in possession thereof under claim of ownership for many years; that they had never been advised that there was any question of title acquired from the United States, having relied on the records of Yazoo County, Miss., which indicated that said land had been properly entered on September 30, 1830, by Aron Humphrey and William Roundtree.

In a letter accompanying the application the attorney stated that the records of the General Land Office showed that Cash Entry No. 5330, Mount Salus, Miss., was suspended upon a question of area, as the certificate of purchase indicated the area as 78.50 acres, while the plat of survey showed 79.75 acres; that it also appeared that the said certificate of purchase was returned to the local land office for correction, but that there was no evidence that it had ever again been received in the General Land Office or that the purchasers had ever been called upon for additional payment. The amount of \$1.58 was tendered in payment of the apparent excess of 1.25 acres at the rate of \$1.25 per acre. Receipt No. 1794603 was issued November 7, 1939.

In a letter addressed to the attorney on January 29, 1940, the Commissioner of the General Land Office, after setting forth the facts substantially as hereinbefore recited, stated:

It is, therefore, the belief of this office that patent may be issued on the entry. However, as the original entrymen failed to pay the entire purchase price of the lands, they did not acquire any title, either equitable or legal. The land comes within the purview of Departmental Order No. 349 of May 14, 1928. The Department has held that in such cases if the Geological Survey reports that the lands are known to be valuable, or have prospective value, for oil or gas, or any other minerals named in the act of July 17, 1914, the claimant would be required to waive rights to such minerals (G. L. O. 05579).

In view of the foregoing, by letter of even date the Geological Survey has been requested to make the required report. As soon as the report is received, you will be advised of same and if necessary the applicants will then be required to file the necessary waiver.

By decision of April 1, 1940, the Commissioner called upon the applicants for their "consent to a reservation to the Government of the oil and gas content of the land to the Government or to show cause, if any, why they should not consent to the mineral reservation," under penalty of suffering rejection of the application for failure to comply. The Commissioner stated that the Geological Survey had on February 23, 1940, reported that the land in question was in an area in which valuable deposits of oil or gas might occur under structural conditions favorable to their accumulation and the land was therefore reported as valuable for oil and gas within the meaning of the act of July 17, 1914 (38 Stat. 509).

The receipt issued to Aron Humphrey and William Roundtree on September 3, 1830, recites that it is for the sum of \$98.12, "being in full for E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section No. 9 Township No. 9 of Range No. 3 West, containing 78.50 acres, at the rate of \$1.25 per acre." The records of the General Land Office indicate that Register's Certificate No. 5330 was issued at the same time for the land and that this was returned from the General Land Office to the register of the local land office at Mount Salus for correction of acreage from 78.50 to 79.75 acres. It does not appear that anything was said or done about payment of any additional sum of money or that the certificate was ever sent back to the General Land Office. It does not appear that the purchasers or any successor in interest were ever notified that the full purchase price had not been paid or that there was any defect in the register's certificate which prevented the issuance of patent.

Presumptively, at least, equitable title passed when the register issued and delivered to the purchasers the cash certificate. The law is stated to be that one who has done everything which is necessary to entitle him to receive a patent for public land has, even before patent is actually issued by the land department, a complete equitable estate in the land which he can sell and convey, mortgage, or lease. 50 C. J. Public Lands, sec. 568; *Wirth v. Branson*, 98 U. S. 118, 121; *Benson*

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Mining Co. v. Alta Mining Co., 145 U. S. 428, 432; *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228, 237. In the present case it is not believed that the mistake made by Government officials of 1.25 acres, resulting in a deficiency of \$1.58 in the purchase price paid, a mistake of approximately 1.5 percent in computation, is of such a material nature as to except this case from the general rule that the equitable title passes to the purchaser of public land upon the issuance and delivery to him of the cash certificate. A contract for the sale of a specific tract of land cannot be avoided

where it is possible by compensation to the party injured by the mistake to put him in as good a position as if the transaction had been what he supposed it to be, and such compensation is given. Restatement of the Law of Contracts, sec. 502 (c) and Illustration No. 10 thereunder.

And it has been held that

The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. Sinking-Fund Cases, 99 U. S. 700, 719. See also *Lynch v. United States*, 292 U. S. 571.

Had the parties to the sale in question been private individuals before a court of equity in 1830, the court would undoubtedly have held the contract valid and that therefore the equitable title to the land had passed to the purchaser, and upon the tender of the \$1.58 deficiency in the purchase price it would have decreed specific performance. Cf. Pomeroy's Eq. Jur., secs. 372, 2167, 4th ed. By the same token, in 1830 the Government could require nothing more than the payment of its \$1.58 lien for the deficiency in the purchase price as a prerequisite to the issuance of patent. Nothing has happened in the interim to enlarge the Government's equities or legal rights in the premises. Surely the general rule that the Government is not chargeable with the mistakes or laches of its officers cannot be expanded to the point of allowing the Government, after a lapse of 110 years, to alter or avoid a contract for the sale of a specific tract of public land which it could not have altered or avoided if a timely disclosure of the error had been made to the vendees.

It is my opinion, therefore, that equitable title vested in the purchasers upon the delivery to them of the cash certificate in 1830. Consequently, the instructions of December 11, 1934 (55 I. D. 99), cited in the Commissioner's decision as authority for the requirement of an oil and gas waiver, have no application in this case because the premise therein was that the United States had not been divested of its equitable title. Cf. *Ruth Sugar Company, Inc.* (A. 22285, unpublished), decided June 26, 1940.

The decision appealed from is reversed.

Reversed.

RIGHT OF THE UNITED STATES TO MAINTAIN SUIT TO
QUIET TITLE

INSTRUCTIONS

February 6, 1941.

FARMERS BANCO—ACT OF MAY 6, 1937.

The Farmers Banco, comprising 583.4 acres of land, was cut from Mexico by a flood of the Colorado River in 1905. In the next year the Bureau of Reclamation took possession of the banco and commenced improvements thereon for the benefit of the Indians on the theory that the lands belonged to the United States by accretion. Expenditures were made to the extent of \$60,000 and entries were allowed on the land under the homestead laws. Under the provisions of conventions between the United States and Mexico, the International Boundary Commission on September 18, 1926, decided to make an order for the elimination of the banco to the United States on the ground it was cut from Mexico by avulsion. The order was issued October 26, 1927.

Between September 18, 1926 and October 26, 1927, the Mexican government by an instrument dated October 22, 1927 granted the land in the banco to one, Alvarez. By letter of July 29, 1930, the Attorney General advised the Secretary of the Interior not to recognize the title of Alvarez. There had arisen a difference of opinion between the Department of State and the Attorney General as to whether the Republic of Mexico or the United States was the sovereign proprietor of the land at the time the former made its grant to Alvarez, but it was agreed that the question was one for the determination of the courts. At the instance of the State Department the Congress passed the act of May 6, 1937 (50 Stat. 131). By this act payment was authorized to the Government of Mexico of \$20,000, of which \$15,000 was to be paid to Alvarez and \$5,000 to the estate or the heirs of Fishburn, an assignee of Alvarez in full settlement of their interests in the Farmers Banco.

The Government of Mexico declined to give the assurances provided in the act and furnished evidence that on April 28, 1937, Alvarez had transferred all the rights pertaining to him under his claim against the United States to one, Diaz. Requests were made by certain holders of farm units under the reclamation acts for patent.

Held: (1) That the issuance of a patent would not be justified without a determination by a court of competent jurisdiction that Alvarez had no rights in the land. (2) That the act of May 6, 1937 would not affect the right of the United States to maintain a suit to remove a cloud on its title created by the grant to Alvarez. (3) That a suit by the United States to quiet title was maintainable on two theories, one being, that it acquired sovereignty over the banco when it was cut from Mexico by avulsion in 1905 by virtue of the decision of the International Boundary Commission under the treaties and conventions under which it acted, and the grant to Alvarez was therefore invalid, and the other being, that if the title of Alvarez was good when made, the United States had now a valid title by adverse possession under applicable statutes of limitations.

CHAPMAN, *Assistant Secretary:*

I have considered your [Commissioner of the General Land Office] letter of June 10, 1940, referring to the letters of Senator Hayden from

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Arizona concerning the reclamation homestead of Henry H. McVaughan, Tucson 02822, assigned to Melvin Crisp, described as Farm Unit "C", embracing SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 30, T. 9 S., R. 24 W., G. & S. R. M., and requesting instructions as to the suggestions of Senator Hayden that patent issue for the homestead or that the United States institute suit in the District Court of the United States for the District of Arizona to quiet the title of the United States to the lands within the Farmers Banco and upon the rendition of a decree in favor of the United States that patents be issued upon the McVaughan and other entries embracing lands in the banco.

It is not thought necessary to attempt a full recital of all material facts that have a bearing on the questions presented. The contents of your letter and the documents and papers therein referred to, when supplemented by the information contained in House Report No. 167 accompanying H. R. 2917, 75th Congress, 1st session, appear to supply all data necessary for a proper conclusion in the matter.

In the first place, it may be said that enough reason appears for some modification of the departmental instructions of October 30, 1929, directing that no further steps be taken looking to disposals of the land within the Farmers Banco until the Mexican claims have been settled. It seems that the mode of settlement proposed by the act of May 6, 1937 (50 Stat. 131), cannot now be effectuated as the Government of Mexico declined to give the assurances provided in the act, as one of the conditions for the settlement; that General Alvarez had not transferred his claim except as specified in the act, and that government has furnished evidence that Alvarez on April 28, 1937, had transferred by deed all the rights pertaining to him under the claim against the United States to Licenciado Jeronimo Diaz. That government has gone further and advised the Secretary of State:

that in view of the fact that the justice and legal basis of this claim has been recognized and that the sum necessary to satisfy it has been set aside, the Government of Mexico considers that its protective intervention in this case has terminated, and leaves the individuals interested in it, General Alvarez or his assignees, absolutely free to claim their rights in the way that they see fit, and the foregoing statement neither can nor should be interpreted as prejudging the validity of the private rights of these gentlemen.

See letter of the Secretary of State of February 28, 1940.

The question whether, by the act of May 6, 1937, the United States recognized the justice and legal basis of the claim of General Alvarez will be considered hereinafter, but whatever may have been the views that controlled the Mexican Government in the position it took, it is clear that no claim for payment under the act may be legally made by the beneficiaries named therein and that they must resort to the courts to enforce their alleged rights in the land. As neither Alvarez

nor his assigns have instituted any suit asserting their alleged title, the question arises as to what action would be appropriate by the Government in its interest and in the interests of those claiming under it.

As to the request of Senator Hayden to issue a patent for the farm unit, serious doubts arise as to the propriety of such action and, furthermore, the issuance of such a patent would be inconclusive as to the validity of the title of the United States to the Farmers Banco.

The fact that Georgie Colman claiming title under a patent from the United States to adjoining SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 30, involving land in the Farmers Banco, obtained from the Superior Court of the State of Arizona in and for Yuma County, a decree against General Alvarez by default quieting her title to said tract, would give no assurance that a like patent to the McVaughnaen entry would not be assailable by a collateral attack upon the validity of the patent or that it would not be subject to the imposition of a trust in favor of claimants under the Alvarez title, as it seems from the pleadings and decree in said cause that no question as to the validity of patent or any rights of Alvarez under his deed necessarily arose or were considered.

A positive and more persuasive reason why the Department should not issue a patent at the present time to the farm unit is that the patent would import that the land was public land subject to entry and patent and that its issuance was not in contravention of Article IV of the convention of March 20, 1905 (35 Stat. 1863), which provides that:

Property of all kinds situated on the said bancos shall be inviolably respected, and its present owners, their heirs, and those who may subsequently acquire the property legally, shall enjoy as complete security with respect thereto as if it belonged to citizens of the country where it is situated.

In the letter of the State Department to the President recommending the enactment of H. R. 2917, which is incorporated in House Report No. 167 *supra*, it is stated:

When the claimant sought to obtain possession of the property in question the Secretary of the Interior requested the advice of the Attorney General and also took up the matter with this Department with a view to obtaining information regarding the basis upon which General Alvarez founds his claim of private title to the land. The Attorney General held that the Secretary of the Interior was not required to relinquish possession of the property to General Alvarez, on the assumption that sovereignty over the banco passed to the United States at the moment the avulsive cut was made. This Department, on the other hand, was of the opinion that sovereignty did not pass at least until the International Boundary Commission handed down its decision. Moreover, as the question of private title to the lands was considered to be a matter for the courts to determine, this Department suggested that the claimant exhaust his legal remedies. The Attorney General concurred in this suggestion.

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As there appears to have been a difference of opinion between the State Department and the Attorney General as to whether the Republic of Mexico or the United States was the sovereign proprietor of the land at the time the former made its grant of the land to General Alvarez, and as it was agreed this question was a matter for determination in the courts, and as the act of May 6, 1937, at least imports that the claim of Alvarez was of sufficient substance to warrant the United States to buy its peace with him, it is believed that the Department would not be justified in the issuance of a patent to the farm unit in question without a determination by a court of competent jurisdiction that Alvarez had no rights in the land.

It is, however, the view of the Department that the facts and circumstances disclosed would warrant the institution of a suit to quiet the title of the United States to the land within the banco. According to the letter of the State Department of January 4, 1937, *supra*, and data with the record substantially in accord with the facts recited in said letter, the Farmers Banco, comprising 583.4 acres, was cut from Mexico by a flood in the Colorado River in 1905. During the next year the Bureau of Reclamation took possession of the land on the theory that it was formed by accretion and, therefore, belonged to the United States and commenced various improvements for the benefit of the Indians residing thereon. The Office of Indian Affairs also expended a considerable amount in clearing and leveling and ditching to improve the land. The total expenditures for the Farmers Banco for improvements was approximately \$60,000. Certain entries were allowed under the homestead acts. At the date of said letter, and it is presumed since that time, the land was divided as follows: 415.1 acres set apart by Executive Order No. 2711, dated September 27, 1917, for the use and occupancy of the Cocopah Indians; 47.1 acres of public lands and 121.2 acres held by entryman.

The International Boundary Commission in undertaking the fixing of the boundary line with reference to small bancos segregated by changes in the river encountered difficulties in the solution of controversies under the principles of the previous conventions. A further convention was therefore signed on March 20, 1905 (35 Stat. 1863). Under this convention certain areas not exceeding 250 hectares (617.5 acres) or not having a population of over 200 souls, cut off by avulsion from either country, and other similar areas that might be formed in the future, were to be surveyed and marked with suitable monuments. Those found on the Mexican side of the river were to be eliminated to that Government while those on the opposite side were to be eliminated to the United States. However, in accordance with the provisions of Article VIII of the convention of March 1, 1889, respecting the decisions of the Boundary Commission, such decisions were con-

sidered binding only in the event that one of the governments did not disapprove them within one month reckoned from the date on which they were pronounced. After the signing of the last-mentioned convention but before the ratification thereof was exchanged, the Farmers Banco was cut from Mexico to the American side of the river. In the circumstances, the provisions of the several conventions, especially that of 1905, became applicable and a decision by the Commission was required in order to determine whether the change in fact was made by avulsion and whether the area or population of the banco was within the limits of those which it was intended should be eliminated from one government to the other. The Commission after considering the evidence regarding the change in the character of the bed of the river decided on September 18, 1926, to make an order for the elimination of the banco to the United States on the ground that it was cut from Mexico by avulsion. The order of elimination, denominated "minute No. 99" was not issued until October 26, 1927. Neither government disapproved the order. Between September 18 and October 26, 1927, the Mexican Government, by an instrument bearing date October 22, granted the land in the Farmers Banco to Alvarez.

It would seem that the question whether any title to the banco passed to Alvarez by the said grant would depend upon the fact whether Mexico was sovereign proprietor of the land at the time of the grant. As above shown, the question of sovereignty of the bancos created by avulsion was committed by the convention of 1905 to the determination of the International Boundary Commission, if not disapproved by either contracting party within one month from the date the determination was pronounced. At the time of the grant to Alvarez the question of sovereignty was *sub judica*, and I think it may reasonably be argued that the determination when made had the effect of a decision that sovereignty over the banco existed in the United States from the date of the avulsion, and whatever may have been the motives that actuated the grant to Alvarez, it would have no more efficacy than a quitclaim by the Government of Mexico. By letter of July 29, 1930, the Attorney General considered the question whether this Department should recognize the claim of Alvarez. Following a recitation of the facts, the Attorney General said:

* * * It is quite obvious from the fact of this record that the grant from the Mexican Government to Alvarez was made with the knowledge on the part of Alvarez and the Mexican Government that the Banco had been cut by avulsion in 1905 and that the Boundary Commission had heard the evidence and had informally reached the conclusion that the Banco should be eliminated from the convention of 1884. The grant was thus made and expedited with the evident purpose of anticipating the formal decision of the Commissioners and thus in effect defeating the purpose and spirit of the conventions between the United States and Mexico.

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Of course the primary question is whether under the terms of the various conventions the sovereignty to the Farmer's Banco passed at the time of the avulsion or at the time of the formal decision of the Boundary Commission. I have examined the memorandum of June 29, 1928, prepared in the office of the Solicitor of the Department of State, a copy of which was sent to the Secretary of the Interior by letter of August 13, 1928, from the Secretary of State, and also the memorandum of September 16, 1927, prepared for the Secretary of the Interior by the Acting Commissioner of Indian Affairs, and the supplemental memorandum of August 16, 1928, prepared for the Secretary of the Interior by the Acting Commissioner of Indian Affairs, all of which relate to the question just referred to. The conclusion reached by the Solicitor of the State Department and evidently communicated to the American Commissioner on the Boundary Commission was that the sovereignty over the Banco cut by avulsion did not pass until the formal decision of the Boundary Commission. I think this conclusion is open to serious difference of opinion, and very substantial arguments might be made to the contrary, but it is possible that this Government is finally committed to that construction.

Assuming that under the terms of the various conventions between the United States and Mexico on this subject the sovereignty over the Banco cut by avulsion does not pass until the decision of the Boundary Commission is announced to the effect that it was cut by avulsion, it does not follow in my opinion that the treaty with Mexico is being violated by our not recognizing the Alvarez grant. It seems to me that the Alvarez claim should be resisted diplomatically and in the courts with the utmost tenacity. It does not seem possible that these conventions ought to be construed to allow one of the Governments after having obtained knowledge of the pending decision of the Boundary Commission that it was to lose sovereignty of a Banco to hasten a grant to a private individual for the purpose of anticipating the decision and thus defeating the real purpose of the treaties, especially in this case where the Government about to acquire sovereignty of the land had in good faith had possession of it for more than 20 years and there had been expended many thousand dollars in public improvements for the benefit of occupying Indians. There is no statute that I know of which allows Alvarez to bring suit against the United States to assert his title. Some patents have been issued to individuals on parts of this Banco and it may be open to Alvarez to litigate his title in a court of the United States by bringing suit against one of the patentees. I am not prepared to advise the Department of the Interior to evacuate this property, abandon their improvements and turn the parcel over to Alvarez on the face of the record. Just how these matters are dealt with in the State Department I do not know, but the implication that has been made that the Government of the United States is violating its treaties with Mexico by refusing to recognize Alvarez' claim might be countered by the suggestion to Mexico that we do not construe these conventions as allowing one Government, after the Commission has reached an informal decision, to attempt to defeat it by making a grant before the formal decision is filed, as was done in this case. There is some rule, I believe, that after a treaty has been negotiated and signed but before ratifications have been exchanged, it is considered improper for one of the parties to do any act which would impair the full force and effect of the treaty when ratified. Possibly some principle of this kind could be invoked to apply to this case. Whether or not the adverse possession by the Federal Government and its Reclamation Bureau and the Indian wards of the Government for more than 20 years prior to the Alvarez grant would give the United States or its wards any prescriptive right against the Mexican Government or its grantee, I am not in-

formed, but I am satisfied that these conventions ought never to be construed to allow a transaction of this kind if it is possible to avoid such a construction.

I am not yet persuaded that I should advise the Secretary of the Interior to recognize Alvarez' claim. As the situation disclosed by the file seems to require some diplomatic exchanges with Mexico and the questions involved are matters of international law and construction of treaties which are peculiarly for the State Department to deal with, I am leaving the subject with the suggestions above made, with the hope that you will find solid basis for responding to the Mexican Ambassador's communications, by rejecting the contention that this transaction should be recognized as permissible.

However, as has been noticed, at the instance of the State Department the Congress passed the act of May 6, 1937. Nothing is seen in this act, when considered in the light of the facts and the reasons presented as a basis for its enactment, that impels the conclusion that thereby the claim of title by Alvarez was considered as, or admitted to be, just or legal. The recommendation that the payments be authorized to Alvarez and to the estate of Fishburn, his assignee, was not based upon any opinion that the claim was just or legal, but because there was considerable doubt and lack of agreement as to which country actually had sovereignty over this banco when the Government of Mexico granted to General Alvarez the interest therein which is now the subject of this claim * * *.

and

In view of the uncertainty regarding the interest of this Government, and in order to settle the matter and acquire undisputed title to these lands so as to protect the investment which has been made thereon by the United States and its citizens, * * *. [House Report No. 167, *supra*.]

The act of May 6, 1937, is as follows:

That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$20,000, of which amount \$15,000 is to be paid to the Government of Mexico for the account of General Higinio Alvarez in full settlement of his claim against the United States with respect to the ownership of lands on the Farmers Banco in the State of Arizona, and the remaining \$5,000 is to be paid to the executors or administrators of the estate of R. E. Fishburn, deceased, in full settlement of such interest in the said Farmers Banco or the proceeds of the settlement therefor as was acquired by virtue of a grant to R. E. Fishburn dated January 6, 1927, signed by General Alvarez, or by the assignment by General Alvarez dated December 3, 1935, in favor of Mrs. R. E. Fishburn and other heirs of said R. E. Fishburn, or by both such grant and assignment, for distribution according to law: *Provided, however,* That no payment shall be made unless and until the Secretary of State shall have received from the Government of Mexico satisfactory assurances that no transfer, other than that specified herein, has been made by General Alvarez, or by anyone acting for or under him, of any part of his right, title, or interest in or to the property comprising the Farmers Banco; until the written opinion of the Attorney General shall be had in favor of the validity of the title; and until General Alvarez has given to the United States a quitclaim deed in such form as may be deemed satisfactory to the Secretary of State, to all of his right, title, and interest in and to all of the land comprising the Farmers Banco, claimed by him under an instrument of

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grant dated October 22, 1926, signed by the Constitutional President of the United Mexican States, or otherwise.

If Congress in passing the act, did so in recognition of the validity of the title of Alvarez, and intended to make adequate provision for its acquisition, it cannot be easily explained why it was that the payments were to be made on condition that Alvarez had made no transfer of the title, and the question of the validity of the title was to be passed upon by the Attorney General, and the sufficiency of the transfer by Alvarez was to be passed upon by the Secretary of State. For if the deed from Alvarez was regarded as essential to the passage of title, it is difficult to understand why the question whether the deed was satisfactory should be left solely to the determination of the Secretary of State.

It is believed that the act of May 6, 1937, may be properly regarded as no more than an offer to purchase an outstanding claim of title to the banco to avoid controversy with a foreign power and with its transferee. By the weight of authority it has been held that the purchase of an outstanding title by one in adverse possession of land does not interrupt the continuity of his possession. (1 Am. Jur., Adverse Possession, sec. 184.) A person may well deny the validity of an adverse claim or title and choose to buy his peace at a small price rather than be at great expense and trouble in litigating it, as acts of this character admit only that the occupant deems it worth while to get rid of the outstanding title and unite it with one which he has been holding (*id.* sec. 184). The test is whether it is a purchase of immunity from litigation (Tiffany, *Real Property*, sec. 1164).

In this view it is not believed that the act of May 6, 1937, would affect the right of the United States to maintain a suit to remove the cloud created by the grant to Alvarez on the title of the United States to the banco.

But regardless of the question whether the title of Alvarez was valid or void in the first place, and assuming that it was valid, it appears that since he acquired it, the United States, through its officers and agents and as to part by its vendees, have been in open, exclusive, notorious, continuous and hostile possession of the land since the grant was made to Alvarez, whether under color of title or not, for more than the periods prescribed by the Statutes of Arizona as necessary for obtaining title by adverse possession (see Rev. Code of Arizona 1928, secs. 2049, 2050, 2051). It has been held that the United States may acquire title by prescription or by adverse possession by the occupancy of the land by its officers or agents. *Stanley v. Schwalby*, 147 U. S. 508, 519. The principle has also been recognized that possession of the vendee may inure to and serve to perfect the title of the vendor (2 C. J. S. Adverse Possession, sec. 39c). It seems, therefore, that

the United States could rightfully claim a perfect title by the law of adverse possession as to the lands in the banco that it has occupied and those held under homestead entry as well. In other words, the United States could maintain its title to the land on two theories. One being, that it acquired sovereignty over the banco when it was created by the avulsion in 1905 by virtue of the decision of the International Boundary Commission under the treaties and conventions under which it acted, and the grant by Mexico to Alvarez was, therefore, invalid, and the other being if Alvarez' title was good when made, the United States has now a valid title by adverse possession under applicable statutes of limitations.

In view of certain of the provisions of Rule 8 (e) of the Code of Civil Procedure in the Federal courts (after sec. 723c, 28 U. S. C.), providing "a party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds or both," it seems it would be optional with the Government to bring a suit on either of the theories, or on both.

You are therefore directed, in accordance with the usual practice, to prepare and submit a letter to the Attorney General recommending that a suit be brought by the United States to quiet its title to the lands within the Farmers Banco, accompanied by a letter reciting all the essential facts and such exemplified copies of your records as may be pertinent, whereupon, if the State Department, upon being advised of the intended action, interposes no objection, the matter will be submitted to the Attorney General.

OSCAR L. CHAPMAN,
Assistant Secretary.

ALICE FIRTH CLARK

Decided February 10, 1941

EVIDENCE—COMPETENCY.

Parol evidence adduced from a party not in privity with the original locator of a mining claim in derogation of such locator's title cannot be considered.

MINING CLAIM—ABANDONMENT BY COTENANT.

One cotenant of a mining claim may abandon his own interest therein so as to preclude him from afterwards asserting an interest therein, but he cannot thereby affect the interest of his cotenants. *Contra: Alaska-Dano Mines Company*, 52 L. D. 550, overruled.

MINING CLAIM—ABANDONMENT.

Abandonment is a question of intention and the evidence thereof must be clear. Lapse of time, absence from the ground, failure to work the claim for any definite period in the absence of other circumstances are not evidence of abandonment.

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MINING CLAIM—ABANDONMENT BY COTENANT.

As the possession of one cotenant is the possession of all, no abandonment can be based on the absence of one of the cotenants, even if he makes a sale of the absent tenant's interest.

MINING CLAIM—ADVERSE POSSESSION.

The question whether mineral applicants, who are shown by the abstract of title to be cotenants of other persons may be granted a patent under the provisions of section 2332, Revised Statutes, is dependent, in the absence of an adverse claim, upon a sufficient showing that they and their predecessors in title, by working and holding the claim adversely to their cotenants for the period prescribed by the statute of limitations of the State, have acquired a perfect title by such possession to the whole of the claim under the State law.

EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that certain cotenants have not acquired by adverse possession title to the whole claim.

CHAPMAN, Assistant Secretary:

July 20, 1939, John P. Clark and Alice Firth Clark made application, Sacramento 032269, for patent to the Big Bonanza Placer Mining Claim described as covering S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 31, T. 36 N., R. 5 W., M. D. M., California.

The abstract of title shows that the claim was located April 28, 1906, by Modesto Bontadelli and N. Trimble; that on July 7, 1909, by quitclaim deed recorded April 13, 1914, Bontadelli conveyed the whole of the claim to Ernest L. Palmer; that on September 10, 1912, Palmer, by deed of bargain and sale recorded April 13, 1914, conveyed the whole of the claim to Edward Sanders who, by like deed dated and recorded October 1, 1923, conveyed the whole of the claim to Nick Pfunder and Frank Oel. The abstract further shows that on July 12, 1938, the administrator of the estate of Frank Oel, pursuant to an order of the Superior Court of Shasta County, California, in consideration of the payment of \$500 conveyed to John P. and Alice Firth Clark as joint tenants "all the right, title interest and estate of the said FRANK OEL, deceased, at the time of his death and also all the right, title or interest in the premises that the said estate may have acquired by operation of law or otherwise, other than, or in addition to that of said decedent, at the time of his death," in and to the "Big Bonanza" mining claim. Amended notice of location was filed by Sanders while he held the mining title to correct description, and a similar notice was filed by the Clarks.

The applicants submitted an affidavit made by one Elder which, among other things, states that of his own knowledge N. Trimble did not claim any title to said claim but signed said notice as a wit-

ness although such notice does not so state; that the whereabouts of Trimble is unknown; that Bontadelli at all times claimed to be the sole owner of the claim until he conveyed the claim to Sanders; that he was well acquainted with Pfunder and Oel; that at the time of his death Oel was residing on the claim; that Pfunder left the claim and vicinity about October 5, 1928, from which time affiant has never seen him, nor does he know his whereabouts.

By decision of September 26, 1940, the Commissioner of the General Land Office advised the register that the entry would be canceled, unless the applicants within 30 days from notice showed either that they had acquired the outstanding interests of Trimble and Pfunder, or that they had taken steps to quiet title to the claim. The Commissioner held that the county record, showing that both Trimble and Bontadelli were locators, was conclusive; that if Trimble, in fact, was only a witness to the location, it would be necessary to have the error corrected by having the notice properly recorded; that:

With respect to the alleged abandonment by Nick Pfunder of his interest, there can be no abandonment by one of two or more owners of a claim so long as the co-owners continue in possession of the claim; the possession of one is the possession of all. (Alaska-Dano Mines Company, 52 L. D. 550.) Neither can the patent applicants take advantage of Section 2332, Revised Statutes, by showing that they and their predecessors have had uninterrupted possession of the claim for a period equal to the time prescribed by the statute of limitations of the State of California. Section 2332 cannot be invoked by one of the owners of a claim against his co-owner. (Alaska-Dano Mines Company, supra.)

Alice Firth Clark, alleging the death of her coapplicant, has appealed. She assigns error in the holdings (1) that there can be no abandonment by one of two or more owners of a claim so long as a co-owner continues in possession of the claim, and (2) that section 2332, Revised Statutes, cannot be invoked by one of the owners of the claim against his co-owner. The appellant contends that holding (1) is not supported by the decisions of the Courts of California, citing *Bath v. Valdez*, 70 Cal. 350, 358; *Packard v. Johnson*, 51 Cal. 545; that the evidence shows that Trimble never claimed any title to the location and Pfunder abandoned his interest therein; that the interests of Trimble and Pfunder are protected by the requirements of posting and publication of the application and their right to file an adverse claim under Revised Statutes, section 2325. She further alleges that she is without knowledge of the whereabouts of Trimble and Pfunder and before a suit to quiet title could be maintained, if either of them be dead, administration would have to be granted upon the deceased person's estate; that the best part of the claim has been worked out and its present value would not justify the expense of a suit to quiet title to the property and unless the claim is patented to her, she will have to abandon it.

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The application does not meet the requirements of an application under section 2332, Revised Statutes, and the mining regulations thereunder (43 CFR 185.78 to 185.80, inclusive). The applicants rely upon a defective record title of transfer to them of the interests of the original locators and an affidavit that one of the locators of record was not such in fact, and that another coowner abandoned his interest.

Section 2325, Revised Statutes, contemplates patent proceedings upon a mining claim only by those having full possessory title to the claim. *Lackawanna Placer Claim*, 36 L. D. 36; *E. J. Ritter et al.*, 37 L. D. 715. The statement of the names of the locators in a location notice of a mining claim in California is a statutory requirement (Stats. 1909, pp. 313-317, sec. 1426, Civil Code of California, 1937) and when the notice is recorded it is prima facie evidence of all the facts which the statute requires it to contain and which are sufficiently set forth. Lindley on Mines, sec. 392. When recorded, the notice is a statutory writing affecting realty, being, in the States where it is required, the basis of the miner's "right of exclusive possession," and the first muniment of his paper title, upon the record of which proceedings for patent are based. Lindley on Mines, sec. 379. The statements of Elder, who is not in privity with Trimble, are not a declaration or admission against interest and does not fall within any exception to the rule that parol evidence is inadmissible to alter, vary or contradict the terms of a valid written instrument. Moreover, applicants cannot be allowed to question Trimble's title in a proceeding in which he is not a party.

Both the courts of California and other mining States have held uniformly that one of several cotenants of a mining claim may abandon his own interest therein so as to preclude him from afterwards asserting an interest therein, but he cannot thereby destroy the interests of his cotenants. Of the numerous authorities so holding, a few will be mentioned. *Badger Gold Min. & Mill. Co. v. Stockton Gold, etc. Min. Co.*, 139 Fed. 838; *Lehman v. Sutter*, 60 Mont. 97, 198 Pac. 1100; *O'Hanlon v. Ruby Gulch Min. Co.*, 48 Mont. 65, 135 Pac. 913; *Sharkey v. Candiani*, 48 Or. 112, 85 Pac. 219; *Miller v. Chrisman*, 140 Cal. 440, *aff'd* 197 U. S. 313; *Clarke v. Mallory*, 70 P. (2d) 664, 667 (Cal.); *Del Giorgio v. Powers*, 81 P. (2d) 1006, 1014, 1015 (Cal.). The holding to the contrary in *Alaska-Dano Mines Company*, 52 L. D. 550, 551, is not supported by *Union Consolidated Mining Co. v. Taylor*, 100 U. S. 37, cited in its support, nor by any other decision of the Department or the courts so far as the Department is aware.

Some decisions hold that upon abandonment by one cotenant of his undivided interest in the claim such interest passes to the other cotenants (*Worthen v. Sidway*, 72 Ark. 215, 79 S. W. 777; *Crane v.*

French, 104 P. (2d) 53 (Cal. App.)) while others hold that such abandoned interest reverts to the public domain (*Badger Gold Min. & Mill. Co. v. Stockton Gold, etc. Min. Co.*, *supra*; *Del Giorgio v. Powers*, *supra*). It is, however, unnecessary to decide in this case whether the interest of a cotenant passes on abandonment to the other cotenants as the applicants have not presented sufficient evidence of abandonment by merely showing that Trimble and Pfunder left the locality of the claim leaving their cotenants in possession and have not returned or manifested any interest in the claim. It is settled law that abandonment of a right is a matter of intention and the evidence of such intention must be clear. Lapse of time, absence from the ground, or failure to work the claim for any definite period unaccompanied by other circumstances are not evidence of abandonment. Lindley on Mines, sec. 644; 30 U. S. C. A. sec. 28, notes 346 to 349. As the possession of one cotenant is the possession of all, no abandonment can be based on the absence of one of the cotenants even though the other makes a sale of the absent tenant's interest. *Waring v. Crow*, 11 Cal. 367, 369.

A further question is whether the Commissioner was right in holding that the patent applicants could not take advantage of section 2332, Revised Statutes, by showing that they and their predecessors in interest have had uninterrupted possession of the claim for a period equal to the time prescribed by the statute of limitations of the State of California.

Section 2332, Revised Statutes, reads as follows:

Where such persons or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent. (U. S. C., title 30, sec. 38.)

In *Shoshone Mining Company v. Rutter*, 177 U. S. 505, 508, the Supreme Court said:

* * * By sections 2319, 2324 and 2332, Revised Statutes, it is expressly provided that this right of possession may be determined by "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;" or "by the statute of limitations for mining claims of the State or Territory where the same may be situated." So that in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact.

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Speaking of section 2332, in *420 M. Co. v. Bullion M. Co.*, 3 Saw. 634, 644, 645, 9 Fed. Cas. No. 4989, p. 596, Judge Sawyer said in the opinion:

* * * it was the intention of Congress to give the right of purchase of a mining claim * * * to the person or association of persons who, in pursuance of the laws of the State or Territory and the local mining customs, rules and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner and entitled to the possession as against everybody except the government of the United States. * * * the party, who at the time can maintain his right to the claim in the courts of the country as against any person but the United States, under the local laws, customs, rules and regulations, is the party upon whom Congress intended to confer the right to purchase no matter how that right originated, if under such laws and customs and decisions of the courts he has the present right.

It would seem from the foregoing that the question whether the applicants may be granted a patent under the provisions of section 2332 is dependent, in the absence of an adverse claim, upon a sufficient showing that they and their predecessors in title, by working and holding the claim adversely to Trimble and Pfunder for the period prescribed by the statute of limitations of the State, have acquired a perfect title by such possession to the whole of the claim under the law of California.

The general rules governing tenants in common are applicable to ownership in common of mining locations on the public domain (Lindley on Mines, sec. 788; Cotenancy, secs. 21, 25, 14 Am. Jur.); and the question of what acts are necessary to constitute an ouster and change a possession of one coowner into an adverse holding by another coowner must be determined by the laws of cotenancy. Lindley on Mines, section 728. The general rule that a cotenant may acquire the entire title to the common property by ouster of his cotenants and the assertion of entire title in himself for the period prescribed for obtaining adverse possession to realty under the State law is followed in California, *Feliz v. Feliz*, 38 Pac. 521; *Tully v. Tully*, 9 Pac. 841; *Smith v. Barrick*, 182 Pac. 56. But before a tenant in common can rely on an ouster of his cotenants, he must claim the entire title to the land in himself and must hold the exclusive and adverse possession against every other person, thus repudiating the relationship of cotenancy. *Aguirre v. Alexander*, 58 Cal. 21; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135. The statute of limitations begins to run from the time the tenant out of possession is disseized. *Cassery v. Alameda County*, 153 Cal. 170, 94 Pac. 765; *Willmon v. Koyer*, 168 Cal. 369, 143 Pac. 694. A cotenant, however, cannot acquire by exclusive possession of the property title by adverse possession, without notice indicating that his possession is hostile and adverse. *Faubel v.*

McFarland, 144 Cal. 717, 78 Pac. 261; *Johns v. Scobie*, 79 P. (2d) 191. His possession of the whole premises is adverse only when he exercises acts of ownership of unequivocal character overt and notorious and of such a nature as by their own import impart information and notice to his cotenants that an adverse possession and disseizin are intended to be asserted against them. *Akeley v. Bassett*, 189 Cal. 625, 209 Pac. 576.

An ouster is held to be effected where a tenant in common conveys the entire property to a third person and the grantee takes possession claiming full ownership under circumstances charging the other cotenants with knowledge of the adverse claim. *Alvarado v. Nordholt*, 95 Cal. 116, 30 Pac. 211; *Frick v. Simon*, 75 Cal. 337, 17 Pac. 439; *McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724. For other cases see Tenancy in Common, sec. 37, 62 C. J. 431. In such a case the registration of the deed to the grantee is constructive notice of an adverse holding (sec. 49, Tenancy in Common, 62 C. J. 438). If then Mrs. Clark should show that she and her predecessors in title have held and worked the claim for the period prescribed for acquiring title by adverse possession of a mining claim under the law of the State (which appears to be 5 years, *Crane v. French*, *supra*) adversely to both Trimble and Pfunder, no reason is seen why a patent to the claim might not issue under section 2332, Revised Statutes. The rule that if the cotenant in possession seeks to effectuate a forfeiture of another delinquent cotenant's interest, the only method is that outlined in section 2324, Revised Statutes, by advertising him out, would not preclude an applicant from showing that by operation of law the cotenancy had terminated and that she had acquired the full possessory title to the claim. Applying, however, the law of the State as above set forth to the facts of the case, it is not believed that Mrs. Clark is in a position to show the requisite possession under section 2332. In the first place, it may be doubted whether the quitclaim deed from Bontadelli to Palmer effected a disseizin as to Trimble. Secondly, assuming that Sanders acquired title by adverse possession under a deed of bargain and sale from Palmer by working and holding the property for the required period, he, nevertheless, created a cotenancy between Oel and Pfunder by his deed to them, and the granting clause in the deed from the administrator of Oel to the applicants, as hereinbefore set forth, is not regarded as sufficient constructive notice to Pfunder of an intent on the part of the grantees to claim the whole location as their own property. And even if such notice were sufficient and it in effect operated as an ouster of Pfunder, the adverse possession of the applications has not continued for a sufficient period under the law of the State to ripen into a title by adverse possession.

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Of course, nothing said herein bars the appellant from instituting a suit in the local court to quiet the title she claims to the location against the cotenants of record from whom she has not shown acquisition of their interests in the location, and if she should succeed in such an action and presents evidence of a decree showing full ownership in connection with a renewed application, such a decree would be regarded as conclusive in that respect.

There is no merit in the contention that a coowner is protected by the requirements of posting and publication of the notice of intention to apply for patent and his privilege to file an adverse claim. It is settled law that a cotenant excluded from the patent application is not an adverse claimant within the meaning of the law requiring the prosecution of adverse claims though he may file an adverse claim and thereby litigate his rights. Lindley on Mines, sections 646, 728; paragraph 53, Circular 430, 43 CFR 185.89. The rule that a cotenant is not required to adverse probably would not apply if prior to the institution of patent proceedings there has been such an ouster of a cotenant as would set the statute of limitations in motion, such a notorious and unequivocal denial of a cotenant's rights brought to his notice as to impose upon such cotenant the necessity of protecting his interest. In such a case the courts would compel the ousted cotenant to assert his rights in the patent proceeding. Lindley on Mines, section 728.

In this case, however, the evidence of ouster is insufficient to hold that the nonparticipating cotenants are barred from asserting their rights by failure to adverse the application. As the record stands the title of the applicants to the location is defective in the respects specified by the Commissioner. It would seem that the simplest, least expensive and most expeditious course that the surviving applicant could pursue to establish the right to patent under the application would be to take and pursue to completion proceedings to forfeit the interests of Trimble and Pfunder in the manner prescribed by section 2324, Revised Statutes, and regulations thereunder (par. 15, Circ. 430, 43 CFR 185.20). By full compliance with such procedure, the defect in the application may be seasonably cured without detriment to the rights of other parties. *E. J. Ritter et al., supra*. The decision of the Commissioner should, therefore, be modified to permit the applicant as an addition to the alternative courses the Commissioner requires, to show that she has begun forfeiture proceedings against Trimble and Pfunder in the manner prescribed by paragraph 15, circular 430.

The applicant is further advised that the rejection of the application does not affect her possessory rights in the claim, or prejudice her right to renew the application in the event that she can show a perfect title thereto, and in the event such an application is filed the present defective application may be made the instrument of new pro-

ceedings to the extent that it is material. *Jaw-Bone Lode v. Damon Placer*, 34 L. D. 72, 76.

To the extent that the decision in *Alaska-Dano Mines Company, supra*, is in conflict with this decision, it is hereby overruled.

The decision of the Commissioner is modified as indicated.

Modified.

F. L. SHIRE v. JOHN H. PAGE ET AL.

Decided February 28, 1941

WESTERN NAVAJO INDIAN EXCHANGE ACTS OF MAY 23, 1930 AND FEBRUARY 21, 1931.

CONTEST.

An Indian exchange application upon which no publication has been had is not complete, and the Department is not precluded from entertaining any inquiry as to the mineral character of the land as a present fact. *Wyoming v. United States*, 255 U. S. 489, distinguished.

No right of possession is conferred to land by the mere filing of an Indian exchange application; such right would only flow from the acquisition of equitable title to the land, and if before such title vests locations under the mining laws are made on the land based upon a valid discovery of minerals, no reason is seen why the locator upon establishment of the fact may not secure the rejection of the application to the extent of such locations.

CONTEST—RES JUDICATA.

While it is true the dismissal of a contest alleging the mineral character of the land is not an award of the land to the contested applicant, and carries no implication that all the determinations essential to the passage of title had been made, and adjudications by the land department concerning public lands are not a bar to its jurisdiction to inquire into any question affecting rights to the land so long as the legal title remains in the Government, the Department has repeatedly held that its decision holding a tract of land to be either mineral or nonmineral will be considered conclusive as to the period covered by the hearing, but will not preclude further consideration of the character of the land based on subsequent explorations and development. *Stinchfield v. Pierce*, 19 L. D. 12; *McCharles v. Roberts*, 20 L. D. 564; *Dargin v. Koch*, 20 L. D. 384; *Mackall v. Goodsell*, 24 L. D. 553; *Leach v. Potter*, 24 L. D. 573; *Town of Aldridge v. Craig*, 25 L. D. 505; *Coleman v. McKenzie*, 28 L. D. 348; *Gorda Gold Mining Company and Wallace Mathers v. Ernest Bauman*, 52 L. D. 519, 520, cited and applied.

CHAPMAN, *Assistant Secretary*:

F. L. Shire has appealed from a decision of the Commissioner of the General Land Office rendered December 6, 1939, which affirmed the decision of the register in holding for dismissal his contest against Western Navajo Indian Reservation exchange, Phoenix 070474, filed July 1, 1931, by John H. Page, Kinter K. Koontz and David B. Morgan under the provisions of the act of May 23, 1930 (46 Stat. 378), as amended by the act of February 21, 1931 (46 Stat. 1204).

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It appears that the remaining lands in the selection list, which have been reduced by various withdrawals and eliminations, are within the boundaries of formerly asserted Elsie placer mining claims 1 to 4, inclusive; that the acts mentioned under which the exchange is proposed authorize the selection of the nonmineral lands only; that in a previous contest brought by W. V. Tiscornia to the use of the Dover Copper Mining Company against applications 070474 and 070036, the Department, by decision of June 10, 1937 (A. 20700), upon consideration of the evidence adduced at a hearing ending June 25, 1935, affirmed the decision of the Commissioner of the General Land Office holding that the land within the Elsie placers 1 to 4 exclusive of certain Tom Wal lodés was shown to be nonmineral in character; that subsequently a protest filed by Shire against the selection, alleging the mineral character of the land and the location of certain mining claims thereon, was rejected for insufficiency; that thereafter on April 4, 1939, Shire filed an affidavit of contest against the selection, alleging, among other things, that certain tracts, all of which had been adjudged nonmineral in the previous decision of the Department, were mineral in character, containing valuable deposits of gold, silver and copper; that the application 070474 was in either total or partial conflict with certain lode mining claims known as the Tom Wal and Silver Basin, located by him on certain specified dates in June and December 1936; that:

I, the undersigned, am the owner of all of said lode mining claims and am now and have been in the exclusive possession of same ever since the date of their location; that within each of the said lode mining claims, valuable deposits of gold, silver and copper have been discovered in rock in place, said deposits of mineral being in quartz, veins, lodes and ledges in a general formation of porphyry and limestone; that said deposits, in said rock in place, have been, and are being, removed therefrom and have been, and are being, assayed and have been, and are being, found to run as high in mineral content as \$27.88 per ton; that said lode mining claims are valid and subsisting mining claims and are being worked and developed for such mineral content and the whole of said area included in the said Indian Reserve Exchange Application, Phoenix, Arizona, Serial 070474, is essentially mineral in character and was known to be mineral in character at and prior to the date of the said filing of said application.

Shire applied for a hearing to establish his allegations. The register sustained the motion by the applicants to dismiss the contest affidavit on the ground that the question of the character of the land was *res judicata*. The reasons given by the Commissioner for affirming the action are as follows:

The soundness of your decision depends upon whether or not there is sufficient evidence in the record from which it definitely can be concluded that there is a community of interest between the Dover Copper Mining Company and the contestant insofar as ownership of the claims in issue is concerned.

As shown by the records, the land embraced in the claims in issue was embraced in the Elsie Nos. 1 to 4 placer claims, which, on the dates of location of the lodés

now in issue, were owned and claimed by the Dover Copper Mining Company, Shire's employer, the alleged validity of which Shire defended as a witness for and an employee of the company, both in its application to contest the selection and in the hearing held pursuant thereto. So far as the records show, Shire continues to hold his position with the company and its confidence. It is difficult to believe that he could do an act which necessarily would operate in large measure to nullify the company's right to any mineral deposits in the ground and still retain his position and the company's trust and in the absence of conclusive evidence to the contrary it will be assumed that a community of interest exists as to the lode claims now in issue.

There are other reasons, however, and to my mind, compelling reasons for dismissing the contest. As indicated in the first paragraph of this decision, the exchange application was completed in 1931. The Supreme Court of the United States held in *Wyoming vs. United States* (255 U. S. 489) in substance that when a party has completed his application for an exchange of land by doing all that is required of him to do, leaving only the necessary work of passing on the sufficiency of his proof and the issuance of evidence of title, he has earned an equitable title to the land and no subsequent change of conditions can impair his rights.

In this case, applicants appear to have complied fully with all the requirements of the law, to have submitted a sufficient deed of conveyance to the United States of the land offered in exchange with satisfactory evidence that they own it, leaving to be done on their part only those acts necessary to show that there has been no conveyance of the land offered since the application was completed, and formal evidence that the deed to the United States has been recorded.

The selection, therefore, is not subject to attack by reason of the discovery of mineral in the land unless such discovery was made prior to the date of completion of the selection, which in this case antedated the alleged discovery by about five years.

There is still another reason why the application to contest should be rejected. At the time the locations were made, the located land was segregated by the outstanding selection application and was not subject to appropriation under the public land laws including the mining laws, so long as the application remained intact upon the records. Even if equitable title had not already passed, no valid location of the land could have been made in June 1936. The most that contestant legally could have done would have been to prospect the land and if minerals had been discovered, to contest the selection on the ground that the land was mineral in character and not subject to disposal under the act pursuant to which title was sought. The grounds upon which this conclusion is based are that a valid application to enter land segregates the land from other forms of disposal and that upon allowance of entry on such an application, the rights of the entryman relate back to the date on which the application was filed.

Briefly stated, it appears that the Commissioner denied the contest on three grounds, namely, (1) that the issue as to the character of the land was *res judicata*; (2) that the applicants had completed their application, had complied with all the requirements of the law and regulations necessary to its completion, and, therefore, under the rules in *Wyoming v. United States*, 255 U. S. 489, had earned equitable title to the land left intact in the selection, and that being so, the application was not subject to attack upon allegations of discovery of mineral subsequent to the completion of the selection, and (3) the land was segregated from the public domain by the outstanding selection and

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was not thereafter subject to mining location and the most that the mineral claimant could legally do would be to prospect the land and if finding it mineral, to contest the selection on the ground that land mineral in character was not subject to disposal under the act pursuant to which title is sought by the applicants.

Elaborate briefs have been filed by the appellant assailing these grounds and by the appellee supporting them.

As a determination of the correctness of the second ground will affect to some extent consideration of the other two, the second will be considered first.

The provisions of the act of May 23, 1930, pertinent to consider, are as follows:

SEC. 2. That upon conveyance to the United States of a good and sufficient title to any privately owned land within the areas described in this Act, the owners or their assigns thereof are hereby authorized under regulations of the Secretary of the Interior, to select at any time within fifteen years after the approval of this Act, from the surveyed, unappropriated, unreserved, nonmineral public lands of the United States, in the State of Arizona, lands approximately equal in value to the lands thus conveyed, such values to be determined by the Secretary of the Interior, and the Secretary of the Interior is hereby authorized to issue patents for the lands thus selected: *Provided*, That the lands conveyed to the United States under authority of this Act shall thereupon become a part of the Western Navajo Indian Reservation.

SEC. 3. *That before any exchange of lands as above provided is effected, notice of such exchange describing the lands involved therein shall be published once each week for four consecutive weeks in some newspaper of general circulation in the county or counties within which the selected lands are situated. [Italics supplied.]*

The applicable regulations (Circ. 1228, pars. 11 to 16, inclusive, 43 CFR 149.55 to 149.60, inclusive) require the applicant to publish the notice of his application at his expense, to make proof of publication, and if the regulations in this regard and other regulations have been complied with, provision is made for the transmission of the application to the Secretary for approval, for the recordation of the deed and extension of the abstract on such approval, and after such recordation and presentation of the abstract showing the same, for the issuance of patent for the selected land and the acceptance of the base land and its incorporation in the Indian reservation.

The record in this case discloses that no publication of the application has been made. The absence of such publication is probably due to the numerous changes made in the application as to the lands applied for, some of such changes being necessary for the reason that the applicant applied for land held as the result of a contest not subject to selection. As the applicants have not made the required publication and furnished proof thereof, they have not done all that was required of them by the law and regulations and, moreover, as under the statute,

no exchange is effected until such publication is made, the applicants have no equitable title to the selected land, nor has the United States any like title to the base land.

In *Wyoming v. United States*, *supra*, it was said, page 494:

Notice of the selection was regularly posted and published, proof thereof was duly made and the State paid the publisher's charge. Thus, as the Circuit Court of Appeals said, "the State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the government, and everything that was required either by statute or regulation of the Land Department" in selecting the lieu land instead of the relinquished tract.

The application in the instant case is, as characterized in the *Dover Copper Mining* case, *supra*, an "unallowed application," and the Department is not precluded from entertaining any inquiry as to the mineral character of the land as a present fact by any principles applied in *Wyoming v. United States*. This is so, even if it be assumed that the application is not merely a proposed exchange and the rights acquired by the selector in this and in the *Wyoming* case if and when the application is completed would be the same.

We turn now to the proposition that the application effected such a segregation of the land that so long as it remained intact mineral location thereon was inhibited. It should be observed that even though mining locations may be barred by reason of the outstanding exchange application, if the adverse claimant alleges in addition to the fact of such locations that the land is mineral in character, in the absence of some other settled rule barring the consideration of such allegation, his affidavit of contest may be treated as a protest and constitutes a sufficient basis for proceeding against the selection. The question whether the land is now subject to mining location by reason of the pendency of the application for exchange is important only in determining whether the affidavit of the mineral claimant may be considered as an application to contest or merely a protest. The rule that a valid application segregates the land from other forms of disposal is well settled, but here the validity of the application is assailed on the ground that the land is mineral in character, and the application only operates to protect the applicants' rights until the validity of their application is determined. *Richards v. McKenzie*, 13 L. D. 71; *Maggie Laird*, 13 L. D. 502; *Goodale v. Olney*, 13 L. D. 498.

The Department is not aware of any case where it has been held that an unperfected nonmineral entry may not be challenged by a proceeding charging that the land is mineral in character, if in fact the land is mineral and sufficient discovery thereof has been made, or that a location under the mining law may not be made peaceably and without force upon the land embraced in such entry. In *The Manners Construction Company v. Rees*, 31 L. D. 408, 410, it was held that the

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fact that a mining claim was located upon an uncanceled homestead entry did not affect the validity of the location; that no vested right to the land had attached under the entry, and until such right should attach the lands belonged to the United States and if mineral in character are subject to location and purchase under the mining laws. The theory upon which the validity of such location is based has been stated to be that by section 2318, Revised Statutes, mineral lands are "reserved from sale, except as otherwise expressly directed by law," and general legislation for the disposal of public lands has no application to mineral land unless it is in terms referred to, and if the land is mineral the homestead is void. *Herman v. Chase et al.*, 37 L. D. 590.

In *Skinner v. Fisher*, 40 L. D. 112, in the case of soldiers' additional homestead, it was held that the time to which the inquiry as to the character of the land is directed is the date of completion of the proof of publication and posting. In *Leonard v. Lennox*, 181 Fed 760, quoted with approval in *Wyoming v. United States*, *supra*, an applicant for additional homestead entry had presented his application, which was complete and perfect in the sense that nothing remained to be done to entitle him to a patent except to furnish a nonsaline affidavit. Before it was furnished, another party filed application to purchase the tract under the coal-land laws, which led to a contest and hearing, as a result of which it was found that the land was valuable for deposits of coal, the finding being based largely upon exploration and discoveries of coal made after the homestead application and prior to the contest. The court held that the character of the land must be determined according to the conditions existing at the time when the applicant does all that is required of him to do to entitle him to a patent, and until the homestead applicant had filed the required nonsaline affidavit, his rights were not perfected so as to prevent the land department from considering the explorations and discoveries of mineral made subsequent to the application.

As respects a homestead entry requiring residence and cultivation, the entryman acquires an exclusive right of possession by his entry (*Stockley v. United States*, 260 U. S. 532, 544), and no appropriation thereof under the mining laws could be made by force and violence (*Lindley on Mines*, secs. 218, 219). But under the present application, as in the case of soldiers' additional entry, no right of possession is conferred by the mere filing of the application. Such right would only flow from the acquisition of equitable title to the land, and if before such a title vests locations under the mining laws are made on the land based upon valid discovery of mineral, no reason is seen why the locator upon establishment of that fact may not secure the rejection of the application to the extent of such locations.

It remains to consider whether the contest affidavit of Shire was properly dismissed because of the previous adjudication in the *Tiscornia* case. The rule is familiar that identity of subject matter, issues and parties is essential to *res judicata*. There is no dispute that the land described in the contest affidavit is in part embraced in the application for exchange and was involved in the Department's decision in the *Tiscornia* case. It is however contended in the contestant's brief that the issue in the *Tiscornia* case and here is not the same; that the issue in that case was confined to the value of the land for minerals in placer formation; that the contestant there was not interested in lodes and no evidence was offered by either party as to the value of the land for its lode deposits. In the *Tiscornia* case, as in this, the contestant alleged "that said land is mineral in character, containing valuable deposits of gold, silver and copper," as well as that the land had been located under the mining laws. In its decision (page 9) the Department said:

Little difficulty is found in sustaining the concurring findings below that the public land within the limits of the placer claims is nonmineral in character and that such claims are valid for lack of discovery. * * *

Exclusive of such of the Tom Wal lode claims that intrude into the subdivisions claimed as placer there was no evidence offered by the contestant that the land located as placer contains valuable lode deposits. * * *

* * * * *

It is concluded that the land embraced in the Tom Wal lodes has not been sufficiently shown to be nonmineral, that it has been so shown as to land within the placers, Elsie Nos. 1, 2, 3, and 4, exclusive of such lodes. * * *

The decision speaks for itself. It was found that the land was not valuable for mineral, either lode or placer. The briefs of counsel for *Tiscornia* show that they not only understood but emphasized the fact that the sole issue in the case was the mineral character of the land. In one of such briefs counsel said:

The sole issue in this case is the mineral or nonmineral character of the land included in the contest, i. e., the areas covered by said Elsie Nos. 1, 2, 3 and 4 placer claims and said Tom Wal Nos. 1 to 12 lode claims. For clearness of statement it may be likewise said that the validity of the mining claims mentioned is not an issue herein, except that it would follow, if said claims are valid mining claims, that the land is mineral in character, and that therefore the contest should be sustained as to any such valid claims. However, if the land is actually mineral in character, it matters not whether it has ever been located as mining claims, inasmuch as the acts under which these exchange selections were made expressly except mineral lands from their operation.

The testimony, therefore, should be read with the issue in mind, and any testimony not bearing, either directly or indirectly upon that single issue, should be disregarded as irrelevant.

As mentioned in the introductory portion of this brief, the single issue to be determined in this case is the character of the selected land, i. e., mineral or non-mineral. If the Department finds as a fact, that the land is mineral in

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character, then it is outside of the class of lands to which such selections may attach, under the terms of the above quoted statute. If, as a fact, the selected area is non-mineral in character, then the selections may be passed to patent, and the contest will go for naught.

In determining the character of land, as mineral or non-mineral, the validity or invalidity of a mining claim located upon the land is not controlling. Stated differently, the land may be mineral in character, and yet a mining claim located thereon may lack such a discovery as would impart validity to the claim.

The pivotal issue being the mineral character of the land, if the land had any value for its lode deposits the contestant should have offered evidence to that effect. The cases are no less identical as to the cause of action because evidence of that character was not adduced. A judgment concludes the party not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Judgments, sec. 429, 15 R. C. L. 952. There is no merit, therefore, in the contention that the issue in the *Tiscornia* case is not the same as in the present case.

With respect to the identity of parties, there is nothing in the previous record in the *Tiscornia* contest to show that Shire had any direct interest in the outcome of that case, had any control over the proceedings, or was in privity with the contestant. The facts that Shire was a corroborative witness to the contest affidavit, a part time employee of the contestant and a witness for it in the prior proceeding, are insufficient to impel the inference of any privity. It is alleged by the applicants and denied by the contestant that in making the present locations and filing the present contest Shire is merely a representative of the Dover Copper Mining Company, but this is an allegation that must be proved.

However, it does not follow that because the case does not fully meet the rules of *res judicata*, Shire should be permitted to have the question of the mineral character of the land readjudicated. It is true that the order of dismissal of the previous contest as to the land here in question, alleging the mineral character of the land, was not an award of the land to the applicant and carried no implication that all the determinations essential to the passage of title had been made (see *West v. Standard Oil Company*, 278 U. S. 200, 214), and that adjudications by the land department concerning public lands are not a bar to its jurisdiction to inquire into any question affecting the rights to the land so long as the legal title remains in the Government, *Searle Placer*, 11 L. D. 441; *C. Henry Bunte*, 41 L. D. 520; *Brooks v. McBride*, 35 L. D. 441. Nevertheless, the Department has repeatedly held that a decision by the Department holding a tract of land to be either mineral or nonmineral in character will be considered conclusive

up to the period covered by the hearing, but will not preclude further consideration of the character of the land based on subsequent exploration and development. *Stinchfield v. Pierce*, 19 L. D. 12; *McCharles v. Roberts*, 20 L. D. 564; *Dargin v. Koch*, 20 L. D. 384; *Mackall v. Goodsell*, 24 L. D. 553; *Leach v. Potter*, 24 L. D. 573; *Town of Aldridge v. Craig*, 25 L. D. 505; *Coleman v. McKenzie*, 28 L. D. 348; *Gorda Gold Mining Company and Wallace Mathers v. Ernest Bowman*, 52 L. D. 519, 520.

In *Mackall v. Goodsell*, *supra*, as the result of a hearing between a homestead applicant and a mineral claimant, the land in controversy was adjudged nonmineral. Subsequently, another mineral claimant sought to raise the question as to the mineral character of the land by protest alleging ownership and possession of certain placer locations affecting the land. The Department held (page 556) that it—

would not be justified in ordering a hearing upon this same charge, unless it is based upon a distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land.

The allegations of Shire that the land was valuable for mineral at the time of the filing of selection is contrary to the decision of the Department, which must be considered as conclusive. His contest affidavit does not specify the character, location and extent of the work alleged to have been done, the size, extent and mineral content of the veins or lodes alleged to have been discovered, or the time when said alleged discoveries are made. In view of the previous judgment and the evidence as to the character and general formation upon which said judgment was based, the failure to supply concrete factual data supporting mere general allegations is not deemed sufficient to apprise the applicants for exchange with sufficient information to meet the same, or to put them to the burden and expense of further litigation, or to satisfy the Department that the question of the mineral character of the land should be reopened.

During the time this appeal has been under consideration by the Department, there has been transmitted by the Register an amended application of contest filed by the contestant November 1, 1940. Local counsel for the contestant on November 6 filed a brief and argument which is styled "In support of amended application to contest" and showed service thereof on contestees. The contestees have responded by filing a motion to strike the brief from the files under Rule 80 of Practice (43 CFR 221.79).

The questions of the right to amend the contest affidavit and the sufficiency thereof were not involved in the appeal. The allowance of the amended contest was a matter within the discretion of the Register.

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(*Nesbitt v. Neal*, 15 L. D. 305), and he might have properly suspended action thereon pending the final disposition of the appeal. However, having submitted it for consideration, it is assumed he awaits instructions with respect to its disposition.

In the amended application the allegations as to mineral location and discovery, hereinbefore quoted, are repeated. To these are added detailed statements of the character of the mineral disclosures on particular tracts involved in the selection and upon the alleged mining locations covering or intruding thereon, the width of the alleged vein on each tract or claim in most instances being given, together with the kind of mineral disclosed and the values found in the assays thereof. There is nothing said as to the time of these alleged disclosures, whether before or after the period covered by the prior hearing. Reading the allegations as a whole they may well be taken as relating to disclosures made prior to the last hearing. If the fact is otherwise, in view of the importance of the element of time as to discovery, it should have been distinctly stated, particularly as the affidavit is silent as to the time when the development work was done, and its nature and extent. The amended contest application therefore does not cure sufficiently the defects of the original.

The amended contest application contains new charges, namely, (1) that the selectors have never complied with the law and regulations by furnishing proper nonmineral affidavits, it being argued in the brief that the mineral affidavits filed are inherently incredible and unworthy of consideration, and (2) that the selected land is of more value than the base, as the price thereof is set at \$3.50 per acre, whereas the land is reasonably worth \$5 an acre, which price the contestant states,

I am willing to pay therefor, if allowed so to do, in compliance with the mineral land laws of the United States, whereas, the lands proposed to be reconveyed to the United States by the contestees as base for said proposed exchange are practically desert grazing land, of small commercial value, for which reason the lands applied to be selected are not "*approximately equal in value*", to the proffered base lands, but are of much greater value than the latter, and the approval and consummation of such proffered exchange would, therefore, result in a financial loss to the United States, and would be contrary to the intent and the express terms of the Act approved May 23, 1930 (46 Stat., 378).

The Department having heretofore held that the lands in question are nonmineral in character, the sufficiency of the applicants' nonmineral affidavit in support of the selection is of no consequence whatsoever at this stage of the proceeding. The report of the mineral examiners for the Government being in agreement with such affidavits as to any tracts now involved, the Commissioner was warranted in regarding the land as nonmineral.

However willing the contestant may be to pay \$5 an acre for the land under the mineral land laws, he would not be permitted to do so

unless he established that his alleged locations were valid and had perfected an application for patent thereto. He suggests no inequality in value between the selected and base lands except that arising from the value of the former as mineral land. The proof of the charge of inequality in values seems, therefore, dependent upon proof that the land is mineral in character, and as the allegations in that respect are insufficient, the charge that the selected land is worth more than the surrendered land and on the ground that the former is valuable for mineral, is not of itself sufficient to sustain a contest.

The amended contest affidavit should be dismissed without prejudice to the right to file a sufficient amended contest affidavit within 30 days after receipt of a copy of this decision. Should such an affidavit be filed, it is to be submitted to the Department for consideration.

The brief, which is the subject of contestees' motion to strike, has been considered only to the extent that it relates to the new matters set up in the amended application to contest. In so far as it relates to questions raised by the appeal, it is clearly filed too late under Rule 80 of Practice and the motion to strike to that extent is granted.

Except as herein modified, the decision of the Commissioner is

Affirmed.

DELEGATION OF AUTHORITY TO SIGN VARIOUS REGULATIONS APPLICABLE TO NATIONAL PARKS AND MONUMENTS

Opinion, March 10, 1941

SECRETARY OF THE INTERIOR—DELEGATION OF AUTHORITY.

Unless "personal" action by the Secretary or Acting Secretary is specifically required, the Secretary by appropriate order, may prescribe and delegate to the Under Secretary, the First Assistant Secretary and the Assistant Secretary the authority to perform any of his duties. So long as such delegated authority remains unrevoked, any action done pursuant thereto is of as much effect as though done personally by the Secretary or Acting Secretary.

MARGOLD, *Solicitor*:

The question has arisen as to whether the authority to sign the various special or subsidiary regulations governing the different parks and monuments under the jurisdiction of the National Park Service may be delegated to the Under Secretary, the First Assistant Secretary, or the Assistant Secretary, or whether such special or subsidiary regulations must be signed personally by the Secretary or Acting Secretary.

Like many other statutes which vest certain powers and duties in the Secretary of the Interior, section 3 of the act of August 25, 1916 (39 Stat. 535), provides:

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That the Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * *.

The determination of that question, therefore, involves the determination of the broader question as to the extent to which the Secretary may delegate authority to the above-named assistant secretaries to perform various departmental duties.

It is my opinion that unless the "personal" action by the Secretary or Acting Secretary is *specifically* required, the Secretary, by appropriate order, may prescribe and delegate to the Under Secretary, the First Assistant Secretary and the Assistant Secretary the authority to perform any of his duties. So long as such prescribed authority remains delegated and unrevoked, any action done in pursuance to such delegated authority is of as much effect as though done personally by the Secretary or Acting Secretary.

Because it is physically impossible for the Secretary to attend personally to all of the numerous duties vested by law in the "Secretary of the Interior" or in the "head of the Department of the Interior," Congress has provided assistants to whom he can delegate the performance of various duties. The position of Assistant Secretary of the Department of the Interior was first created by the appropriation act of March 14, 1862 (12 Stat. 355, 369, 5 U. S. C. sec. 482); that of First Assistant Secretary by the appropriation act of March 3, 1885 (23 Stat. 478, 497, 5 U. S. C. sec. 482); and that of Under Secretary by the appropriation act of May 9, 1935 (49 Stat. 176, 177).

The practice of devolving the duties of heads of departments upon assistant secretaries has been growing for many years throughout the Government service. MacMahon and Millett, *Federal Administrators*, 17 (1939). The need for such delegation has been fully recognized. See *Administrative Procedure in Government Agencies*, S. Doc. 8, 77th Cong., 1st sess., pp. 20-24 (1941). With the exception of the act of July 23, 1868 (15 Stat. 168, 5 U. S. C. sec. 4), wherein Congress provided that "In case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President * * * perform the duties of such head until a successor is appointed, or such absence or sickness shall cease," Congress has been silent as to the allocation of the functions to be rendered by these assistant secretaries and has left their duties to the discretion of the head of the Department. Thus the act creating the position of Assistant Secretary of the Interior provided that he

* * * shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary, or may be required by law, and * * * shall act

as Secretary of the Interior in the absence of that officer. [12 Stat. 355, 369, 5 U. S. C., sec. 483.]

Furthermore, the act of March 28, 1918 (40 Stat. 499, 5 U. S. C. sec. 483), provided that

official papers and documents as the Secretary may direct.

the assistant to the Secretary of the Interior * * * is authorized to sign such

And under 5 U. S. C. sec. 22,

the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, [and] the distribution and performance of its business * * *.

Congress has thus given a broad power to the head of the department in the allocation of duties and supervisory functions. This has been the case not only in so far as the Interior Department is concerned, but also, with but few exceptions, with regard to other departments. (See MacMahon and Millett, *Federal Administrators*, 18 (1939).) Obviously, had Congress explicitly required that the performance of specific duties be delegated to definite officers, there would have resulted a rigidity ill-suited to the needs of administration in changing circumstances and to the desirability of suiting assignments to personalities.

The weight of judicial decisions has aided this flexibility by giving full authority to the acts of the various assistant secretaries of each department without requiring specific congressional authorization for each delegation of authority. As early as 1877, in a case involving business claims transacted with the Second Assistant Postmaster General, the Supreme Court of the United States said :

* * * the evidence and the arguments were presented to the assistant instead of the head of the department. We suppose that the assistant postmasters general were appointed for precisely such functions as this one discharged in the matter, and it would be a dangerous principle to hold that the department is bound alone by what is transacted by the Postmaster General in person; for the same rule would free parties dealing with the department from obligations not assumed directly with its head. [*Alvord v. United States*, 95 U. S. 356, 358 (1877).]

And in 1879 the Supreme Court emphatically stated :

It has been found, in regard to * * * the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence statutes have been made creating the office of assistant secretaries for all the heads of departments.

It would be a very singular doctrine, and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal secretary or head of department. It was to relieve the overburdened principal of some part of those duties that the office of assistant was created. [*Parish v. United States*, 100 U. S. 500, 504 (1879).]

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This position has been consistently reaffirmed by the Supreme Court of the United States, the Court of Claims, and various other Federal courts.

Norris v. United States, 257 U. S. 77 (1921); *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 206 (1911); *Restivo v. Clark*, 90 F. (2d) 847 (C. C. A. 1, 1937); *Werrmann v. Perkins*, 79 F. (2d) 467 (C. C. A. 7, 1935); *United States ex rel. Petach v. Phelps*, 40 F. (2d) 500 (C. C. A. 2, 1930); *United States v. Karnuth*, 35 F. (2d) 601 (D. C. W. D. N. Y., 1929), 31 F. (2d) 1022 (C. C. A. 2, 1929), cert. den. 280 U. S. 570; *Hajdamacha v. Karnuth*, 23 F. (2d) 956 (D. C. W. D. N. Y., 1927); *Lew Shee v. Nagle*, 22 F. (2d) 107 (C. C. A. 9, 1927); *Ferguson v. Port Huron & Sarnia Ferry Co.*, 13 F. (2d) 489 (D. C. E. D. Mich. S. D. 1926); *Young Chow v. Ebey*, 2 F. (2d) 1023 (C. C. A. 7, 1924); *Cranv v. Nichols*, 1 F. (2d) 33 (D. C. S. D. Tex., 1924); *Bowling v. United States*, 299 Fed. 438, 441-42 (C. C. A. 8, 1924); *United States ex rel. Chin Fook Wah v. Dumton*, 288 Fed. 959 (D. C. S. D. N. Y., 1923); *Robertson v. United States ex rel. Baff*, 285 Fed. 911, 52 App. D. C. 177 (1922); *May v. United States*, 236 Fed. 495 (C. C. A. 8, 1916); *Franklin Sugar Refining Co. v. United States*, 178 Fed. 743 (C. C. E. D. Pa., 1910); *United States v. Warfield*, 170 Fed. 43, 45 (C. C. A. 4, 1909); *Turner v. Seep*, 167 Fed. 646 (C. C. E. D. Okla., 1909); *People's U. S. Bank v. Gilson*, 140 Fed. 1, 5 (C. C. E. D. Mo., 1905); *The John Shillito Co. v. McClung*, 51 Fed. 868 (C. C. A. 6, 1892); *United States v. Adams*, 24 Fed. 348 (C. C. D. Ore., 1885); *Chadwick v. United States*, 3 Fed. 750, 756 (C. C. D. Mass., 1880); *McCollum v. United States*, 17 Ct. Cl. 92, 101 (1881).

These cases relate to a wide variety of situations, including the issuance or approval of orders and regulations and the exercise of administrative and judicial duties which clearly involved the use of discretion and judgment and which often directly affected the rights or conduct of private citizens. In each case the authority of the Secretary of an executive department to delegate the performance of such duties to the various assistant secretaries was upheld in broad terms. Thus, in *Ferguson v. Port Huron & Sarnia Ferry Co.*, 13 F. (2d) 489 (1926), it was held, under a statute imposing on the "Secretary of the Treasury" the duty of issuing certain regulations fixing rates of compensation to be paid for overtime services rendered to transportation vessels, that such regulations were valid although signed by an assistant secretary of the Treasury. And in *Turner v. Seep*, 167 Fed. 646, 650 (C. C. E. D. Okla., 1909), the court expressly declared that the Secretary of the Interior was fully empowered "to delegate to the Assistant Secretary the authority to

approve leases and assignments of leases, and that, so long as the powers so delegated to the Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the Assistant Secretary is coordinate and concurrent with that of the Secretary." Furthermore, in *Robertson v. United States ex rel. Baff*, 285 Fed. 911, 52 App. D. C. 177 (1922), where the validity of an order, signed by the Assistant Secretary of the Interior Department, disbaring Baff from practice before a bureau, of the Interior Department, was attacked on the ground that the statute required such order to be approved by "the Secretary of the Interior," the United States Court of Appeals for the District of Columbia said (285 Fed. 911, 915) :

Section 439 (Comp. St. Sec. 667) provides that the Assistant Secretary of the Interior shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary or may be required by law. The relator insists that the duties which may be assigned to the Assistant Secretary under that provision are administrative, not judicial, duties, and that consequently his approval of the disbarment order was extraofficial and void. We cannot agree with that construction, inasmuch as it reads into the statute language which Congress did not use to make manifest its legislative intention. The section says that the Assistant Secretary shall perform such *duties*, not such administrative duties, as the Secretary shall prescribe, and, having said that, it does not lie with the courts to legislate into the law a word which Congress carefully omitted. The clear intention of the section was to permit the Secretary to relieve himself of those duties to which *in his judgment* he could not give proper personal attention, and that purpose might well be defeated, in part at least, by the introduction of what would be nothing less than a judicial, if not an injudicious, amendment. Such legislation is in the interest of governmental efficiency, and its value should not be lightly impaired or its scope narrowed because of a mere conjecture that the lawmaker *might* not have meant what he said. [Italics supplied.]

In *Bowling v. United States*, 299 Fed. 438 (C. C. A. 8, 1924), wherein it was contended that the Assistant Secretary of the Interior was without authority to determine the legal heirs of a deceased Indian allottee by making findings which were quasi-judicial in nature, the Eighth Circuit Court of Appeals expressly declared (299 Fed. 438, 441-442) :

The office of Assistant Secretary of the Interior and the powers relating to that office were established by sections 438 and 439, R. S. (12 Stat. 369) * * * [which] provided that he shall "perform such duties in the Department of the Interior as shall be prescribed by the Secretary, or may be required by law * * *." Under these statutory enactments, the Assistant Secretary is authorized to act in place of the Secretary, under the conditions specified * * *.

In *May v. United States*, 236 Fed. 495 (C. C. A. 8, 1916), it was contended that the Assistant Attorney General was without authority to appoint special attorneys under the act of June 30, 1906, which required such appointment to be "by the Attorney General." The Eighth Cir-

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cuit Court of Appeals, quoting sections 360, 348, 161 and 177, Revised Statutes, whose provisions are almost identical with the statutes authorizing the Secretary of the Interior to delegate authority to the assistant secretaries, disposed of that contention by saying (236 Fed. 495, 500) :

We do not think the act of June 30, 1906, in conferring the power of appointment upon the Attorney General, should be construed to mean that the Attorney General must, in all cases, sign the appointment himself, but that the power of appointment is conferred upon the Attorney General as other powers are conferred to be exercised by him personally or through his lawful assistants when duly authorized for such purpose.

Furthermore, the legality of the Secretary's exercise of such broad powers of delegation to the assistant secretaries has been uniformly upheld not only by the courts, but also by various legal and administrative officials. Thus, the Comptroller of the Treasury and the Comptroller General have repeatedly held that all duties vested in heads of departments may be delegated to the assistant secretaries under the statutory authority permitting such delegation. 1 Comp. Dec. 370 (1895) ; 3 Comp. Dec. 730 (1897) ; 4 Comp. Dec. 462 (1898) ; 17 Comp. Dec. 315 (1910) ; 18 Comp. Dec. 531 (1912) ; 25 Comp. Dec. 109, 111 (1918) ; 3 Comp. Gen. 694 (1924) ; 3 Comp. Gen. 777 (1924) ; 3 Comp. Gen. 797 (1924) ; 7 Comp. Gen. 482 (1928) ; 16 Comp. Gen. 695 (1937).

The Solicitors of the various departments have also adhered to this view and have so advised various administrative officials. Thus, in his opinion of November 17, 1904, to the Secretary of Commerce and Labor, the Solicitor of that Department said :

A careful examination of the various statutory provisions and judicial constructions thereof and opinions of the Attorney General in construction thereof, compels the conclusion that the power given to the heads of Departments to prescribe the duties of their assistants extends so far as to warrant the delegation to an Assistant Secretary of every power and function conferred by law upon the head of the Department, unless there is some express statutory provision prohibiting the same. The mere fact that the statute may have provided that the power shall be exercised or the function performed by the "head of the Department" or by "the Secretary" does not prohibit its delegation, where the Secretary is given the power to prescribe the duties of his assistant, even although the power and function is one involving discretion and judgment, or is quasi-judicial, or even judicial in the fullest sense of the word.

A similar position has uniformly been taken by various Solicitors for the Interior Department (52 L. D. 230, 234 (1927) ; Solicitor's memorandum of April 12, 1938, to the Assistant Secretary ; Solicitor's memorandum, M-30707, of April 26, 1940, to the First Assistant Secretary) and has long been uniformly followed in the administrative practice and in the decisions of this Department. See, e. g., *Wildrick v. Thomas*, 50 L. D. 149 (1923).

Until the recent opinion of the Attorney General (39 Op. Atty. Gen. No. 80), this was also the position consistently adhered to by the various Attorneys General. In 18 Op. Atty. Gen. 432, 433 (1886), Attorney General Garland concisely stated:

So long as the powers delegated to the Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the former is co-ordinate and concurrent with that of the latter.

Not only was this opinion reiterated in 19 Op. Atty. Gen. 133 (1888), but it seems to have been the administrative practice of the Attorney General in certain instances to view assistant secretaries as being within the scope of the phrase "head of department". Thus, although it is well established that the Attorney General will not render an opinion at the request of any Government official other than the President and the "head of any executive department" (Rev. Stat. secs. 354, 356, 5 U. S. C. secs. 303, 304; 39 Op. Atty. Gen. No. 91, October 4, 1939), nevertheless the Attorney General, without raising any objection, has frequently rendered opinions at the request of an assistant secretary. 39 Op. Atty. Gen. No. 106 (September 9, 1939); 39 Op. Atty. Gen. No. 55 (November 3, 1938); 38 Op. Atty. Gen. 441 (1936); 37 Op. Atty. Gen. 204 (1933); 35 Op. Atty. Gen. 305 (1927); 35 Op. Atty. Gen. 374 (1927); 34 Op. Atty. Gen. 457 (1925); 32 Op. Atty. Gen. 139 (1920).

The foregoing overwhelming line of authority seems to have wavered somewhat as a result of certain statements made in Attorney General Cummings' opinion of October 14, 1933, released for publication on July 1, 1939 (39 Op. Atty. Gen. No. 80), relating to the power of the Secretary of Commerce to delegate duties to the assistant secretaries of Commerce under statutes identical with those applicable to the assistant secretaries of the Interior Department. Attorney General Cummings stated:

* * * regulations which have the force of law and bear upon the rights or conduct of private citizens * * * must, in some manner, emanate from you. If a subordinate should draft a regulation which truly reflected your view and wish, I should regard all requirements as fully met, but the difficulty and uncertainty that might attend the establishment of the essential facts strongly suggest the advisability of your personal signing or other unequivocal act of approval.

He also quoted the following language from an opinion of Attorney General Sargent (35 Op. Atty. Gen. 15, 20, 21 (1925)), as being "particularly pertinent in the present connection":

"The making of regulations * * * designed to have the force of law, to be binding upon the public, and to be recognized and enforced by the courts is, I think, a duty which the statutes place upon the Secretary personally. Wherever, therefore, in the provisions of law mentioned in your letter, and to which I have hereinbefore referred, a power and duty to make regulations of this kind is conferred or imposed upon the Secretary I think those regulations should have his personal approval before they are promulgated."

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Since Attorney General Sargent's opinion was the only authority cited in support of the above proposition, it should be noted that Attorney General Sargent's opinion dealt, not with the power of the Secretary of the Treasury to delegate authority to the Under Secretary or assistant secretaries of the Treasury, but rather with his power to delegate them to the Director of Customs, the head of a particular bureau of the Treasury. In fact, Attorney General Sargent had expressly stated in his opinion (35 Op. Atty. Gen. 15, 20):

It is my understanding that in the organization and operations of the Treasury a full measure of discretion and judgment, in connection with many matters, has been exercised by the Undersecretary, since the creation of that office, and by the Assistant Secretaries for many years. The fact that this has been going on for a long time without question or challenge by Congress, or by the courts, is persuasive evidence of its propriety and legality.

It would seem, furthermore, that Attorney General Cummings did not intend his opinion to be a flat ruling that *all* administrative regulations bearing on the rights or conduct of private citizens are invalid unless they had been signed personally by the Secretary of the Department. On the contrary, his opinion seems to have stressed, not that the proposed delegation by the Secretary of Commerce was illegal, but rather that it would be less productive of any doubt as to the legality of the regulations if the Secretary signed them personally. Thus, he specifically declared in his opinion:

The theory underlying the vesting in an executive officer of numerous duties, varying in importance, is not that he will personally perform all of them, but rather that he will see to it that they are performed, the responsibility being his and he being chargeable with the result. The accomplishment of this is one of the highest responsibilities of an executive and there is not, and in reason cannot be, any set formula by which it is to be done.

The courts recognize this and will presume much in favor of the validity of an act performed by a responsible subordinate, particularly when he purports to act for, by direction of, or in the name of his superior; * * *

After Attorney General Cummings had issued this opinion, the Secretary of Commerce, by letter of November 4, 1933, requested clarification of the opinion with particular reference to his "right to delegate to one of the Assistant Secretaries of the Department any or all of the regulatory powers and functions" exercised and performed under one of the statutes mentioned in the opinion. By letter of November 10, 1933, Attorney General Cummings replied that he had not declared the delegation of such functions to be illegal, but had "expressly stated in my opinion of October 14th that the powers and duties vested in you by the statutes which you now mention, as well as the others listed in that opinion, might properly be delegated to one of the Assistant Secretaries, in accordance with the principles indicated" and that to forestall any challenge of a determination made by an Assistant Secre-

tary "it would be helpful to be able to show that the Assistant Secretary had applied in the particular case some general principle laid down by you." See also 40 Op. Atty. Gen. No. 3 (January 28, 1941).

It is my opinion, therefore, that the Secretary of the Interior has the power to delegate to the Under Secretary, the First Assistant Secretary, and the Assistant Secretary his authority to perform any of his duties, including the duty of approving the special or subsidiary regulations applicable to the various parks and monuments under the jurisdiction of the National Park Service.¹

Approved:

HAROLD L. ICKES,
Secretary of the Interior.

**BROWN AND ROOT, INC., AND MCKENZIE CONSTRUCTION
COMPANY**

Decided March 12, 1941

CONTRACTS—EIGHT-HOUR LAW—VIOLATIONS—EXCUSABILITY IN EMERGENCY.

A requirement of mere business convenience or pecuniary advantage does not constitute an "emergency" relieving a contractor of the penalty for a violation of the eight-hour law. The necessity of repairing a dangerously weak tower, however, does constitute an emergency "caused by * * * danger to life," and no penalty should be imposed for overtime employment in such work.

WIRTZ, Under Secretary:

On December 5, 1936, the United States and Brown and Root, Inc., and the McKenzie Construction Company entered into a contract (I2r-6809) covering items 1 to 55, inclusive, of the schedule of specifications, No. 702, made a part of the contract for the construction of Marshall Ford Dam, Colorado River Project, Texas. Article 11 of the contract provides in section (c) :

EIGHT-HOUR LAW.—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of the United States Code, title 40, sections 321 and 324, relating to hours of labor.

The contractor appeals from Findings of Fact Nos. 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, and 16 made by the construction engineer concerning violations of the 8-hour law.

¹ See 40 Op. Atty. Gen. 6 (March 12, 1941) confirming the interpretation accorded by this opinion to the Attorney General's opinion of October 14, 1933. [EDITOR.]

March 12, 1941

1. On November 30, 1937, the construction engineer made Findings of Fact No. 3, covering the cases of 26 workers who were required or permitted to work in excess of eight hours. In accordance with section 11 (c) of the contract the sum of \$130, representing a penalty of \$5 for each violation of the 8-hour law, was withheld from the payments to which the contractor was entitled under the contract. In a letter dated September 21, 1940, the contractor appeals from the imposition of such penalty in 25 cases and a claim for refund of \$125 has been made, the contractor stating that in 25 cases the overtime work was required because of an "emergency." The contractor states:

A strike of electrical workers had not only left us short of qualified men but the electrical work had fallen behind schedule while we were without any men. A vital transmission line between dam and gravel plant was being erected, and these men were worked ten hours one shift to avoid the loss of a whole day's production the following day.

The construction engineer in his Findings of Fact states:

The contractor advised that on account of the strike called by the electricians' union the force was short of qualified workers. The facts do not support this contention as five days after the strike occurred the number of electrical workers employed exceeded the number employed previous to the strike. The first date on which workers were required to work in excess of 8 hours was October 23, 1937, or approximately 15 days after the strike was called. No extraordinary emergency existed at the time the violations occurred which required employment in excess of the eight-hour calendar day.

* * * * *

The contractor has stated that the employment of the electrical workers and laborers on October 23, 1937 and November 3, 1937 in excess of eight hours per day was necessary in order to provide additional electrical service to the aggregate processing plant and that there was a shortage of qualified men for the work. This did not constitute an extraordinary emergency, and the shortage of qualified workers is not borne out by the facts.

The circumstances do not constitute an "extraordinary emergency" within the meaning of the 8-hour law. Section 325 of Title 40, United States Code (see section 11 (c) of the contract), lists as examples of emergencies those caused by famine, flood, danger to life, property, etc. The Supreme Court held in *United States v. Garbish*, 222 U. S. 257, 260, that "* * * no mere requirement of business convenience or pecuniary advantage is an extraordinary emergency within the meaning of the act." See *Ellis v. United States*, 206 U. S. 246, 257; 26 Op. Atty. Gen. 278.

The penalty, therefore, was properly imposed. The appeal from Findings of Fact No. 3 is dismissed and the claim for refund for the amount deducted is disallowed.

2. On May 9, 1938, the construction engineer made Findings of Fact No. 4, that in 31 cases men were required or permitted to work in excess of eight hours during February, March and April, 1938. In accord-

ance with said provision of the contract, the sum of \$155, representing a penalty of \$5 for each violation of the 8-hour law, was withheld from payments to which the contractor was entitled under the contract.

It appears that these findings were incorrect as a result of error in the pay rolls submitted by the contractor. A letter of July 7, 1938, from the Commissioner to the Chief Engineer and a letter of July 13, 1938, from the Acting Chief Engineer to the Construction Engineer direct that an additional finding be made, recalling and vacating the prior Findings of Fact No. 4, and a voucher be drawn in the sum of \$155 to be submitted to the Comptroller General for payment. On July 19, 1938, Findings of Fact No. 7 were made, amending Findings of Fact No. 4. Since Findings of Fact No. 4 have been vacated, the appeal therefrom is dismissed.

3. On June 16, 1938, the construction engineer made Findings of Fact No. 5, that during the month of May 1938, in 51 cases workers were required or permitted to work in excess of eight hours. In accordance with provision 11 (c) of the contract the sum of \$255, representing a penalty of \$5 for each violation of the 8-hour law, was withheld from the payments to which the contractor was entitled under the contract. An appeal has been taken from the imposition of such penalty in 18 cases and a claim for refund has been made. In the letter of September 21, 1940, the contractor states:

At this time, the main track of the cableway suddenly failed, and it was necessary to take down the old cable and erect a new one. We did not have enough riggers to work three shifts per day, and could not obtain them in time to do us any good. As mentioned above, the job was shut down until the repairs could be made, throwing close to a thousand men out of work. We claim that on any construction job, this constitutes an emergency. This work accounted for 50 violations. The remaining one was a cement finisher who worked over when his relief did not report. The work had to be done as the cement would have been too hard to finish before another man could be found. This also constitutes a genuine emergency.

It appears that the overtime was required for reasons of business convenience. The same rules of law discussed under point one apply here, that no mere requirement of business convenience or pecuniary advantage is an extraordinary emergency within the meaning of the act justifying overtime employment. *United States v. Garbish*, 222 U. S. 257, 260; *Ellis v. United States*, 206 U. S. 246, 257, 26 Op. Atty. Gen. 278. The penalty, accordingly, was properly imposed. The appeal is dismissed and the claim for refund of the amount deducted is disallowed.

4. On July 11, 1938, the construction engineer made Findings of Fact No. 6, that during June in 10 cases workers were required or permitted to work in excess of eight hours per day. In accordance with provision 11 (c) of the contract the sum of \$50, representing a penalty

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of \$5 for each violation of the 8-hour law, was withheld from the payments to which the contractor was entitled under the contract. An appeal has been taken with regard to seven cases from the imposition of such penalty and a claim for refund has been made. In the letter of September 21, 1940, the contractor states:

Again a rigger crew worked overtime to change a broken endless line on the cableway, so as to avoid shutting down the job with consequent loss of time to large numbers of men.

The same considerations of mere business convenience are apparent here and do not constitute an extraordinary emergency justifying overtime. The penalty, accordingly, was properly imposed. The appeal on this ground is dismissed and the claim for refund of the amount deducted is disallowed for the same reasons as stated above under point one.

5. On July 19, 1938, the construction engineer made Findings of Fact No. 7, vacating Findings of Fact No. 4, with regard to 13 violations of the 31 comprised therein. Findings of Fact No. 7 state that in 18 cases during February, March and April, workers were required or permitted to work more than eight hours per day. In accordance with provision 11 (c) of the contract, the sum of \$65 was refunded from the \$155 withheld under Findings of Fact No. 4, leaving a penalty of \$90 withheld from payments to which the contractor was entitled under the contract. An appeal has been taken with regard to 18 cases from the imposition of such penalty and a claim for refund has been made. The contractor states in his letter of September 21, 1940:

These cases divide into two classes. The first is where repair crews worked overtime to get equipment back into use, and the second where operators "doubled over" when the man who should have relieved them did not report. Substantially all concrete at Marshall Ford was placed with one cableway. If this one machine was down, the job practically shut down, causing hundreds of men to lose a shift. This was true whether the interruption was caused by mechanical trouble, or by failure of a key operator to report for duty. Either caused an emergency so far as the job was concerned, and we claim justified a few man-hours of overtime.

For the reasons stated under point one, *supra*, the penalty was properly imposed inasmuch as the circumstances do not constitute an "emergency" within the meaning of the act. The appeal on this point is dismissed and the claim for refund disallowed.

6. On October 28, 1938, the construction engineer made Findings of Fact No. 8, that in 11 cases at various times during the months of July, August and October, men were permitted or required to work more than eight hours per day. In accordance with section 11 (c) of the contract, the sum of \$55, representing a penalty of \$5 for each

violation of the 8-hour law, was withheld from the payments to which the contractor was entitled under the contract. An appeal has been taken in eight cases from the imposition of such penalty and a claim for refund has been made. The contractor states in his letter of September 21, 1940:

Six of these were caused by a broken endless line on the cableway, as above, one by a concrete finisher required to work over when no other finisher was available to relieve him, and one by a fireman on the locomotive working over to make the boiler safe. All the above were special and emergency cases, which occasionally cannot be avoided in work of this character.

For the same reasons expressed under the foregoing points, the penalty was properly imposed. The appeal is dismissed and the claim for refund disallowed.

7. On January 20, 1939, the construction engineer made Findings of Fact No. 9, that during December 1938, six employees were required or permitted to work overtime. In accordance with section 11 (c) of the contract, the sum of \$30, representing a penalty of \$5 for each violation of the 8-hour law was withheld. An appeal has been taken from the imposition of such penalty and a claim for refund has been made. In his letter of September 21, 1940, the contractor states:

Six riggers were out in the center of the 2,200 foot span cableway repairing a line. The work took longer than anticipated, and they were 30 minutes late getting in to where they could reach the ground. The violation is technical, rather than real.

It appears from the statement that the said violations of the 8-hour law could not be avoided by the contractor. However, the facts still do not constitute an "extraordinary emergency" within the meaning of the 8-hour law. The only exception to the 8-hour law is such an "extraordinary emergency" which is not equivalent to a failure or inability on the part of the contractor to avoid overtime on certain occasions where unexpected circumstances arise. A distinction must be drawn between emergency situations and unexpected situations or even unavoidable situations. The instant case is probably an unexpected and perhaps even an unavoidable case, but certainly it is not an "extraordinary emergency." The penalty, accordingly, was properly imposed. The appeal is dismissed and the claim for refund disallowed.

8. On March 14, 1939, the construction engineer made Findings of Fact No. 10, covering 24 violations of the 8-hour law during January 1939. In accordance with section 11 (c) of the contract, the sum of \$120, representing a penalty of \$5 for each violation, was withheld from the payments to which the contractor was entitled under the contract. An appeal has been taken from the imposition of this

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penalty and a claim for refund has been made. In the letter of September 21, 1940, the contractor states:

All chargeable to repairs on the cableway on three different occasions. As pointed out before, we have but one cableway which was scheduled for three shift operations, seven days per week. Repairs were thus always "emergency" in that very serious loss was incurred whenever delays occurred.

For the reasons stated under point one, the penalty imposed was proper. The circumstances do not constitute an extraordinary emergency justifying exceptions from the 8-hour law. The appeal on this point is dismissed and the claim for refund disallowed.

9. On April 6, 1939, the construction engineer made Findings of Fact No. 11, covering three violations of the 8-hour law during March 1939. In accordance with section 11 (c) of the contract, the sum of \$15, representing the penalty of \$5 for each violation, was withheld. An appeal has been taken from the imposition of this penalty and a claim for refund has been made.

It appears that the three employees were required to work in excess of eight hours while making repairs to the cableway, in the same circumstances as described in Findings of Fact No. 10. For the same reasons stated under point 10, the appeal from this finding is dismissed and the claim for refund disallowed.

10. On June 6, 1939, the construction engineer made Findings of Fact No. 12, covering six violations of the 8-hour law during May. In accordance with section 11 (c) of the contract, the sum of \$30 representing a penalty of \$5 for each violation, was withheld. It appears that the employees were required to work overtime to make repairs to a derrick and hoist used in placing concrete. For the reasons stated under point one, the penalty was properly imposed. Accordingly, the appeal is dismissed and the claim for refund disallowed.

11. On November 2, 1939, the construction engineer made Findings of Fact No. 13, covering four violations of the 8-hour law during October. In accordance with section 11 (c) of the contract, the sum of \$20, representing a penalty of \$5 for each violation of the 8-hour law, was withheld from the contractor. In the Findings of Fact is quoted the following explanation of the contractor:

"Upon inquiry of the foreman in charge, I find that these men did work a few minutes past whistle time to finish connecting one length of pipe so that the pump could go into operation. The time needed was certainly not more than twelve minutes, and probably less. The foreman does not remember whether the men had had extra time off for lunch on that day or not, but does know that on almost every day the crews have more than that amount of time off waiting for materials, or for some other operation to clear so that they could go ahead. In view of this situation, he did not consider that the perhaps eight or ten minutes involved constituted either bona fide overtime, or an eight hour violation."

The construction engineer states:

* * * On October 11, 1939, R. T. Robinson and J. P. Huber were interviewed and stated they started work at 7:30 A. M. on October 10, 1939 and had 30 minutes for lunch period. On October 12, 1939, Barney Walsh and Sam W. Reid stated they started their shift on October 10, 1939 at 7:30 A. M. and had 30 minutes for lunch. Investigation discloses that the employment of these four men on October 10, 1939, in excess of the regular eight-hour working day, was required in placing a pump and discharge line on upstream block No. 17 of the Marshall Ford dam from 3:50 P. M. to 4:12 P. M. It is found that no extraordinary emergency existed at the time of the violations which required employment in excess of eight hours in any calendar day.

For the reasons stated under point one, the circumstances do not constitute an "extraordinary emergency" overtime employment. Accordingly, the penalty was properly imposed. The appeal on this point is dismissed and the claim for refund disallowed.

12. On March 8, 1940, the construction engineer made Findings of Fact No. 15, covering two violations of the 8-hour law during January 1940. In accordance with section 11 (c) of the contract, the sum of \$10, representing a penalty of \$5 for each violation, was withheld from the payments due under the contract.

In the Findings of Fact is quoted the following explanation of the contractor:

"On the above date we were reerecting one of the 100 foot trusses on the sand stacker layout. We had the truss almost in final position at the end of the shift, when it was noticed that some of the green timbers in the top of the highest tower were very badly distorted, and, as the pull on the truss came nearer to final position, the distortion was rapidly becoming worse, to a point where it was dangerous to continue the lift. We, therefore, considered it necessary to lower the truss to a point where it could be safely tied off, and then install some additional stiffening in the head frame of the tower. No riggers were available to handle this work on the new shift, so the two men mentioned above were detailed to take care of lowering the truss, and making matters safe.

"The condition of the tower and truss at the end of the shift was definitely a menace to the life of anyone working thereunder, and it would have been extremely dangerous and poor practice to have left the situation as it was until the next day. We think this is definitely a case where overtime work was justified, inasmuch as, regardless of cost, we considered it essential to correct the condition before some one was killed or seriously injured.

"We, therefore, respectfully request that this overtime work be considered as necessary for the safety of other employees, and that we be not penalized for same."

The construction engineer states:

* * * Upon investigation it was found that these workers were required to work 16 hours on January 26, 1940 for the reasons set forth in the contractor's statement above. No extraordinary emergency existed at the time of the violation which required employment in excess of eight hours on that day.

In his letter of September 21, the contractor states:-

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A high tower being erected showed alarming signs of weakness just before the end of the shift. To make it safe required skillful and dangerous rigging work. No relief riggers were available and these two men worked over. To anyone who saw this tower deflecting under its load, its repair was certainly "emergency" of a grave character.

In view of the foregoing, an actual emergency existed constituting a danger to life and limb justifying the overtime required. Accordingly, the penalty should not have been imposed. The appeal on this point is allowed.

13. On May 17, 1940, the construction engineer made Findings of Fact No. 16, covering one violation of the 8-hour law in April 1940. In accordance with section 11 (c) of the contract, the sum of \$5 for this violation of the 8-hour law was withheld from the payments due the contractor under the contract. In his letter of September 21, 1940, the contractor states:

A cableway operator worked one hour overtime to complete the setting of a gate then under way, and to prevent serious delay to other operations on the next shift. When a situation of this kind arises only very occasionally as has been the case at Marshall Ford, we claim it is justifiably classed as an emergency, and appeal from the decision.

For the reasons stated under point one, these facts do not constitute an emergency within the meaning of the 8-hour law. Accordingly, the penalty was properly imposed. The appeal on this point is dismissed and the claim for refund disallowed.

In conclusion, the contractor's appeal from Findings of Fact Nos. 3, 4, 5, 6, 8, 9, 10, 11, 12, 13 and 16 is disallowed. The appeal from Findings of Fact No. 15 is allowed. Accordingly, the sum of \$10, which was withheld under Findings of Fact No. 15, should be refunded.

So Ordered.

LANCE CREEK INDEPENDENT OIL PRODUCERS AND ROYALTY OWNERS' ASSOCIATION, INC., Petitioner

v.

ARGO OIL CORPORATION, CONTINENTAL OIL COMPANY, THE BUCK CREEK OIL COMPANY, THE OHIO OIL COMPANY, AND UTAH OIL REFINING COMPANY, Respondents

Decided March 17, 1941

CONTRACTS—PETROLEUM FROM FEDERAL LANDS—REVOCATION OF DEPARTMENTAL APPROVAL OF SALES CONTRACTS.

In the absence of regulations authorizing such action, the departmental approval of contracts for the sale of petroleum produced from Federal lands may not be revoked by the Department in the absence of fraud, misrepresentation or mistake.

CHAPMAN, *Assistant Secretary*:

On May 31, 1939, after consideration of the report and recommendations submitted by the Geological Survey, the Secretary of the Interior established a minimum price amounting to \$1.14 per barrel, effective July 1, 1939, for the purpose of computing royalties due the Government on crude oil produced from Federal Land in the Lance Creek oil and gas field, Niobrara County, Wyo.

Thereafter, a contract dated July 1, 1939, between Argo Oil Corporation, Continental Oil Co., The Buck Creek Oil Co., and The Ohio Oil Co., as "Sellers," and Utah Oil Refining Co., as "Buyer," was submitted to the Department for approval by said sellers.¹ The contract was conditionally approved July 26, 1939.²

Petitions were filed by various oil and gas lessees and operators in the Lance Creek field for a hearing in the matter of the minimum price established for Government royalty computation purposes. At the hearing, which was held on September 20-21, 1939, counsel for the Lance Creek Independent Oil Producers and Royalty Owners' Association, Inc., the petitioner herein, moved that it be adjourned until after a hearing had been conducted for the purpose of determining whether approval of the July 1 contract should be revoked. This motion was denied, but the petitioner was given leave to request a hearing at a later date or to submit a brief in support of its petition. The question of revocation of approval has been presented for decision on briefs.

The authority to provide in Government oil and gas leases that sales contracts or other methods of disposal of lease products be submitted to the Secretary for approval or disapproval stems from broad provisions of section 30 of the mineral leasing act of 1920 which authorize the Secretary to insert in the leases "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 * * *," and from section 32. Obviously, to accomplish these objectives it is essential that the Department know

¹Oil and gas leases issued under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), require the lessee to file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas produced under said leases, except that used for production purposes, and contain an agreement by the lessee not to sell or otherwise dispose of the products leased except in accordance with a sales contract or other method first approved by the Secretary of the Interior. (Sec. 2 (d).)

²The condition is as follows: "This approval shall not be used to the prejudice of the United States as evidence in any hearing or litigation, nor shall it be construed as an admission by the United States that the prices to be paid for crude oil pursuant to section 5 of this agreement, in so far as they may apply to Government royalty oil, are reasonable or representative of its fair value or acceptable to the United States * * *."

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at all times under what terms and conditions the production from public lands is being disposed of in order that if such terms and conditions are not satisfactory, appropriate action may be taken.

The approval or disapproval of sales contracts or other methods of disposal of the production from Federal lands is wholly discretionary in nature. The Secretary must exercise his judgment with respect to a number of factors. For example, he must determine the effect, if any, of the price offered under a given contract upon the Government's royalty interest, whether the provisions dealing with measurement of products are in accord with the operating regulations, whether the contract is between proper parties in interest having authority to deal in the production from public lands—in short, he must determine whether approval of the contract will accord with the objectives of the act and conclude whether conditional or unconditional approval or outright rejection is warranted.

When the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him by the statute. *Wilbur v. Burley Irrigation District*, 58 F. (2d) 871 (App. D. C. 1932); *Garfield v. United States ex rel. Goldsby*, 30 App. D. C. 177, 183 (1907) and cases cited therein. This is not a case where the mere modification of administrative orders or regulations is involved (*cf. West v. Standard Oil Co.*, 278 U. S. 200 (1929)), but the invalidation of a contract between private parties in reliance upon which there has been a substantial change of position by the parties thereto.

Although there is ample authority under the provisions of sections 30 and 32 of the mineral leasing act to reserve in the leases or in the regulations or in both the power of the Secretary to review or even to recall his approval of sales contracts governing the disposal of products from Federal oil and gas leases, the Department has not done so and no such reservation exists with respect to the contract in question. The leases and the regulations are silent with respect to a review or recall of approval once given by the Secretary. It must be concluded, therefore, that in the absence of fraud, misrepresentation, or mistake the approval constitutes the final action of the Department.

Since the record is free of proof of fraud or misrepresentation there remains for consideration only the question of whether, as is alleged, the action of the Department was arbitrary or unreasonable or was taken in haste and without full consideration.

The petitioner urges that the contract should not have been approved in that it establishes a discriminatory posted price differ-

ential for Lance Creek crude oil for a 6-year period in advance, and that revocation of approval is necessary "to protect the rights and equities of those owners of royalty and production, including the Government, in the Lance Creek Field, none of whom are parties to the aforesaid contract of July 1, 1939." But the Department representing the Government's royalty interest is not affected by the price stipulated. The contract was approved upon the express condition that the approval shall not be construed as an admission by the United States that the prices specified in the agreement, insofar as they may apply to the Government's royalty portion of the oil, are reasonable and representative of its fair value or acceptable to the United States. The contract was approved, moreover, because it was deemed in the public interest to take such action. The Department has no authority to take action merely to protect the "rights and equities of owners of royalty and production" in the Lance Creek field. The mineral leasing act empowers the Secretary to take such action only as he deems to be in the public or Federal interest. If such action does not coincide with the private interests of all concerned, the conflicting private interests must yield. The Department having acted in the public interest, its determination cannot be characterized as arbitrary and unreasonable merely because the contract may have had an adverse effect upon the petitioners.

The petitioner also asserts that the Department, in approving the contract of July 1, 1939, failed to act with its usual deliberation, and that it approved the contract without consideration or approval of seven prior underlying contracts relating to the sale and purchase of Sundance and Leo crude oil produced from the Lance Creek field.

The assertion that the Department acted on the contract without adequate deliberation is refuted by the record. (Tr. pp. 73-80). The contract was carefully considered in the light of the order establishing a minimum price at the Lance Creek field for the purpose of computing Government royalties before it was conditionally approved. The only significance of the reference in the July 1, 1939, contract to the seven prior underlying contracts discussed in the petitioner's brief is that they establish an order of priority governing the taking of Lance Creek oil by the respondent, Utah Oil Refining Company. From the record it appears that they are not in any way amendatory of, or supplementary to, the July 1, 1939, contract and they have no direct relationship with that contract. The contracts that involve the disposal of Government royalty oil are, of course, subject to the same form of conditional approval as was accorded the respondents' contract.

In view of the foregoing, I find that no misrepresentation nor fraud in securing conditional approval of the contract of July 1,

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1939, has been proved, and that the Department's action was neither arbitrary, unreasonable nor ill-considered. Consequently, the petition of the Lance Creek Independent Oil Producers and Royalty Owners' Association, Inc., for revocation of the Department's approval of July 26, 1939, of the contract in question should be and is hereby denied.

Denied.

EMPLOYMENT OF ALIENS BY GOVERNMENT OF VIRGIN ISLANDS

Opinion, March 29, 1941

VIRGIN ISLANDS—OFFICIALS—EMPLOYEES—CITIZENSHIP.

The employment of an alien pilot by the Harbor Department of the Municipality of St. Thomas and St. John does not contravene section 38 of the Organic Act of the Virgin Islands (49 Stat. 1817, 48 U. S. C. sec. 1406j), requiring that "all officials of the Government of the Virgin Islands * * * be citizens of the United States," since a pilot is merely an employee and not an "official," the tenure, duration, duties and salary of the position not being fixed by law.

MARGOLD, *Solicitor*:

My opinion has been requested as to whether service by James E. Simmons, an alien, as a pilot of the Municipality of St. Thomas and St. John, Virgin Islands, contravenes section 38 of the Organic Act of the Virgin Islands (49 Stat. 1817, 48 U. S. C. sec. 1406j). That section provides that "All officials of the Government of the Virgin Islands shall be citizens of the United States * * *." Under section 2 of that act, the phrase "the Government of the Virgin Islands," as used in the act, includes "the governing authority of the two municipalities."

The question of the employment of James E. Simmons as a pilot by the St. Thomas Harbor Board was considered in a memorandum of the Acting Solicitor dated October 15, 1937. In that memorandum it was held that "a pilot in the employ of and paid by the Harbor Board would not be an officer of either the Government of the Virgin Islands or the government of the Municipality of St. Thomas and St. John, and could not be classified as an 'official' in the sense and meaning of the word as used in section 38" of the Organic Act and that "it is unnecessary to decide the question on the basis of the distinction that exists between an employee and an official * * *."

By ordinance of the Municipal Council of St. Thomas and St. John approved March 1, 1941, the St. Thomas Harbor Law of April 6, 1906, which created the Harbor Board, was repealed and a Harbor

Department was created as a department of the municipality. Section 4 of that ordinance provides:

(a) There is hereby created a Harbor Department for the purpose of administering the functions of the Harbor of St. Thomas. The head of this Department shall be known as the Harbormaster. The Harbormaster and all other officers and employees necessary for the proper functioning of this Department shall be appointed by the Governor, by and with the advice and consent of the Municipal Council, Provided, that the present incumbents of all offices and positions under the Harbor Department shall continue in office until their successors are appointed and have qualified unless sooner removed by competent authority.

(b) Funds, for defraying the expenses of administering the Harbor Department, including the salaries of the Harbormaster and other officers and employees of said department, shall be made available in the annual municipal budget from March 1, 1941.

It is therefore necessary to determine whether one serving in the capacity of a pilot is an "official" of the municipality.

While the term "office" is not susceptible of precise definition, the Supreme Court of the United States has stated that it "embraces the idea of tenure, duration, emolument and duties fixed by law." *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, 520.

The appointment of James E. Simmons, as a pilot of the St. Thomas Harbor Board, was originally made by the Governor pursuant to an amendment to the budget for the St. Thomas Harbor for the fiscal year 1938 which made provision for the position and specified the salary thereof. The appointment was for an indefinite period. The duties of the position were prescribed by the Harbormaster.

The status of the position was not changed by the ordinance of March 1, 1941. It has neither tenure, duration, duties or salary fixed by law. The position may be abolished, the incumbent removed, the salary and duties changed by appropriate administrative action at any time.

In these circumstances, it is my opinion that James E. Simmons, in his capacity as pilot, is merely an employee of the municipal government and not an "official" thereof. It follows that his continued employment in that position does not contravene section 38 of the Organic Act which requires all "officials" of the governments of the Virgin Islands to be citizens of the United States.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

UNITED STATES v. AARON CLEMENTS

Decided March 31, 1941

STOCK-RAISING HOMESTEAD—APPLICATION—SUBSTITUTE—RIGHTS INITIATED.

A stock-raising homestead application to enter undesignated lands, filed as an amendment of an earlier application and including other lands, is a substitute for, rather than an amendment of the earlier one, and, upon designation, the applicant's rights relate back to the later application and not to the earlier one.

CHAPMAN, Assistant Secretary:

On October 19, 1927, Aaron Clements applied to enter 430.79 acres of land within the Blackfoot, Idaho, land district under the act of December 29, 1916 (39 Stat. 862, 43 U. S. C. sec. 291). He filed a second entry showing as required by the act of September 5, 1914 (38 Stat. 712, 43 U. S. C. sec. 182). On December 12, 1927, a supplemental homestead application was filed with changes in the land description which increased the acreage applied for to 593.49 acres. A petition was also filed requesting that the lands applied for be designated as of stock-raising character, and, on April 13, 1928, they were so designated. The second entry showing was found to be satisfactory, and homestead entry was allowed on June 25, 1928, of the lands applied for on December 12, 1927.

As the result of a field investigation conducted in November 1934, the Commissioner of the General Land Office on May 10, 1935, directed adverse proceedings against the entry charging that the entryman had not established and maintained a residence in accordance with the requirements of law; that he had not placed permanent improvements on the land to the value of at least \$1.25 per acre; and that he was not qualified to make the entry for the reason that at the time it was initiated he was the owner and proprietor of more than 160 acres. Final proof was submitted July 24, 1935, about two months after receipt of the notice of the adverse proceedings. It is alleged in the final proof that residence was established August 1, 1928, and maintained continuously to the date of final proof, and that a house and 3½ miles of fence, valued at \$921, have been placed upon the land.

At the hearing held before George A. McLeon, probate judge, at Hailey, Idaho, J. G. Hedrick, Esq., appeared for the entryman, and R. P. Lowther, a special agent of the Department, appeared on behalf of the Government.

Upon consideration of the evidence adduced at the hearing, the register, on September 12, 1939, recommended cancelation of the entry on the ground that the entryman did not make a bona fide residence on the land. He held that the charges as to insufficient improvements and ownership of more than 160 acres had not been sustained. The entryman appealed to the Commissioner of the General Land Office.

By decision of March 28, 1940, the Commissioner held that although there may be some doubt as to the adequacy of the stock-raising improvements, entryman's failure to establish and maintain a bona fide residence is beyond question, and that as he was the proprietor of more than 160 acres at the time the entry was initiated, he was disqualified to make the entry regardless of any question as to whether or not he met the requirements as to residence and stock-raising improvements. The Commissioner held the final proof for rejection and the entry for cancelation.

The entryman has appealed to the Department on the ground that the Commissioner erred in holding that residence had not been established and maintained; that the necessary improvements had not been made; and that the entryman was not qualified at the time he made entry. It is contended that the Commissioner was in error in considering the questions of entryman's qualification and improvement of the land inasmuch as the register had held that these charges had not been proven; that the register had passed only on the question of residence; and that the entryman's appeal was taken only on the latter ground. It is submitted that the evidence clearly shows that entryman was not the owner, in possession of or entitled to the possession of more than 160 acres of land at the time he made the entry, and that there is nothing in the record to dispute his statements and the showing made by the final proof as to the improvements made on the land and the value thereof. It is contended that there is no positive proof that the entryman did not live on the land; that the testimony on behalf of the Government was purely negative; and that there was no evidence that he had a home elsewhere.

There is no merit in the contention that the Commissioner was in error in considering questions affecting appellant's entry which were not raised on the appeal to his office. It is well settled that the judgment of the register is not conclusive upon questions affecting the disposition of public lands (*Barnard's Heirs v. Ashley's Heirs*, 18 How. 43; *Dippert v. Berger*, 13 L. D. 496), and that his actions are subject to the supervision and control of the Commissioner under direction of the Secretary of the Interior (*Stephen Sweayze*, 5 L. D. 570, 574; *Morrison v. McKissick*, 5 L. D. 245). Moreover, the Secretary has jurisdiction if entry has been made under the public land laws to inquire and determine whether or not the entry was properly made, and, if found not to have been so allowed, it is his duty to vacate and cancel such entry (*Reed v. Bowron*, 32 L. D. 383; *F. A. Hyde & Co.*, 33 L. D. 639, 640).

In view of the charge that appellant was not qualified to make entry by reason of the ownership of more than 160 acres at the time the entry was initiated, it is deemed proper first to consider that

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question. Should it be found that he was in fact disqualified, there would be no reason to consider the charges with respect to residence and improvements.

The Government's representative at the hearing introduced a certified copy of a warranty deed signed by members of the Neal family, and executed by H. H. Neal, their attorney in fact, and Effie G. Neal, purporting to convey to appellant 294.26 acres situated in Blaine County, Idaho. The instrument was executed and acknowledged before J. G. Hedrick, representing appellant in this proceeding, on September 7, 1927, and recited therein that it was signed and delivered in the presence of J. G. Hedrick. Objection was interposed by Mr. Hedrick on the ground that the instrument was not signed and delivered in his presence, but was merely acknowledged by him as a notary public; that it does not show evidence that it was delivered to appellant on or before October 17, 1927; and that the records show that the deed was recorded on the records of Blaine County, Idaho, on February 9, 1928.

H. H. Neal testified that he was cashier of the First National Bank of Hailey, Idaho; that as attorney in fact for the Neal family he signed and acknowledged the deed dated September 7, 1927, but that appellant did not pay him the \$1,900 for the land until January 3, 1928; and that he did not deliver the deed to appellant until he paid the purchase price. Appellant testified that Neal did not deliver the deed until he gave Neal a check for \$1,900 on January 3, 1928.

The Government next offered in evidence a certified copy of a warranty deed executed by Christena M. and Emphield H. Sowers purporting to convey to appellant 80 acres also situated in Blaine County. This instrument was duly executed and acknowledged on October 11, 1927, and recited that it was signed and delivered in the presence of Frank S. Boone, notary public, residing at Hailey, Idaho. The deed was filed for record on November 18, 1927. Appellant testified that he paid the purchase price for the land described in the Sowers deed on November 18, 1927, and received the deed on that date. Counsel for appellant introduced in evidence the original deed of this transaction and called attention to a notation thereon of "\$100 November 18."

The Government then offered a certified copy of a warranty deed whereby Ralph Edmiston conveyed to appellant 102.69 acres situated in Blaine County. The instrument was duly executed and acknowledged on September 30, 1927, and recited that it was signed and delivered in the presence of Frank S. Boone, notary public. It was recorded on October 4, 1927. Counsel for appellant interposed no objection.

Upon a consideration of this evidence, the Acting Assistant Commissioner stated that the deeds, having been executed prior to the initiation of the entry, conferred a valid right upon the entryman to the lands involved, subject only to his own act or default, and that, therefore, he was disqualified to make the entry, citing *Reiber v. Stauffacher*, 38 L. D. 201, 203, and *United States v. Terliamis*, 56 L. D. 320, 324. Setting aside for the moment the general question of the validity of appellant's entry, the Department cannot agree that he possessed an enforceable right to acquire title by virtue of the instruments introduced in evidence. At the hearing, convincing testimony was adduced to prove that two of the deeds were not delivered on the dates of execution. Parol evidence is admissible to show such fact. *Whitney v. Dewey*, 10 Idaho 633, 80 Pac. 1117. Therefore, unless there was in existence a valid contract of sale, appellant possessed no enforceable right to acquire title, as the remedy of specific performance presupposes the existence of such a contract. Section 6009, Idaho Revised Codes, requires that an agreement for the sale of real property is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party charged. In construing this section, the Supreme Court of Idaho in the case of *Houser v. Hobart et al.*, 22 Idaho 735, 127 Pac. 997, held that the memorandum must be signed by both parties, where there are mutual promises, in order that it may be binding upon both and so each may have an action upon it. See *Earhart v. Rein*, 38 L. D. 613. The record does not disclose any such agreement and we must assume that there was none. It follows that appellant had no enforceable right.

The stock-raising homestead law provides that it shall be lawful for any person qualified to make entry under the homestead laws to make a stock-raising homestead entry. 43 U. S. C. sec. 291. Section 2289 of the Revised Statutes, 43 U. S. C. sec. 161, provides that "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." This explicit inhibition is intended to prevent those who own land from abusing the public bounty. The law should be equitably construed in the light of that intention.

Appellant first filed application for a stock-raising entry of 430.79 acres on October 19, 1927, and on December 12, 1927, he filed another application embracing 162.70 acres more than applied for in the earlier application, and petitioned for a designation of all the land as stock-raising. The right of entry conferred by the stock-raising act does not attach to the land unless and until designated. The applicant merely has a preference right to enter the land, as against others, when and if designated as subject to the provisions of the stock-raising act, and his application has no segregative effect. *John F. Silver*, 52 L. D. 499; Instructions of January 12, 1921 (47 L. D.

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629). All of the land applied for in the application of December 12, 1927, was subsequently designated on April 13, 1928, and appellant's right of entry related back to the date of his application. *Condas v. Heaston*, decided December 22, 1922 (49 L. D. 374). The December 12 application, including as it did other lands, was a substitute for, rather than an amendment of the earlier application. The lands described in the later application were the ones designated in accordance with the petition accompanying it. It follows that appellant's rights related back to his application of December 12, 1927, the one which was allowed on June 25, 1928.

The evidence discloses that appellant negotiated for the purchase of 476.95 acres of privately owned lands, and deeds were executed by the grantors, prior to the filing of either homestead application. No objection was interposed at the hearing to the evidence that he acquired 102.69 acres of land from Ralph Edmiston by warranty deed executed September 30, 1927, and recorded October 4, 1927. In connection with the Sowers deed, executed October 11, 1927, reciting the transfer of 80 acres of land to appellant, he testified that he paid the purchase price of \$100 and received the deed on November 18, 1927, and that it was recorded the same day. Subsequently, December 12, 1927, appellant filed the homestead application which was allowed on June 25, 1928, and swore therein that he was not the proprietor of more than 160 acres of land in any State or Territory. It cannot be disputed that by virtue of the Edmiston and Sowers deeds he was in fact the proprietor or owner of at least 182.69 acres of land on December 12, 1927. His declaration to the contrary on that date misrepresented the facts. In these circumstances, he was disqualified to acquire any rights under the homestead laws, and his entry was an unlawful appropriation of public lands.

While it is unnecessary, in view of the foregoing conclusion, to consider the charges of insufficient residence and improvements, it may be stated that a preponderance of the evidence discloses a failure to comply with the law in these respects. Six witnesses for the Government who lived near the homestead and were in a position to know the facts testified that they had never seen appellant living upon the land and that the land bore no evidence of his having resided thereon. Appellant and two others testified to the contrary. One of these witnesses, Unamuno, testified that he had not been to the entry since residence was alleged to have been established. The register and the Commissioner concurred in finding appellant had not maintained a bona fide residence on the homestead, and their decisions are fully warranted by the evidence.

Appellant's entry must be canceled, and the decision appealed from accordingly is affirmed.

Affirmed.

**PREFERENCE RIGHTS OF ENTRY OF RELINQUISHERS OF FORMER
HOMESTEAD ENTRIES IN BOISE RECLAMATION PROJECT**

Opinion, April 3, 1941

RECLAMATION—HOMESTEADS—PREFERENCE RIGHTS OF ENTRY.

Notwithstanding a provision in the Interior Department Appropriation Act, 1941 (act of June 18, 1940, 54 Stat. 406, 439), declaring it to be the policy of Congress that, in the opening to entry of newly irrigated public lands, preference should be given to families who have no other means of earning a livelihood, or who have been compelled to abandon, through no fault of their own, other farms in the United States, which provision is not mandatory but merely a suggestion or guide to the Secretary in providing for the entry of newly irrigated public lands, the Secretary has sufficient superintending and supervisory power to warrant his giving first preference in the opening of lands in the Payette Division of the Boise Reclamation Project to former homestead entrymen who relinquished their homesteads in good faith in the expectation of receiving patents from the State of Idaho under the Carey Act.

MARGOLD, Solicitor:

I have received a memorandum of January 30 from the Under Secretary wherein he asks for my opinion as to the authority of the Department to grant preference rights of entry to relinquishers of former homestead entries of lands now in the Payette division of the Boise reclamation project which will be superior to preferences given to others by the following provision of the Interior Department Appropriation Act, 1941 (act of June 18, 1940, 54 Stat. 406, 439) :

It is hereby declared to be the policy of Congress that, in the opening to entry of newly irrigated public lands, preference shall be given to families who have no other means of earning a livelihood, or who have been compelled to abandon, through no fault of their own, other farms in the United States, and with respect to whom it appears after careful study, in the case of each such family, that there is a probability that such family will be able to earn a livelihood on such irrigated lands.

Prior to the time when the lands in the Payette division of the Boise project were withdrawn for reclamation purposes, some of the lands were included in homestead entries. During the time when certain of these entries were outstanding, and prior to final proof, assurances were given that the lands were to be included in a Carey Act reclamation project, and the entrymen were prevailed upon to relinquish their entries in the expectation of receiving patents from the State under the Carey Act. That the relinquishments were filed in good faith and upon assurances that the Carey Act project would be completed, there can be no doubt. The project failed of completion, whereupon many of the relinquishers filed applications for reinstatements of their entries, but as the lands had in the meantime been included in a first-form reclamation withdrawal, the applications could not be allowed. How-

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ever, they were not rejected but were suspended and still remain suspended.

As the Commissioner of Reclamation has stated, in his memorandum of December 31, 1940, the Department has taken the position that it would favor the recognition of the apparent equities existing in the relinquishers, and therefore it is proposed that preference be given certain of these persons in the entry of the lands in the Payette division under the reclamation laws without regard to the question of whether or not they possess any or all of the attributes set out in the quoted provision of the Appropriation Act.

The question which I am called upon to decide is whether you have authority to give such preference.

It will be noted that the quoted provision of the Appropriation Act is not so worded as to constitute a mandate that you shall give preference to families having the particular attributes set out therein. Instead, the provision merely declares a policy of Congress without directing you to carry out that policy. It therefore can properly be considered merely as a suggestion or guide to you in providing for the entry of newly irrigated lands, which suggestion or guide, in the absence of other factors, you would no doubt prefer to follow. In fact, it may be mentioned parenthetically that, as to all lands in the Payette division other than those which the relinquishers are to be permitted to enter, preference rights of entry are to be given those families who come within the purview of the statute.

At any rate, the statute is not mandatory and accordingly you are well within your authority if, in the interest of protecting the equities existing in the relinquishers, you depart from the guiding provisions of the statute.

This conclusion is buttressed by the decision of the Supreme Court of the United States in the case of *Williams v. United States*, 138 U. S. 514. In that decision the Court stated (p. 524):

* * * It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

This broad interpretation of the scope of your powers in dealing with the public lands, when considered in the light of the fact that the quoted provision of the statute is not mandatory, makes it clear that you possess sufficient authority, in the face of patent equities not protected by the statute, to make such provision for the entry of the lands as will further the interest of justice.

Accordingly, it is my opinion that the proposal to grant preference in the entry of the lands in the Payette division to the relinquishers of former homesteads embracing such lands does not violate the provisions of the Appropriation Act and is within the scope of your authority.

Approved:

A. J. WIRTZ,
Under Secretary.

STATUS OF ALIENS UNDER ALASKAN FISHERY LAWS

Opinion, April 18, 1941

ALIENS—EXCLUSION FROM ALASKA FISHERIES—RIGHTS OF DECLARANTS FOR CITIZENSHIP.

Declarants holding first citizenship papers are not excluded from fishing in Alaskan waters under the act of June 25, 1938 (52 Stat. 1174, 48 U. S. C. A. 243), amending section 1 of the act of June 14, 1906 (34 Stat. 263).

MARGOLD, *Solicitor*:

My opinion has been requested on the question of whether declarants for citizenship (i. e., non-citizens who have taken out first papers but have not yet been finally admitted to citizenship), are excluded from fishing in the waters of Alaska under the act of June 25, 1938 (52 Stat. 1174, 48 U. S. C. A. 243), amending section 1 of the act of June 14, 1906 (34 Stat. 263), entitled "An Act to prevent aliens from fishing in the waters of Alaska." The amendatory act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section I of the Act of Congress approved June 14, 1906 (34 Stat. 263), entitled "An Act to prevent aliens from fishing in the waters of Alaska," is amended to read as follows:

That it shall be unlawful for any person not a citizen of the United States, or who has declared his intention to become a citizen of the United States, and is not a bona fide resident therein, or for any company, corporation, or association not organized or authorized to transact business under the laws of [the United States or under the laws of] any State, Territory, or district thereof, or for any person not a native of Alaska, to catch or kill, or attempt to catch or kill, except with rod, spear, or gaff, any fish of any kind or species whatsoever in any of the waters of Alaska under the jurisdiction of the United States: Provided, however, That nothing contained in this Act shall prevent those lawfully taking fish in the said waters from selling the same, fresh or cured, in Alaska or in Alaskan waters, to any alien person, company, or vessel then being lawfully in said waters: Provided further, That nothing contained in this Act shall prevent any person, firm, corporation, or association lawfully entitled to fish in the waters of Alaska from employing as laborers any aliens who can now be lawfully employed under the existing laws of the United States, either at stated wages or by piecework, or both, in connection with the [Alaskan fisheries or with] canning, salting, or otherwise preserving of fish: *Provided further, That any person owing allegiance*

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to the United States shall not be considered an alien for the purposes of this Act: And provided further, That any person who is a bona fide resident of Alaska and has been such a resident for the period of three consecutive years prior to the date of approval of this Act, and who during such three-year period has been continuously or seasonally engaged in fishing in the waters of Alaska for commercial purposes, may continue to engage in fishing in the waters of Alaska for commercial purposes for the period of three years after the date of the approval of this Act, although not a citizen of the United States.

Language in the original act which was not retained in the amendatory act is bracketed, and that which has been added by the amendatory act is italicized.

A strictly grammatical reading of the main clause of this statute, paying faithful attention to the arrangement of not's, and's, and or's, might lead one to the conclusion that only Indians and Eskimos may lawfully catch fish in Alaska without using rods, spears, or gaffs. Such an attempt to read grammatically what is clearly an ungrammatical sentence would lead to a practical absurdity. It is necessary, therefore, to consider the practical administration which was given to the act of June 14, 1906. It is this practical construction that Congress must have intended to continue, when it reenacted the 1906 act, except in those respects wherein specific modifications were made in the 1906 act. The issues on which such modifications were made are irrelevant to the question before me.

I find that a constant course of construction of this statute has placed declarants on a parity with citizens with respect to the right to fish in Alaskan waters. This construction was apparently accepted by the court in *United States v. Miyata*, 4 Alaska 436 (1912). A recent opinion by George W. Folta, Counsel at Large for the Interior Department in Alaska, refers to "the practical construction given the enacting clause up to the present time, namely, that declarants are allowed to fish on an equality with citizens," and declares:

that any other construction would result in conflict and produce hardships. Since the enacting clause has been retained in its original form, it seems clear that the rights of declarants are not affected by the amendatory act (Op. No. 34, Jan. 2, 1941).

Furthermore, in construing the final proviso of the act cited, the opinion cited held—

that aliens who have been continuously or seasonally employed as fishermen in Alaska for the three years preceding the passage of the amendatory act and who have, during that period, resided in Alaska, may continue in such employment only until June 25, 1941, unless they are admitted to citizenship on or before that date, in which event they would be allowed the fishing privileges of citizens generally. *Inability to complete their naturalization by the crucial date would not result in the loss of the right to fish since the right of a declarant to fish, as pointed out, is identical with that of a citizen.* [Italics supplied.]

I am of the opinion that the ambiguities of this statute with respect to the rights of declarants have been resolved by a course of practical construction confirmed by the judicial and legislative branches of the Government and that it is therefore incumbent upon the Executive branch of the Government to recognize in declarants the same rights of fishing that citizens may claim in Alaskan waters.

I have the less hesitation in reaching this conclusion because it appears to be entirely in conformity with the actual intent of Congress. What Congress attempted to do was to exempt four classes from the prohibitions of the statute cited, namely: (a) citizens; (b) declarants; (c) authorized corporations and associations; and (d) Alaskan natives. It was clearly not the intention of Congress to require any group or person as a condition of fishing in Alaskan waters to meet more than *one* of these qualifications. Accordingly, it is clear that Congress intended to confer upon declarants the same right to fish that it conferred upon the other three classes considered.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

EXPENDITURE OF TAXES REFUNDED TO PHILIPPINE TREASURY

Opinion, May 13, 1941

PHILIPPINE ISLANDS—EXPENDITURE OF REFUNDED PROCEEDS OF EXCISE TAXES— STATUTORY CONSTRUCTION.

Section 19 (a) of the Philippine Independence Act (53 Stat. 1232, 48 U. S. C. 1248) provides that the proceeds of excise taxes collected on coconut oil shipped to the United States from the Philippines shall be paid into the treasury of the Philippines, "to be used for the purpose of meeting new or additional expenditures which will be necessary in adjusting Philippine economy to a position independent of trade preferences in the United States and in preparing the Philippines for the assumption of the responsibilities of an independent state." The word "and" is to be construed in the disjunctive and the proceeds therefore may be used to strengthen the Philippine Constabulary and for the construction of an airport upon a determination that such purposes will serve "in preparing the Philippines for the assumption of the responsibilities of an independent state."

MARGOLD, *Solicitor:*

Pursuant to the Assistant Secretary's reference of April 14, 1941, I have considered the request of the United States High Commissioner to the Philippine Islands for the views of this Department on the question whether excise taxes on coconut oil, collected in the United States and refunded to the Government of the Philippine Common-

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wealth, may be used to strengthen the Philippine Constabulary and to construct an airport at Manila.

The pertinent statutory provisions are found in section 19 added to the Philippine Independence Act by section 6 of the act of August 7, 1939 (53 Stat. 1226, 1232). Subsection (a) of section 19 provides in part that the proceeds of excise taxes collected on coconut oil shipped to the United States from the Philippine Islands—

* * * shall be held as separate funds and paid into the treasury of the Philippines to be used for the purpose of meeting new or additional expenditures which will be necessary in adjusting Philippine economy to a position independent of trade preferences in the United States and in preparing the Philippines for the assumption of the responsibilities of an independent state: * * *

As neither the strengthening of the Philippine Constabulary nor the construction of an airport at Manila appears to be a means of "adjusting Philippine economy to a position independent of trade preferences in the United States," while it is quite possible that either or both may be means of "preparing the Philippines for the assumption of the responsibilities of an independent state," the first question is whether the "and" connecting these two prepositional phrases in the above quotation may be construed as prescribing an alternative. I think it quite clear that it can and should be so construed.

The word "and" in a statute may be construed in the disjunctive where the sense of the provision requires and where necessary to effectuate the legislative intent. *Hensel et al. v. United States*, 126 Fed. 576 (1903); *Traveler's Insurance Co. v. Norton*, 24 F. Supp. 243 (1938); *United States v. Fisk*, 70 U. S. 445 (1865); *United States v. Mullendore*, 30 F. Supp. 13 (1939). In the instant provision, I think, a logical analysis of the language itself justifies such a construction. The direction is that funds be used for expenditures necessary to achieve either one or both of two described ends, namely, "in adjusting Philippine economy to a position independent of trade preferences in the United States" and "in preparing the Philippines for the assumption of the responsibilities of an independent state." It can be said that any adjustment looking toward independence from trade preferences theretofore enjoyed would constitute preparation, in one form, for assuming the responsibilities of an independent state; the converse, however, that any preparation for such responsibilities would necessarily take the form of an adjustment to the loss of trade preferences, cannot be said to be true.

If, therefore, the word "and" is to be construed technically in the conjunctive sense, no effect is given to the second phrase used by Congress because, while it is the broader, it would be limited by the preceding phrase and would add nothing to the meaning.

On the other hand, to construe "and" in this instance in the disjunctive will give logical purpose to the use of the two phrases, namely, to authorize the expenditure of funds for the broader purpose included in the second phrase and at the same time to emphasize the importance, in the legislative intent, of the narrower purpose first defined. The specific mention of one of a class, followed by mention of the class itself, is a rhetorical device not uncommonly employed for emphasis, and in this instance it seems clear that it is used by the Congress for that purpose.

Assuming, therefore, that expenditures may be made for that class of objects designed to further the independent functioning of the Philippines although not related to the matters involved in the loss of trade preferences, the question remains whether the strengthening of the Philippine Constabulary and the construction of an airport at Manila fall within that class. This is largely a question of fact, but it may be said that the authority granted is not limited to such expenditures as are required to replace expenditures formerly made by the United States for identical purposes; specifically, a prior expenditure of funds by the United States for the support of the Philippine Constabulary is not a condition precedent to the authority of the Commonwealth Government to spend these funds for the support of that body. I think it may be said that within the meaning of the provision in question are included those objects of expenditure normally considered by a government to be necessary for the maintenance of its integrity as a sovereign power and for the maintenance of its place among other nations in trade and commerce. The two objects mentioned by the High Commissioner in his request certainly seem, on the basis of the facts before me, to qualify in those categories.

While it is my opinion, based on the foregoing, that the expenditures contemplated fall within the terms of subsection (a) of section 19, it must be noted that by subsection (b) the President of the United States is specifically invested with final administrative authority to determine at any time whether the Commonwealth Government is acting in compliance with the provisions of subsection (a). The availability of these funds for any specific purpose will, therefore, depend on the President's determination of whether, in the circumstances then obtaining, their expenditure will meet the requirements of subsection (a) which I have construed above, irrespective of the present views of this Department on the qualification of any object for such expenditure.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

CRIMINAL JURISDICTION OVER INDIANS ON LANDS PURCHASED FOR THEM WITHOUT STATE CONSENT

Opinion, May 28, 1941

STATUS OF LANDS PURCHASED FOR INDIANS—EFFECT OF PROCLAMATION AS INDIAN RESERVATION—FISH AND GAME LAWS—GENERAL CRIMINAL LAWS.

Lands purchased by the Federal Government for Indian use and set apart under the superintendence of the Government, whether proclaimed an Indian reservation or not, have the same status as an Indian reservation, and, therefore, the State of Wisconsin cannot enforce its criminal laws, including its fish and game laws, against the Indians on such lands.

MARGOLD, *Solicitor*:

You [Secretary of the Interior] have referred to me for an opinion the question presented by the Indian Office whether the State of Wisconsin may enforce its fish and game laws and other criminal statutes against Indians for acts committed on lands purchased for them by the Federal Government, including lands formally declared an Indian reservation under the Indian Reorganization Act and those which have not yet been so declared.

The question arose because of the arrest of an Indian of the Sakaogon Indian Community in Wisconsin on lands purchased for the Community under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and declared a reservation under section 7 of that act. The arrest was made by a State game warden for violation of the State game laws and the Indian was fined by the Justice of the Peace. It is reported that State game wardens have entered this reservation at various times and searched the Indian homes.

The argument advanced by the Justice of the Peace and the State Conservation Department is that the lands purchased for the Indians were purchased by the Federal Government without securing an enabling act from the State legislature and the permission of the county authorities and that therefore the State did not lose criminal jurisdiction of the lands purchased.

The conclusion of the State authorities that State officers may arrest Indians within an Indian reservation for violation of the State law does not follow from the premise that the State did not lose criminal jurisdiction of the area because of the purchase of land by the Federal Government without the consent of the State. The Federal Government does not assert exclusive jurisdiction of the lands purchased for Indians (see *United States v. McGowan*, 302 U. S. 535 at 539), nor claim that the State lost sovereignty of the land. The position of the Government is that criminal jurisdiction over the lands remains in the State for all purposes except that the State cannot apply its laws to the Indians within the reservation without the sanction of Congress.

Whether the Federal purpose relates to Indians or not, the ownership and use by the Federal Government of lands within a State, acquired without the consent of the State legislature, do not affect the jurisdiction of the State, except that the State cannot interfere with the Federal purpose for which the lands were acquired. See *Surplus Trading Company v. Cook*, 281 U. S. 647 at 650, 651. As stated in that case, a typical illustration of this situation is the "usual Indian reservation set apart within a State as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life." The civil and criminal laws of the State were said to apply to such areas except in relation to the Indians therein.

Over Indian activities within Indian reservations the Federal Government does claim jurisdiction exclusive of the State. A group of Indians within an Indian reservation created for them by the United States is a "dependent Indian community" over which the United States has jurisdiction to the exclusion of the State. *Kagama v. United States*, 118 U. S. 375; *United States v. Sandoval*, 231 U. S. 28; *United States v. Quiver*, 241 U. S. 605; *United States v. McGowan*, *supra*.

One of the most thorough judicial analyses of the exclusive nature of Federal jurisdiction over Indians on Indian reservations as it relates to the criminal law of the State was made in 1931 by the Supreme Court of Wisconsin. *State v. Rufus*, 205 Wis. 317, 237 N. W. 67. That case held that the criminal law of Wisconsin did not apply to Indians on the Bad River Reservation, and reversed an 1879 Wisconsin case to the contrary. The argument was based upon the uniform recognition by Congress and the Federal courts that Indians on reservations are the wards of the Government subject to Federal supervision, which supervision can admit no interference or supplementation by State action.

This principle was applied specifically to the Wisconsin game laws by the Federal District Court when Wisconsin game officers sought to enforce the State laws against Indians on the same reservation. *In re Blackbird*, 109 Fed. 139 (D. C. Wis., 1901). The court said (at page 143) that the "true and unimpeachable ground" of Federal jurisdiction over Indians placed on reservations in the States is that they are wards of the Government and, Congress having assumed to punish for criminal offenses, the jurisdiction is exclusive. Identical rulings have been made by other Federal courts. *In re Lincoln*, 129 Fed. 247 (D. C. N. D. Calif., 1904); *United States v. Hamilton*, 233 Fed. 685 (W. D. N. Y., 1915). Both the *Rufus* and the *Blackbird* cases cite the fact that State jurisdiction over the reservation is complete except in matters touching the Federal relationship to the Indians. That State criminal laws apply to white persons within the reservation is well attested. *United States v. McBratney*, 104 U. S. 621; *Draper v. United States*, 164 U. S. 240.

May 28, 1941.

These rules of jurisdiction are so well established that the only present question is whether a difference in the conclusion is necessitated by the fact that the lands were purchased for the Indians and were not set apart by treaty, statute, or Executive order from the original Indian country or from the public domain.

This office considered a similar question in the Solicitor's Opinion of September 4, 1940, 57 I. D. 162, *supra*, which held that State officers could not enter an Indian reservation in Florida for the purpose of removing deer thought to be infested with ticks. The lands of the Florida reservation were purchased under congressional appropriations providing merely for the purchase of lands for permanent homes for the Seminole Indians. Other lands recently purchased for the reservation under the Indian Reorganization Act had not yet been declared a reservation.

In that opinion I referred to the effect of the *McGowan* decision, and said of that case:

The Supreme Court swept aside distinctions based on the manner of acquisition of the land and on its previous character, saying that what must be regarded as Indian country must be considered in relation to the changes which have taken place, that the protection of the United States is extended over all dependent Indian communities within its borders, that the fundamental consideration of both Congress and the Department of the Interior in establishing this Colony was the protection of a dependent people, that the Indians in this Colony were afforded the same protection as that given Indians in other settlements known as reservations, that it is immaterial whether Congress designates a settlement as a reservation or a colony, that land may be an Indian reservation simply because it is set apart for the use of the Indians under the superintendence of the Government, as occurred in the case of the Reno Indian Colony, and that, while the State may retain sovereignty over the territory its laws cannot conflict with Federal enactments passed to protect and guard its Indian wards.

This decision was foundation for my memorandum to the Assistant Secretary of February 17, 1939, advising that lands purchased under the Indian Reorganization Act but not yet proclaimed a reservation may nevertheless be treated as a reservation and that section 7 of that act contemplated a formal declaration of status rather than a change in status of the lands. The fact that the newly purchased lands in the Hendry County reservation have not been declared a reservation would not seem to be significant or place them in a different category from any other lands of the reservation. All the lands have been set apart for the use of the Indians, under the superintendence of the Government. [p. 166.]

The *McGowan* decision is a culmination of the uniform line of Federal decisions, rehearsed in the *Rufus* and *Blackbird* cases, which rest the exclusive nature of Federal jurisdiction over the Indians, not upon the original title to the Indian reservation, but upon the existence of a dependent Indian community in an area established by the Federal Government for their protection.

The creation of an Indian reservation by purchase is not a new procedure. Congress has frequently authorized the purchase of land for

Indian use, usually designating the specific tribe, as in the Florida case, but sometimes providing a general authorization as in the Indian Reorganization Act. Congress has not, however, differentiated between the status of this type of reservation and other types. They have all been subsumed under the general term "Indian reservation" and treated as subject to the same laws. Because the original general allotment act of February 8, 1887 (24 Stat. 388), which was passed before the practice of purchasing lands for Indians became necessary, related only to treaty, statutory, and Executive order reservations, setting apart lands for Indian use, the act of February 14, 1923 (42 Stat. 1246), was passed to extend the provisions of the act to all lands purchased by authority of Congress for the use of any Indian or Indian tribe. This act demonstrated the assimilation of the purchased lands into the status of other reservation lands.

I, therefore, conclude that the statutes and judicial decisions relating to the application of State criminal law to Indians on Indian reservations, apply to lands set apart for Indians by the Federal Government by purchase, in the same manner as to other reservations, and that, therefore, the question presented by the Indian Office should be answered in the negative.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

ADMISSION OF ALIEN WORKERS TO VIRGIN ISLANDS

Opinion, June 2, 1941

AUTHORITY OF GOVERNOR OF VIRGIN ISLANDS TO WAIVE PASSPORT AND VISA REQUIREMENTS—AUTHORITY OF PRESIDENT—ADMISSION OF ALIENS AS DEFENSE WORKERS—IMMIGRATION.

The authority conferred upon the Governor of the Virgin Islands by Executive Order No. 8430 of June 5, 1940, to waive passport and visa requirements in cases of emergency for nonimmigrant aliens applying for admission at a port of entry of the Virgin Islands, is applicable to the situation of nonimmigrant aliens coming to the Virgin Islands from other parts of the West Indies to engage in work on defense construction projects.

The applicable provisions of Executive Order No. 8430 are (a) legally valid and (b) currently in force.

The authority of the Governor of the Virgin Islands, under the Executive order cited, extends to (a) cases where the visitor intends to remain for the duration of the necessity, and (b) cases where the visitor has a pending application for an immigration visa and has a conditional intent to secure immigrant status if permitted to do so.

MARGOLD, Solicitor:

The Governor of the Virgin Islands reports that a serious labor shortage now exists in the Islands as a consequence of the national

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defense construction work now under way. The Naval Officer in Charge of Construction on the Island of St. Thomas reports that the Arundel Corporation, contractor for such construction, is employing approximately 250 aliens who have entered the Virgin Islands irregularly, coming from neighboring islands. In addition to the force now employed, the naval officer in charge of this construction work estimates that he will require 500 more unskilled laborers within the next few months and that he will be unable to obtain these laborers without employing aliens who have entered the Islands irregularly.

According to the advice of the Governor of the Virgin Islands and the resident naval officer in charge, if the employment of alien labor in the Islands is prohibited and the necessary action taken to deport aliens already there and to prevent others from entering the Islands, the national defense work now in progress will be disrupted and a very large increase in the present immigration enforcement personnel in the Islands will be required.

The Inspector of Immigration in the Virgin Islands suggests that in these circumstances the Governor exercise his power to regularize the admission of nonimmigrant aliens from neighboring islands under authority conferred by Executive Order No. 8430 which, so far as pertinent to the question here at issue, declares:

By virtue of and pursuant to the authority vested in me by the act of May 22, 1918, 40 Stat. 559, as extended by the act of March 2, 1921, 41 Stat. 1205, 1217, I hereby prescribe the following regulations pertaining to documents required of aliens entering the United States (which regulations shall be applicable to Chinese and to Philippine citizens who are not citizens of the United States except as may be otherwise provided by special laws and regulations governing the entry of such persons):

PART I

1. Nonimmigrants must present unexpired passports or official documents in the nature of passports issued by the governments of the countries to which they owe allegiance or other travel documents showing their origin and identity, as prescribed in regulations issued by the Secretary of State, and valid passport visas, except in the following cases:

* * * * *

4. The Secretary of State is authorized in his discretion to waive the passport and visa requirements in cases of emergency for nonimmigrants, *except that the Governor of the Virgin Islands is authorized in his discretion to waive the requirements in cases of emergency for nonimmigrant aliens applying for admission at a port of entry of the Virgin Islands.* [Italics supplied.]

The proposed procedure raises questions concerning (1) the applicability, (2) the validity, and (3) the scope, of the foregoing provision.

These questions may be more precisely formulated in the following terms:

1. Whether the authority conferred upon the Governor of the Virgin Islands by Executive Order No. 8430 of June 5, 1940, to waive passport and visa requirements in cases of emergency for nonimmigrant aliens applying for admission at a port of entry of the Virgin Islands, is applicable to the situation of nonimmigrant aliens coming to the Virgin Islands from other parts of the West Indies to engage in work on defense construction projects.

2. Whether the said provisions of Executive Order No. 8430 are (a) legally valid and (b) currently in force.

3. Whether the authority of the Governor of the Virgin Islands, under the Executive Order cited, extends to (a) cases where the visitor intends to remain for a period in excess of 30 days; and (b) cases where the visitor has a pending application for an immigration visa.

1. THE APPLICABILITY OF THE EXECUTIVE ORDER

The power vested in the Governor of the Virgin Islands by the cited Executive Order to waive passport and visa requirements in otherwise undefined "emergency cases" necessarily carries with it the responsibility of deciding what cases are emergency cases. The question of whether any particular case is to be considered an "emergency case" is primarily an administrative rather than a legal question. A question of law arises only upon the claim that some particular exercise of administrative discretion is so unreasonable as to amount to an *ultra vires* act.

It may be argued that the term "emergency" cannot properly have reference to such a general situation as that created by the present defense construction and shortage of labor in the Virgin Islands, but must refer only to emergencies personal to the entering alien, such as birth on shipboard, shipwreck, or forced landing. Such a contention, however, will not withstand scrutiny. For these emergencies, which have no particular pertinence to the Virgin Islands, remedies have been devised which are not limited to these Islands. Thus emergencies arising out of births on shipboard are expressly provided for in section 1 (c) of Part I of the order cited, and this provision applies to all parts and possessions of the United States and not simply to the Virgin Islands. Likewise, emergencies arising from acts of God, such as storm and shipwreck, are covered by special immigration regulations, which permit temporary entry of shipwrecked sailors at any point on the coast of the United States, and not merely at ports of entry in the Virgin Islands. (22 CFR 65.1 (c).)

These arguments, of course, are purely negative, but in the absence of any affirmative evidence of an intention to limit the scope

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of authority conferred by the Executive order upon the Governor of the Virgin Islands, the law requires that we accept the plain meaning of terms. The term "emergency" is not limited, either in common usage or by any logical process, to a particular class of emergencies arising in a particular geographical area. The very use of the term "emergency" in the Executive order indicates that the President did not pretend to foresee the characteristics of all future cases that might be presented to the Governor of the Virgin Islands. As if to emphasize this fact, the Executive order uses the term "discretion" in defining the power of the Governor.

The essential limitation upon the power of the Governor of the Virgin Islands lies not in the character of the emergencies which he may consider but in the character of the applications upon which he may pass. The Governor of the Virgin Islands has power only with respect to "nonimmigrant aliens applying for admission at a port of entry of the Virgin Islands," and it seems clear that his power extends only to admitting such individuals to such a port, to the exclusion of all other ports. This is the basic limitation upon the power created by the Executive order, and it is not necessary to invent an additional limitation by holding that the term "emergency" has a meaning in one part of the sentence quoted that is different from its meaning in another part of the same sentence (where it is used with reference to the Secretary of State).

It is noteworthy that the section which confers power upon the Governor of the Virgin Islands does not confer parallel powers upon the Governors of Puerto Rico, Alaska, Hawaii, or any other territories or insular possessions of the United States. If the emergencies considered had been simply emergencies arising out of relations with nearby islands and adjoining Territories inhabited by poor native populations, then it is reasonable to assume that the Executive order would have covered other islands and Territories similarly situated. The fact that the Virgin Islands alone was mentioned in this provision suggests that a clue to the intent of the entire provision may be found in conditions peculiar to the legal status and history of the Virgin Islands. Now the fact of the matter is that the Virgin Islands occupy a peculiar position in the law of the United States, a position which arises out of the peculiar international history of these islands. For many centuries these islands, containing what is perhaps the best port in the West Indies and owned since 1671 by the traditionally neutral country of Denmark, enjoyed an economic existence largely based on the fact that they offered a free port for the entry of European vessels even in time of war.

When the United States took over these islands in 1917 it recognized that to bring them under existing tariff laws would bring about the economic destruction of the island economy. Accordingly, the Virgin Islands were exempted, as a free port, from the provisions of the United States tariff. The result is that to this day a considerable part of the economy of the islands is based on the privilege of importing from Europe goods which, if imported into the United States proper, are subject to high tariffs. American tourists in the Virgin Islands, able to bring limited quantities of such goods to the Continent without payment of duties, make a substantial contribution to the local economy, particularly to that of the Island of St. Thomas.

Thus it is that the peculiar status of the islands derives primarily from their commercial position.

Commerce is impossible without the travel of human beings, and the same reasons which led to a relaxation of tariff restrictions led also to a relaxation of restrictions upon the entry of aliens. When the islands were purchased by the United States in 1917, quota restrictions upon immigration were not in force. There was, of course, no particular objection to those restrictions against the entry of anarchists, criminals and other excludable classes which were in force.

When the Immigration Act of May 26, 1924, was passed there was some doubt as to whether its exclusionary provisions applied to the Virgin Islands. These doubts were settled a year later by a proclamation of the Governor of the Virgin Islands, issued on May 12, 1925, putting the provisions of the Immigration Act of 1924 in full force and effect in the Virgin Islands of the United States on and after June 1, 1925. (See State Department, Admission of Aliens into the United States, Appendix F, page 142.) In order to guard, however, against difficulties arising from the application of general immigration laws to an island economy based on free trade, special leeway was allowed to dispense with the rigors of general restrictive legislation. Thus the regulations prepared by the Department of the Interior and transmitted to the Department of State on April 28, 1931, set forth various situations in which the rigors of existing law were relaxed by the local authorities, acting in cooperation with the Immigration and Naturalization Service. The provisions in question declare:

Because of the peculiar geographical situation of the Virgin Islands, surrounded as they are by numerous foreign islands, visaed passports or immigration visas are not required of alien visitors entering the Virgin Islands from places where American Consular Officers are not located.

In view of the medical facilities available in the Virgin Islands of the United States, the natives of the neighboring foreign islands frequently require hospitalization or medical advice in the Virgin Islands. In such cases, as well as in other cases, where the facts of the case appear to warrant such action, the Commissioner

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of Immigration may grant permission for temporary visits not exceeding thirty days, subject to renewal if necessary.¹

In actual administration, the Governor has exercised this power to waive visa and passport requirements not only in cases of residents of nearby islands but also in cases involving Europeans. For example, the power has been exercised on various occasions to permit the landing, for brief periods, of ship captains and of refugees proceeding to the Dominican Republic or other lands.

It is in the light of this peculiar legal history, involving a special free trade status and a series of relaxations of exclusionary immigration regulations, that the significance of the present Executive order can best be appreciated. Against this background, it is clearly not an unreasonable assumption to assume that the language of the Executive order means exactly what it says.

What it says is that the Governor of the Virgin Islands shall have power to act in case of emergency. It is certainly not unreasonable for the Governor of the Virgin Islands to find that as a result of conditions which the President of the United States has officially characterized as constituting an emergency, and as a result of urgent construction activities and a pressing local labor shortage deriving from those conditions, it is convenient and proper to admit to the Virgin Islands, temporarily, certain nonimmigrant aliens who do not have passports or visas. I am of the opinion that such action by the Governor of the Virgin Islands is clearly authorized by the Executive Order cited.

2. THE VALIDITY OF THE EXECUTIVE ORDER

Having determined that the Executive order in question has application to the situation presented by the Governor of the Virgin

¹ State Department, Admission of Aliens into the United States, Appendix F, pp. 142-143. It should be noted that the "Commissioner of Immigration" referred to in these regulations is the Commissioner of Immigration of the Virgin Islands, an officer responsible to the Governor of the Virgin Islands.

Transmission of the foregoing regulations by the Interior Department was made pursuant to the following request of the Department of State:

"APRIL 3, 1931.

"The Honorable THE SECRETARY OF THE INTERIOR.

"Sir: With reference to the provisions of the Executive Order No. 5566 of February 27, 1931, placing the Government of the Virgin Islands under the supervision of the Department of the Interior, this Department has been informed by the Department of Labor that it is understood that the enforcement of the United States immigration laws in the Virgin Islands will be placed under the supervision of the Civil Governor.

"The Department would appreciate receiving for its own information and that of its consular officers abroad copies of any administrative orders or regulations which may be promulgated by the Governor of the Virgin Islands with regard to the enforcement of the immigration laws in the islands.

"Very truly yours,

"For the Secretary of State:

"(Signed) WILBUR J. CARR,
"Assistant Secretary."

Islands, we are bound to consider any arguments which may be directed against the validity of that portion of the Executive order which gives to the Governor of the Virgin Islands the authority to waive passport and visa requirements. Such arguments may relate either (a) to the validity of the order when issued, or (b) to the effect upon the order of subsequent legislation.

(a) The argument may be advanced that the President is without authority to provide for admitting an alien to one part of the United States while excluding him from other portions thereof. If this argument is valid, then the attempt to confer such a power upon the Governor of the Virgin Islands must be deemed ineffective.

It must be admitted at the outset that no existing statute specifically provides for such a limited permission. The basic question is thus raised: Must administrative authorities show specific statutory authorization for all conditions imposed upon the admission of temporary visitors to the United States, or are such authorities vested with a measure of discretion sufficient to warrant imposition of conditions not spelled out in the statutes?

The view that denies the existence of such discretionary powers and contends that specific statutory authority is necessary to justify the incorporation of geographical restrictions in the entry permit given to a visitor is a view which has important and wide-reaching consequences. In the first place, that view is inconsistent with the opinion, if not with the holding, of the United States Supreme Court in *United States v. Curtiss-Wright Corp.*, 299 U. S. 304 (1936). In that case it was the opinion of the Court, expressed *per Sutherland, J.*, that the President in matters affecting the international relations of the country, is vested not only with specific statutory authority, but with

* * * such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution (pp. 319-320).

To deny that the President and the officers responsible to him have authority to limit a visitor to a restricted area, one would have to deny the soundness of the foregoing statement, for it is clear that the entry of aliens is as much a matter of international relations as the export of commodities. *Fong Yue Ting v. United States*, 149 U. S. 698 (1893); *Nakazo Matsuda v. Burnett*, 68 F. (2d) 272 (C. C. A. 9, 1933); *Akira Ono v. United States*, 267 Fed. 359 (C. C. A. 9, 1920). Certainly no one could maintain that the powers of the President to lay conditions upon the entry of an alien are more narrowly circumscribed by the Constitution than his powers to lay conditions upon the export of commodities by a citizen of the United States.

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Now it must be admitted that the assertion of the Supreme Court above quoted is broader than the facts of the particular case required, and it may thus be argued that the cited statement is "mere dictum."

This argument, however, would not suffice to justify the view that the President is legally powerless to fix geographical limitations upon the entry of a visiting alien, even with the alien's consent. For there are in fact a number of statutes which confer broad administrative powers upon the President and upon other subordinate officials with respect to the control of visiting aliens. Thus, one who contends that the President does not have power to affix a geographical condition upon the permission given an alien to enter the country temporarily must explain away not only the broad language of the Supreme Court in the *Curtiss-Wright* case, but also the broad language which Congress has used in defining the scope of Executive authority in the matter of visiting aliens.

The act of May 22, 1918 (40 Stat. 559), as amended by the act of March 2, 1921 (41 Stat. 1217, 22 U. S. C. 223, 227), provides that it shall

* * * be unlawful—(a) For any alien to * * * enter * * * the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; * * *

In order to support the view that the President does not have power to prescribe geographical "limitations" or "exceptions" in permitting an alien to enter the country, one would have to read into the present law a proviso declaring in effect that the limitations and exceptions which the President is authorized to prescribe shall in no case limit the territory to which the alien is admitted or except from that territory any part of the United States.

The fact remains that Congress did not see fit to enact any such proviso restricting the Presidential power which it established.

The propriety of this broad congressional grant of power to the President has been repeatedly upheld and never successfully challenged. *United States v. Phelps*, 22 F. (2d) 288 (C. C. A. 2, 1927), cert. denied 276 U. S. 630; *United States ex. rel. Komlos v. Trudell*, 35 F. (2d) 281 (C. C. A. 2, 1929); *Goldsmith v. United States*, 42 F. (2d) 133 (C. C. A. 2, 1930), cert. denied 282 U. S. 837; *United States ex. rel. Faneco v. Corsi*, 57 F. (2d) 868 (D. C. S. D. N. Y., 1932), aff'd 61 F. (2d) 1043 (C. C. A. 2, 1932). Again it has been held in all of the cases cited that this grant of legislative power to the President is not impaired by anything contained in the Immigration Act of 1924.

The Immigration Act of May 26, 1924 (sec. 15, 43 Stat. 153, 162, as amended, 8 U. S. C. 215), supplements the broad powers conferred upon the President with respect to the control of aliens by specifically

authorizing regulations governing the admission to the United States of nonimmigrants (among whom is classified "an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure"). The governing statutory provisions, in title 8 of the United States Code, declare:

SEC. 203. "*Immigrant*" defined.—When used in this subchapter the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provision of a present existing treaty of commerce and navigation. (May 26, 1924, c. 190, sec. 3, 43 Stat. 154.)

SEC. 215. *Admission of persons excepted from definition of immigrant and nonquota immigrants; maintenance of exempt status.*—The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 203 of this title, or declared to be a nonquota immigrant by subdivision (e) of section 204 of this title, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 203, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States. (May 26, 1924, c. 190, sec. 15, 43 Stat. 162.)

It is notable that the statute specifies that conditions so prescribed, in so far as they deal with the class of temporary visitors, may include, when deemed necessary, "the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed." The statute leaves it entirely to the administrative officers to decide what conditions shall be included in such bond.

These broad grants of authority to control the admission of visiting aliens would, in effect, be rendered meaningless by the view that the President needs further express legislation in order to limit a visiting alien to the particular part of the territory of the United States which he asks permission to visit.

The fact of the matter is that any such narrow restriction upon Executive authority would be inconsistent with the long established practice of the Executive, which has been repeatedly ratified by the courts. The Executive has repeatedly laid down conditions upon the entry of visiting aliens, citing as authority only the general statutes above quoted, and these orders and regulations have been repeatedly

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upheld by the courts. See, for example, Executive Order No. 8430; Executive Order No. 7865; Executive Order No. 6986; *United States v. Phelps, supra*; *United States ex rel. Komlos v. Trudell, supra*; *Goldsmith v. United States, supra*; *United States ex rel. Faneco v. Corsi, supra*.

If it is true that administrative authorities have no power to limit the residence of a visiting alien, then certainly they have no power to limit his occupation, for the statutes with regard to nonimmigrants are as silent on the one topic as on the other. In fact, however, existing regulations contain various restrictions, not required by any statute, relating to occupations in which alien visitors may engage or even determining whether they may engage in any occupation at all. Thus, for example, existing regulations provide:

* * * A student whose parents or relatives are financially able to support him, or who otherwise has sufficient income to cover expenses, will not be permitted to work either for wages or for board and lodging (8 CFR 10.1).

There are many other situations in which administrative authorities have imposed conditions upon the entry of visiting aliens. Thus, for example, existing regulations provide that a person applying for admission to the United States as a transient alien may be required to be accompanied by such guards or attendants as will "ensure his passage in and out of the United States without unnecessary delay" (8 CFR 6.4).

Again, consuls have been authorized by the State Department to refuse visitors' visas to persons considered to be "morally delinquent," although there is no express statutory requirement covering the morality of alien visitors. (State Department, Admission of Aliens into the United States, Revised to January 1, 1936, Note 17.) All such regulations would have to be classed as illegal if we should adopt the view that specific statutory authorization is required to justify any restrictions upon the entry of alien visitors.

In fact the foregoing regulations go much further than that which is here in question. The precise question at issue is whether an alien who expresses a desire to visit a particular insular possession or Territory of the United States may, in the discretion of the administrative authorities, be given permission to do precisely what he wants to do and no more. In order to deny such authority to administrative officials one would have to impugn the validity of a great mass of existing regulations.

It is to be observed that a good many existing regulations in this field require the nonimmigrant not merely to bring himself within the general categories prescribed by the statute, but to show specifically how he fits within such category, and to indicate with particularity

how he intends to spend the time allotted him for a temporary stay. Thus, for example, existing regulations provide:

Any alien admitted temporarily to the United States as a nonimmigrant under section 3 (2) of the Immigration Act of 1924 (43 Stat. 154; 8 U. S. C. 203) shall be considered as having failed to maintain his status as that term is used in section 15 of that Act (47 Stat. 524; 8 U. S. C. 215) if after having been admitted as a tourist or visitor for pleasure he engaged in any business or occupation or employment, or if after having been admitted for business he engaged in any business or occupation or employment other than that given as a reason for his request for temporary admission (8 CFR 25.14).

A parallel situation is the case of the immigrant student who must not merely show that he intends to study at an accredited institution of learning but must specify the particular institution that he expects to attend. This statement becomes a condition of the status under which he is admitted, and existing regulations provide that if he is expelled from that institution or fails in his attendance he may be deported:

Any immigrant student admitted to the United States as a nonquota immigrant under the provisions of subdivision (e) of section 4 of the Immigration Act of 1924 (43 Stat. 155; 8 U. S. C. 204 (e)), as amended, who fails, neglects, or refuses regularly to attend the school, college, academy, seminary, or university to which admitted, or the accredited school, etc., to which he has lawfully transferred, or who is expelled or dropped from such institution, or who accepts employment except as authorized, or who fails to provide himself with a passport, or document in the nature of a passport acceptable under consular regulations, which will permit his voluntary departure to his own or some other country, or who fails or refuses to so depart, shall be deemed to have abandoned his status as an immigrant student, and shall, upon the warrant of the Secretary of Labor, be taken into custody and deported (8 CFR 10.3).

In these cases, the Government, without attempting, for instance, to restrict all business visitors to the purchase of machinery or to restrict all students to attendance at Harvard University, takes the position that if a visiting alien states, in applying for a visa, that he will engage in the purchase of machinery or study at Harvard he shall be taken at his word and thereby he subjects himself to deportation if he departs from the terms of his declaration. No one familiar with the problems of administration and enforcement of immigration laws can say that such insistence upon specificity is unreasonable.

What is true of the specifications of occupation and attendance in the foregoing cases is no less true of a geographical declaration which a nonimmigrant visitor may make. There appears to be nothing in the law to prevent consular officials or immigration authorities from asking an applicant for permission to enter the United States to specify the areas in which he intends to travel or reside and advising him that he will be taken at his word and will forfeit his status if

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he violates his declaration. Is that not, at the very least, a reasonable method of maintaining adequate supervision of alien visitors?

The fact is that the immigration visa forms now in use require the immigrant to declare where he intends to settle, and the immigrant who knowingly answers such a question falsely becomes liable to criminal penalties (act of May 26, 1924, sec. 22, 43 Stat. 153, 165, 8 U. S. C. 220), and thereupon to deportation (act of February 5, 1917, sec. 19, 39 Stat. 874, 889, 8 U. S. C. 155).

If an applicant for an immigration visa can be required to declare where he will reside, although the immigration laws do not expressly provide for any such declaration, then certainly an applicant for a temporary permit to enter can be required to make a similar statement, under the broad authority conferred by the statutes governing entry of alien visitors (act of May 22, 1918, 40 Stat. 559, as extended by the act of March 2, 1921, 41 Stat. 1205, 1217; act of May 26, 1924, sec. 15, 43 Stat. 153, 162, as amended by the act of July 1, 1932, 47 Stat. 524, 8 U. S. C. 215; act of June 28, 1940, sec. 30, 54 Stat. 670). The same penalties for a false statement that apply to applicants for immigration visas apply equally to applicants for visitor's visas (8 U. S. C. 220, 155).

In view of these considerations I am of the opinion that it is clearly within the discretionary authority of the President to require an alien visitor to say where he is going and to hold him to his word. I can see no valid distinction between thus restricting an alien visitor geographically and the time-honored practice of restricting him occupationally.

The narrow view which holds that administrative authorities must show specific statutory authorization for all conditions imposed upon the admission of temporary visitors to the United States is, in view of the foregoing considerations, incompatible with the clearly expressed views of the Supreme Court, with the broad definitions of Executive power in the relevant statutes of Congress, and with the unbroken practice of the President, the State Department and the immigration authorities, which has been repeatedly tested and upheld in the courts.

Conceivably, one may agree that the Executive is endowed by Constitution or by statute with a broad discretion in promulgating rules and procedures for the control of alien visitors and yet maintain that geographical considerations are entirely foreign to that discretion.

One who would attempt on purely legal grounds to limit Executive discretion in these fields and to say *a priori* that geographical considerations must always be disregarded has assumed a heavy burden. Clearly, as a matter of fact, a person desiring to reside on a remote

island presents a problem of enforcement and supervision different from that presented by one who will travel at will over the entire United States. One who seeks to exclude geographical considerations must then assert as a matter of law that considerations of enforcement and supervision are not within the scope of Executive discretion.

Again it is clear, as a matter of fact, that considerations of national defense involve geographical factors, so that dangers which exist when alien visitors ask permission to roam at will throughout the territory of the United States may be eliminated or minimized if the alien seeks a more modest living space. If this is the actual fact, can it be said, as a matter of law, that all such factual considerations must be excluded from the scope of Executive discretion? If this be the law, then one must indeed place a narrow interpretation upon the Executive authority which is embodied in Executive Order No. 8430 (June 5, 1940), which declares *inter alia*:

No passport visa, transit certificate, or limited entry certificate shall be granted to an alien whose entry would be contrary to the public safety or to an alien who is unable to establish a legitimate purpose or reasonable need for the proposed entry (Executive Order No. 8430, Pt. I, sec. 5).

Certainly a fair reading of this provision indicates that the scope of Executive discretion is broad enough to justify different treatment, for example, to three applicants for visitor's visas, one of whom wishes to spend his time in the Virgin Islands, another to travel throughout the United States and a third to make a tour of factories engaged in national defense work.

These examples suffice to indicate the consequences that follow from the view that prospective residence of a visiting alien is a taboo subject into which administrative authorities may not inquire and upon which they may not rest any inference. Many other situations might be cited in which the absurdity of any such limitation upon Executive discretion would be apparent.

In the only reported Federal case which has been found in which this question is discussed, the court declared:

* * * It is urged that this amendment is beyond the power of the department to enact, and that an alien once landed in any territory, or other place subject to the jurisdiction of the United States, may freely go thence to any portion of the United States whether it be the mainland or any of its island possessions. With this conclusion I am unable to agree.

There may be reasons for rejecting an alien at continental ports which would not exist if he were applying to enter the Philippines. Labor and climatic conditions and standards of living are so diverse that one going to the Philippines who would not there be likely to become a public charge might well be likely to become such if he proceeded thence to the mainland. A more rigid test may therefore well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines. And as the amendment to the immigration rules, providing that the possession of a certifi-

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cate of lawful entry into the Philippines should not be conclusive as to the holder's right to enter a continental port, was in effect at the time all of these petitioners sailed from Manila, the question was properly open for investigation by the immigration officers here as to whether or no, at the time these aliens were admitted to the Philippines, they were likely to become public charges if they proceeded thence to the mainland. This question was investigated upon their arrival here, and was decided adversely to the petitioners. As we have heretofore seen, this decision is final and not subject to review. (*In re Rhagat Singh*, 209 Fed. 700, 703, 704 (D. C. N. D. Calif., 1913).)

There remains to be considered the possible argument that it would be contrary to public policy to prevent a visitor to one of the insular possessions of the United States from traveling to the continental United States. Far from there being a public policy against special treatment for our insular possessions, public policy today in fact subjects them to a great many special administrative regulations in establishing special classes of privileged visitors and immigrants in the various insular possessions. See, for example, 22 CFR 61.3 (Virgin Islands), 61.7 (Puerto Rico), 61.10 (American Samoa, Guam), 61.11 (possessions generally); 8 CFR 1.3 (j) (possessions), 3.11 (Puerto Rico, Hawaii), 8.1-8.6 (insular possessions and Canal Zone), 11.1-11.10 (Hawaii), 30.3-30.14 (Philippine citizens in Hawaii), 36.1 (insular possessions and Canal Zone), 36.4 (Virgin Islands, Puerto Rico, Canal Zone, American Samoa, Guam). See also *In re Rhagat Singh et al.*, 209 Fed. 700 (D. C. N. D. Calif., 1913).

In fact, the existing regulations on immigration are prefaced by these words of explanation (8 CFR, ch. 1, subch. A) :

* * * Under the provisions of the [1924 Immigration] Act persons who are not citizens of the United States or citizens of the insular possessions coming from the insular possessions to the mainland or proceeding from one insular possession to another must undergo examination under each and every provision of the Act.

The special status of our territories and island possessions in immigration matters is further shown by various regulations authorizing the issuance of visas by governors of United States possessions. Thus, for example, Part III of Executive Order No. 8430, approved June 5, 1940, provides :

The Executive Secretary of the Panama Canal is hereby authorized to issue passport visas, transit certificates, limited entry certificates, and immigration visas to aliens coming to the United States from the Canal Zone. The Governor of American Samoa is hereby authorized to issue passport visas, transit certificates, limited entry certificates, and immigration visas to aliens coming to the United States from American Samoa. The Governor of Guam is hereby authorized to issue passport visas, transit certificates, limited entry certificates, and immigration visas to aliens coming to the United States from Guam.

Special treatment in immigration matters may be connected with special treatment in the matter of customs duties. Thus the Federal

customs duties are not applicable to imports from foreign countries to the Virgin Islands but are applicable in certain cases, defined by statute, to imports to the United States from the Virgin Islands (Act of March 3, 1917, secs. 3-4, 39 Stat. 1133, 48 U. S. C. 1394-1395). For customs purposes, in effect, the Virgin Islands are not an integral part of the United States economy. Our tariff laws have been justified as protecting the American standard of living by restricting the sale, in our domestic markets, of the products of impoverished foreign workers. Our 1924 Immigration Law was justified as implementing these restrictions by limiting the entry of those impoverished foreign workers, who might, it was feared, pull down the tariff-protected American standard of living. The Virgin Islands, being outside our tariff walls and outside of any tariff-protected American standard of living, had no economic need for an immigration law to implement tariff bars. In effect, then, a major objective of the 1924 Immigration Law has no practical application to the Virgin Islands. These considerations make it clear that if special regulations, in immigration matters, are applied to such possessions as the Virgin Islands, it cannot be said that such application is arbitrary or whimsical. On the contrary, such special treatment has a basis in the historical, political, and economic considerations which underlie the whole scheme of our immigration legislation.

I am of the opinion, therefore, that if a visiting alien seeks permission to sojourn within a specified territory or possession of the United States, and the administrative authorities see fit to grant him such permission, they are not under a legal duty to permit the applicant thereafter to travel wherever he pleases in the United States.

Finally, I am of the opinion that the provisions of the Executive Order in question are authorized by the Constitution and statutes of the United States.

(b) Having reached the determination that the cited provision of Executive Order No. 8430 was valid when issued, we must consider the question whether this provision has been repealed by the Alien Registration Act of June 28, 1940, section 30 of which provides:

No visa shall hereafter be issued to any alien seeking to enter the United States unless said alien has been registered and fingerprinted in duplicate. * * *

Any alien seeking to enter the United States who does not present a visa (except in emergency cases defined by the Secretary of State), a reentry permit, or a border-crossing identification card shall be excluded from admission to the United States.

It will aid in analyzing this question to consider the two types of action which the Governor of the Virgin Islands was authorized to take by Executive Order No. 8430.

In the first place, the Governor was empowered by this order of the President to waive the usual passport requirements applicable to alien

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visitors. On this subject nothing is said in the Alien Registration Act. Therefore this power continues, unaffected by that act.

In the second place, the President authorized the Governor to waive the usual requirement that an alien visitor present a passport visa. This power could be exercised in either of two ways: (a) by admitting such visitors without any documentation, or (b) by admitting such visitors under some document other than a regular visa.

To follow course (a) after June 28, 1940, might be considered as threatening the comprehensiveness and integrity of the Alien Registration Act. For that act provides for the registration and fingerprinting of all aliens in the United States on the date of its enactment and also seeks to provide for those hereafter entering. It does this by setting up the machinery of fingerprinting and registration at the two doors through which aliens may enter the United States: specifically, it provides for the registration and fingerprinting of visiting aliens who secure *visas* or *border-crossing identification cards* after June 28, 1940. Except for special cases defined by the Secretary of State and the reentry of aliens formerly lawfully admitted, the securing of visas or border-crossing identification cards is a condition of entry, and thus it is contemplated that all aliens hereafter entering the United States will be registered and fingerprinted. This scheme would be upset if the Governor of the Virgin Islands could admit visiting aliens without visas or border-crossing identification cards (as he could before June 28, 1940), because under such authority it would be possible for some aliens to come into an island possession of the United States without being registered or fingerprinted and without appearing on the special lists authorized under the act by the Secretary of State. Thus it may be argued, with some force, that the Alien Registration Act must be held to have abolished the power formerly vested by the President in the Governor of the Virgin Islands to admit visiting aliens without any documentary controls whatever. It does not appear, as a matter of fact, that any such power has ever been exercised by the Governor of the Virgin Islands. Nor is any such power now claimed. Therefore it is unnecessary to consider whether this theoretical power has been theoretically abolished or whether it may be saved by the theory that the Alien Registration Act is not to be construed as affecting the President's discretionary powers, whether exercised directly or by delegation.

On the other hand, a question that has practical significance and requires answering relates to the second of the two courses open to the Governor in the waiver of visas, namely the course actually followed of issuing substitute papers for the purpose of identifying such alien visitors upon entry and of controlling their going and coming. Such identification papers were formerly termed "visitor's permits"; now

the same documents, issued by the local authorities, have been designated by the State Department as "border-crossing identification cards." (See fn. 14, *infra*.) Persons receiving such cards are subjected to provisions of the Alien Registration Act respecting registration and fingerprinting. Therefore there is no room for argument that the issuance of these border-crossing identification cards by the Governor of the Virgin Islands will in any way threaten the comprehensiveness and integrity of the alien registration system. Nevertheless, a more subtle (though, I believe, fallacious) argument may be made to the effect that even the Governor's power to admit visiting aliens under border-crossing identification cards has been abolished by the Alien Registration Act.

The argument runs: (a) This statute limits entry into the United States to three classes of persons:

1. Those who have visas or to whom the Secretary of State has given an emergency dispensation from usual visa requirements;
2. Those who have reentry permits; and
3. Those who have border-crossing identification cards.

(b) The term "border-crossing identification card," it may be argued, is a definite "term of art" with an historically established and narrowly restricted meaning that excludes the purposes for which the Governor of the Virgin Islands seeks to apply it. (c) The statute, it is then argued, "froze" the historically established meaning of this term; otherwise, it is urged the statute contains a loophole which undermines its very purpose.

The first premise of the argument, in so far as it sets forth the effects of the statute in restricting entry to the three named classes, appears to me to be sound. The remainder of the argument consists of two propositions which deserve separate scrutiny.

Question A. Is the term "border-crossing identification card" a definite "term of art" with an historically established and narrowly restricted meaning that excludes the purposes for which the Governor of the Virgin Islands seeks to apply it?

This issue compels a preliminary inquiry: How has the term "border-crossing identification card" been defined in the past?

On this question we must note, in the first place, that there appears to be no statutory definition of the term. Certainly there is no such definition in the Alien Registration Act nor is there any definition of the term in any other statute that I have been able to discover. Nor do I find a definition of the term in any reported case or in any of the legal encyclopedias which usually define legal "terms of art." If, then, it is to be viewed as a "term of art" it must be such by virtue of a long-continued unvarying usage in administration. What, then, have been the administrative uses of this term?

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Analysis of the administrative uses of the term "border-crossing identification card" is peculiarly difficult because of the comparatively informal character of the document itself and the fact that published regulations and orders often fail to refer specifically to the document in situations where it is actually utilized. This, coupled with the entire absence of reported litigation involving "border-crossing identification cards" and the inadequacy of governmental reporting of Executive orders and regulations prior to the establishment of the Federal Register and the Code of Federal Regulations in 1936 and 1938, respectively, lend added difficulty to the task of analyzing past usage of the term "border-crossing identification card." However, even an incomplete survey, based on the issues of the Federal Register, the State Department Bulletin, the regulations in titles 8 and 22 of the Code of Federal Regulations, the pamphlet of the Immigration and Naturalization Service, "Immigration Laws: Immigration Rules and Regulations of January 1, 1930, as amended up to and including January 31, 1936," and the pamphlet of the Department of State, "Admission of Aliens into the United States: Supplement A of the Consular Regulations, Notes to section 361, revised to January 1, 1936," suffices to show that "border-crossing identification cards" have been used in a great variety of cases which have little in common.

A few factors we may venture to isolate as common to all the uses of this instrument that we have been able to discover. Other elements appear frequently, but not in all cases. The results of such an analysis may be briefly summarized:

1. Such a card is issued at the border by local authorities to an applicant actually present and seeking permission to cross the border rather than being issued to a person in a distant country by a consular officer abroad.²

2. Such a card is issued to authorize a crossing of the border which does not amount to immigration.³

3. The card serves to identify the holder by containing photographic and descriptive matter, thus facilitating control over aliens entering the country illegally.⁴

4. The card is a comparatively informal document conveying only a temporary and revocable permission to the permittee.⁵

² See 8 CFR 3.53; *ibid* 361 (August 23, 1940), 5 FR 3196.

It may be noted that while the Regulations of the Immigration and Naturalization Service for some years back include references to "border-crossing identification cards," there is no reference to such cards in the regulations of the State Department codified in title 22 (Foreign Relations) of the Code of Federal Regulations "having general applicability and legal effect in force June 1, 1938." Only recently, apparently, have State Department regulations provided for issuance of such cards.

³ See 8 CFR 3.55; and see fn. 5, 9, 10, *infra*.

⁴ See 8 CFR 3.53; *ibid* 3.61 (August 23, 1940), 5 FR 3196.

⁵ "Border-crossing cards; periodic inquiry; renewals. The status of holders of identification cards shall be inquired into periodically. Renewal will be evidenced by a notation bearing the date thereof and the initials of the validating officer.

"Border-crossing card; cancellation. An identification card may be taken up and canceled at any time, within the discretion of the proper immigration officials." 8 CFR 3.57, 3.58. And see 22 CFR 61.101 (d) (October 3, 1940), 3 State Department Bull. 280.

5. The use of the card is frequently, but not always, confined to the port of issue.⁹

6. The card generally permits only a visit for a period not exceeding 30 days.⁷ But this cannot be an essential characteristic, for there are some situations in which border-crossing identification cards have been utilized where no such limitation is placed upon the length of the visit, as, for example, where such cards are used by aliens permanently residing in the United States who have occasion to return to the United States after leaving the country.⁸ And various other regulations prescribing the use of such cards fail to include any fixed limitation upon the duration of visits.⁹

7. The card is often used to identify a person who wishes to cross a given border frequently.¹⁰ But this cannot be an essential characteristic since border-crossing identification cards have been made available for such emergency needs as hospitalization, where there is no probability of repeated visits.¹¹

8. The card is frequently used to identify a citizen or resident of an area immediately contiguous to the boundary crossed. But this cannot be an essential characteristic, since such cards are issued to various classes of aliens not citizens or residents of contiguous foreign areas, as, for example, aliens who have already been admitted to the United States and wish to reenter after a visit abroad,¹² and residents of various islands of this hemisphere which are not "contiguous" to American soil.¹³

Of these characteristics, then, only the first four can possibly be considered essential in the sense of constituting essential elements in a "term of art." A definition limited to essentials would then declare, in substance, that a border-crossing identification card is a document, temporary and revocable, issued at the border by border immigration authorities authorizing a crossing of the border which, because of the temporary duration of the stay or other special conditions, does not amount to immigration. Other incidents of past administration involve too wide a variation to permit incorporation in a technical definition.

In the light of these considerations, the first question must probably be answered in the negative. In my opinion the term "border-crossing

⁹ "Border-crossing card; use. The use of an identification card shall be confined to the port of issue, unless it shall be established that the applicant has occasion to enter the United States from time to time through other ports of entry, in which event an unrestricted card may be issued to him, which shall be honored at other ports." 8 CFR 3.54.

⁷ See State Department Order No. 874 (August 24, 1940), 3 State Department Bull. 176.

⁸ "Aliens who have been admitted into the United States for permanent residence with immigration visas and who have been issued border identification cards, do not require further documentation for reentry into the United States." Regulations Effective July 1, 1940, Relating to Entries from Canada and Mexico, 3 State Department Bull. 15. And see pp. 320-321, *infra* (use of card for irregularly admitted aliens).

⁹ See 8 CFR 3.53-3.58. See also 8 CFR 11.83 (August 5, 1938), 5 FR 1951, which refers to "limited visits" but does not fix a specific limit.

¹⁰ See 8 CFR 3.53, 3.56.

¹¹ 22 CFR 61.101 (d) (October 3, 1940), 3 State Department Bull. 280. And see "Admission of Aliens into the United States; Supplement A of the Consular Regulations" page 143. See also fn. 5, *supra*.

¹² See fn. 5, *supra*.

¹³ See State Department Order No. 874 (August 24, 1940), 3 State Department Bull. 176; 22 CFR 61.101 (b) (August 24, 1940), 3 State Department Bull. 198; 22 CFR 61.101 (d) (October 3, 1940), 3 State Department Bull. 280.

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identification card" is not a term of art at all; as used in the statute it means just what it says: an identification card under which border-crossing is authorized. There is no departure from this common-sense meaning if such a card is used in the situation presented by the Governor of the Virgin Islands.

Question B. Did the statute "freeze" an historically established meaning of the term "border-crossing identification card"?

If, as I believe, the term "border-crossing identification card" is not a term of art with narrowly restricted meaning, then the Alien Registration Act could not possibly have resulted in "freezing" such a meaning, and there is nothing further to discuss.

So, too, if the only logical meaning that can be given to the term "border-crossing identification card" is a meaning which includes the use now in question, there is nothing further to discuss.

Assuming, however, for the sake of argument, that I am mistaken in my understanding and analysis of the past usage of the term "border-crossing identification card," and that in fact this term has been used only in situations basically different from that now presented,—the question then arises: Does the Alien Registration Act "freeze" the definition of this term so as to prevent its application to new situations not formerly dealt with in this manner? If the act does not have this effect, then even a conclusive demonstration that cases A, B and C, in which such cards were used in 1937, 1938 and 1939, do not cover case D, in which it is proposed to use the card in 1941, would fail to show that extension of the technique to case D is illegal.

The argument against the validity of the proclamation may be summarized in these terms: When the statute refers to "border-crossing identification cards" it must have meant to limit the term to past usage, since otherwise, in the absence of any statutory definition, any kind of identification card held by an alien might be called a "border-crossing identification card." The alien holding such a card would then be allowed to cross any border, and the restrictive purposes of the statute would thus be evaded. Thus by merely calling a document by a certain name immigration restrictions would be nullified. Congress, it is urged, could not possibly have intended such a result.

This argument involves two assumptions—(a) that the purpose of limiting immigration would be defeated if the term in question did not have a narrowly limited and firmly fixed meaning, and (b) that the purpose of the statute is, in fact, to limit the entry of aliens. Both these assumptions are, I believe, false.

The argument as to the supposed defeat of Congressional intention by the inclusion of a flexible term would have considerable force if the question at issue were whether an alien holding, let us say, a regis-

tration identification card could, by calling it a "border-crossing identification card," secure admission to the United States. When the question is thus badly put, it is obvious that neither the alien's designation of a document nor even a designation conferred by popular usage could bring any particular document within the prescribed statutory category. But the fallacy in the argument lies in the assumption, without warrant, that Congress was unwilling to allow the term "border-crossing identification card" to be defined administratively, in the future as in the past, by specific regulations made in specific cases by immigration authorities responsible to the President of the United States. The broad powers over the admission of non-immigrant aliens which have been vested in the President and immigration officials responsible to him under the 1918 and 1921 acts cited in the Governor's proclamation have been carefully used in the past, and there is no suggestion in the legislative history of the Alien Registration Act that Congress was not entirely satisfied with the administrative machinery by which such terms as "border-crossing identification card" had been defined in case-by-case decisions.

The argument that fixed definitions are indispensable ignores the fact that fixed definitions are neither the only way nor the most effective way of safeguarding the enforcement of a law. In truth, the certainty conveyed by such fixed definitions is to often an illusory certainty. Any word can be misconstrued, and even if it is formally defined the very words of the definition can be misconstrued. Congress must rely upon administrative discretion to see that the purposes of Congressional enactments are carried out, and where Congress has invested the President of the United States with a broad measure of control over the temporary admission of alien visitors, as it has done in the 1918 and 1921 acts, there is no practical reason why Congress should draw an iron ring around the cases in which that discretion may be favorably exercised or the terms of the documents used as tools in such administration. It is under the Executive orders of the President that local immigration authorities, and the Governor of the Virgin Islands, act in defining special uses for "border-crossing identification cards." Their every action in this field is subject to Presidential review and supervision. In this fact, rather than in an impossible series of frozen definitions, was the warranty that the acts of Congress would be faithfully administered. The legislative history of the Alien Registration Act is entirely devoid of any suggestion that Congress distrusted this discretion. There is no suggestion that Congress, in this act, sought to impose new restrictions upon the President, in the use of border-crossing identification cards, or upon the subordinate officials to whom he had entrusted administrative authority in this field.

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The foregoing argument is strengthened by the use of the cards since the Alien Registration Act went into effect. As this act limited the documents under which nonresident aliens may enter the United States to visas and border-crossing identification cards, the Department of State has apparently used the cards as a general substitute in cases where a visa could not be issued but where, on the basis of present immigration legislation, the alien is admissible to the United States.

A typical example of this is the establishment of the card system on the Virgin Islands by regulation of the Secretary of State on October 3.¹⁴ The history of this regulation is quite illuminating. On September 13 the Governor of the Virgin Islands, through the Secretary of the Interior, proposed that the Secretary of State establish a vice-consulate in St. Thomas for the purpose of issuing visas to aliens from neighboring islands who had been used to enter the Virgin Islands on a temporary visitor's permit, valid for six months and extended for such periods as the Governor saw fit. The Governor felt that, in order to avoid any legal question as to the status of these visitor's permits after the enactment of the Alien Registration Act, visas should be issued in these cases by an American consul located in the Virgin Islands. The Secretary of State replied that it was not permissible to establish consulates in United States Territories and that in view of the practical difficulties and expense which would be involved if the inhabitants of neighboring islands had to obtain visas from as distant a consulate as that in Barbados, a border-crossing identification card system should be established in the islands for the use of inhabitants of neighboring French and British islands. While the use of these cards is somewhat different in details from that of visitor's visas, due to the inherent nature of the identification card system, it is clear that the cards are being used for a purpose which has been and usually still is served by visitor's visas, visas being ruled out simply because cards are practically a more convenient method of documentation. That this situation does not necessarily call for border-crossing identification cards, apart from the Alien Registration Act, is shown by the fact that Mr. George L. Brandt of the Visa

¹⁴ "Sec. 61.101. Waiver of passport and visa requirements for certain aliens.

* * * * *

"(d) *Aliens desiring to enter Virgin Islands for less than 30 days; resident aliens of Virgin Islands.* Under the emergency provisions of section 30 of the Alien Registration Act, 1940, and of Executive Order No. 8430, of June 5, 1940, British subjects domiciled in the British Virgin Islands and French citizens domiciled in the French island of St. Bartholomew, who seek admission into the Virgin Islands for business or pleasure for a period of less than 30 days on any one visit, may present a nonresident alien's border-crossing identification card issued by the immigration authorities of the Virgin Islands. Border-crossing identification cards may also be issued to aliens residing in the Virgin Islands who may have occasion to proceed temporarily to the British Virgin Islands or to the French island of St. Bartholomew (Sec. 30, Public No. 670, 76th Cong., 3d sess., approved June 28, 1940; E. O. 8430, June 5, 1940)" [3 State Department Bull. 280-281].

Division in the Department of State, who came to the islands on an inspection tour in 1936, was advised of the temporary visitor's permits used there and at no time suggested that they should be replaced by border-crossing identification cards, as a more appropriate form of documentation.

As a matter of fact, the Department of State also stated in its letter of October 8 that the card system may be used to enable aliens who are illegally in the Virgin Islands because of the late application of the 1924 Immigration Act there, to return to the islands from visits to neighboring islands. Thus, the cards are being used to enable persons to return to the islands for permanent residence who otherwise, having left the islands on a trip and having no legal claim to permanent residence in United States territory, would have no right or possibility to return. This, while a most desirable solution to a complex local problem of long standing, helps to show that the card system may be used as a general substitute wherever it is desirable to admit alien visitors to the United States who cannot obtain a visa or reentry permit and who could qualify for any of the many other types of documentation heretofore accepted by the immigration authorities but which have been reduced by the Alien Registration Act to the one type of border-crossing identification card.

It is thus clear that the State Department has given a contemporaneous construction to section 30 of the Alien Registration Act which leaves the term "border-crossing identification card" as used therein subject to the same process of administrative interpretation and development as existed before the act. That this is indeed reconcilable with the purpose of the statute will be plain when we turn to examine that purpose.

What has already been said is a sufficient answer to the argument that without a rigid freezing of terms the purpose of Congress would be defeated. But a more fundamental objection to this whole argument exists. The argument assumes that Congress intended, in section 30 of the Alien Registration Act, to erect immigration restrictions. That is not true. There is nothing in the letter or the spirit or the legislative history of the act which evinces any such purpose. It would indeed be a queer method of legislating if this paragraph 2 of section 30, which was inserted in the bill one year after it had first been introduced and which was never as much as mentioned by any Committee report or in any debate on the floor of the Senate or the House and which was never presented to the Committee on Immigration and Naturalization of the Senate or the House, should now be considered to have radically modified and restricted the vast body of immigration legislation and regulation heretofore in force. This provision stands as part of Title III of the act, which relates to the

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registration of aliens, and is not a part of Title II of the act, which relates to exclusions and deportations. It appears as the second paragraph in a section which, in its first paragraph, makes registration a prerequisite to visa issuance. But linking registration to visa issuance would be meaningless, from the standpoint of achieving the statutory objective of complete alien registration, unless either visa issuance were a prerequisite to the admission of aliens or other methods of admission were noted and provision made in the statute for requiring registration in these other cases. This latter course was chosen by Congress which recognized that border-crossing identification cards might be used in lieu of visas in certain cases and then went on, in section 32 (c) of the act to authorize the Commissioner of Immigration, with the approval of the Attorney General, to issue special regulations to require registration of "holders of border-crossing identification cards."

Standing where it does, paragraph 2 of section 30 can most reasonably and simply be viewed as a pure requirement of documentation, leaving completely aside the entirely distinct question of who should issue these documents and in what cases. This question not having been dealt with at all in this act, there would be no basis for the fear that the issuance of border-crossing identification cards to any type of people could undermine the purpose of the statute. If the alien is not in a class admissible under general immigration legislation, he will be excluded by the provisions of such legislation without reference to paragraph 2 of section 30 of the Alien Registration Act.

It is my opinion, in short, that this provision, as well as the entire Title III of the Alien Registration Act, is a police measure and does not constitute immigration legislation proper. These provisions are designed to give the Government a more complete check on the movements of aliens without providing for any more restriction on admissions than there has been before. In other words, the entrance of aliens and their stay in this country is still subject to the immigration legislation and regulations heretofore in existence. All the Alien Registration Act intends to do is to improve the means of the Government to acquire information about the character, the residence, and the identity of such aliens. Paragraph 2 of section 30 especially does not presume to change the rules of admissibility of aliens. It merely limits the types of documents which may be issued to them once they have been found admissible.

The Department of State in its regulation of October 3 has, it seems to me, fully recognized this character of the provision, for in cases where heretofore the Governor used to issue temporary visitor's permits, the Department in effect stated that such permits, being no longer

acceptable under the Alien Registration Act, should be replaced by border-crossing identification cards, which are so acceptable. Had the Department of State considered this provision as restricting the entrance of aliens, it would have had to argue that, temporary visitor's permits no longer being acceptable under the act, aliens of a type who heretofore were issued such permits can no longer be admissible.

That such is indeed not the meaning of the act is furthermore shown by the fact that the State Department now also issues visas where heretofore "limited entrance permits" or similar papers were issued. Thus, the act did not "freeze" the definition of visas, either; for as long as the alien presents a visa the requirements of the act are satisfied and as long as he has a right to enter the United States—with a limited entrance permit before or with a visa now—the requirements of the immigration laws are satisfied too. As long as every person presenting himself at a port of entry of the United States can show either a visa or a special emergency waiver of a visa or a reentry permit or a border-crossing identification card, the purpose of the statute is satisfied, as the alien will be identified by one of the four methods of identification acceptable under the act. It does not matter in what cases these cards are issued, because the degree of identification which is achieved with this card, and which is the real and sole purpose of the statute, will always be present, no matter for what purpose the card was issued. As to the cases in which border-crossing identification cards or, for that matter, visas or reentry permits may be issued and as to the authorities who may issue such documents, the statute is mute, clearly leaving these questions, which are questions of immigration, to the body of immigration legislation and regulation in force.

These considerations compel the conclusion that the Alien Registration Act of June 28, 1940, did not terminate the power which the President conferred upon the Governor of the Virgin Islands by Executive Order No. 8430 of June 5, 1940, to waive the usual *visa* requirements in emergency cases where border-crossing identification cards are issued to nonimmigrants seeking temporary admission only to the Virgin Islands.

3. THE SCOPE OF THE EXECUTIVE ORDER

It is impossible, of course, to foresee the legal peculiarities and complexities of every case which may arise in the administration of the power conferred upon the Governor of the Virgin Islands by the President, and no attempt will be made at this time to pass upon all the legal questions that may thus be presented. It seems appropriate, however, to consider the scope of the Governor's power with respect to two situations: (a) where the visitor intends to remain for a period in excess of 30 days; and (b) where the visitor has a pending application for an immigration visa.

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(a) The first of the situations suggested is likely to arise generally in the application of the proposed procedure. Persons coming to the Virgin Islands to take employment on a job that will not be completed for some months cannot truthfully declare that they intend to leave the islands within 30 days, and therefore are not within the special situation affecting vendors of garden produce and other day-to-day visitors for whom special dispensation has already been made by regulation.¹⁵ The alien visitors whose entry local naval and civilian officials desire to facilitate and regularize will expect to remain in the Virgin Islands until either the construction work now under way has been completed or the need for alien labor in that work has disappeared. These two conditions are related to a great national emergency the end of which cannot yet be precisely forecast.

It may be argued that one who wishes to reside in a Territory of the United States for a period which cannot be precisely fixed cannot be considered a temporary visitor; or nonimmigrant, within the meaning of the statutory definition (Immigration Act of 1924, sec. 3 (2), 43 Stat. 153, 154, 8 U. S. C. 203: “* * * an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure * * *”).

Although the period for which a visitor's visa is granted has, in the past, usually been fixed at six months, this is purely an administrative matter. While the statute uses the term “temporary,” this term has not been administratively construed as meaning “very short” but rather has been construed, quite properly, as meaning the opposite of “permanent.” Thus it is possible for a visit to be “temporary but protracted,” and in fact the instructions of the Department of State to consular officers authorize long-term visits by “aliens desiring to proceed to the United States for training in well-known banking or industrial institutions for a temporary but protracted period” (State Dept., Admission of Aliens into the U. S., Note 33). Likewise in the case of candidates for religious orders, consuls are advised that “if the period of training will extend beyond one year applications for extensions of temporary stay will be considered annually and will ordinarily be granted upon a showing that the aliens are maintaining their status” (*Ibid.*, Note 34). The recently promulgated regulations covering refugee children, approved by the Attorney General on July 13, 1940, prescribe as the period for which admission is valid “a period of two years subject, however, to the power of the Attorney General to shorten or extend the period of admission.” According to the State Department's Press Release of July 14, 1940, the purpose of these regulations is to care for a special problem for the duration of emergency conditions:

¹⁵ See page 319, *supra*.

The Department of State and the Department of Justice announced on July 14 the adoption of simplified procedure which will make possible the admission of refugee children from the war zones in whatever numbers shipping facilities and private assurances of support will permit.

It is contemplated that visas and the necessary travel papers shall at all times during the period of the emergency be in the hands of at least 10,000 children in excess of those for whom shipping facilities are currently available. The plan is designed to facilitate evacuation of children regardless of their financial circumstances.

The new regulations apply only to children under 16 years of age who seek to enter the United States to escape the dangers of war. The regulations authorize issuance of visitors' visas to such children upon a showing of intention that they will return home upon the termination of hostilities. * * *

Under these precedents it seems to me clear that the fact that the applicant for entry desires to remain within a possession of the United States for a contingent period which he cannot control or predict is not enough to exclude him legally from the statutory classification of "alien visitor." Referring again to the regulations on child refugees, one might object that the duration of the present war is unpredictable and that since it may possibly last a century visitors "for the duration" cannot be considered "temporary visitors." Yet the Secretary of State and the Attorney General have not considered that this possibility must exclude application of the "visitor" category. From Aristotle to Cardozo it has been observed that in social problems the certainty of mathematics cannot be achieved. If those in whom power to act on behalf of the Federal Government has been vested are reasonably persuaded that certain conditions which now exist are temporary rather than permanent, then it is only fitting and proper that they class as temporary visitors those aliens who seek permission to remain within these island possessions of the United States during a period when their presence is urgently desired by the local naval and civilian authorities.

(b) There remains, finally, for consideration the question whether any applicants for temporary entry permits who have pending applications for immigration visas must be excluded on the ground that the pendency of such an application is incompatible with the acceptance of a "temporary visitor" status.

I am of the opinion that no such legal consequence is attached to the act of applying for an immigration visa. This view is in accord with a series of decisions of the Federal courts holding that a person may in good faith apply for, and become entitled to receive, a visitor's visa even though the applicant has a conditional intent to acquire a more permanent status if the law permits. Thus, in the case of *Chryssikos v. Commissioner of Immigration*, 3 F. (2) 372 (C. C. A. 2, 1924), the decision of the Labor Department excluding the relator from entry as a temporary visitor, on the ground that she had testified that

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she wanted to stay in the United States permanently, was reversed in habeas corpus proceedings. The court held that a desire to obtain the right of permanent residence did not evidence bad faith in applying for a temporary visitor's permit, and that the exclusion of the relator was therefore not legally justified.

Again, in the case of *United States v. Curran*, 13 F. (2d) 233 (D. C. S. D. N. Y., 1925), the decision of the immigration authorities to exclude an alien claiming a temporary visitor's status, on the ground that he hoped later to achieve a quota-exempt student-immigrant status, was reversed by the court, on the authority of the *Chryssikos* case. The court declared:

* * * His exclusion was unjustified as a matter of law, because the statute gives him a present right to enter as a temporary visitor, and does not authorize the immigration authorities to exclude temporary visitors simply because they intend to learn our language and qualify themselves for admission to our colleges and universities. Whether this alien should be ultimately permitted to remain and pursue his studies in Stevens Institute is a question which does not arise at this time. It is sufficient that he is now entitled to enter as a temporary visitor. The case cannot in principle be distinguished from the decision of the Circuit Court of Appeals in this circuit in *Chryssikos v. Commissioner of Immigration* (C. C. A.) 3 F. (2d) 372, p. 235.)

To the same effect is the decision in *United States v. Reimer*, 10 F. Supp. 992 (D. C. S. D. N. Y., 1935).

It is not intended, of course, to express a view on the question of fact which arises in every case as to whether the applicant for permission to take up temporary residence in a given Territory or insular possession of the United States intends in good faith to assume a merely temporary residence there. Cf. *United States v. Commissioner of Immigration*, 13 F. (2d) 943 (D. C. S. D. N. Y., 1925); *Ex parte Menaregidis*, 13 F. (2d) 392 (D. C. S. D. N. Y., 1925); *United States v. Karnuth*, 28 F. (2d) 281 (D. C. N. D. N. Y., 1928). All that is here asserted is the proposition which the absence of legislation suggests and which the decided cases make perfectly clear: that application for an immigration visa to enter the United States is not inconsistent with an intention that an interim visit to a designated Territory or insular possession shall be merely temporary, and does not legally preclude the applicant from the enjoyment of privileges accorded to other temporary visitors.

Other special circumstances which may raise legal questions as to the scope of the authority of the Governor to admit nonimmigrant aliens to the Virgin Islands in emergency cases will be considered as they arise, upon submission of the facts to the Department.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

ACTIVITIES OF CITY GUIDES ON THE GROUNDS OF THE FORT MARION NATIONAL MONUMENT, FLORIDA

Opinion, June 24, 1941

NATIONAL MONUMENT—JURISDICTION—REVOCABLE LICENSE.

Authority of the Secretary of the Interior to prohibit activities of city guides on the grounds of the Fort Marion National Monument, Florida. *Held*, regardless of whether the United States has exclusive or merely proprietary jurisdiction over the Fort Marion National Monument in St. Augustine, Florida, the Secretary of the Interior has the authority to prohibit guides licensed by the city from soliciting on the monument grounds, including that area occupied, used and maintained by the city under a revocable license granted by the Secretary of War for street and sidewalk purposes.

COHEN, Acting Solicitor:

My opinion has been requested relative to the authority of the Secretary of the Interior to prohibit guides, licensed by the City of St. Augustine, from soliciting on that portion of the Fort Marion National Monument, Florida, which the City, under a revocable license granted by the Secretary of War, is authorized "to occupy, use and maintain for street, roadway, and sidewalk purposes."

It appears that the United States acquired title to the land in question from Spain by treaty, January 24, 1818, and that said land was reserved for military purposes March 23, 1849. By a "deed of cession" dated September 4, 1893, the Governor of Florida ceded exclusive jurisdiction over said land to the United States, describing it as the Military Reservation of Fort Marion. On January 8, 1908, the Secretary of War, who at the time was administering the area, executed a license, revocable at will by the Secretary, authorizing the City of St. Augustine "to occupy, use and maintain for street, roadway, and sidewalk purposes" certain described portions of land.¹ By a

¹"THE CITY OF SAINT AUGUSTINE, FLORIDA, is hereby granted a license, revocable at will by the Secretary of War, to occupy, use and maintain for street, roadway, and sidewalk purposes, all that portion of the United States Military Reservation of Fort Marion, in Saint Augustine, Florida, lying between the tracks of the Saint Johns Light and Power Company (as shown on the map hereto attached) and the fences now existing around the private grounds bordering said reservation, with the exception of the ground attached to the so-called 'Sergeant's' house built and owned by the Government in the Southwest corner of the reservation and the house thereon: subject to the following provisions and conditions:

"1.—That said Licensee shall construct and maintain a roadway at least twenty-five (25) feet in width along and outside of the tracks of the Saint Johns Light and Power Company; said roadway to be provided with a hard and smooth surface, and to be at all times maintained in good repair and condition.

"2.—That all portions of the ground herein authorized to be so used by said licensee that may not be needed for roadway or sidewalk purposes shall be always kept in a neat and parklike condition, either in grass or shrubbery, or both.

"3.—That the construction of a roadway and sidewalk, and the maintenance of the same and of the other portions of the reservation included within the grounds herein authorized to be used, shall be under the supervision of, and in the manner directed by, the Engineer Officer of the United States Army in charge of said reservation.

"4.—That said licensee shall prevent any further encroachment upon said reservation by private parties."

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proclamation dated October 15, 1924 (43 Stat. 1868), issued under the authority of the act of June 8, 1906 (34 Stat. 225), the President declared the entire area of Fort Marion Military Reservation, with the historic structures and objects thereto appertaining, to be a national monument. The administration of Fort Marion National Monument was transferred from the Department of War to the Department of the Interior by Executive Orders Nos. 6166 and 6228, dated June 10, 1933, and July 28, 1933, respectively (5 U. S. C. sec. 132 note), under authority of the act of March 3, 1933 (47 Stat. 1518, 5 U. S. C. sec. 128).

I have not been requested for an opinion, nor is there any need here to determine, whether Fort Marion National Monument is still within the exclusive jurisdiction of the United States or whether, because it is no longer used for military purposes, political jurisdiction has reverted in the State of Florida. In either event, I am of the opinion that this Department is authorized to prohibit the solicitation activities herein involved.

The grounds and the buildings of the Fort Marion National Monument are owned by the United States and the monument is maintained and supervised by the United States Department of the Interior for the benefit of the public. It has been held repeatedly that even when a State has political jurisdiction over lands owned by the United States the Federal Government may, nevertheless, use and regulate the use of such lands without embarrassment from the State. *Camfield v. United States*, 167 U. S. 518, 525, 526; *Utah Power and Light Co. v. United States*, 243 U. S. 389, 404; *McKelvey v. United States*, 260 U. S. 353, 359; *Hunt v. United States*, 278 U. S. 96; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650; *James v. Dravo*, 302 U. S. 134, 141, 142.

In the *Hunt* case, *supra*, it was held that, when necessary to protect public land from damage, Federal regulations respecting the killing of deer in a national reserve prevailed over State game laws which squarely conflicted with the Federal regulation. *Cf. Noh v. Babcock*, 21 F. Supp. 519, reversed on other grounds, 99 F. (2d) 738. It has also been held that State police regulations with respect to the use of oleomargarine, which conflicted with Federal regulations governing the internal conduct of a Federal institution, that is, the use of oleomargarine in a soldiers' home, was inapplicable, notwithstanding the fact that the State had political jurisdiction over the area. *Ohio v. Thomas*, 173 U. S. 276. It has been held, moreover, that the State police regulations did not apply to a post road, a Federal instrumentality, where the State police regulations conflicted with the Federal regulations covering the same subject matter—that is, the qualifications of a driver employed by the Post Office Department to drive a

Government truck over a post road in Maryland. *Johnson v. State of Maryland*, 254 U. S. 51.

Since the Fort Marion National Monument is a Federal institution or instrumentality, operated by the Federal Government on Federal land, it appears, in the light of the above-cited cases, that the Secretary of the Interior may, if he finds it necessary for the "proper government," "protection," or "maintenance of good order," prohibit the solicitation by city guides on any portion of the Fort Marion National Monument area. Act of March 2, 1933 (47 Stat. 1420, 16 U. S. C. secs. 9a, 10a). In brief, the Federal Government's power to govern its institutions and the use of its lands is supreme and when State or city regulations conflict therewith Federal regulations control.

It is not believed that the revocable license which authorizes the City to maintain and use a street on the Fort Marion Monument grounds takes the street area in question out of the general rule stated above. Such licenses are permissive only and are subject to revocation for reasonable cause. *United States v. Colorado Power Co.*, 240 Fed. 217. Accordingly, if the City were to persist in using the street in a manner which interfered with or embarrassed the Federal Government in its regulation of the monument in accordance with the purposes for which it was established, the Secretary of the Interior would be warranted in revoking the City's license and prohibiting its further use of the street. Should the City, therefore, refuse to cooperate with respect to the activities of its guides on the street area in question and take the position that the terms of its present revocable license are broad enough to authorize such activities, then the most feasible procedure, from an administrative standpoint, would appear to be the revocation of its present license and the issuance of a new license expressly prohibiting such activities.

In my opinion, therefore, regardless of whether the United States has exclusive or merely proprietary jurisdiction over the Fort Marion National Monument in St. Augustine, Florida, the Secretary of the Interior has the authority to prohibit guides licensed by the City from soliciting on the monument grounds, including that area occupied, used and maintained by the City under a revocable license granted by the Secretary of War for street and sidewalk purposes.

It should be indicated, however, that such authority stems from and must be in accordance with the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. sec. 3), the act of March 2, 1933 (47 Stat. 1420, 16 U. S. C. secs. 9a, 10a), and the act of March 3, 1933 (47 Stat. 1518, 5 U. S. C. sec. 128 (a) (c)). The Judge Advocate General's opinion of October 23, 1930, cited in the National Park Service letter of August

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30, 1940, must therefore be construed in the light of these statutes, which alter the statutory authority for the issuance of regulations in so far as national monuments are concerned.

Approved:

W. C. MENDENHALL,
Acting Assistant Secretary.

ALAMO IRON WORKS (ON REHEARING)

Decided June 27, 1941

CONTRACTS—LIQUIDATED DAMAGES—SUBSTANTIAL PERFORMANCE.

A contract for materials provided for delivery by a certain date and for the assessment of liquidated damages at the rate of \$5 per day for delay in performance. All of the materials except certain bolts, having a value of 6 percent of the total contract price and not essential in the use of the remaining materials, were delivered by the date fixed. *Held*, that there was substantial performance of the contract within the time set and that liquidated damages accordingly should not be assessed.

BURLEW, *Acting Secretary*:

On November 7, 1939, invitation for bids No. A-46,820-A was issued for furnishing bolts, nuts and structural steel shapes and plates under schedule No. 1 for the Colorado River Project, Texas. The invitation for bids provided for liquidated damages at the rate of \$5 per day for failure to make shipment within 30 calendar days after the date of receipt by the contractor of notice of award of the contract or within the period of time specified by the bidder if greater than the said number of days.

The Alamo Iron Works, in its bid dated November 9, 1939, agreed to make shipment from Houston, Texas, within 30 days after date of receipt of notice of the award of the contract. This bid of \$288.20 being the lowest as to price the bidder was notified of the award of the contract by a letter dated November 23, 1939, which was received by the contractor on November 25, 1939, thus fixing December 25, 1939, as the shipping date under the contract.

Shipment, consisting of all the material specified in the contract excepting 192 high tensile bronze bolts with a value of approximately 6 percent of the contract sum, was made from Houston, Texas on December 23, 1939. On February 13, 1940, the contractor made shipment of 189 of the bolts from Houston, Texas. On February 28, 1940, the remaining three bolts were mailed from Chicago, Illinois, by parcel post by the manufacturer pursuant to directions from the contractor and these bolts were received on March 11, 1940.

The contracting officer, in his findings dated April 16, 1940, concluded that the mailing of the final three bronze bolts from Chicago, Illinois on February 28, 1940, constituted performance by the contractor of his contract obligations on that date and, accordingly, that there was a delay of 65 days in the completion of the contract, for which the contractor should be assessed liquidated damages. The liquidated damages resulting from these findings would amount to \$325, exceeding the contract sum of \$288.20 by \$36.80. These findings were sustained on appeal, in a departmental decision dated December 30, 1940.

In a motion for rehearing of the previous findings the contractor alleges that, as a matter of law, the provision in the contract for liquidated damages should have been construed as a provision for penalty, that the misinterpretation by the contractor of the drawings attached to the contract constitutes a legal excuse for delay, and that delay is also legally excusable because the United States suffered no actual damages and that the Secretary erred in finding that the contract was not completed until February 28, 1940.

It appears that the liquidated damage provisions of this contract may, as a matter of law, be provisions for penalty. The contract called for delivery within 30 days. The contractor states in his brief "that even 30 days after the specified bolts and nuts had been delivered they were still not needed and had not been used, for the job had not progressed to the point where there was any necessity for the bolts and nuts." In order for a provision for liquidated damages to be valid there must be a reasonable relation between the liquidated damages assessed and the probable damages which might be expected to follow a breach. *Wise v. United States*, 249 U. S. 361; *Kothe v. R. C. Taylor Trust*, 280 U. S. 224; 16 Comp. Gen. 344, 345; 17 Comp. Gen. 466. If at the time the contract here in question was executed it was apparent from the progress of the work on the project that the materials involved could not be used for 100 or more days, it would appear that there was no reasonable relationship between the liquidated damage provisions and the probable damages which the Government might suffer from any breach not extending beyond this 100-day period. Inasmuch, however, as the facts with respect to this matter are not definitely established, these findings are not based on this point.

While it is regrettable that the contractor misinterpreted the drawings, it is not believed that such a mistake is a legal excuse for delay or nonperformance. There is no showing that the Government accepted the bid with knowledge of the mistake or that the discrepancy in the amount bid as compared with other bids for the same parts was sufficient to warrant a charge of notice to the Government of the mistake.

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The fact that there were no actual damages would not be material if there was an actual breach of contract covered by valid provisions for liquidated damages.

This leaves only the question of time of performance of the contract. In previous findings it was held that the contract was not completed until delivery of the final three bolts (valued at approximately 27 cents), notwithstanding the fact that the bulk of the material, some 717 articles valued at approximately \$288, had been delivered. It appears also that the major portion of these materials could have been installed and used without the bolts in question. The contract included parts 11, 12, 18, 19, and 20 of schedule No. 1, and it appears that the materials included in parts 18, 19, and 20 could have been completely installed without the materials included in parts 11 and 12, and without the bolts in question. In addition to these circumstances, it is noted that the inspector for the Government accepted the materials covered by the contract within the 30-day period, stating in his report that:

Since the order was substantially complete, the contractor was authorized to make shipment on Government B/L No. I-813133, with the understanding that bronze bolts should be provided to meet specifications, subject to inspection after shipment and at no additional cost to the Government.

In these circumstances I consider it proper to find that the contract was substantially completed within the contract period and that the contractor need not be charged with any amount as liquidated damages for delay in delivery of the bolts in question.

Accordingly, the administrative finding of December 30, 1940, is vacated, and the findings of the contracting officer are reversed.

Prior Decision Vacated.

AUTHORITY OF THE SECRETARY OF THE INTERIOR TO WITHDRAW PUBLIC LANDS

Opinion, July 14, 1941

PUBLIC LANDS—PRESIDENT'S WITHDRAWAL POWER—SECRETARY OF THE INTERIOR— EXERCISE OF PRESIDENT'S POWERS THROUGH HEADS OF EXECUTIVE DEPARTMENTS.

The President is authorized by the act of June 25, 1910 (36 Stat. 847, 43 U. S. C. 141-3), as amended by the act of August 24, 1912 (37 Stat. 497), to withdraw public lands of the United States temporarily in aid of legislation or classification or other public purposes and has inherent power, apart from these statutes, to make permanent reservations of public lands for Federal uses. The President, with certain exceptions, may exercise his powers through the various heads of the Executive Departments of the Government. Since the administration of the public lands is vested in the Secretary of the Interior, the powers of the President relating to the withdrawal of the public lands may be exercised by the Secretary of the Interior.

COHEN, *Acting Solicitor*:

You [Secretary of the Interior] have requested that I advise you concerning your authority to sign the orders of withdrawal of public lands which are constantly being submitted to the President for his signature.

It is my opinion that you have such authority.

The power to withdraw public lands of the United States temporarily in aid of legislation or classification or for other reasons has been specifically vested in the President by the act of June 25, 1910 (36 Stat. 847, Title 43, secs. 141-3, United States Code), as amended by the act of August 24, 1912 (37 Stat. 497). The President, moreover, has inherent power, apart from these statutes, to make permanent reservations of public lands for Federal uses. Opinion of Attorney General to Secretary of the Interior, dated June 4, 1941. The question then is whether these powers, which are fundamentally vested in the President, may be exercised by the Secretary of the Interior.

In general, it may be stated that the President, with certain exceptions not pertinent here, may exercise his powers through the various heads of the Executive Departments of the Government. *Wilcox v. Jackson*, 13 Pet. 498, 512. This question was exhaustively considered by the Attorney General, and in 7 Op. Atty. Gen. 453, it is stated (p. 479):

I trust enough has been said, however, to establish the general position, that, in their executive acts, instructions, and orders, the Heads of Departments speak for and in the authority of the President; that, if the act be within the lawful jurisdiction of such Head of Department, the direction of the President is presumed in law; that whether to name the President or not, in a departmental order, becomes, in most cases, a matter of discretion, judgment, or taste, according to the subject matter; that, if he be named, it is for emphasis or enforcement, rather than from necessity; that, whether he be named or not, the act or order is to have legal effect as, by construction, the act or the order of the supreme executive authority, civil and military, of the United States.

It also appears from this opinion and decisions of the courts that there need be no specific authorization to enable the heads of departments to exercise the powers of the President concerning matters properly within the jurisdiction of their respective departments. In such cases the authority and direction to act is presumed. *United States v. Watkins*, 22 F. (2d) 437, 440; *Maresca v. United States*, 277 Fed. 727, 735; *Northern Pac. Ry. v. Mitchell*, 208 Fed. 469, 472.

The function of administering the public lands of the United States is conferred on the Secretary of the Interior by statute. Title 5, sec. 485, United States Code, provides:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

First. The public lands, including mines.

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Also see Title 43, secs. 2 and 1201, United States Code. This statutory authorization includes authority over "the acquisition of rights in the public lands and the general care of these lands." *Cameron v. United States*, 252 U. S. 450, 459; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324; *Knight v. U. S. Land Association*, 142 U. S. 161, 177, 181; *United States v. Schurz*, 102 U. S. 378, 395.

It follows from the foregoing that the powers of the President relating to the withdrawal of the public lands may be exercised by the Secretary of the Interior.

The courts have consistently adopted the view that the Secretary of the Interior is authorized to withdraw public lands. *Northern Pac. Ry. Co. v. Wismer*, 246 U. S. 283, 287; *Chicago, Mi. & St. P. Ry. v. United States*, 244 U. S. 351, 356, 357; *United States v. Morrison*, 240 U. S. 192, 212; *Wood v. Beach*, 156 U. S. 548, 550; *Riley v. Welles*, 154 U. S. 578; *Billard v. Des Moines Railroad*, 122 U. S. 167, 172; *Wolsey v. Chapman*, 101 U. S. 755, 768-770; *Wolcott v. Des Moines*, 5 Wall. 681, 688; *Wilbur v. United States*, 46 F. (2d) 217, 219 (aff'd, 283 U. S. 414); *Stockley v. United States*, 271 Fed. 632 (rev'd on other grounds, 260 U. S. 532). All of these cases involved the validity of orders of withdrawal issued by the Secretary of the Interior. In each case the withdrawal was held valid on the ground that the act of the Secretary of the Interior was, in legal contemplation, the act of the President. This has also been the position previously taken by this Department. *Daniel P. Nolting*, A, 17134, January 28, 1933.

In my opinion, accordingly, you are vested with authority to sign the orders of withdrawal of public lands which under present practice are submitted to the President for signature.

As pointed out, however, your authority in this regard is based on a presumption that the President has acquiesced in and directed its exercise. Since the Secretary of the Interior has in the past exercised the power in question only in isolated instances, there has been no occasion to make explicit the authorization implicit in this presumption. If in the future this power is to be exercised generally, I believe it would be desirable to have the President execute an order authorizing and directing you to sign withdrawal orders. I have, therefore, prepared and am attaching a draft of such an order¹ for the President's signature and a transmittal letter to the President for your signature.

¹ Executive Order No. 9146, April 24, 1942 (7 F. R. 3067), amended by Executive Order No. 9337, April 24, 1943 (8 F. R. 5516). [Ed.]

AUTHORITY TO REQUIRE EMPLOYEES TO REIMBURSE GOVERNMENT FOR DAMAGE TO PROPERTY

Opinion, July 14, 1941

FEDERAL EMPLOYEES—DAMAGE TO GOVERNMENT PROPERTY—PROCEDURE FOR ENFORCEMENT OF CLAIMS BY UNITED STATES.

An administrative officer is without authority to require reimbursement, either by withholding compensation or otherwise, from an employee for damage to Government property caused by the employee's negligence, since an officer or employee may not be administratively deprived of his lawful compensation, and is as much entitled to his day in court as any other citizen against whom the United States may assert a claim. The appropriate procedure is to refer such a claim to the Department of Justice for action if a request for payment is unsuccessful.

GRAHAM, Assistant Solicitor:

This is with reference to Acting Commissioner Bashore's memorandum for the Solicitor, dated September 16, 1940, concerning a collision on December 4, 1938, between a Bureau of Reclamation truck and a truck assigned to the Indian Service, which appears to have been caused by the negligence of the latter's truck driver. The question presented is whether the United States should seek to obtain redress from its employee for the damage suffered to its property.

The following is quoted from an opinion of the Attorney General, dated March 25, 1941, addressed to the Secretary of Agriculture, dealing with a similar question:

The Acting Secretary of Agriculture, in his letter of February 5, requested my opinion "whether the Secretary of Agriculture, in taking disciplinary action against an employee of this Department on account of the employee's misconduct, can properly require the employee to reimburse the Government for a payment made by the Government to a private person for property damage resulting from the employee's negligence."

By way of illustration he cited the following case: An employee making an official trip in a Government car became intoxicated and collided with a privately owned vehicle. * * *

In the absence of statutory authority, express or implied, an officer or employee of the Government may not be administratively deprived of his lawful compensation. Speaking on this subject in *Corcoran v. United States*, 38 Ct. Cls. 341, 345, the court said:

"Two things are essential to deprive an officer of his statutory compensation: The first is that the power so to do must be lodged, directly or by necessary implication, in some official hands * * *"

See also *Smith v. Jackson*, 246 U. S. 388; *McCarl v. Cox*, 8 F. (2d) 669, Cert. Denied, 270 U. S. 652; *McCarl v. Pence*, 18 F. (2d) 809; 34 Op. A. G. 517.

The act of December 28, 1922, under which the claim was adjusted and reported to the Congress does not provide for reimbursement by the employee, and no statute charges you with collecting the amount from him. If it were to be attempted the employee would, I think, be entitled to his day in court as in connection with other claims asserted by the United States against its citizens.

Aside from these considerations, it is not within the power of the head of a department to enforce such demands by administrative action save with the

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acquiescence of the employee; and the damage might be great, affecting both willingness and ability to repay.

* * * * *

For the foregoing reasons it is my opinion that there is no authority in the Secretary of Agriculture to require an employee to reimburse the Government for a payment made in settlement of a claim under the act of December 28, 1922. Of course, the employee may be subjected to suitable discipline, including dismissal, if warranted. [Vol. 40, No. 9.]

Although this opinion deals with the question of whether the United States can require reimbursement from the employee for payment made for private property damage, whereas in the instant case the question is whether the United States can require reimbursement from the employee for damage to Government property, there appears to be little distinction between the final results of the two situations. In both cases, the Government has suffered a pecuniary loss as the result of the negligence of its employee. It would appear that in both cases in the absence of voluntary payment by the employee, the Government cannot proceed administratively to collect payment for the damage by withholding compensation. This does not rule out proceeding to collect from the employee in the same way as claims are brought against private persons who negligently damage Government property. The latter procedure, as you may recall, is first to request payment and then if such request is refused to transmit the case to the Department of Justice for appropriate action.

There apparently is no way in which, by a transfer of funds, the Office of Indian Affairs may reimburse the Bureau of Reclamation for the damage to the latter's truck. I suggest, therefore, that an informal request for reimbursement be made upon the employee of the Office of Indian Affairs, and, if that fails, that the file be transmitted to the Department of Justice for collection in the same manner as other claims, if you regard such a procedure to be warranted administratively.

JURISDICTION OF UNITED STATES COMMISSIONERS TO TRY PETTY OFFENSES ON INDIAN RESERVATIONS

Opinion, July 19, 1941

INDIAN RESERVATIONS—JURISDICTION OF UNITED STATES COMMISSIONER OVER PETTY
FEDERAL OFFENSES—JURISDICTION OVER PETTY TRIBAL OFFENSES—OFFENSES
UNDER LAW AND ORDER REGULATIONS.

The act of October 9, 1940, "To confer jurisdiction upon certain United States commissioners to try petty offenses committed on Federal reservations" provides an alternative procedure for the trial of petty offenses now within the jurisdiction of the Federal district courts and therefore, while it applies to such Federal offenses upon Indian reservations, the act does not apply to offenses defined by tribal law or the law and order regulations of the Interior Department, since such offenses are not Federal offenses cognizable in the Federal district courts.

MARGOLD, Solicitor:

The Commissioner of Indian Affairs has requested this office to prepare an opinion as to the bearing, if any, upon law and order among Indians of the act approved October 9, 1940, "To confer jurisdiction upon certain United States commissioners to try petty offenses committed on Federal reservations" (54 Stat. 1058). The Commissioner reports that it was the informal opinion of this office while the act was pending in Congress that if the act were passed it would be without effect except in matters already within the jurisdiction of the Federal district courts. He calls attention, however, to the discussion of the bill on the floor of the House indicating that some members of that body did think that the bill would include matters internal to Indian tribes not now subject to the jurisdiction of the Federal courts. A formal opinion of the Solicitor is desired which can be distributed to the field officers concerned with law enforcement among Indians.

Section 1 of the bill, which contains most of the provisions which are significant to this question, provides that:

* * * any United States commissioner especially designated for that purpose by the court by which he was appointed shall have jurisdiction to try and, if found guilty, to sentence persons charged with petty offenses against the law, or rules and regulations made in pursuance of law, committed in any place over which the Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction, and within the judicial district for which such commissioner was appointed. The probation laws shall be applicable to persons so tried before United States commissioners. For the purposes of this Act the term "petty offense" shall be defined as in section 335 of the Criminal Code (U. S. C., title 18, sec. 541). If any person charged with such petty offense shall so elect, however, he shall be tried in the district court of the United States which has jurisdiction over the offense. The commissioner before whom the defendant is arraigned shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant after being so apprised, signs a written consent to be tried before the commissioner.

Section 2 provides that an appeal shall lie from cases of conviction by the United States Commissioners to the district court of the United States for the district in which the offense was committed. The section also directs the Supreme Court to provide rules of procedure and practice for the trial of cases before the Commissioners and for appeals to the district courts.

Section 3 provides the standard of compensation to the Commissioners for services rendered under the act.

Section 4 directs that the act shall not be construed as repealing or limiting the existing jurisdiction of United States Commissioners, particularly Commissioners for the national parks and Commissioners in Alaska.

Section 5 excludes from application of the act the District of Columbia.

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This act, in my opinion, provides an alternative procedure for the prosecution of petty offenses which are now within the jurisdiction of the Federal district courts. It accomplishes this by empowering the United States Commissioners to try and sentence persons charged with the commission of petty offenses on Federal reservations, provided that the defendant does not elect to be tried by the Federal district court which has jurisdiction over the offense. The act does not create any new Federal offenses nor make any substantive change in Federal law.

The purpose and the scope of the act are unmistakably revealed in the report on the bill of the Committee on the Judiciary to the House of Representatives, which report incorporated letters to that Committee discussing the bill from the Department of Justice and the War Department. The report emphasizes the need for a more speedy and convenient method of prosecuting minor Federal offenses which, under existing law, must be prosecuted in the Federal district courts. Reference is made principally to the distance of the Federal district courts, to the necessary delay in reaching trial, and to the inconvenience resulting to the defendant and to the Government. Similar arguments of procedural convenience are the burden of the letters of the Justice and War Departments (H. R. Report No. 2579; 76th Cong. 3d sess.).

This interpretation that the petty offenses covered by the act must be Federal offenses within the jurisdiction of the Federal courts is made inescapable by the provision in the act for election by the defendant of a trial before the Commissioner or before the Federal district court which has jurisdiction of the offense. If the offense is not one within the jurisdiction of a Federal district court, the purpose, as well as the provisions, of the bill no longer has application. The function of the United States Commissioner under the act is to relieve the Federal district court of the burden of the minor cases, to the advantage of all parties.

The act may, in my opinion, be held to apply to offenses committed on Indian reservations, although the matter is not entirely free from doubt. My reason is that the act may be characterized as a general law "as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States" and as such it becomes applicable to Indian reservations under 25 U. S. C. A. sec. 217, which section extends all such laws to the Indian country. It is not necessary, under this reasoning, to determine whether an Indian reservation is a place under the concurrent or exclusive jurisdiction of the United States to which the act by its terms directly applies. I conclude that any white person or Indian who commits within an Indian reservation a Federal offense which comes within the pre-

scribed definition of a petty offense and for which he is subject to trial in a Federal district court may be tried before the United States Commissioner, provided he consents to such procedure.

However, as the law relates only to Federal offenses, it in no way affects the trial and punishment of offenses defined by tribal law and regulation. Such offenses continue to be tried by the tribal authorities and are not subject to prosecution before the Commissioner or the Federal district courts. The act, in my opinion, is no more applicable to offenses under tribal law than it is to offenses under State law committed within Indian reservations.

My conclusion is the same in regard to offenses defined by the law and order regulations of this Department as such offenses are not offenses over which the Federal district courts have jurisdiction. Section 1 of the act describes the offenses subject to the jurisdiction of the United States Commissioners as "petty offenses against the law, or rules and regulations made in pursuance of law." This reference to rules and regulations makes the act applicable to violations of Federal regulations which are made a Federal offense by statute. The law and order regulations of this Department have a peculiar status. There is no statute providing in terms for regulations governing the conduct of Indians on Indian reservations or making violation of such regulations a Federal offense cognizable in the Federal district courts. In the extensive analysis of the authority for these departmental law and order regulations, set forth in my memorandum of February 28, 1935, it was pointed out that these regulations were sanctioned by congressional appropriations over 60 years for the employment of Indian judges and Indian police and for maintaining law and order on Indian reservations. The authority for the regulations was also found in the tribal power over the internal relations of Indians on Indian reservations, the Interior Department assisting in this regard where tribal organization was weak.

The discussion of the bill on the floor of the House of Representatives on July 1, 1940, does indicate that two or three of the Congressmen participating in the discussion believed that the bill would permit the United States Commissioners to try offenses against tribal laws and regulations if the defendant and the tribal court consented to such procedure. Such an understanding of the bill is a natural one to reach without close scrutiny of all the terms of the bill, in view of the broad general language of the title of the bill and of the opening sentence. However, much of the discussion consisted in raising questions as to the application of the bill to Indian reservations and was not advanced as conclusive. The discussion, moreover, loses weight by reason of the fact that it was based upon the premise that tribal courts had jurisdiction over offenses by white persons on Indian res-

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ervations, which premise is erroneous. In any case, discussion of the provisions of a bill on the floor of Congress can determine the interpretation of the bill only in the event its provisions are ambiguous. In the case of this act the provisions, when read as a whole, are not ambiguous. As concluded previously, they provide solely for a new procedure to relieve the Federal district courts of the trial of certain Federal offenses, designated as petty offenses, now within their jurisdiction.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

SAMUEL W. LEWIS and FRANK O. LEWIS v. REGIONAL
AGRICULTURAL CREDIT CORPORATION
(ON REHEARING)

Decided July 21, 1941

GRAZING LANDS—HOMESTEAD ENTRY—ACT OF DECEMBER 29, 1916, ACT OF APRIL 28, 1922, AND NEW MEXICO STAT. ANN. (1929) SECS. 111-107 AND 151-156.

When settlers who file applications for stockraising homestead entries have previously mortgaged their entire interest in every improvement on the land, together with all feed, range, pasturage and water rights, have defaulted on the mortgages and suffered foreclosure and rendition of deficiency judgments against them and have permitted the time for redemption to expire, they have stripped themselves of all the essentials of settlement and stock-raising so that they have in effect, abandoned their right to make stock-raising homestead entries.

When applicants have been deprived of all the improvements and rights without which the land cannot be put to any use as a home for stockraising purposes before application for entry, it cannot reasonably be said that the applications are "honestly and in good faith made for the purpose of actual settlement, use, and improvement by the applicant, * * * in good faith to obtain a home * * *."

Since the necessary consequence of granting the applications would be to grant the applicants the power substantially to deprive the mortgagee of the use of property which a court of competent jurisdiction has decreed now belongs to the mortgagee, the Department should exercise its undoubted power to refuse to allow the bounty of the public land laws to be used for inequitable ends. Following *Williams v. United States*, 138 U. S. 514, 524 (1891); *Northern Pacific Ry. Co. v. McComas*, 250 U. S. 387, 393 (1919); *Payne v. U. S. ex rel. Olson*, 269 Fed. 198, 50 App. D. C. 119 (1920).

The law of New Mexico (N. Mex. Stat. Ann. (1929) secs. 111-107 and 151-156) permits the mortgage of a valid interest in the improvements, water rights and other rights on public lands—even though such improvements or rights may be attached or appurtenant to the land. But apart from this, principles of comity and estoppel are persuasive that this Department should not permit to be brought into question before it in this proceeding, a determination by

a Federal court which has resolved the validity of the mortgages in favor of the mortgagee, where the mortgagors and the mortgagee were parties to the suit.

Section 2296, Revised Statutes, act of April 28, 1922 (42 Stat. 502, 43 U. S. C. sec. 175), exempting homestead land from liability for the satisfaction of a debt contracted prior to the issuance of a patent therefor, is not applicable to mortgages. *Ruddy v. Rossi*, 248 U. S. 104 (1918), is not to the contrary. The mortgages here involved did not cover the lands. The question as to whether section 2296, *supra*, renders invalid the mortgages on the improvements and grazing and water rights has similarly been determined by the decree of the court.

The power of the courts to determine possessory rights to public lands is well settled. A writ of assistance directing an ouster from possession is not void as an attempt to adjudicate the title to public lands.

The issue as to what rights may have been acquired under a tax sale certificate issued during the existence of the mortgage for taxes due prior to the foreclosure, which certificate was obtained by the son of a mortgagor after foreclosure but prior to the expiration of the period of redemption, is not a question for determination by this Department since the son is not a party to, and a determination of his rights has no place in, a proceeding on an application by the mortgagors for stockraising homestead entries.

Even if the applications here involved were not rejected in their entirety, they still could not be allowed under the stockraising homestead law since the lands applied for were not designated under that act prior to the Executive order of withdrawal of November 26, 1934. At most, if lands are subject to designation under the enlarged homestead act, the applicants are entitled to 320 acres under each application, and, if not, then to only 160-acre entries.

CHAPMAN, *Assistant Secretary*:

Samuel W. Lewis and Frank O. Lewis moved for rehearing of the decision of July 5, 1939, which affirmed two decisions of the General Land Office dated January 12, 1939, holding for rejection two homestead applications for certain lands in New Mexico under the stockraising homestead act of December 29, 1916. (39 Stat. 862, 43 U. S. C. sec. 291). Their motion was granted for the purpose of allowing the parties to submit further briefs.

The significant facts are these: Between 1932 and 1935, the Regional Agricultural Credit Corporation, hereinafter referred to as RACC, loaned a considerable sum of money to the applicants and members of their families operating as the Y. O. Sheep Company and received promissory notes secured by various mortgages. These mortgages covered all the farming and ranching equipment, machinery appliances, implements, herds, all feed and watering privileges, and all range rights, water rights and pasturage rights held by the Lewises on certain lands, including those covered by the homestead applications. Upon default in payment, RACC commenced an action in foreclosure in the United States District Court for the District of New Mexico. On May 2, 1938, the court rendered a decree in favor of RACC, holding that the Lewises had effectively mortgaged all

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said improvements and rights and ordered a foreclosure sale. At the sale, RACC bid in the property at \$40,000. By its order of October 20, 1938, the court ratified the transfer of the said property to RACC and entered a deficiency judgment for \$21,972.67. On the same date, the court ordered the issuance of a writ of assistance to enable RACC to acquire possession of the property purchased by it at the sale and the Lewises were thereupon ousted. In ordering the issuance of the writ, the court stated that although the Lewises had filed homestead applications in this Department "neither said S. W. Lewis or F. O. Lewis are entitled to the possession of said lands prior to the allowance of their said application to the Department of Interior." The decree of the court has become final since the Lewises did not appeal.

However, on May 17, 1938, fifteen days after the entry of the foreclosure decree, the Lewises filed the homestead applications here involved, alleging settlement on the land in 1918 and 1923, respectively, and subsequent improvements thereon. Each of the applications involves 640 acres in Ts. 21 and 22 S., R. 16 E., N. M. P. M., New Mexico, the surveys of which were approved on February 12, 1935.

Upon rehearing, we are again convinced that the applications were properly denied.

Our decision of July 5, 1939, was based upon the ground that as a result of the execution of mortgages covering all improvements and all water and grazing rights, and their subsequent default, leading consequently to the foreclosure and sale, the appellants had stripped themselves of all the essentials of settlement and stockraising, and that this was in effect an abandonment of their settlement rights in a stockraising homestead entry. Upon reconsideration, we think there are other reasons as well for denying the appellants any relief.

In the applications they filed the Lewises stated under oath in order to show compliance with statutory requirements (see section 2290, R. S., 43 U. S. C. 162; act of December 29, 1916, 39 Stat. 862, 43 U. S. C. 291):

* * * this application is honestly and in good faith made for the purpose of actual settlement, use, and improvement by the applicant, * * * that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement and improvements necessary to acquire title to the land applied for; * * * in good faith to obtain a home for myself, * * *.

It may be assumed that this statement was true at the time the Lewises first settled on the land. Clearly, it could not reasonably be said to be true at the time they filed their applications; the uncontradicted facts demonstrate an absence at that time of the essential intent in good faith to use the lands as a home and for stockraising. The appellants had then been deprived of all the improvements and rights without which

the land could not be put to any such use and, of course, that fact was within their knowledge. In the light of that fact and that knowledge, the conclusion is inevitable that the intent was lacking. And the element of good faith is the essential foundation of all valid claims under the homestead law. *Lee v. Johnson*, 116 U. S. 48, 52, 53 (1885); section 2290, R. S., 43 U. S. C. 162.

Moreover, the necessary consequence of granting the Lewises possession of the lands would be to grant them the power, as a practical matter and it may be as a matter of law,¹ substantially to deprive RACC of the use of property they mortgaged to it for very valuable considerations, property which a court of competent jurisdiction has decreed now belongs to the mortgagee. In the circumstances, we think such a result inequitable. Not only is the good faith of the applicants to be judged in the light of this result, but the Department should exercise its undoubted power to refuse to allow the bounty of the public land laws to be used for inequitable ends. *Williams v. United States*, 138 U. S. 514, 524 (1891); *Northern Pac. Ry. Co. v. McComas*, 250 U. S. 387, 393 (1919); *Payne v. United States ex rel. Olson*, 269 Fed. 198, 50 App. D. C. 119 (1920); *Brown v. Hitchcock*, 173 U. S. 473, 476, 478, 479 (1899); *Gottlieb Roth*, 50 L. D. 197 (1923); *Protection of Transferees and Mortgagees*, 48 L. D. 582, 592-93 (1922); *State of Utah v. Olson*, 47 L. D. 58, 64, 65.

The appellants argue that the mortgages were insufficient to vest RACC with a valid interest in the improvements, water rights and other rights, apparently because the title to them is inseparable from the title to the land while they remain attached or appurtenant to the land. In the first place, the law of New Mexico seems to the contrary. New Mex. Stat. Ann. (1929), secs. 111-107, 151-156; *First State Bank of Alamogordo v. McNew*, 33 N. Mex. 414, 269 Pac. 56 (1928); *Yates v. White*, 30 N. Mex. 420, 235 Pac. 437 (1925); see also *Schmidt v. Carrol*, 201 Wis. 631, 231 N. W. 181 (1930); *Mattecheck v. Pugh*, 153 Ore. 1, 55 P. (2d) 730 (1936). But apart from this, a final decree of a Federal court in a case in which the Lewises and the RACC were parties has resolved the question in favor of the validity of the mortgages. Principles of comity and estoppel are persuasive that we should not permit the appellants to question that determination in this proceeding. *United States v. California & Oregon Land Co.*, 192 U. S. 355 (1904); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 (1940); *Wisconsin R. R. Farm Mortgage Land Co.*, 5 L. D. 81, 87-88, 92 (1886); *Cayce v. St. Louis & Iron Mountain R. R. Co.*, 7 L. D. 204 (1888); *Peter Sherreback Claim*, 2 L. D. 364 (1884).

The appellants also insist that section 2296, Revised Statutes, as amended by the act of April 28, 1922, c. 155 (42 Stat. 502, 43 U. S. C.

¹ Cf. *Patterson v. Chaney*, 24 N. Mex. 156, 173 Pac. 859, 6 A. L. R. 90 (1918); *First State Bank of Alamogordo v. McNew*, 33 N. Mex. 414, 269 Pac. 56, 66 (1928).

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175), renders invalid the mortgages on the improvements and grazing and water rights. The statute provides that:

* * * no lands acquired under the provisions of the homestead laws
* * * shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

One answer is that the statute refers to lands and concededly the mortgages did not cover the lands. Another answer is that the courts have held that the statute is not applicable to mortgages. *Hafemann v. Gross*, 199 U. S. 342, 345-347 (1905); *Worthington v. Tipton*, 24 N. Mex. 89, 172 Pac. 1048 (1918); *Protection of Transferees and Mortgagees*, 48 L. D. 582, 584 (1922); *Cf.* New Mex. Stats. Ann. (1929), secs. 48-111. The case of *Ruddy v. Rossi*, 248 U. S. 104 (1918), relied on by the appellants, is inapplicable; no mortgage was involved in that case. *Irwin v. Wright*, 258 U. S. 219, 231 (1922); *Lockwood v. Lounsbury*, 48 L. D. 637 (1922); *Protection of Transferees and Mortgagees*, 48 L. D. 582, 586 (1922). A third answer is that this question has similarly been determined by the decree of the court.

It is said that the decree and the writ of assistance were void because a court has no jurisdiction with respect to the title to public lands. But neither the decree nor the writ makes any attempt to pass on the title to the lands. The writ of assistance did direct an ouster from possession but the power of the courts to determine possessory rights to public lands is well settled. *Kennedy v. United States*, 119 F. (2d) 564, (C. C. A. 9, April 19, 1941); *Graham v. Superior Court*, 131 Calif. App. 579, 21 P. (2d) 621 (1933), and cases cited; also on estoppel as to jurisdiction, see *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, 377 (1940).

Subsequent to the submission of briefs on this rehearing, the appellants' attorney wrote the Department questioning the title of RACC "even under their foreclosure" by reason of a tax sale to the State of New Mexico and an assignment to Carl Lewis, a son of the appellant Samuel W. Lewis. Enclosed with the letter was what appears to be a Tax Sale Certificate, No. 1644, executed by George Abbott, County Treasurer of Otero County, New Mexico, on December 12, 1936, which certifies that "Improvements on Government Land assessed to S. W. Lewis in School Dist. #19" were sold on December 12, 1936, for 1935 taxes to the State of New Mexico for \$127.58 and that unless redemption is made of "said real estate" the State will be entitled to a deed on or after December 13, 1938. On the reverse side, there is what purports to be an assignment of the certificate signed by the County Treasurer to Carl Lewis for \$151.45. The certificate only refers to improvements assessed to Samuel W. Lewis; Frank O. Lewis is not involved.

Carl Lewis may or may not have acquired some right to the improvements by reason of the assignment of the tax sale certificate. That

question is not before us for determination. Carl Lewis is no party to, and a determination of his rights has no place in, this proceeding. The applicants are Samuel W. Lewis and Frank O. Lewis. The latter is not mentioned in the tax certificate. And we think the former is estopped by the decree in foreclosure from questioning the ownership of the improvements by RACC in this proceeding.

Underlying all of the appellants' arguments is the assumption that the Department is attempting to deprive them of a vested right to make entry based on their settlement. This assumption is without foundation, because, (a) even a vested right may be abandoned, (b) they have no such right in the absence of good faith, and (c) such rights as they might have acquired are always subject to denial in order to prevent an inequitable result.

It should be pointed out that in any event the lands involved were not designated under the stockraising act of December 29, 1916 (39 Stat. 862, 43 U. S. C. sec. 291), prior to the Executive order of withdrawal of November 26, 1934, and that therefore the appellants acquired no rights under that act. *George J. Propp*, 56 I. D. 347 (1938). At most, if the lands are subject to designation under the enlarged homestead act (act of February 19, 1909, 35 Stat. 639, 43 U. S. C. sec. 218), they would be entitled to 320 acres under each of the applications, and if not, then to 160-acre entries. *Instructions*, January 12, 1921, 47 L. D. 629; *Alfred O. Lende*, 49 L. D. 305 (1922); *Don Carlos Bernard*, September 24, 1937, unpublished, A. 19233; section 2289, R. S., 43 U. S. C. 161. However, our conclusion is that the applications should be denied in their entirety.

Upon rehearing, the decision of July 5, 1939, is adhered to and the Commissioner's decision again

Affirmed.

EXTRADITION TO INDIAN RESERVATIONS OF INDIAN FUGITIVES

Opinion, August 14, 1941

EXTRADITION—INDIAN FUGITIVES—AUTHORITY OF STATE—AUTHORITY OF INTERIOR DEPARTMENT—AUTHORITY OF INDIAN TRIBE—CUSTODY OF INDIANS OUTSIDE INDIAN RESERVATIONS.

No extradition of Indian fugitives from the jurisdiction of a State may be obtained as States are authorized to extradite fugitives only pursuant to the Constitution and laws of the United States, which do not include the extradition of Indians to Indian reservations.

- (a) The Interior Department has no authority to extradite Indians from one reservation to another, but Indian tribes have authority to request of each other the return of fugitives and to act on such requests to the extent of removing fugitives from the reservation or of turning over the fugitives to the authorities of the tribes requesting extradition.

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(b) Neither the Indian police nor the tribal police have recognized authority to hold Indians in custody outside Indian reservations and legislation is necessary to authorize such custody by Federal or tribal officials as agents of the tribe seeking extradition.

COHEN, *Acting Solicitor*:

My opinion has been requested by the Indian Office on the general subject of the authority and procedure for the extradition of Indians to Indian reservations from which they have fled, for the purpose of trial for the commission of offenses or for execution of sentence. The Indian Office has phrased the problem as follows:

The question arises whether or not an Indian may, under authority of an Indian Court, be taken against his will from one reservation to another or from any other place outside the reservation to a reservation, or from one state to an Indian reservation in another state in order to try him before the Court of Indian Offenses or to carry out a sentence previously imposed. * * *

The presentation of the question follows a letter of February 3, 1941, from the Chief Special Officer to the Indian Office reporting that extradition of Indians is important to the efficient operation of Indian courts, particularly in dealing with cases of desertion, and that due to the doubt as to the authority for such extradition, the position has been taken that extradition should not be attempted except within the boundaries of one State.

To consider this question I have divided the problem into two parts: First, extradition of an Indian within the jurisdiction of a State, and second, extradition of an Indian from another Indian reservation.

(1) *Extradition from within State jurisdiction.*—If an Indian has fled from the reservation where he has committed an offense and is within the jurisdiction of the State, the question of extradition is the same whether or not the State is the one in which the reservation is located. In either case there can be no extradition unless State officers are authorized to extradite fugitives from Indian reservations. It has long been decided that extradition by a State is not a matter of discretion or comity but is governed exclusively by the Constitution and laws of the United States. *Ex parte Morgan*, 20 Fed. 298 (D. C. W. D. Ark. 1883); *United States v. Meyering*, 75 F. (2d) 716 (C. C. A. 7, 1935). The Constitution in Article IV, section 2, provides for extradition between States, and the statutes of the United States in 18 United States Code, section 662, provide for extradition either from a State or Territory. The *Morgan* case expressly held that there can be no extradition to an Indian reservation on the request of the tribal authorities as a reservation is neither a State nor a Territory. My conclusion, therefore, is that until legislation is obtained authorizing action by the States in this situation there can be no extradition of Indians from the jurisdiction of a State.

(2) *Extradition from another Indian Reservation.*—Two questions are basic to this discussion: (a) The power of reservation officials to authorize extradition from the reservation of refuge, and (b) the authority to hold the prisoner in custody during transit outside the reservation.

(a) Neither the Indian Service nor the Interior Department has authority to cause the extradition of an Indian from one reservation to another. Such authority would have to be based upon statute. Not only is there no statute, but the statutes which would have authorized at least removal of an Indian from a reservation not his own by Interior Department officials in their discretion were repealed. The repealed statutes, sections 220 through 226 of title 25 of the United States Code, authorized the Commissioner and the Indian Agent to remove from reservations persons found there contrary to law, or thought to be undesirable, or absconding Indians, and to obtain the necessary force to effect such removal, including use of the military forces. These statutes were held to authorize the removal from an Indian reservation of Indians not belonging there, but not to authorize the forced return of such Indians to another reservation. *United States v. Crook*, Fed. Cas. No. 14891. Thus at no time, even when most authority was lodged in the Indian Service, was there authority to return fugitive Indians to reservations against their will.

However, an Indian tribe has authority to remove from its reservation persons who are not members of the tribe (55 I. D. 48-50). Moreover, the law and order regulations expressly authorize the Courts of Indian Offenses to order the delivery of offenders to the proper authorities of a tribe or reservation, as well as to the proper authorities of the State or Federal Government, where such authorities consent to exercise jurisdiction (25 CFR 161.2). I have no doubt that part of the unabridged sovereignty and authority of Indian tribes is to request of other tribes the return of fugitive members and to act upon such requests to the extent of removing the fugitive from the reservation or of turning over the fugitive to the proper authorities of the tribe requesting extradition.

(b) It is apparent from the foregoing that, if reservations were contiguous, extradition could be effectuated by the Indian police removing the fugitive upon court order to the border of the reservation where he could be received by the Indian police, acting upon the authority of the court of that reservation. Where, however, the reservations are not contiguous, a problem arises from the fact that the Indian police established under the appropriations for maintaining law and order on Indian reservations have no authority outside the Indian reservation for which they were appointed (18 Op. Atty. Gen. 440; Memo Sol., Int. Dep't, May 5, 1939, pt. IV). Even where there are

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tribal police appointed and paid by the tribe, it is doubtful whether the authority of such police to hold another Indian in custody would be recognized outside an Indian reservation, since Indians outside the reservation are subject to State law, and since as a general rule peace officers of one sovereignty have no more authority outside that sovereignty to hold a person in custody than a private citizen. You will note that State officers are given authority to hold fugitives in custody during extradition across other States by the Federal statute adopted under Constitutional authority (18 U. S. C. sec. 664).

The fact that extradition may exist and function between separated tribes when implemented by Federal authorization is revealed by the treaties made by the United States with each of the Five Civilized Tribes in 1866 (14 Stat. 755, 769, 785, 799). These treaties provided for a general council composed of delegates from all the Indian tribes in the Indian territory with "power to legislate upon all subjects and matters pertaining to the intercourse and relations of the Indian tribes and nations resident in the said territory, the arrest and extradition of criminals escaping from one tribe to another, the administration of justice between members of the several tribes of the said territory * * *." This power existed until the acts of Congress, beginning with the act of June 7, 1897 (30 Stat. 83), placed jurisdiction of Indian offenses in the Indian Territory in the United States courts in the Territory and abolished the tribal courts and tribal governments in that Territory. Extradition power in the Indian Territory was implicitly recognized by the Attorney General in an opinion in 1883 (17 Op. Atty. Gen. 566), advising this Department on the disposition of an Indian held prisoner at Fort Reno, Oklahoma. The prisoner was a Creek Indian who had murdered an Arapaho Indian on the Potawatomi Reservation in the Indian Territory. The Attorney General said:

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

While Indian tribes have complete legal authority to seek and grant extradition, the custody problem needs solution where the two reservations are not contiguous and the prisoner refuses to remain in the custody of the Indian police officer while outside either reservation. In this situation it would appear necessary to obtain authority for holding a prisoner in involuntary custody between the reservations, in order for extradition between separated tribes to be accomplished, when the prisoner is not otherwise subject to custody by the agents of

the tribe or the Department, as in the case of minors and mental incompetents (*Peck v. A. T. & S. F. Ry. Co.*, 91 S. W. 323). Legislation would be appropriate to authorize Federal law enforcement officers or the tribal police to hold prisoners in involuntary custody outside of Indian reservations as agents of the tribe seeking extradition. Consideration might be given in this connection to the legislation proposed by the Indian Office to enlarge and define the duties of Federal law enforcement officers on Indian reservations.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**MARGARET SCHARF, APPLICANT, R. E. HAVENSTRITE,
INTERVENER**

(MOTIONS FOR REHEARING AND INTERVENTION)

Decided August 15, 1941

SCHOOL LAND GRANTS—MINERAL CHARACTER—PRESUMPTION THAT TITLE PASSED TO THE STATE.

There is a presumption, which exists until the contrary is clearly shown, that land granted to a State for school purposes was of the character contemplated by the grant in so far as its then mineral or nonmineral character was concerned, and that therefore the title to a school section identified by survey has passed to the State.

SCHOOL LAND GRANTS—DEPARTMENTAL DETERMINATIONS OF MINERAL CHARACTER IN PROCEEDINGS ON AN APPLICATION FOR AN OIL AND GAS LEASE—NECESSITY FOR SUBSTANTIAL EVIDENCE.

Mere allegations to the effect that the land granted for school purposes was mineral in character and that the title therefore did not pass to the State, unsupported by substantial evidence rebutting the presumption that the title had passed to the State as nonmineral land, will not warrant this Department, upon an application for an oil and gas lease, to entertain proceedings for a determination of the mineral character of the land.

SCHOOL LAND GRANTS—MINERAL LANDS—ACT OF JANUARY 25, 1927—DETERMINATION OF MINERAL CHARACTER.

School lands which, because of their mineral character, could not pass under the original school grants, nevertheless passed to the State by virtue of the act of January 25, 1927, as amended (44 Stat. 1026, 47 Stat. 140, 43 U. S. C. sec. 870), provided certain circumstances enumerated in that act were not present. Therefore even if there were sufficient evidence offered to rebut the presumption as to the nonmineral character of the land, this Department will not, on an application for an oil and gas lease, determine the mineral character of the land unless the existence could be shown of any of those circumstances.

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SCHOOL LAND GRANTS—AUTHORITY TO DETERMINE MINERAL CHARACTER—ACT OF JANUARY 27, 1927, AS AMENDED, AND ACT OF JUNE 21, 1934.

This Department has jurisdiction to make conclusive determinations respecting the known mineral character of school lands at the effective date of the grant. Such determinations, however, will be made only pursuant to the function conferred on the Secretary of the Interior by the act of June 21, 1934 (48 Stat. 1185, 43 U. S. C. sec. 871a), or to his functions (a) of determining whether the title to any lands which clearly were excepted from the act of 1927 had passed or failed to pass under the original school grant where sufficient evidence had been shown to rebut the presumption that the title had passed under the original school land grant, or (b) of passing on any dispute as to whether or not any of the circumstances enumerated in the act of 1927 actually existed or were sufficient to prevent the title, which otherwise would pass under that act, from passing thereunder. A request that this Department determine the known mineral character of the land, unrelated to any of the above-enumerated functions of this Department, is merely a request for an advisory opinion which this Department will not usually render. A conclusive determination of the question may be made by this Department either upon application of the State under the act of 1934 or in those other instances above set forth.

CHAPMAN, *Assistant Secretary*:

On March 24, 1941, the Department affirmed the decision by the Commissioner of the General Land Office, dated December 7, 1940, rejecting an oil and gas lease application (Los Angeles 053770) filed by Margaret Scharf. By these decisions the application, covering two designated groups of lands, was rejected on the following grounds: As to one group of lands (the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 16, and lots 1 and 2, sec. 22, T. 4 N., R. 17 W., S. B. M., California), it was held that, having been approved to the State of California as indemnity school lands "nonmineral in character," they were no longer subject to the authority of this Department. As to the other group of lands (the remainder of sec. 16, same township), it was held that, in so far as the records of this Department show, there was nothing to prevent the passage of title to the State of California either (a) by virtue of the act of March 3, 1853,¹ if the land were known to be nonmineral in character at or prior to the date of the acceptance of the official plat of survey on July 17, 1880; or (b) by virtue of the act of January 25, 1927,² if the

¹ 10 Stat. 244, 246, ch. 145.

² 44 Stat. 1026, 43 U. S. C. secs. 870, 871, as amended by the act of May 2, 1932, 47 Stat. 140, 43 U. S. C. sec. 870. As amended, this act provides:

"Subject to the provisions of subsections (a), (b) and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

"(a) The grant of numbered mineral sections under this section shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject

land, because of its known mineral character, had failed to pass to the State under the act of 1853.³ There was, therefore, no need, in so far as Scharf's application was concerned, to pass on whether or not the land was actually known to be mineral in character on or prior to July 17, 1880.⁴ In either event, none of the lands are now subject to an oil and gas lease under the Mineral Leasing Act of February 25, 1920.⁵

On April 10, 1941, R. E. Havenstrite, acting on behalf of R. E. Havenstrite, Operator, a limited copartnership, which now holds oil and gas leases on all of Sec. 16 from those deriving title under a patent without reservation issued on February 13, 1886, by the State of California, filed a letter requesting that the Department reconsider its decision of March 24 and modify it by making findings of fact to the effect that all of the land in said Sec. 16 was nonmineral in character at the date of the acceptance of the official plat of survey on July 17, 1880, so that it could be held that the title thereto passed to the State of California at that date solely under the act of March 3, 1853, *supra*. His letter is here treated as a motion to intervene, which is herewith allowed, and as a motion praying for the relief requested. Both Mr. Havenstrite and the copartnership of which he is a member will hereinafter be indiscriminately referred to as Havenstrite.

to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

"(b) The additional grant made by this section is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

"(c) That any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceeding in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this section.

"SEC. 2. That nothing herein contained is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered school sections in place, and this Act shall not apply to indemnity or lieu selections or exchanges or the right hereafter to select indemnity for numbered school sections in place lost to the State under the provisions of this or other Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect."

³ *Ivanhoe Mining Co. v. Keystone Consol. Min. Co.*, 102 U. S. 167 (1880); *Hermocilla v. Hubbell*, 89 Calif. 5, 26 Pac. 611 (1891).

⁴ See *George M. Bourquin*, 27 L. D. 289, 290 (1898).

⁵ 41 Stat. 437, 30 U. S. C. sec. 181, 226, as amended by the act of August 21, 1935, 49 Stat. 674, 676, 30 U. S. C. Supp. sec. 185, 226.

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On May 2, 1941, the applicant, Margaret Scharf, filed a motion for rehearing and requested "additional time to prepare and present further evidence and law."

Scharf's Motion.—Rule 83 of the Rules of Practice⁶ specifically states that a motion for rehearing "must state concisely and specifically the grounds upon which the motion for rehearing is based and be accompanied by brief and argument in support thereof. If proper grounds are not shown the rehearing will be denied * * *."

A careful examination has been made of the grounds set forth by the applicant as a basis for her motion for rehearing and request for additional time. These consist merely of general allegations that a State may not, under the laws of the United States, acquire title to lands of the United States which are mineral in character; that no officer of the Government has authority to approve any plat or clear list, or certify any land to a State until "such applicant" had affirmatively presented evidence that the lands were not mineral lands; that no proper evidence has been presented nor a proper determination made that the laws of the United States were complied with or that the lands involved are not mineral lands; that the lands are not agricultural lands but have been considered more valuable for minerals both before and after the approval or certification of the lands to the State; and that the title to such lands still remains in the United States.

These mere general allegations, without any authority or facts to support them, are clearly insufficient either to overthrow the presumption that land granted to a State for school purposes is, in so far as its mineral character is concerned, of the character contemplated by the grant unless the contrary is shown by clear evidence, or to warrant this Department, upon her application, to make any determination as to the mineral character of the land.⁷ On this ground alone Scharf's motion should be denied. In any event, Scharf's allegations completely disregard both the effect of the act of 1927, as amended, *supra*, and the established line of authority that this Department has ample power to approve lands to the State of California as indemnity school lands.⁸ The title to the lands approved as indemnity school lands has clearly passed.⁹ As to the other lands, even

⁶ 51 L. D. 547, 561 (1926), 43 CFR 221.81.

⁷ *Hypolite Favot*, 48 L. D. 114 (1921), rehearing denied 48 L. D. 118 (1921); *Southern California Petroleum Corp.*, A. 22940 (March 28, 1941).

⁸ Act of March 3, 1853 (10 Stat. 244, 246, ch. 145); act of July 23, 1866 (14 Stat. 218, 43 U. S. C. sec. 865); sec. 2275, Revised Statutes; act of February 28, 1891 (26 Stat. 796, 43 U. S. C. sec. 851); *West v. Standard Oil Co.*, 278 U. S. 200, 212 (1929).

⁹ *West v. Standard Oil Co.*, 278 U. S. 200, 212 (1929); *Johanson v. Washington*, 190 U. S. 179, 185 (1903); *Reid v. State of Mississippi*, 30 L. D. 230 (1900); *Cole v. State of Washington*, 37 L. D. 387 (1909); *Sewell A. Knapp*, 47 L. D. 152 (1918); *Homer H. Harris*, 53 I. D. 584, 586 (1932); *Butler v. State of California*, 29 L. D. 127 (1899).

if the title thereto did not pass under the act of 1853, the title must be deemed to have passed under the act of 1927 unless the existence could be shown of any of the circumstances listed in the act of 1927 which prevented the title from passing under that act. Scharf has made no such showing.

It is therefore the opinion of this Department that the applicant has failed to show anything which would constitute "proper grounds" for granting either her motion for rehearing or her request for additional time.¹⁰

Nor would Havenstrite's motion, or the consideration thereof by this Department warrant granting Scharf's motion for rehearing or her request for additional time. No matter what changes in the decision of March 24 might be made pursuant to Havenstrite's motion, Scharf's application would in any event be rejected. Her motion for rehearing and her request for additional time are therefore herewith denied.

Havenstrite's Motion.—Havenstrite has represented to the Department that he is unable to carry out his lease obligations because he cannot obtain full title insurance on his interest in the lands in Sec. 16 and that this is due solely to the existence of a doubt as to whether the title to this section actually passed to the State of California on July 17, 1880, as nonmineral land under the act of 1853. He has filed a copy of an opinion rendered on December 16, 1940, to the Title Insurance and Trust Company of California by its legal advisers, advising the exception from title insurance policies on school section lands of any possible future claims of the United States. This opinion, based upon a consideration of the acts of Congress of 1853,¹¹ 1927,¹² and 1934,¹³ and certain court and departmental decisions,¹⁴ questions not only the jurisdiction of this Department to determine the known mineral or non-mineral character of school lands, but also the power of Congress to authorize this Department to make such determinations. The fundamental basis of this opinion is that Congress, by the act of 1927, granted to the State of California the title to mineral school land sections and that it is therefore questionable whether either this Department or Congress have any further jurisdiction over such lands.

¹⁰ Cf. Rule 80, Rules of Practice, 51 L. D. 547, 560 (1926), 43 CFR 221.79.

¹¹ *Supra*, fn. 1.

¹² *Supra*, fn. 2.

¹³ *Infra*, fn. 63.

¹⁴ *West v. Standard Oil Co.*, 278 U. S. 200 (1929); *Huntington v. Donovan*, 183 Calif. 746, 192 Pac. 543 (1920); *Lawyer v. State of Utah*, A. 5870, June 6, 1928 (quoted in part, 53 I. D. 30, 35); Instructions, Circ. 1114, 52 L. D. 51 (1927), 43 CFR 270.23; *Shores v. State of Utah*, 52 L. D. 503 (1928); Construction of act of January 25, 1927, 53 I. D. 30 (1930); Circ. 1338, 55 I. D. 7 (1934), 43 CFR 270.31; *Süger Gold Mining Company*, 56 I. D. 67 (1937).

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In his motion, Havenstrite states that in the case of *Huntington v. Donovan*¹⁵—

it was held to be the rule that after acquired title of the state did not inure to its patentee. Therefore the date, on which title vested in the State, becomes a matter of paramount importance to the fee owner holding under patent from the State of California, because if the land were mineral in character in 1880, then the title to the minerals would be vested in the State of California under the Act of 1927. The Act of 1927 provides that the State can dispose of its minerals on school lands only by lease providing royalties to be paid to the State for school purposes. In such a situation the mineral rights would not inure to the present fee owner from which source the undersigned holds an oil and gas lease with appreciable development thereon.

This conflict creates a serious cloud upon my title¹⁶ and as a result the Title Company will not pass a clear title covering my oil and gas lease, which prevents me at the present time from carrying out my lease obligations.

It is my belief, that in as much as the Department has determined that a portion of the land embraced in the Margaret Scharf oil and gas lease application was nonmineral in character at the time that title passed to the State of California and inasmuch as such portions of land occupy a position on both the north and south boundaries of the above mentioned Section 16, it is my opinion that the Department should also find that the remaining acreage in question was therefore nonmineral in character in 1880, at which time it passed to the State of California.

Since this Department, when it approved the first group of lands above mentioned (lots 1 and 2, Sec. 22 and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. 4 N., R. 17 W., S. B. M., California) to the State of California as indemnity school lands, had found as a fact that these lands were then "nonmineral in character," Havenstrite's motion relates only to that portion of land in Sec. 16 embraced in the second group of lands above mentioned. The question of the mineral character of Sec. 16, except as to the NE $\frac{1}{4}$ NW $\frac{1}{4}$, has apparently never been determined by this Department. Nor was any such determination made by this Department in its decision of March 24, such a determination being unnecessary to a decision on Scharf's appeal in view of the holding that, according to the records in this Department, the title to the land appeared to have passed

¹⁵ 183 Calif. 746, 192 Pac. 543 (1920). This case held that an after-acquired title of the Federal Government did not inure to its patentee. The after-acquired title of a State was not involved. But it would seem that this rule of the Huntington case applies also to the after-acquired title of a State. *Elmondorff v. Carmichael*, 13 Ky. (3 Litt.) 472, 481-484, 14 Am. Dec. 86, 94-95 (1823); *Gouverneur v. Robertson*, 24 U. S. (11 Wheat.) 332, 358-380 (1826); cf. *Stith v. Hart's Heirs*, 22 Ky. (6 Monroe) 624 (1828); *Taylor v. Shufford*, 11 N. C. (4 Hawks) 116, 15 Am. Dec. 512 (1825).

¹⁶ The title of those claiming this section under patent from the State of California is not subject to collateral attack. *Saunders v. La Purisima Gold Min. Co.*, 125 Calif. 159, 57 Pac. 656 (1899); *Worcester v. Kitts*, 8 Calif. App. 181, 96 Pac. 335 (1908); *Graham v. Reed*, 83 Calif. App. 516, 257 Pac. 131 (1927). But this rule does not apply where the attack is by the Federal Government or its patentees. *United States v. Morrison*, 240 U. S. 192, 213 (1916); *Sherman v. Buick*, 93 U. S. 209, 216 (1876); *Ord Land Co. v. Alamitos Land Co.*, 199 Calif. 380, 249 Pac. 178 (1926); *Keeran v. Allen*, 33 Calif. 542 (1867); *Keeran v. Griffith*, 31 Calif. 461 (1866); *Kile & Thompson v. Tubbs*, 23 Calif. 431 (1863).

to the State of California either under the act of 1853 or under the act of 1927.

It has long been an established rule of law that this Department is without jurisdiction over lands the title to which has passed from the Government, whether to a State or to an individual, and its functions with regard to such land necessarily ceases at that time.¹⁷ Havenstrite's motion therefore directly presents the question whether this Department has jurisdiction in this case, upon Havenstrite's motion to do so, to make findings of fact as to the mineral character of the land as of the effective date of the original school land grant, which findings will be conclusive.

It is the opinion of this Department that under the act of 1927 as supplemented by the act of 1934, *infra*, it has jurisdiction, in a proper case, to make findings of fact as to the mineral character of school lands which will constitute a valid and conclusive determination of that issue. But this Department is further of the opinion that the case as now before it does not present a proper case in which the Department will or may exercise its jurisdiction to make such findings.

The Background of the Act of 1927.—Prior to the act of 1927, it had been the uniform policy of Congress, in making the various school land grants, to reserve from their operation, as a general matter, all lands which were embraced in Indian, military, or other types of reservations,¹⁸ or were subject to valid claims initiated prior to the effective date of the grant,¹⁹ or were known to be mineral in character at the date they were identified by survey, or at the date of the grant where the survey preceded it.²⁰ This policy was followed in the act of 1853.²¹ But this act, like the acts granting school lands to many

¹⁷ *United States v. Schurz*, 102 U. S. 378, 402 (1880); *Belay v. Naphtaly*, 169 U. S. 353, 365 (1898); *State of California v. Boddy*, 9 L. D. 636 (1889).

¹⁸ Act of February 28, 1891 (26 Stat. 796, 43 U. S. C. sec. 851); *United States v. Morrison*, 240 U. S. 192, 200 (1916); *Minnesota v. Hitchcock*, 185 U. S. 373, 400-401 (1902); *United States v. Thomas*, 151 U. S. 577, 582 (1894); *Black Hills National Forest*, 37 L. D. 469 (1909).

¹⁹ Revised Statutes, sec. 2275, as amended by the act of February 28, 1891 (26 Stat. 796, 43 U. S. C. sec. 851); *United States v. Morrison*, 240 U. S. 192, 200 (1916); *Heydenfeldt v. Daney Gold & Silver Mtn. Co.*, 93 U. S. 634, 639 (1876); *Sherman v. Buick*, 93 U. S. 209, 213-214 (1876); *State of Utah*, 47 L. D. 359, 360 (1920); *Andrew J. Billon*, 36 L. D. 334, 335 (1908); Circular of April 30, 1907, 35 L. D. 581, 43 CFR 270.19; see Instructions of April 22, 1891, 12 L. D. 400; *Fannie Lipscomb*, 44 L. D. 414 (1915); *State of Washington v. Kuhn*, 24 L. D. 12 (1897); *Todd v. State of Washington*, 24 L. D. 106 (1897); cf. *Noyes v. State of Montana*, 29 L. D. 695 (1900).

²⁰ *Ivanhoe Mining Co. v. Keystone Consol. Mining Co.*, 102 U. S. 167 (1880); *United States v. Sweet*, 245 U. S. 563 (1918); *Mullan v. United States*, 118 U. S. 271, 276 (1886); *Original Amador Mining Co. v. State of California*, Copp's U. S. Mining Dec. 109 (1873); *State of California v. Poley*, 4 Copp's L. O. 18 (1877); *State of Colorado*, 6 L. D. 412, 419 (1887); *Abraham L. Miner*, 9 L. D. 408 (1889); *Mangan & Simpson v. State of Arizona*, 52 L. D. 266 (1928); *State of Wyoming*, 46 L. D. 34, 36 (1917); *State of Wyoming*, 45 L. D. 590 (1916).

²¹ Sections 6 and 7, 10 Stat. 244, 246-47; *Known Mineral Lands: Ivanhoe Mining Co. v. Keystone Consol. Mining Co.*, 102 U. S. 167 (1880); *Original Amador Mining Co. v. State of California*, Copp's U. S. Mining Dec. 109 (1873); *State of California v. Poley*, 4 Copp's L. O. 18 (1877); *Abraham L. Miner*, 9 L. D. 408 (1889); *Settlement claims: Sherman*

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other States, made no provision for determining what part of the land was thus excluded from the grant. Neither the issue of a patent nor any other equivalent action was provided to evidence the transfer of the title to the State. Until a decisive determination had been made as to the character of the land in so far as it was affected by any prior entry, mining claim or settlement claim, or by a reservation, or by the known mineral character of the land, or by the date and validity of a survey, it could not be certain whether or not the title to a particular tract of school land had actually passed to the State of California under the act of 1853.

The determination of these issues was a function regularly exercised by this Department in the course of its administration of the public lands.²² The title to school land tracts was frequently declared by this Department to have either vested or to have failed to pass to the State as a result of determinations made by this Department in connection with the validity or date of a survey,²³ or the superiority of a valid claim initiated before survey,²⁴ or the effectiveness of a reservation to exclude a tract from the grant,²⁵ or the effect of an indemnity selection upon the title to the granted lands,²⁶ or the known mineral character of the land at the date of survey or the date of the grant where the survey preceded it.²⁷

v. *Buick*, 93 U. S. 209 (1876); *Reservations: State of California*, 15 L. D. 350 (1892); *State of California*, 3 L. D. 327 (1885).

²²It is well settled "that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior." *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 166-167 (1895); Revised Statutes, secs. 441, 453, 2473; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 309 (1903); *Burke v. Southern Pac. R. R. Co.*, 234 U. S. 669, 684 (1914); *Cameron v. United States*, 252 U. S. 450, 461 (1920); *Johanson v. Washington*, 190 U. S. 179, 185 (1903).

²³*State of California v. Dodson*, 3 L. D. 306 (1885); *Frands O. Grundvig*, 14 L. D. 291 (1892); *Virginia Lode*, 7 L. D. 459 (1888); *State of Michigan*, 8 L. D. 560 (1889); *Barnhurst v. State of Utah*, 30 L. D. 314 (1900); *State of Florida*, 30 L. D. 187 (1900).

²⁴*Giovanni Le Franchi*, 3 L. D. 229 (1884); *Paris Gibson*, 21 L. D. 327 (1895); *Sherman v. Buick*, 93 U. S. 209, 214 (1876); *John Jack*, 5 L. D. 14 (1886); *Cichy v. Paltzer*, 20 L. D. 52 (1895); *State of New Mexico v. Garrett*, 44 L. D. 489 (1915); *State of Utah*, 47 L. D. 359 (1920); *Samuel A. Robinson*, 48 L. D. 103 (1921); *Odillon Marceau*, 9 L. D. 554 (1889); *Hamilton v. State of California*, 45 L. D. 471 (1916); *State of Washington v. Lynam*, 45 L. D. 593 (1916); *Barnhurst v. State of Utah*, 30 L. D. 314 (1900); *State of Idaho v. Kingston Townsite*, 37 L. D. 455 (1909); *Schumacher v. State of Washington*, 33 L. D. 454 (1905); *State of Washington v. Geisler*, 41 L. D. 621 (1913).

²⁵*Black Hills National Forest*, 37 L. D. 469 (1909); Instructions, 47 L. D. 361 (1920); *State of California*, 3 L. D. 327 (1885); *State of California*, 15 L. D. 350 (1892); *State of Michigan*, 8 L. D. 560 (1889); *John W. Schofield*, 42 L. D. 538 (1913); Instructions, 33 L. D. 610 (1905); *Reid v. State of Mississippi*, 30 L. D. 230 (1900); Instructions, 41 L. D. 433 (1912); *State of Minnesota*, 28 L. D. 374 (1899); *State of Washington v. Lynam*, 45 L. D. 593 (1916); *Elizabeth J. Lawrence*, 49 L. D. 611 (1923).

²⁶*Hallengren v. Mitchell*, 42 L. D. 296 (1913).

²⁷*Original Amador Mining Co. v. State of California*, Copp's U. S. Mining Dec. 109 (1873); *State of California v. Poley*, 4 Copp's L. O. 18 (1877); *State of Colorado*, 6 L. D. 412, 419 (1887); *Abraham L. Miner*, 9 L. D. 408 (1889); *Mangan & Simpson v. State of Arizona*, 52 L. D. 266 (1928); *State of Wyoming*, 46 L. D. 34, 36 (1917); *State of Wyoming*, 45 L. D. 590 (1916).

The authority of this Department to make a conclusive determination of the known mineral character of the land as of the effective date of the grant was asserted at an early date,²⁸ and thereafter frequently exercised, despite strenuous objections that the Department had no such jurisdiction or authority.²⁹ Of course, the theoretical argument could be made that the title of lands, actually known to be nonmineral in character at the time title ordinarily passes to the State, would then have passed from the Federal Government as a grant *in praesenti*; and therefore, that this Department, under the rule that its functions cease when title has passed from the Government, would have no jurisdiction to pass upon the question of the mineral character of the land in order to determine whether the title actually had passed to the State and that such issue would be justiciable only in the courts.³⁰ But judicial decision was otherwise. So long as the Secretary of the Interior had not made a determination that the land was nonmineral in character, or had not taken action the effect of which was to pass the title to the State, as, for example, approving an indemnity list, the jurisdiction to determine the fact whether a particular tract, granted by an act excluding lands known to be mineral, was of that character, was held to rest with the Secretary of the Interior.³¹

As a general matter, this Department, both by regulations and decisions, took the position that until the contrary was clearly shown, the presumption existed that land granted to a State for school purposes was of the character contemplated by the grant, insofar as its then known mineral or nonmineral character was concerned, and that therefore the title to school sections identified by survey has passed to the

²⁸ See, for example, *Original Amador Mining Co. v. State of California*, Copp's U. S. Mining Dec. 109 (1873); *State of California v. Poley*, 4 Copp's L. O. 18 (1877); *Townsite of Silver Cliff v. State of Colorado*, Copp's U. S. Mineral Lands 279 (1879); Circular approved May 2, 1887, 5 L. D. 696; Circular of November 16, 1888, 7 L. D. 585, 587; Regulations of May 27, 1891, Rule 7, 24 L. D. 548, 551.

²⁹ *Warren v. State of Colorado*, 14 L. D. 681, 682 (1892); *Keystone Lode & Mill Site v. State of Nevada*, 15 L. D. 259, 261 (1892).

³⁰ Precisely this argument was made in *Standard Oil Co. of California v. United States*, 107 F. (2d) 402, 409 (C. C. A. 9, 1940), *cert. den.* 309 U. S. 654, 673, 697 (1940); see also *George G. Frandsen*, 50 L. D. 516, 520 (1924).

³¹ *West v. Standard Oil Co.*, 278 U. S. 200 (1929); *Standard Oil Co. of California v. United States*, 107 F. (2d) 402 (C. C. A. 9, 1940), *cert. den.* 309 U. S. 654, 673, 697 (1940); see *Cameron v. United States*, 252 U. S. 450, 461-64 (1920); *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 684-87 (1914); *Keystone Lode & Mill Site v. State of Nevada*, 15 L. D. 259, 261 (1892); *Central Pacific R. R. Co. v. Valentine*, 11 L. D. 238, 243 (1890). The enabling acts of some of the States expressly conferred authority on this Department to determine the mineral character of the school lands granted. See act of February 22, 1889, secs. 10, 18 (25 Stat. 676, 679, 681) (Mont., Wash., N. Dak., S. Dak.); act of July 3, 1890, secs. 4, 13 (26 Stat. 215, 217) (Idaho); act of July 10, 1890, secs. 4, 13 (26 Stat. 222, 223, 224) (Wyoming); act of March 3, 1875, secs. 7, 15 (18 Stat. 474, 475, 476), as amended by act of April 2, 1884 (23 Stat. 10) (Colorado); see also act of August 9, 1888, sec. 6 (25 Stat. 393) (Wyoming); Circular approved May 2, 1887, 5 L. D. 696; Circular of November 16, 1888, 7 L. D. 585, 587; Regulations of May 27, 1891, Rule 7, 24 L. D. 548, 551. See *New Mexico v. Lane*, 243 U. S. 52, 55 (1917); *Steel v. Smelting Co.*, 106 U. S. 447, 451-452 (1882).

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State.³² So strong was this presumption that even a return by the surveyor-general that the lands were mineral in character was insufficient to overcome it.³³

But occasions often arose for the determination of the known mineral character of the land as of the time of its presumptive passage to the State. Among the types of cases in which such determinations were most frequently made³⁴ were the following:

(1) On adverse proceedings instituted by this Department to test the title;³⁵

(2) On an application by a State for lands in lieu of any school lands;³⁶

(3) On an application for a patent based on a valid mineral location;³⁷

(4) On an application prior to the Mineral Leasing Act of 1920 to purchase coal lands;³⁸

³² *Boulder & Buffalo Mining Co.*, 7 L. D. 54 (1888); Regulations of March 6, 1903, 32 L. D. 39; *State of Utah*, 32 L. D. 117 (1903); Regulations of January 10, 1906, par. 16, 34 L. D. 365, 369; *State of South Dakota v. Walsh*, 34 L. D. 723 (1906); Regulations of April 25, 1907, par. 15, 35 L. D. 537, 540; Regulations of June 23, 1910, par. 15, 39 L. D. 39, 42, 43 CFR 270.15; *Charles L. Ostensfeldt*, 41 L. D. 265, 267 (1912); *Tillian v. Keepers*, 44 L. D. 460, 463 (1915); *State of Utah v. Olson*, 47 L. D. 58, 47 L. D. 65 (1919); *Hyppolite Favot*, 48 L. D. 114 (1921); *Russell v. United States Borax Company*, 48 L. D. 418 (1922); *State of Utah v. Braffet*, 49 L. D. 212 (1922); *Albert E. Dorff*, 50 L. D. 219 (1923); *George G. Frandsen*, 50 L. D. 516 (1924); *Work v. Braffet*, 276 U. S. 560 (1928); *Homer H. Harris*, 53 L. D. 584 (1932).

³³ *State of Utah*, 32 L. D. 117 (1903); Instructions of January 20, 1902, 31 L. D. 212 (1902); cf. *State of Utah v. Lichliter*, 50 L. D. 231 (1924); Regulations of August 6, 1915, Rules 100, 101, 44 L. D. 247, 310-311; *Mahogany No. 2 Lode Claim*, 33 L. D. 37 (1904); *United States v. State of Utah*, 51 L. D. 432, 436 (1926).

³⁴ Other instances were, e. g., on applications for town-site entry, *Townsite of Silver Cliff v. State of Colorado*, Copp's U. S. Mineral Lands 279 (1879); on application by State to clear the title on behalf of purchaser therefrom as against mineral locator, *Perriera v. Jacks*, 15 L. D. 273, (1892); on conflict between the State and one claiming settlement, *August Erickson*, 44 L. D. 215 (1915).

³⁵ *West v. Standard Oil Co.*, 278 U. S. 200 (1929); *Standard Oil Co. of California v. United States*, 107 F. (2d) 402, 412-13 (C. C. A. 9, 1940), cert. denied 309 U. S. 654, 673, 697 (1940); *United States v. State of New Mexico*, 48 L. D. 11 (1921); *United States v. State of Utah*, 51 L. D. 432 (1926).

³⁶ Prior to the act of 1927, where a State applied for lands in lieu of school section lands alleged to be mineral in character and thereby excepted from its grant, satisfactory proof was required that such school section lands had not, because of their mineral character, passed to the State. Regulations of March 6, 1903, 32 L. D. 39; Regulations of January 10, 1906, par. 17, 34 L. D. 365, 369; see *Standard Oil Co. of California v. United States*, 107 F. (2d) 402, 411 (C. C. A. 9, 1940), cert. denied 309 U. S. 654, 673, 697 (1940). Since the act of 1927, school section lands cannot, merely because of their mineral character, be assigned as the base for a lieu selection. 43 CFR 270.17, Instructions of February 1, 1928, 52 L. D. 273, 274.

³⁷ *Boulder & Buffalo Mining Co.*, 7 L. D. 54 (1888); *Fleetwood Lode*, 12 L. D. 604 (1891); *Keystone Lode & Mill Site v. State of Nevada*, 15 L. D. 259 (1892); *State of Utah v. Allen*, 27 L. D. 53 (1898); Regulations of January 10, 1906, par. 16, 34 L. D. 365, 369; *State of South Dakota v. Trinity Gold Min. Co.*, 34 L. D. 485 (1906); *State of South Dakota v. Delicate*, 34 L. D. 717 (1906); *South Dakota v. Vermont Stone Co.*, 16 L. D. 263 (1893); *State of Montana v. Silver Star Mining Co.*, 23 L. D. 313 (1896).

³⁸ *State of Montana v. Buley*, 23 L. D. 116 (1896); *Tillian v. Keepers*, 44 L. D. 460 (1915); *Warren v. State of Colorado*, 14 L. D. 681 (1892); *Frees v. State of Colorado*, 22 L. D. 510 (1896); *Charles L. Ostensfeldt*, 41 L. D. 265 (1912); *State of Utah v. Olson*, 47 L. D. 58, 47 L. D. 65 (1919); *State of Utah v. Braffet*, 49 L. D. 212 (1922); *George G. Frandsen*, 50 L. D. 516 (1924); *Work v. Braffet*, 276 U. S. 560 (1928).

(5) On an application for a lease or prospecting permit under the Mineral Leasing Act of 1920, *supra*, provided it were accompanied by a showing that because of the known mineral character of the land, the title had not passed to the State.³⁹

The possibility, therefore, always remained that the title to school section lands claimed by the State or its grantees might be later unsettled by a proceeding in the land department at which sufficient evidence was adduced to rebut the presumption of the nonmineral character of the land at the time the title presumptively passed. Although this was well known to Congress, numerous bills on the subject having frequently been introduced,⁴⁰ it was not until the act of 1927 that Congress passed any legislation on this subject.

The Act of 1927.—For some time prior to the enactment of this statute, there were pending in this Department more than 1,700 proceedings, based on allegations that the lands were known to be mineral in character at the time the title thereto would otherwise have passed, which had been instituted by this Department questioning the States' presumptive title to school lands.⁴¹ The pendency of these proceedings seriously clouded the school land titles of many States with consequent embarrassment to their common-school funds.⁴² The legislative history of the act clearly shows that it was to remove this threat that Congress passed the act of 1927. The purpose of the act was to vest the States, subject to the circumstances hereinafter mentioned, with title to those lands which, except for their mineral character, would have vested in the States under their original school land grants. The act of 1927, subject to these circumstances, applied only to school section lands known to be of mineral character at the effective date of the original school land grant and did not apply to lands which were not known to be mineral in character at the time title could vest, even though afterwards discovered to contain minerals, since title thereto would vest in the State under the original grant.⁴³ But Congress did not intend to vest the State with title to *every* school section in place. The purpose and the terms of the act, as well as its legislative history, seem clearly to indicate that the intention of Congress

³⁹ *Albert E. Dorff*, 50 L. D. 219 (1923); *State of Utah v. Lichter*, 50 L. D. 231 (1924).

⁴⁰ See S. Rept. 603, 69th Cong., 1st sess., p. 6 (1926); H. Rept. 1617, 69th Cong., 2d sess., p. 10 (1926); H. Rept. 1761, 69th Cong., 2d sess., p. 5 (1927).

⁴¹ See S. Rept. 603, 69th Cong., 1st sess., p. 5 (1926); H. Rept. 1617, 69th Cong., 2d sess., pp. 9, 14 (1926); H. Rept. 1761, 69th Cong., 2d sess., p. 4 (1927).

⁴² These proceedings, of course, were directed only in those instances, particularly the Western States, where the State's school land grant excluded, either expressly or impliedly, lands then known to be mineral. Such proceedings were not instituted where the granting acts included mineral lands. See *Work v. Louisiana*, 269 U. S. 250 (1925); letters approved by the First Assistant Secretary of March 17, April 12, and April 15, 1937 (G. L. O. 06397) (Iowa). See also *Cooper v. Roberts*, 59 U. S. (18 How.) 173 (1855) (Michigan); *State of Alabama*, 6 L. D. 493, 497 (1888).

⁴³ Instructions of March 15, 1927, construing act of January 25, 1927, Circ. 1114, 52 L. D. 51 (1927), 43 CFR 270.23.

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was to vest in the States, finally and irrevocably, the full title to school sections in place *wherever the only bars to the operation of the previous school land grants was the then known mineral values of the lands*,⁴⁴ provided they had not become subject to rights, reservations or court proceedings or disposed of as indemnity or lieu lands. If the *only* hindrance to the State's title was that the land was known to be mineral in character at the time the grant could take effect, then the title was vested in the State under the act of 1927. In other words, the fact that the land was known to be mineral in character could not, of itself, thereafter be sufficient basis upon which to attack the State's title.

It is equally apparent, however, that Congress did not intend to vest in the States the title to such lands which were then subject to other impediments. Thus the act did not affect school section lands which had been used by the State as base for indemnity or lieu selections. Nor did it affect school section lands then subject to any existing reservations, or included in any proceeding pending in the courts of the United States, or subject to or included in any valid application, claim or right initiated or held under any existing laws of the United States. Such lands remained unaffected by the act. Obviously, the title to any school section lands did not pass to the State under the act of 1927 if any of these bars existed.

The effect of the act of 1927, therefore, was to prevent thereafter being raised in this Department any question as to whether the title to such lands had passed from the Government to the State, if there was nothing to prevent the operation of the act of 1927 and if that question was based solely on the issue whether such land was or was not of known mineral character at the time the school land grant could take effect. No matter which way this Department might decide that issue, the title to the land was in the State.⁴⁵ If that issue were the only one involved, a determination thereof by this Department would therefore in no way be a function in pursuance of this Department's administration over the public lands and hence no longer a question upon which this Department could make a conclusive determination.⁴⁶

But since the act of 1927 did not pass to the State the title to lands which were affected by any of the aforementioned circumstances listed

⁴⁴ See instructions of February 1, 1928, construing act of January 25, 1927, 52 L. D. 273, 275 (1928). In 1932, while explaining S. 3570, of which he was the manager in the House and which was passed as an amendment to the act of 1927 (see fn. 2, *supra*), Congressman Colton stated: " * * * the act of January, 1927, was only to lift a cloud that was upon the school lands because of the minerals * * *." 75 Cong. Rec., Part 8, p. 8416, 72d Cong., 1st sess. (April 18, 1932).

⁴⁵ See Instructions, Circular 1114, 52 L. D. 51 (1927), 43 CFR 270.23; Construction of act of January 25, 1927, 53 I. D. 30 (1930); see letter 1259783, approved April 17, 1928.

⁴⁶ *Lawyer v. State of Utah*, A. 5870, June 6, 1928 (quoted in part, 53 I. D. 30, 35); *Shores v. State of Utah*, 52 L. D. 503 (1928).

in the act, some of which might not be apparent from the records of the land office, the act unquestionably was not intended to prevent this Department from determining whether the title to any lands which clearly were excepted from the act of 1927 had passed or failed to pass under the original school grant, or from passing on any dispute as to whether or not any of the enumerated circumstances actually existed or were sufficient to prevent the title, which otherwise would pass under the act of 1927, from passing thereunder.

Thus, if it were clear that the title could not have passed under the act of 1927, because of the existence of a reservation,⁴⁷ or of a valid claim,⁴⁸ or any other exception listed in that act, this Department has held that the title either passed or failed to pass to the State or has entertained proceedings to determine whether the title had failed to pass under the original school land grant because of the then known mineral character of the land. In addition, such authority has been exercised in determining whether a reservation⁴⁹ or an asserted claim⁵⁰ was sufficient to prevent the title from vesting in the State under the act of 1927. In passing on any such issue, however, this Department might first have to determine whether the land involved was not subject to the act of 1927 because the title thereto had passed under the original school land grant. Thus, if the land actually were nonmineral in character at the time title could have vested under the original grant, the title would then have vested and would not be subject to the act of 1927 in any way. For, as already mentioned, the act of 1927, subject to the enumerated circumstances, applies only to school section lands known to be of mineral character at the effective date of the original school land grant.

If there had previously been a determination that the mineral character of the land was such that the title had not passed under the original school land grant, the act of 1927 clearly applied and the question would be presented whether the title failed to pass because of any of the aforementioned circumstances.⁵¹ If, on the other hand, no such determination as to the mineral character had ever been made,

⁴⁷ *Byers v. State of Arizona*, 52 L. D. 488 (1928); letter 514914, approved July 11, 1929; letter 1137480, approved March 21, 1929; *United States v. State of Utah*, 1137480, approved October 18, 1932. See *State of New Mexico*, 52 L. D. 679, 52 L. D. 681 (1929); *State of Montana*, A. 22059, Feb. 13, 1940.

⁴⁸ *Elizabeth Clark*, 52 L. D. 278 (1928); letter 1208708, April 9, 1927 (*Albert W. Parker*, Pueblo 049375).

⁴⁹ *State of Utah*, A. 21949 (On Rehearing) July 10, 1940; *State of Utah*, 53 I. D. 365 (1931); *Byers v. State of Arizona*, 52 L. D. 488 (1928); *State of Utah*, 53 I. D. 224 (1930); letter approved April 6, 1928 (see letter 1132704), May 11, 1928, and *United States v. Utah*, A. 17787, October 4, 1934); letter 1127230, approved June 18, 1928.

⁵⁰ *Suger Gold Mining Co.*, 56 I. D. 67 (1937); *Mangan & Simpson v. State of Arizona*, 52 L. D. 266 (1928); *Bartlett v. State of Wyoming*, A. 22978, June 23, 1941; letter approved January 9, 1929 (*C. Vernon Storey*, Santa Fe 053700).

⁵¹ *State of Utah*, A. 21949 (On Rehearing) July 10, 1940; *Mangan & Simpson v. State of Arizona*, 52 L. D. 266 (1937).

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this Department would presume that the title to the land had passed to the State under its original school land grant. But this presumption is not a conclusive one. It could be rebutted by evidence to the contrary. Hence if sufficient evidence were offered to warrant a determination of the preliminary question as to whether the title had passed under the original grant, this Department would entertain proceedings for such a determination.⁵² But such a determination could be had only where it was clear that the land had failed to pass under the act of 1927 or for the purpose of deciding the issue whether, because of the existence of any of the circumstances enumerated, the title which otherwise would have passed under the act of 1927, had failed to pass thereunder. Otherwise a determination as to the mineral character of the land, as has already been indicated, would not, since the act of 1927, be a function for this Department.

This construction of the act of 1927 has been recognized and frequently acted upon by this Department. Where the issues presented related only to the known mineral character of the land at the time the school grant could take effect, this Department has declared a determination thereof to be beyond the scope of its authority.⁵³ But where it was clear that the act of 1927 did not apply,⁵⁴ or where the issue as to the known mineral character of the land was presented in order to determine the validity of an asserted claim⁵⁵ or the sufficiency of a reservation⁵⁶ to prevent the operation of the act of 1927 on a particular tract, this Department has clearly asserted its authority to make such determinations.

This contemporaneous and subsequent continuous practical construction, known to and acquiesced in by Congress, would strongly support its validity, even when its validity is the subject of investigation.⁵⁷ Under such circumstances, unless it is "plainly erroneous," the construction given by the department to which is committed the administration of the public lands, would not be disturbed by the courts.⁵⁸ That such authority is within this Department was, however, recognized by the Supreme Court of the United States in *West v. Standard*

⁵² *Stiger Gold Mining Co.*, 56 I. D. 67, 72, 73 (1937).

⁵³ *Lawyer v. State of Utah*, A. 5870, June 6, 1928 (quoted in part, 53 I. D. 30, 35); *Shores v. State of Utah*, 52 L. D. 503 (1928).

⁵⁴ See fns. 47 and 48, *supra*.

⁵⁵ See fn. 50, *supra*.

⁵⁶ See fn. 49, *supra*.

⁵⁷ *United States v. Midwest Oil Co.*, 236 U. S. 459, 472-474, 481 (1915); *United States v. Jackson*, 280 U. S. 183, 193-197 (1930); *United States v. Healey*, 160 U. S. 136, 141, 145 (1895); *United States v. Philbrick*, 120 U. S. 52, 58-59 (1887); *Hahn v. United States*, 107 U. S. 402, 406 (1882); *Brown v. United States*, 113 U. S. 568, 571 (1885); *Fannin Lipscomb*, 44 L. D. 414, 418-419 (1915).

⁵⁸ *State of California v. Deseret Water, Oil & Irr. Co.*, 243 U. S. 415, 421 (1917); *McMichael v. Murphy*, 197 U. S. 304, 312 (1905); *United States v. Johnston*, 124 U. S. 236, 253 (1888).

*Oil Co.*⁵⁹ wherein it held that because subsection (c) of section 1 of the act of 1927 excepted land "included in any pending suit or proceeding in the courts of the United States * * *" that act did not affect the authority of this Department to make determination of the known mineral character of the land in that case. Subsequently, this Department held that the land in that case was known to be mineral in character at the effective date of the grant,⁶⁰ and that determination was held to be conclusive.⁶¹

The Act of 1934.—Although the act of 1927 removed the major source of defect in the title to school land grants, it clearly did not remove all possibility that a cloud might be created on a State's title through a proceeding in this Department which was based on the two contentions: (a) that title had not vested in the State under the original school land grant because of the then known mineral character of the land and (b) that the title did not pass under the 1927 act because of the existence of any of the circumstances enumerated in the act of 1927. Congress itself was aware that the act of 1927 did not preclude all possibility of a cloud on the State's title and that because of the necessity "to ascertain the character of the land at the date when title would otherwise attach in order to know whether or not title vested in the State, either under the grant of nonmineral lands made by the original granting act or under the grant of mineral lands made by the act of January 25, 1927, * * * the title of the State" was "in doubt and * * * subject to attack."⁶² Congress therefore passed the act of June 21, 1934,⁶³ directing the Secretary of the Interior, upon the application of a State to issue patents, covering numbered school sections in place granted either by the act of 1927 or any other act, and showing the date when title vested in the State and the extent to which the title is subject to prior conditions, limitations, easements or rights, if any. By directing the Secretary to make such determinations and issue such patent, Congress recognized that the act of 1927 had not

⁵⁹ 278 U. S. 200, 209 (1929).

⁶⁰ *United States v. State of California*, 55 I. D. 121 (1935), 55 I. D. 532 (1936).

⁶¹ *Standard Oil Co. of California v. United States*, 107 F. (2d) 402 (C. C. A. 9, 1940), cert. denied 309 U. S. 654, 673, 697 (1940).

⁶² See S. Rept. 903, and H. Rept. 1796, 73d Cong., 2d sess. (1934).

⁶³ 48 Stat. 1185, ch. 689, 48 U. S. C. sec. 871a. This act provides:

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

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operated to deprive Congress or this Department of all authority to make such determinations. Otherwise the act of 1934 would have been a nullity, and it is not to be presumed that an act of Congress is nugatory.⁶⁴ Nor can it be said that the *sole* purpose of the patent authorized by the act of 1934 is to provide evidence of a title which had been transferred by a previous grant *in praesenti*.⁶⁵ The patent would also import that a conclusive determination, the exercise of which is vested in the Secretary of the Interior, had been made as to whether the land was subject to the operation of the act.⁶⁶ As the Supreme Court stated in the *Standard Oil Co.* case,

If such act provides for the issue of a patent, whether it be to pass the title or to furnish evidence that it has passed, the patent imports that final determination of the non-mineral character of the land has been made. The issue of the patent terminates the jurisdiction of the Department over the land. [pp. 211-212.]

* * * * *

Where, by the terms of an act, the Secretary is required, upon application of the claimant, to issue a patent * * * Congress, by implication, confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. After issue of the patent * * * his findings of facts are conclusive, in the absence of fraud or mistake, not only on the Department, but upon the courts * * *. [Pp. 218-219.]

The act of 1934, not by implication, but in express and unequivocal terms, declares that the Secretary of the Interior has the specific authority to make such determinations in the issuance of a patent under that act. Such determinations had always been made by this Department in the exercise of its function under the school land grants which also had operated to pass title to the States. There is nothing in the act of 1927 which would evidence that Congress intended thereby to deprive this Department of that function except to the extent that such a determination would, as already indicated, no longer have any bearing on the administration by this Department of its duties with regard to such lands.

Pursuant to the authority and directions contained in the act of 1934, upon an application by the State, and after the prescribed proceedings, including publication of the State's application,⁶⁷ this Department could issue a patent which is required to show the date when

⁶⁴ *United States v. Powers*, 307 U. S. 214, 217 (1939); *Graham & Foster v. Goodcell*, 282 U. S. 409, 422 (1931); *Clark v. Barnard*, 108 U. S. 436, 460 (1883); *Unity v. Burrage*, 103 U. S. 447, 457 (1880); *Bird v. United States*, 187 U. S. 118, 124 (1902).

⁶⁵ *Langdeau v. Hanes*, 88 U. S. (21 Wall.) 521 (1874); *Morrow v. Whitney*, 95 U. S. 551 (1877); *Wright v. Roseberry*, 121 U. S. 488, 497 (1887); *Wisconsin Cent. R. R. Co. v. Price County*, 133 U. S. 496, 510 (1890); *Deseret Salt Co. v. Tarpey*, 142 U. S. 241 (1891).

⁶⁶ *West v. Standard Oil Co.*, 278 U. S. 200, 211-212, 218-219 (1929); *Wright v. Roseberry*, 121 U. S. 488, 500-501, 509 (1887); *French v. Fijan*, 93 U. S. 169, 171 (1876).

⁶⁷ Circ. 1338, October 19, 1934, 55 I. D. 8 (1934), 43 CFR 270.32.

title vested in the State.⁶⁸ The issuance of such patent would import a conclusive determination by this Department of every fact necessary to the vesting of title in the State, including the fact as to whether the land were mineral or nonmineral in character at the time the original school land grant could take effect, and would divest this Department of further jurisdiction over the land.⁶⁹

Furthermore, if no patent under the 1934 act had yet been issued, this Department would determine the question of the mineral character of the land at the time of the original grant if that determination were necessary (a) to a decision as to whether title had or had not passed under the act of 1927 because of the alleged existence of any of the enumerated circumstances, or (b) to a decision whether the title had or had not passed under the original school land grant because of its then known mineral character where it was clear that the title could not have passed under the act of 1927 and sufficient evidence had been shown to rebut the presumption that the title had passed to the State under its original school land grant.

The question then is whether this case is within one of the three classes of cases above enumerated in which the Department will pass on the known mineral character of the land. No application for a patent under the 1934 act has been made. As to Scharf's application, there is no need to determine the mineral character of the land since she has shown nothing to rebut the presumption that title passed to the State under the school land grant. Even if she did make such a showing it would avail her nothing because she has shown nothing which would reasonably support an allegation that title could not pass under the act of 1927 because of the existence of any of the enumerated circumstances, and indeed she has not even made such an allegation or raised the issue in any way whatsoever.

Nor does Havenstrite's motion present a proper case warranting such a determination by this Department. It does not raise the question of the known mineral character of the land in connection with a reasonable dispute as to whether title could pass under the act of 1927. It does not raise that question with regard to whether the title could have passed under the act of 1853 under circumstances where it was clear that the title could not have passed under the act of 1927 and

⁶⁸ The Department has issued many patents specifying whether the State's title vested on January 25, 1927, under the act of 1927, e. g., Patents 1099149, 1099150, 1099151 (Great Falls 080516(d), 080521(a) and 080521(b), respectively, October 12, 1938), or whether the title vested under the original school land grant, e. g., patent 1099147, October 12, 1938, Great Falls 080516(b); Patent 1099097, September 28, 1938, Great Falls 080521-A; Patent 1099148, October 12, 1938, Great Falls 080516(c); see State of Montana, A. 22059, Feb. 13, 1940, in which the Department, on petition for exercise of supervisory authority to reinstate a rejected application for patent under the Act of 1934, held that the State acquired no title, either under its school land grant or under the act of 1927.

⁶⁹ *West v. Standard Oil Co.*, 278 U. S. 200, 212-13 (1929).

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sufficient evidence had been shown to rebut the presumption that the title had passed to the State of California under its original school land grant. And obviously it is not an application for a patent under the act of 1934. Havenstrite's motion is not only a request for an advisory opinion, but for a determination unrelated to any function of this Department. Moreover, a conclusive and authorized determination of the question may be made by this Department either upon application of the State under the act of 1934 or in those other instances above set forth. His motion should therefore be denied.

The motions of Scharf and Havenstrite are

Denied.

APPLICABILITY OF MINING LAWS TO REVESTED OREGON AND CALIFORNIA AND RECONVEYED COOS BAY GRANT LANDS

INSTRUCTIONS

August 25, 1941.

REVESTED OREGON AND CALIFORNIA AND RECONVEYED COOS BAY GRANT LANDS—ACTS OF JUNE 9, 1916 AND AUGUST 28, 1937.

A grant of rights under mining law in revested Oregon and California and reconveyed Coos Bay grant lands is clearly inconsistent with the objects and purposes of the act of August 28, 1937.

The policy of making mineral lands in national forests subject to the operation of the mining law was continued with certain restrictions and limitations in the act of June 9, 1916, but the act of August 28, 1937, as to timber lands made the objects and purposes of that act paramount, notwithstanding any conflict with any provision of the mineral land laws.

As to acts setting aside lands for particular public purposes which do not expressly extend or prohibit the operation of the mineral land laws, there is no sufficient basis for the presumption that the mineral land laws, unless there are express words of exclusion, extend to them. On the contrary in all such cases the intent of Congress in that respect must be gathered from the act itself.

The act of August 28, 1937 repealed all acts, and particularly any part or parts of the acts of June 9, 1916 and February 26, 1919, inconsistent with its provisions.

The act of August 28, 1937 contains nothing which authorizes the lease of minerals.

Lands classified under section 3 of the act of August 28, 1937, as more valuable for agriculture than for timber, if in fact more valuable for mineral than for agriculture, and not therefore subject to disposition under section 3, are subject to location, entry and purchase under the mining laws in accordance with section 3 of the act of June 9, 1916.

CHAPMAN, *Assistant Secretary:*

In memorandum of June 4 you request instructions upon the question whether or not, in view of the Comptroller's opinion of February

27, 1939 (B-173), as to the effect of the act of August 28, 1937 (50 Stat. 874), the mining laws of the United States are still applicable to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands.

The Comptroller General in his opinion of February 27, 1939, in ruling on a fiscal question relating to the O and C lands held that the first five sections of the act of June 9, 1916 (39 Stat. 218), are repealed by the act of August 28, 1937, *supra*. You advert to the fact that Walter H. Horning, Chief Forester of the O and C lands, requested a ruling of the Department on the question and in several subsequent letters has urged that a conclusion be reached in accord with that of the Comptroller General. By letter of October 19, 1939, Mr. Horning was advised by the Department that under Departmental Order No. 660 of July 29, 1933, an opinion of the Comptroller General when not confined to a strictly fiscal question is not regarded as controlling and does not preclude the Department from rendering its opinion in the matter.

The act of June 9, 1916 (39 Stat. 218) provided for the revesting in the United States of title to certain lands theretofore granted to the Oregon and California Railroad Company, for dividing the land into three classes, namely, timber, agricultural and power-site lands, for the sale of the timber and land separately, for the disposition of the proceeds of such sales, for the opening of the agricultural lands to homestead entry, and for the extension of mineral land laws to the mineral lands with certain exceptions and limitations. The act of February 26, 1919 (40 Stat. 1179), accepted reconveyance to the United States of the Coos Bay Wagon Road grant lands then involved in litigation with the United States and by section 3 thereof the classification and disposition of said lands were to be in accordance with the act of June 9, 1916, *supra*.

Section 3 of the act of June 9, 1916, provides as follows:

SEC. 3. That the classification provided for by the preceding section shall not operate to exclude from exploration, entry, and disposition, under the mineral-land laws of the United States, any of said lands, except power sites, which are chiefly valuable for the mineral deposits contained therein, and the general mineral laws are hereby extended to all of said lands, except power sites: *Provided*, That any person entering mineral lands of class two shall not acquire title to the timber thereon, which shall be sold as hereinafter provided in section four, but he shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is sold by the United States.

Section 1 of the act of August 28, 1937, provides:

That notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant

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lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may *hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed, except as provided in section 3 hereof*, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities: *Provided*, That nothing herein shall be construed to interfere with the use and development of power sites as may be authorized by law. [Italics supplied.]

Then follow provisions relating to limitations on annual cuttings in advance of determination of productive capacity and for the sale of such cuttings, for the division of the timber lands into forest units to facilitate sustained yield management, for hearings before establishing boundaries of such units, and for the limitation of sales of timber to productive capacity.

Section 2 provides for cooperative agreements between Federal and State agencies, private owners and operators as to coordinated administration.

Section 3 provides as follows:

The Secretary of the Interior is authorized to classify, either on application or otherwise, and restore to homestead entry, or purchase under the provisions of section 14 of the Act of June 28, 1934 (48 Stat. 1269), any of such revested or reconveyed land which, in his judgment, is more suitable for agricultural use than for afforestation, reforestation, stream-flow protection, recreation, or other public purposes.

Any of said lands heretofore classified as agricultural may be reclassified as timber lands, if found, upon examination, to be more suitable for the production of trees than agricultural use, such reclassified timber lands to be managed for permanent forest production as herein provided.

Section 4 authorizes the issuance of grazing leases that will not interfere with the production of timber or other purposes of the act and provides for disposition of the receipts from such leases and for the formulation of rules and regulations relating to grazing lands.

Section 5 authorizes the Secretary of the Interior to perform all acts and make rules and regulations for the purpose of carrying the act into effect and to consult the Oregon State Board of Forestry in the formulation of forest-practice rules and to consult and make agreements with public agencies with respect to forest-fire protection. The remainder of the act under the caption "Title II" relates solely to fiscal matters except the concluding paragraph, which reads:

All Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act.

There is no express mention in the act of mineral lands or of the mining laws, but there is a direct reference to *any* provisions of the

act of June 9, 1916, which undoubtedly comprehends section 3 above quoted.

To aid in the determination whether section 3 of the act of 1916 was in conflict with section 1 of the act of 1937, in its letter to Mr. Horning of October 19, 1939, the Department requested further information as to "whether the exercise of mineral rights provided by the act of 1916, upon the lands classified or classifiable as timber lands, would to any extent interfere with or prevent the accomplishment of the objects and purposes of the act of 1937, as expressed in the first section thereof. * * *". The gist of the reply of Mr. Horning of November 18, 1939, was that legitimate mining development would not necessarily interfere seriously with the management of the O and C lands for the production of timber on a sustained yield basis if the type of mineral development permitted continuation of timber growing and did not result in marked disturbance or destruction of the soil and vegetation so as to leave little or no possibility of further timber growing on the area. An example of the devastating effect of poisonous fumes from smelters upon timber was cited. Illegitimate use of the mining laws was mentioned in the location and holding of mining claims without adequate discovery for long periods and the use thereof for other purposes than mining. The principal abuses mentioned of the mineral laws were (1) starting of forest fires by prospectors and settlers on mining claims; (2) the location of claims in strategic positions and obtaining patent therefor with or without adequate showing of mineral deposits for the purpose of levying tolls on the transportation of timber; (3) objectional developments on invalid mining claims upon recreational sites. Mr. Horning suggested that the mineral resources of the O and C lands should be developed in accordance with the principle of sustained yield and their development be permitted under a leasing procedure with provision for the payment of royalties on tonnage of materials removed in accordance with the spirit of the act of 1937 though admitting that there was no specific reference to this matter therein.

In his letter of September 20, 1940, Mr. Horning submitted a report of a forest ranger relating to the dredging of claims asserted under the placer mining law, a portion of which was on O and C lands, as an illustration of the destructive effects of such active placer mining upon timber.

The matters to which Mr. Horning called attention are noticed in your letter but, without discussion of their bearings on the question presented, you express the opinion that:

The act of 1937 does not expressly repeal the mining laws and there being no manifestation of intent to depart from the general policy which has consistently prevailed to permit mining in the national forests, it cannot be said that the mining laws were repealed by implication. The lack of discussion or reference

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to the mining laws indicates clearly that Congress had no intention of repealing that provision in the 1916 act and it is unwarranted to presume, in the light of the well-recognized policy of Congress, that legislation enacted to conserve valuable timberlands is intended to repeal legitimate mining operations under the United States mining laws expressly authorized in the 1916 act.

It is the opinion of this office that Congress intended, by the act of 1937, that the lands and timber involved should be used in the same manner and for the same purposes as those within national forest reservations and that the mineral laws are intended to continue to apply to the mineral lands in reconveyed areas without change.

As grounds for your conclusion:

1. Attention is invited to the similarity between the purpose of the act of 1937 and the purpose of the National Forest Act (act of June 4, 1897, 30 Stat. 11, 34, 35, 36, 16 U. S. C. secs. 475, 478, 482), the latter expressly making the mineral lands in national forests subject to location, entry and purchase under the general mining laws.

2. You further declare:

The policy of Congress from the very beginning has been to treat the mineral lands separate and apart from nonmineral public domain lands and this policy was adhered to when the mining laws were extended to the mineral lands in the national forests, and by the act of 1916, to reconveyed lands. This policy has been uniformly recognized by the Department, and it has considered that the mineral laws are still operative unless they have been expressly repealed or unless no other conclusion than that they were repealed is reasonably consistent. * * *

3. Attention is invited to section 2318, Revised Statutes, which provides: "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law" and to the view expressed in the argument in the case of *Herman v. Chase*, 37 L. D. 590, 591, overruled on other grounds *George Judicak*, 43 L. D. 246, that "General legislation for disposal of public lands has no application to mineral lands unless it is in terms referred to."

4. It is further stated that no reference is made in the act of 1937 to the mineral provisions of the act of 1916 and the question relating to mineral lands was not raised or presented during the hearings or debates in Congress on the bill.

There is no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes, and these words are sufficient in and of themselves to determine the purpose of the legislature, if the plain meaning does not produce results at variance with the policy of the legislation as a whole. *United States v. American Trucking Ass'ns*, 310 U. S. 534, 543, and the cases there cited.

The declaration in section 1 of the act of 1937 that the lands classified as timber lands shall be managed for permanent forest production and that the timber thereon shall be sold, cut and removed "in con-

formity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries and providing recreational facilities," notwithstanding any provisions of the act of June 9, 1916, certainly means that these objects must be carried out, notwithstanding any provision in section 3 or any other provision of the act of 1916. It is difficult to perceive how such objects could be carried out unless the ownership and exclusive control of the timber land and the timber thereon were retained by the United States. While illegitimate uses and abuses of the mining laws, as mentioned by Mr. Horning, undoubtedly result in a frustration of or interference with the accomplishment of the objects and purposes of the act of 1937, they are not authorized or permitted by the mineral land laws and do not establish a conflict between these laws and the act of 1937. A conflict would only arise when the exercise of lawful rights under the mining laws would be inconsistent with the stated purposes of the act of 1937.

Under the mineral land laws, as extended by said section 3, the locator of a mining claim based upon a sufficient discovery of mineral would have the right to the exclusive possession and enjoyment of the claim, except as to such rights of entry by the United States as might be necessary for the cutting and removing of timber sold. He would have the right to use any quantity of timber necessary for his mine, no matter how much it would interfere with management for permanent forest production or with the principle of sustained yield or with the object of providing a permanent source of timber supply. He could upon compliance with the prerequisite conditions obtain absolute title to the land and thus prevent reforestation of the land, and even if he never applied for or acquired a patent, he could, as in the instance cited by Mr. Horning in the legitimate exercise of rights under the placer mining laws, completely denude the land claimed of its soil and vegetation so as to render it thereafter valueless for future timber growth and supply. A grant of rights under the mining law which in their lawful exercise would entail such possible consequences, is clearly inconsistent with the object and purpose of the act of 1937.

The act of 1937 expressly notices the act of 1916 showing that its provisions were clearly in the mind of Congress when the former was enacted. It does not specify what parts thereof are repealed, if any, but clearly by the last clause expressly declares if there is a conflict between any parts of the acts of 1916 and 1937, such parts of the 1916 act are repealed to the extent of conflict. The policy expressed in the National Forest Act is directly the reverse of that stated in the act of 1937. By section 1 of the former (16 U. S. C. sec. 475) it is provided:

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No public forest reservation shall be established, except to improve and protect the forests within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

Then follow provisions for the use of timber and for the egress and ingress of settlers, including the following provision:

Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations. [16 U. S. C. sec. 478.]

Section 1 of the act further provides for the restoration to the public domain of lands better adapted to agricultural or mining purposes and provides that:

* * * any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, *notwithstanding* any provisions herein contained. (16 U. S. C. sec. 482.) [*Italics supplied.*]

By the above-quoted provisions the Congress declared that it was not the policy of the United States to include mineral lands within national forests and made such lands subject to the operation of the mining laws, notwithstanding any conflict with the purposes for which national forests were created. The same policy was continued in the act of 1916 with certain restrictions and limitations, and without imposing upon the prospector or locator the obligation to conform his activities to Government regulations. The act of 1937, however, as to the timber lands, made the objects and purposes of that act paramount notwithstanding any conflict with any provisions of the mineral land laws.

The policy of Congress not only to establish a particular mode of disposition of mineral lands, but also to except and reserve them from all other grants and modes of disposal where there is no express provision for their inclusion, is well established. *United States v. Sweet*, 245 U. S. 563. Section 2318, Revised Statutes, and other acts declaring this policy, however, relate to sales and dispositions of land. The lands, however, to be classified as timber lands under section 1 of the act of 1937 are not to be disposed of in any manner but are to be permanently retained and managed for forestry and other purposes mentioned in the act and section 2318 has no application to such lands. The only provision for sale and disposal in the act of 1937 relates to

the lands classified as agricultural lands as provided in section 3 and the mode of disposition is limited to the homestead laws and to public sale as isolated tracts under section 14 of the Taylor Grazing Act. It is well settled and well known that mineral lands are not subject to homestead entry, except under the stock-raising homestead act where the minerals are reserved to the United States, and that mineral land is also not subject to sale under the isolated tract law (43 CFR 250.3) except lands withdrawn on account of certain nonmetalliferous minerals, where the mineral is likewise reserved (43 CFR 250.26 to 250.29, inclusive). Sections 1 and 3 of the act of 1937 are, therefore, entirely consistent with section 2318, Revised Statutes, and with the policy as to the disposal of mineral lands.

While the policy is well established that mineral lands are not to be sold or otherwise disposed of except by express provisions of law, the Department is not aware of any established or stable public policy that lands set aside for particular public uses and purposes under any acts of Congress, which neither expressly exclude nor include mineral lands, are to be construed as subject to the mineral land laws. To the contrary, in many instances public lands reserved or withdrawn for sundry public uses and purposes by acts or pursuant to acts of Congress which do not in terms expressly include mineral lands, and likewise lands reserved or withdrawn by the President by virtue of his inherent power, which contain no reference to mineral land, are not subject to the operation of the mineral land laws. Among these instances of reserves where mineral exploration, location and development are not expressly inhibited but are not permitted, may be mentioned military reservations (17 Op. Atty. Gen. 230); national monuments created under the act of June 8, 1906 (34 Stat. 225); *Cameron v. United States*, 252 U. S. 450. The various acts creating bird and game reserves (16 U. S. C. ch. 7) do not expressly forbid mineral location and entry or operations under the mineral land laws, nevertheless applications for permits under the General Leasing Act have been denied on such reserves where the operations would jeopardize or impair (*J. D. Mell et al.*, 50 L. D. 308), or destroy (*R. G. Folk*, A. 20601, unreported, decided March 4, 1937) the usefulness of the reserve as a wildlife refuge. Mineral lands within withdrawals for stock-driveway purposes made under section 10 of the act of December 29, 1916 (39 Stat. 862), became subject to the mining laws under rules, regulations and restrictions provided by the act of January 29, 1929 (45 Stat. 1144). See 43 CFR 185.35. And likewise mineral land included in withdrawals for construction purposes under the reclamation act of June 17, 1902 (32 Stat. 388), were by the act of April 23, 1932 (47 Stat. 136), made subject to location and entry and patent under the mining laws in the discretion of the Secretary where the

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rights of the United States would not be prejudiced, with reservation of such rights, ways and easements necessary to the protection of the irrigation interests.

While in the National Forest Act the Congress expressly opened the land to the miner, and other acts, such as the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), opened the withdrawals made thereunder to the miner of metalliferous minerals, the acts creating the national parks in the public land States have closed the door to the miner in such parks. See 16 U. S. C. secs. 21 to 355, inclusive; Lindley on Mines, sec. 196. As to acts setting aside lands for particular public purposes which do not expressly extend or prohibit the operation of the mineral land laws, there is no sufficient basis for the presumption that the mineral land laws, unless there are express words of exclusion, extend to them. On the contrary, in all such cases the intent of Congress in that respect must be gathered from the act itself.

The act of 1937 expressly repealed all acts, and particularly any part or parts of the acts of June 9, 1916, and February 26, 1919, inconsistent with its provisions. An express repeal is the repeal which is literally declared by a new law, either in specific terms, as where particular laws or provisions are mentioned or identified and declared to be repealed, or in general terms, as where a provision in a new law declares all laws inconsistent therewith to be repealed (25 R. C. L., Statutes, sec. 163). Such a provision in general terms is deemed as only declaratory of what would be the legal effect of the act without the provision, but such clause is useful in preventing doubt as to legislative intent (*id.*, sec. 165; 59 C. J., Statutes, sec. 507). The express notice taken in the act of 1937 of the act of 1916, including section 3 of the latter, plainly indicates an intention to abrogate it to the extent it is inconsistent with the act of 1937, and no doubts as to such intention are created by the fact that the effect of the act in relation to the mining laws was not discussed or mentioned in the hearings on the bill or in the debate thereon in Congress, the intention being clearly expressed in the act itself. See *Mackenzie v. Hare*, 239 U. S. 299; *United States v. St. Paul M. & M. R. Co.*, 247 U. S. 310; *Lapina v. Williams*, 232 U. S. 78; *Helvering, v. City Bank Farmers Trust Co.*, 296 U. S. 85.

As to the suggestion of Mr. Horning that the minerals be explored and developed under a leasing system in accordance with the principle of sustained yield, it is sufficient to point out that the act of 1937 does not cover that subject and contains nothing from which the authority to lease the minerals may be implied. If exploitation of the minerals under such a system is deemed desirable and in the public interest, further legislation will be necessary.

As the law now stands, it is the conclusion of the Department that section 3 of the act of June 9, 1916, is clearly irreconcilable and in conflict with section 1 of the act of August 28, 1937, and the mineral land laws are no longer applicable to the lands classified under that section; that if, perchance, certain lands classified as more valuable for agriculture than for timber under section 3 of said act are in fact more valuable for mineral than for agriculture, and not subject to disposition as provided for in that section, such lands are subject to location, entry and purchase under the mining laws in accordance with section 3 of the act of June 9, 1916.

OSCAR L. CHAPMAN,
Assistant Secretary.

APPLICATION OF FEDERAL LICENSE TAXES TO NATIVE CORPORATIONS IN ALASKA

Opinion, August 27, 1941

FEDERAL LICENSE TAXES ON OCCUPATIONS IN ALASKA—APPLICATION TO NATIVE CORPORATIONS—ALASKA INDIAN REORGANIZATION ACT—TERRITORIAL LICENSE TAXES.

Native corporations organized under the Alaska Indian Reorganization Act which undertake to engage in occupations made subject to license tax by Congress, which license taxes appear as sections 259 and 2569 of the 1913 Compiled Laws of Alaska, are subject to such license taxes, but no liability is recognized by this opinion for such additional license taxes as may be imposed by the Territory of Alaska.

FLANERY, *Acting Solicitor:*

My opinion has been requested by the Indian Office on the question whether native corporations in Alaska organized pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as extended to the Territory of Alaska by the act of May 1, 1936 (49 Stat. 1250), are subject to the license taxes called for by sections 259 and 2569 of the Compiled Laws of Alaska. These section numbers are those used in the 1913 compilation. The sections appear in the 1933 Compiled Laws of Alaska as sections 180 and 176, respectively.

The facts concerning the enactment of these laws and their purpose and scope are of paramount importance to the determination of the question presented. Both the laws are acts of Congress enacted before the legislature of the Territory was created by the Organic Act of August 24, 1912 (37 Stat. 512). Section 2569 is the earlier law, being contained in section 460 of the act of March 3, 1899 (30 Stat. 1253). This statute, covering nearly 100 pages, was an act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure. Section 460 provided that any person or per-

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sons, corporation or company seeking to undertake any of the 40-odd enumerated businesses must obtain a license from the district court. Failure to obtain a license was made a misdemeanor subject to fine and imprisonment. Section 460 was amended in the act of June 6, 1900 (31 Stat. 324), being an act to create Alaska as a civil and judicial district. There was no change in that part of the section which levied a license tax upon the occupation of salmon canning. The proceeds from these licenses were to be accounted for to the United States Treasury and divided between the expenses of the district courts and the schools in Alaska. Subsequent modifications provided that all the proceeds from licenses in incorporated towns were to be turned back to the towns for school and other public purposes and half of all the proceeds from licenses outside incorporated towns were to be designated by the United States Treasury for use by the Secretary of the Interior for school purposes. The remaining one-half apparently continued to be used for court purposes.

Section 259 was enacted as section 1 of the act of June 26, 1906 (34 Stat. 478), and is now codified as section 230 of title 48 of the United States Code. The section provides for a license tax on canning fish to be applied in lieu of all other taxes. It exempts only private salmon hatcheries to the extent that such hatcheries liberate salmon fry. Payment and collection of the taxes are to be made as provided for taxes collected under section 2569. The section was part of a comprehensive statute for the regulation of fishing in Alaska which appears in sections 221 to 247 of title 48 of the Code.

Sections 2569 and 259 have been the subject of various judicial opinions which have formulated certain relevant conclusions respecting these sections. Section 2569 was held to be a revenue measure adopted by Congress as a means of obtaining funds from Alaska for the administration by the Federal Government of the civil government in Alaska by a method appropriate to the peculiar conditions existing there at that time. There was no general taxation system in the district of Alaska. *Binns v. United States*, 194 U. S. 486 (1904); *In re C. E. Wynn-Johnson*, 1 Alaska 630 (1902), *aff'd* 194 U. S. 496 (1904). Section 259 was held to have superseded so much of section 2569 as related to licenses for the operation of fish canneries. This section also was found to be a revenue measure although appearing as part of regulatory laws on fishing. It was further held that the legislature of the Territory after the enactment of the organic act was privileged to supplement the taxes levied by Congress by imposing additional license taxes for the operation of fish canneries, so long as such additional taxes were not so unreasonable as to deny the privilege of carrying on the occupations licensed by Congress. *Alaska Fish Salt-*

ing & By-Products Co. v. Smith, 255 U. S. 44 (1921); *Alaska Pacific Fisheries v. Territory of Alaska*, 236 Fed. 52 (C. C. A. 9, 1916), *cert. den.* 242 U. S. 648; *Auk Bay Salmon Canning Co. v. United States*, 300 Fed. 907 (C. C. A. 9, 1924); *Freeman v. Smith*, 62 F. (2d) 291 (C. C. A. 9, 1932).

In view of the fact that these license tax laws were enacted by Congress thirty years before the passage of the Indian Reorganization Act and its extension to Alaska, there is no occasion for speculation as to the application of these tax laws intended by Congress to the Indian corporations. It is possible, however, to determine whether the tax laws applied to the natives and their associations at the time the laws were passed and whether Congress intended to exempt native corporations from these Federal taxes through authorizing their organization under the Indian Reorganization Act.

The 1899, 1900 and 1906 statutes were broad enough to include enterprises engaged in by any person. As pointed out in the case of *United States v. Schmidt*, 5 Alaska 675 (1917), the license tax is one placed upon occupations and not upon any class of persons. There is no doubt that the rest of the criminal code established in the 1899 act and of the fishing regulations in the 1906 act applied equally to natives as to other persons in Alaska. Only one distinction is made in the criminal code between natives and other persons and that was with respect to the sale of liquor (secs. 464 and 466). The 1900 act singled out the natives only to provide for protection of the lands in their occupancy. The presence of the distinctions in these particulars indicates that Congress had the natives in mind and intended the other provisions to apply to them. The proceeds from the license taxes were as much for the benefit of the Indians as other persons, particularly with respect to the funds set aside for the use of the Secretary of the Interior for school purposes, since the Secretary of the Interior was charged with the duty of providing schools for the natives (*Handbook of Federal Indian Law*, ch. 27, pp. 24-27).* The Clerk of the United States District Court at Juneau reported in a letter of June 1, 1938, that the Indian community of Hydaburg, being an incorporated town, received regularly all license taxes obtained within the town.

The question is, therefore, whether the organization of groups of Indians having a common bond of occupation or association or residence and their incorporation by a Federal charter under the Alaska Indian Reorganization Act *ipso facto* exempts them from these Federal license taxes which otherwise apply to them. It is my opinion that such organization and incorporation do not exempt them from the application of Federal laws or the obligation of Federal occupation taxes. The Federal charters authorize these corporations to engage

*Ch. 21, pp. 406-407, of the 1942 edition. [Editor.]

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in any enterprise for their economic welfare, but only such enterprises as are not inconsistent with law, and subject to any restrictions in the Constitution and laws of the United States. The fact that most enterprises engaged in by these corporations are and will be supervised and financed through the Indian Office does not change their legal status.

There is no general exemption of Federal instrumentalities from taxation or regulation by the Federal Government. The Federal instrumentality doctrine applies to protect such instrumentalities from burdens imposed by State and territorial laws. Thus in the case of *Territory of Alaska v. Annette Islands Packing Co.*, 289 Fed. 671 (C. C. A. 9, 1923), *cert. den.* 263 U. S. 708, the occupation tax levied by the Territory by virtue of its power under the organic act to impose additional license taxes to those provided by Federal law was held not to apply to a cannery operating under a lease with the Secretary of the Interior within the Annette Islands Indian Reserve, because such a cannery was a Federal instrumentality. There is a general principle that the sovereign does not tax its own property. However, this principle is not involved in the question whether a Federal corporation is subject to Federal occupation taxes.

If a Federal instrumentality is exempt from Federal taxes, it must be found in the language or the intent of the particular statutes involved. On this question it would be helpful to compare the decisions of the Solicitor respecting the application of other Federal tax laws to Indian corporations. In the memorandum to the Commissioner of May 1, 1941, it was held that tribal enterprises on the Navajo Reservation were subject to the Federal social security taxes because of the removal of the exemption from such taxes of Federal instrumentalities, excepting Federal instrumentalities wholly owned by the Federal Government or exempted from taxation by other law. The same conclusion was reached with respect to the application of such taxes to Eskimo cooperative stores in Alaska, in a memorandum to the Commissioner of June 10, 1940. Before the social security law was changed and while that law exempted all Federal instrumentalities, it was held in an opinion of June 30, 1937 (M. 29156), that the taxes did not apply to tribal enterprises operating under Indian relief and rehabilitation grants. In the opinion of May 31, 1940 (57 I. D. 129), *supra*, it was held that the Menominee Indian mills were not liable for Federal sales taxes on gasoline purchased for the use of the mill. The chief reason for the exemption was that the Federal law exempted gas purchased for the use of the United States and the operations of the mills were considered to be operations of the United States in this respect. This opinion does, however, argue that the Department should hesitate to recognize Federal revenue, as distinguished from regulatory, laws as applying to Indian enter-

prises. Such hesitancy, however, is less well founded in the case of native enterprises in Alaska, since the natives have historically been governed by the general laws applying to all persons in Alaska. The recent exemption by Congress of natives and permanent white residents from certain fishing restrictions (48 U. S. C. A. secs. 232, 233) indicates that Congress specifically exempts the natives when such exemption is intended.

My conclusion is that when native corporations organized under the Alaska Indian Reorganization Act undertake to engage in the occupation of fish canning or any of the other occupations specified by the Federal license law they are subject to the Federal license taxes. Nothing in this conclusion, however, should be taken to recognize the liability of such corporations for such additional license taxes as may be imposed by the Territory of Alaska.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

THE TEXAS COMPANY

Decided September 26, 1941

OIL AND GAS—LEASE TERMS—PAYMENT OF ADVANCE ROYALTIES—INTERPRETATION IN THE LIGHT OF APPLICABLE REGULATIONS.

Statutes and regulations affecting leases issued by the Department must be considered as part of the lease terms irrespective of whether or not they are set forth in the lease. Consequently, where an oil and gas lease does not specifically cover the status of advance royalties after production is obtained, the lease may be interpreted in the light of the applicable regulations and the prior administrative practice prevalent when the lease was issued.

An oil and gas lease on restricted Indian lands did not specifically state that advance royalties were payable after production commenced, but the applicable regulations and the administrative interpretation which had been accorded to the lease terms prior to the issuance of the particular lease clearly indicated that advance royalties were payable even after production commenced. *Held*, that subsisting explanatory regulations and administrative practice support a holding that under the particular lease advance royalties are required after production commences.

CHAPMAN, *Assistant Secretary*:

The Texas Company has appealed from a demand by the oil and gas supervisor for payment of \$211.94 as advance royalty on oil and gas lease 1-5-Ind-4901, Cut Bank Oil Field, Montana, involving restricted allotted Indian lands.

The first production of oil and gas from the leased land was had in April 1934 and a small volume of petroleum was produced until September 1938, at which time all production operations were suspended. The advance royalty demanded is for the lease years 1935

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to 1938, inclusive, and represents the excess of the amount of advance royalties which are due under the schedule stipulated in the lease, if such royalties were payable during that period, over the production royalties actually paid.

Whether the so-called "advance" royalties were payable during this period is therefore the question for decision. The answer depends upon whether the advance royalties were intended, and were understood to be in fact under the applicable lease provisions, departmental regulations, and administrative practice, a guaranteed minimum royalty.

Section 5 of the lease in question provides that:

Commencing from the date of the approval of this lease, and continuing until lessee shall have drilled a producing well on said land, lessee shall pay to the officer in charge, for lessor, as advance royalty, 15 cents per acre per annum in advance for the first and second years, 30 cents per acre per annum in advance for the third and fourth years, 75 cents per acre per annum in advance for the fifth year, and \$1 per acre per annum in advance for each succeeding year during the term of this lease: *Provided*, That should the producing well or wells on said land cease to produce during the fixed term hereof, then at the next succeeding advance royalty paying day, lessee shall resume the payment of advance royalty. It is understood and agreed that such sum of money so paid shall be a credit on stipulated royalties for the year for which the payment of advance royalty is made, and lessee hereby agrees that said advance royalty when paid shall not be refunded to lessee because of any subsequent surrender thereof, nor shall lessee be relieved from the obligation to pay said advance royalty annually when it becomes due by reason of any subsequent surrender or cancelation of this lease.

The section does not specifically cover the question of the status of advanced royalties after production is obtained, and the Texas Company contends that the obligation to pay the stipulated advance royalties ceased entirely when a producing well was drilled by the lessee. The Geological Survey, has, however, held that section 5 is a provision for a guaranteed minimum royalty and that, although advance royalties are not payable *in addition to* production royalties, they do not cease when production is obtained but are reduced proportionately as production royalties rise.

The Department holds that the interpretation placed upon section 5 by the Geological Survey is correct. Whatever doubt might exist as to the meaning of section 5, considered *in vacuo*, is dispelled when it is read in the light of applicable regulations and prior administrative practice. In the "Regulations Governing The Leasing Of Restricted Allotted Indian Lands For Mining Purposes," approved July 7, 1925, and under which the lease in question and hundreds of similar leases were issued, it is specifically provided that:

14. Lessee shall pay on each oil and gas lease annually in advance, commencing from the date of approval by the Secretary of the Interior, and continuing until lessee shall have drilled a producing well, royalties as follows: Fifteen cents per

acre per annum for the first and second years; 30 cents per acre per annum for the third and fourth years; 75 cents per acre per annum for the fifth year; and \$1 per acre per annum for each succeeding year during the term of the lease. *Such payments shall be made until the royalties on production exceed the advance royalty. Provided, That should the producing well or wells on the leased land cease to produce during the fixed term of the lease, then at the next succeeding advance royalty paying day the lessee shall resume the payment of advance royalty.* [Italics supplied.]

These regulations were clearly authorized by the act of March 3, 1909 (37 Stat. 781, 783), and, therefore, had the force and effect of law and it must be conclusively presumed that the lessee took the lease issued pursuant thereto with full knowledge of their provisions.

Moreover, more than seven months before the instant lease was issued, the Department had considered and decided adversely the point now raised by the Texas Company. On June 6, 1932, the Department approved a letter of instructions from the Commissioner of Indian Affairs to the Director of the Geological Survey which in part read as follows:

Under the terms of the lease the advance royalty payments are regarded as minimum and should be paid in advance as required by leasing regulations until the royalties from production exceed the advance royalties. When the royalty on production is not sufficient to equal the advance royalty no refund is allowable, but credit may be taken against the latter in the amount of production royalties.

Where lessees have been allowed to cease the payment of advance royalty because the royalties from production were in excess of the advance royalties they should be required to resume the payment on the latter immediately when production royalties fall below the required advance royalties.

It is clear, therefore, that at the time of the issuance of this lease there were subsisting explanatory regulations and administrative practice which resolved any doubt as to the meaning of section 5 and which fully support the decision of the Geological Survey.

The decision appealed from is, accordingly,

Affirmed.

EXCLUSION OF OSAGE COUNTY FROM OKLAHOMA WELFARE ACT

Opinion, October 9, 1941

STATUTORY CONSTRUCTION—SEC. 8, OKLAHOMA WELFARE ACT—OSAGE TRIBE—
OSAGE COUNTY, OKLAHOMA.

In view of the clear unambiguous language of section 8 of the act of June 26, 1936 (49 Stat. 1968, 25 U. S. C. sec. 508), all Indians residing in Osage County, Oklahoma, and all lands situated therein must be held to be excluded from the provisions of that act.

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MARGOLD, *Solicitor*:

There has been referred to me the question of the interpretation of section 8 of the Oklahoma Welfare Act of June 26, 1936, reading as follows: "This Act shall not relate to or affect Osage County, Oklahoma." The question is whether the section was intended to exclude from the benefits of the act only the Osage Tribe of Indians or all Indians residing in Osage County, regardless of the tribe to which they belong.

The obvious interpretation of this section would be that clearly called for by the unambiguous term "Osage County" used therein. The section thus should exclude from the act all Indians and their holdings in that county regardless of tribal membership. The legislative history of the act would appear to confirm this interpretation. The House Committee on Indian Affairs in its Report No. 2408, 74th Congress, 2d session, discussed the inclusion of section 8 in S. 2407, which became the Oklahoma Welfare Act, in the following words:

Because of the peculiar circumstances prevailing in Osage County the committee has recommended in section 8 of the proposed substitute that it be excluded from the provisions of the bill. The Osage Reservation is rich in mineral deposits, and the members of the tribe have derived millions of dollars in royalties and bonuses from this natural resource. There are numerous unallotted members of the tribe who participate to a negligible amount in the tribal revenues. Some of these should be eventually allowed to take advantage of the provisions embodied in this legislation. Further studies are necessary, however, before a definite conclusion in this respect can be reached, and the committee therefore feels that the exclusion of Osage County is proper at this time.

It is true that the reasoning would apply more directly to members of the Osage Tribe but the language used by the Committee clearly refers to the Osage Reservation and Osage County, and thus shows no intent to exclude other Indians who reside therein from the provisions of section 8.

Consideration should furthermore be given to the parallel provisions in the Indian Reorganization Act. It is significant that that act contains both tribal and geographical exclusion and the difference between the two types has not been confused. Section 13 excludes the Osage and other Oklahoma tribes by name. It also excludes the geographical areas of the Territories, colonies and insular possessions; and section 18 excludes any reservation which has voted against the application of the act.

This office has consistently held that the exclusion of a reservation is geographical in that the act does not apply to any persons therein, even a member of a tribe covered by the act. The latest expression of this opinion is a memorandum to the Commissioner of Indian

Affairs of June 30, 1941, denying the possibility of purchasing white-owned land in the name of the United States for a Quinaielt Indian on the Chehalis Reservation.

Finally, the language of the Oklahoma Welfare Act is clear enough to include all Indians living in the county. Thus, where section 1 of the act authorizes the Secretary of the Interior to acquire lands for Indians, the language of section 8 unmistakably prohibits such acquisition in Osage County regardless of whether the Indian for whom the land is to be acquired is a member of the Osage or another Indian tribe. Also, where section 4 of the act permits any ten or more Indians to receive from the Secretary of the Interior a charter as a local cooperative association, Indians living in Osage County do not have this privilege regardless of their tribal affiliation. Similarly Indians living in Osage County cannot apply for loans from the revolving loan fund set up by section 10 of that act.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

AUTHORITY TO CARRY ON SOIL AND MOISTURE CONSERVATION ACTIVITIES UNDER REORGANIZATION PLAN NO. IV

Opinion, October 25, 1941

SOIL AND MOISTURE CONSERVATION—AUTHORITY OF SECRETARY OF AGRICULTURE UNDER SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT.

The authority of the Secretary of Agriculture, under the Soil Conservation and Domestic Allotment Act of April 27, 1935 (49 Stat. 163, as amended, 16 U. S. C. ch. 3B), to carry on soil and moisture conservation activities was almost plenary, in that he could carry on such activities on any land regardless of ownership, subject only to the condition that proper safeguards to protect the work and to preserve the beneficial effect of the operations were insured and, in the case of lands owned by the United States, subject to the condition that the activities to be performed thereon should be conducted in cooperation with the agency having jurisdiction thereover. Also, there is nothing in the act which indicates that each project thereunder must be confined entirely either to private lands or public lands, or that any single project must benefit solely either private lands or public lands.

SOIL AND MOISTURE CONSERVATION—TRANSFER OF AUTHORITY BY REORGANIZATION PLAN NO. IV—AUTHORITY OF SECRETARY OF THE INTERIOR UNDER TAYLOR GRAZING ACT.

In addition to the authority given the Secretary of Agriculture by the Soil Conservation and Domestic Allotment Act, which authority, so far as lands under the jurisdiction of the Secretary of the Interior are concerned, has now been transferred to the latter by Reorganization Plan No. IV, the Secretary of the Interior has similar authority under section 2 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269, as amended, 43 U. S. C. ch. 8A), to carry on

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soil and moisture conservation activities for the benefit of lands that are subject to the provisions of that act, and broad authority to carry on such activities on other lands under his jurisdiction. Under these several sources of authority the Secretary of the Interior may determine the lands under his jurisdiction that are in need of soil and moisture conservation work, and may initiate and carry on such work, regardless of whether the work is to be done on private or public lands, so long as the work benefits lands under his jurisdiction.

SOIL AND MOISTURE CONSERVATION—AUTHORITY OF SECRETARY OF THE INTERIOR TO PLACE ORDERS WITH SOIL CONSERVATION SERVICE OF DEPARTMENT OF AGRICULTURE FOR SOIL AND MOISTURE CONSERVATION WORK UNDER SECTION 601 OF THE ECONOMY ACT—EFFECT OF REORGANIZATION PLAN NO. IV ON SUCH AUTHORITY.

Reorganization Plan No. IV does not nullify the authority vested in the Secretary of the Interior by section 601 of the Economy Act of June 30, 1932 (47 Stat. 417, 31 U. S. C. sec. 686), to place orders with the Soil Conservation Service of the Department of Agriculture for the performance of soil and moisture conservation work on a reimbursable basis on lands under the jurisdiction of the Department of the Interior.

FLANERY, *Acting Solicitor*:

Certain questions submitted by the Director of Grazing dealing with the functions of the Department of Agriculture and of this Department relating to soil and moisture conservation on lands under the jurisdiction of this Department and on privately owned lands have been referred to me for consideration and opinion. The questions are substantially as follows:

1. Does Reorganization Plan No. IV which, among other things, transferred to the Secretary of the Interior certain functions of the Soil Conservation Service with respect to soil and moisture conservation operations on lands under the jurisdiction of the Department of the Interior, authorize the Secretary of the Interior to conduct any such operations on private lands and, if so, to what extent?
2. Does Reorganization Plan No. IV nullify the authority vested in the Secretary of the Interior by section 601 of the Economy Act of June 30, 1932 (47 Stat. 417, 31 U. S. C. sec. 686), to place orders with the Soil Conservation Service of the Department of Agriculture for the performance of soil and moisture conservation work on a reimbursable basis on lands under the jurisdiction of the Department of the Interior?

I

Prior to the time when Reorganization Plan No. IV became effective, the Soil Conservation Service, acting on behalf of the Secretary of Agriculture, had broad powers under which its functions were performed. These powers deraigned from the various provisions of the "Soil Conservation and Domestic Allotment Act" (Act of April 27, 1935, 49 Stat. 163, as amended, 16 U. S. C., ch. 3B). The powers enjoyed by the Secretary of Agriculture, so far as they related directly to soil and moisture conservation activities, were conferred by sections 1 to 4, inclusive, of that act.

Section 1 of the act, among other things, declares it to be the policy of Congress to provide permanently for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, prevent impairment of reservoirs, maintain the navigability of rivers and harbors, and *protect public lands*. In order that these purposes might be carried out, the Secretary of Agriculture was authorized to conduct surveys, investigations, and research relating to soil erosion and preventive measures, to carry out preventive measures by engineering operations, methods of cultivation, and changes in use of land, to cooperate or enter into agreements with, or to furnish financial or other aid to, any agency, governmental or otherwise, or any person, subject to any conditions he might think necessary in carrying out the purposes of the act. He was also authorized to acquire lands, or rights or interests therein, by purchase, gift, condemnation, or otherwise, whenever necessary to the purposes of the act.

By section 2 of the act he was authorized to perform any of the above activities on lands owned or controlled by the United States or any of its agencies, with the cooperation of the agency having jurisdiction thereover, and on any other lands, upon obtaining proper consent or the necessary other rights or interests in such lands.

By section 3 of the act it is provided that, as a condition to the extending of the benefits of the act to any lands not owned nor controlled by the United States or any of its agencies, the Secretary of Agriculture is authorized to require (1) the enactment and reasonable safeguards for the enforcement of State and local laws imposing suitable permanent restrictions on the use of such lands and otherwise providing for the prevention of soil erosion, (2) agreements or covenants as to the permanent use of such lands, and (3) contributions in money, services, materials, or otherwise, to any operations conferring such benefits.

By section 4 of the act the Secretary of Agriculture is authorized among other things, to secure the cooperation of any governmental agency in carrying out the purposes of the act.

A reading of these portions of the act serves to indicate that, so far as soil and moisture conservation activities were concerned, the Secretary of Agriculture enjoyed almost plenary powers. He could carry on such activities on any land regardless of ownership, subject only to the condition that proper safeguards to protect the work and to preserve the beneficial effect of the operations were insured and, in the case of lands owned by the United States, subject to the condition that the activities to be performed thereon should be conducted in cooperation with the agency having jurisdiction thereover.

It should also be noted that there is nothing in the act to indicate that each project thereunder must have been confined entirely either

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to private lands or to public lands, or that any single project must have benefited solely either private lands or public lands. Under a reasonable construction of the act, it appears that the actual operations involved in any project could have been performed on private or public lands, or both, and that the benefits to be derived from the project could have flowed either to private or public lands, or both. In other words, in any case wherein it was the opinion of the Secretary of Agriculture that the purposes of the act could be served by carrying on work under the act, it was proper for him to proceed regardless of whether the project benefited private or public lands or of whether the necessary operations were to be performed on private or public lands.

At the same time that this authority was enjoyed by the Secretary of Agriculture, you also enjoyed similar authority which, although restricted to soil and moisture conservation activities for the benefit of lands that were subject to the Taylor Grazing Act, was extremely broad. The source of this authority lay, and still lies, in section 2 of the Taylor Grazing Act. That section reads in part as follows:

The Secretary of the Interior shall make provision for the *protection*, administration, regulation, and *improvement* of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and *establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts*, namely, to regulate their occupancy and use, *to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range*; and the Secretary of the Interior is authorized to *continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act*, through such funds as may be made available for that purpose, * * *. [Italics supplied.]

I consider it beyond question that such provisions serve to vest in you ample authority to carry out any soil and moisture conservation activities that benefit any public lands, within or outside of grazing districts. The only limitation on this authority is that it shall be so exercised as to "accomplish the purposes" of the Taylor Grazing Act, "insure the objects of * * * grazing districts" created thereunder, or be of such a type as may be necessary "amply to protect and rehabilitate the areas subject to the provisions of this [Taylor Grazing] Act."

It should be noted that there is no provision in the Taylor Grazing Act which specifies the type of land, i. e., private or public, on which the actual protecting and rehabilitating work may be performed. All that is required is that the work protect and rehabilitate the lands subject to the act. Such lands would include all unreserved and unappropriated public domain lands, grazing district lands, and even lands

withdrawn or reserved for other purposes if made subject to the Taylor Grazing Act by cooperative agreement under section 2 of the act or included in a grazing district with the approval of the head of the Department having jurisdiction thereover, as provided in section 1.

Soil and moisture conservation operations may be of two general types. That is, they may be done on a particular tract of land for the benefit of that land, or they may be done on a tract of land principally or entirely for the benefit of another tract. In practically all public land areas the land-ownership pattern is such that operations of any considerable scale would, if performed, necessitate the use of some private land. Also, in practically all cases, an operation carried on for the benefit of Taylor Grazing Act lands would yield some resultant benefit to private lands. These conditions are so general that, were it to be held that your authority under the Taylor Grazing Act is limited to the performance of such soil and moisture conservation operations as can be performed entirely on Taylor Grazing Act lands and for the sole and exclusive benefit of such lands, it would mean that the authority vested in you by the act extends only to the performance of small, inconsequential operations, and is thus largely illusory. Such a conclusion could not be justified in the face of that part of the statute which authorizes you "to perform such work as may be necessary amply to protect and rehabilitate the areas" subject to the provisions of the act. The purpose of the statute was obviously not merely the protection and rehabilitation of inconsequential areas wherein the soil and moisture conservation activities can be performed entirely on Taylor Grazing Act lands and for the sole benefit of such lands.

Accordingly, it is my opinion that under the Taylor Grazing Act you are authorized to perform soil and moisture conservation activities on any lands, either private or public, provided such activities have as their principal objects the protection and rehabilitation of the lands subject to the act. This presupposes, of course, that private rights will be fully recognized and that operations on private lands will not be initiated until and unless proper consent or the necessary rights or interests in such lands have been obtained.

With these conclusions in mind, it is timely to consider the effects of Reorganization Plan No. IV. The germane portions of the plan are as follows:

Sec. 6. Certain functions of the Soil Conservation Service transferred: The functions of the Soil Conservation Service in the Department of Agriculture with respect to soil and moisture conservation operations conducted on any lands under the jurisdiction of the Department of the Interior are transferred to the Department of the Interior and shall be administered under the direction and supervision of the Secretary of the Interior through such agency or agencies in the Department of the Interior as the Secretary shall designate.

* * * * *

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SEC. 13. Transfer of functions of heads of departments: Except as otherwise provided in this plan, the functions of the head of any department relating to the administration of any agency or function transferred from his department by this plan, are transferred to, and shall be exercised by, the head of the department or agency to which such transferred agency or function is transferred by this plan.

A reading of the Plan shows clearly that it in no manner limits the authority conferred on you by section 2 of the Taylor Grazing Act. So far as the lands that are subject to the provisions of that act are concerned, your authority to carry on soil and moisture conservation activities on or for the benefit of such lands remains unabridged.

As to the lands under your jurisdiction other than Taylor Grazing Act lands, it should be noted that, under the broad powers given you by the various statutes which placed those lands under your jurisdiction, even before the Plan you had certain express and implied powers which would have permitted you to perform soil and moisture conservation operations on those lands. Thus as to those lands, the Plan may not have actually augmented your authority, but may merely have acted to confirm additionally the authority which you already possessed. For the purpose of this opinion, however, such otherwise-existing authority will be disregarded and the opinion will confine itself entirely to a consideration of the authority transferred to you by the Plan.

We come then to a consideration of the Director's first question.

II

Does Reorganization Plan No. IV, which, among other things, transferred to the Secretary of the Interior certain functions of the Soil Conservation Service with respect to soil and moisture conservation operations on lands under the jurisdiction of the Department of the Interior, authorize the Secretary of the Interior to conduct any such operations on private lands and, if so, to what extent?

Under the authority given by the Soil Conservation and Domestic Allotment Act, as has been stated, the Secretary of Agriculture could perform soil and moisture conservation activities on any lands, regardless of the ownership of the lands on which the work was to be done, and regardless of the ownership of the lands to be benefited. The only limitations on this authority were the requirements that proper safeguards to protect the work and to preserve the beneficial effect of the operations were insured and, in the case of lands owned by the United States, that the activities to be performed thereon should be conducted in cooperation with the agency having jurisdiction thereover. It is from this broad authority that the powers vested in you by section 6 and the general provisions of the Plan were carved.

In the first place, section 6 of the Plan transfers to you the functions of the Soil Conservation Service with respect to soil and moisture conservation operations conducted on any lands under the jurisdiction of the Department of the Interior. In addition, section 13 of the Plan transfers to you the functions of the Secretary of Agriculture relating to the administration of any agency or function transferred. Clearly this means that so far as soil and moisture conservation activities on lands under your jurisdiction are concerned, all investigations, planning, mapping, construction work, field operations, and maintenance are now to be performed by you. In other words, so far as the responsibility and the authority for performing such work in connection with lands under your jurisdiction are concerned, you now have all the former powers of the Secretary of Agriculture.

I do not think that the broad grants of authority made by these provisions were intended to be construed in a way which would preclude you from taking effective action to bring about soil and moisture conservation on Interior Department lands in situations where the performing of work on adjacent or intermingled lands not under your jurisdiction is a necessary step to the achievement of this end, provided the consent of the owner or the cooperation of the agency administering the lands on which the work is to be done is obtained.

The President's message of April 11, 1940, transmitting Reorganization Plan No. IV to the Congress, in effect constitutes the legislative history of the Plan, for it is there that the purposes of the Plan are authoritatively disclosed. In construing a statute, consideration must be given to its purposes and that construction adopted which effectuates those purposes. To determine such purposes, legislative history may be resorted to as an aid to construction.

Whereas the Plan itself states that the functions of the Soil Conservation Service with respect to soil and moisture conservation operations conducted *on* any lands under the jurisdiction of the Department of the Interior are transferred to you, thus giving some ground for a construction that the transfer vests in you authority to perform soil and moisture conservation work only *on* lands under your jurisdiction, it is apparent from the message that the aims of the transfer were much broader. The message reads in part as follows:

Department of the Interior.—I propose to transfer to the Department of the Interior the activities of the Soil Conservation Service *relating* to soil and moisture conservation on lands under the jurisdiction of the Interior Department. *With respect to private lands*, the soil conservation work of the Federal Government is primarily of a consultative character and can best be carried on by the Department of Agriculture through cooperation of the farmers throughout the country. *In the case of Federal lands*, this work includes the actual application by the Government of soil conservation practices and is an appropriate function of the agency administering the land. [Italics supplied.]

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From this it will be seen that the transfer must be viewed from the standpoint of a division of responsibility for the protection of lands, based primarily on jurisdiction over the lands to be protected. That is to say, the responsibility for protection of lands under the jurisdiction of this Department is to be vested in this Department.

Such responsibility, if properly to be assumed, must carry with it certain necessary incidents of authority. A holding that you are authorized to perform soil and moisture conservation work only on lands under your jurisdiction and solely for the benefit of such lands would so limit you that it would be impossible, in the vast majority of cases, to accomplish satisfactory results. On the other hand, if you are to protect adequately the lands under your jurisdiction, you must have authority to do work on private lands if in any case it appears necessary, and to do work for the benefit of lands under your jurisdiction irrespective of the fact that some resultant benefit may flow to private lands.

When so considered, I have no difficulty in determining as a matter of law that you have certain authority to perform soil and moisture conservation work on private lands. In arriving at such a conclusion I am influenced by the same considerations that prompted me to find earlier in this opinion that you have authority to perform soil and moisture conservation work on private lands for the benefit of Taylor Grazing Act lands. In both cases it would be impracticable in the vast majority of instances to perform soil and moisture conservation operations for the benefit of the lands under your jurisdiction if it were necessary to perform such operations entirely on such lands or if the entire benefits of such operations must accrue to such lands. Many of the lands under your jurisdiction are interspersed with lands in private ownership, and regardless of the areas on which the operations are to be conducted or of the areas to be benefited, it would be impossible in most cases to carry on effectively a comprehensive project for the benefit of Interior Department lands unless at least some work were done on private lands and some benefits accrued to private lands.

I am of the opinion, therefore, that you are now vested with authority to determine the lands under your jurisdiction that are in need of soil and moisture conservation work, and to initiate and carry on such work regardless of whether the work is to be done on private or public lands. In other words, your authority is limited to the performance of soil and moisture conservation work on lands under your jurisdiction, or which has as its primary purpose the protection and benefit of lands under your jurisdiction. Once it has been determined that any such land is in need of soil and moisture conservation work, you may proceed to carry out that work regardless of the

fact that any or even all of the actual operations must be performed on private lands, and of the fact that resultant benefits may flow to private lands.

III

Does Reorganization Plan No. IV nullify the authority vested in the Secretary of the Interior by section 601 of the Economy Act of June 30, 1932 (47 Stat. 417, 31 U. S. C. sec. 686), to place orders with the Soil Conservation Service of the Department of Agriculture for the performance of soil and moisture conservation work on a reimbursable basis on lands under the jurisdiction of the Department of the Interior?

I am of the opinion that it does not.

Section 601 of the Economy Act reads in part as follows:

(a) Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, upon its written request, either in advance or upon the furnishing or performance thereof, all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau, or office as may be requisitioned; but proper adjustments on the basis of the actual cost of the materials, supplies, or equipment furnished, or work or services performed, paid for in advance, shall be made as may be agreed upon by the departments, establishments, bureaus, or offices concerned: *Provided, however*, That if such work or services can be as conveniently or more cheaply performed by private agencies such work shall be let by competitive bids to such private agencies. Bills rendered, or requests for advance payments made, pursuant to any such order, shall not be subject to audit or certification in advance of payment.

As has been stated above, prior to the Reorganization Plan, the Secretary of Agriculture had authority to conduct soil and moisture conservation operations on any lands, regardless of ownership. However, in the case of federally owned lands, he could only conduct operations thereon in cooperation with the Department having jurisdiction thereover. Having arranged for such cooperation, his authority to conduct operations on such lands was complete. Included in such authority was the incidental authority to conduct soil and moisture conservation studies on Interior Department lands, to determine the particular lands which in his opinion were in need of soil and moisture conservation work, and to carry on such work to any desired extent. Now, however, as I have pointed out above, that authority has been transferred to you so that complete jurisdiction in such matters rests in your hands.

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The question presented by the Director, stated in other terms, is whether or not, in any case where you have determined that certain soil and moisture conservation work is necessary for the protection or rehabilitation of lands under your jurisdiction, you are authorized to have such work performed by the Soil Conservation Service of the Department of Agriculture under an agreement that the cost of such work shall be repaid to the Soil Conservation Service under the provisions of section 601 of the Economy Act, *supra*. I am of the opinion that such a procedure is proper.

The principal object of the particular provisions of the Plan now under discussion was to place primary authority for soil and moisture conservation work in the Department having primary jurisdiction over the lands to be benefited. Such being the case, as long as you retain full authority and responsibility for performance of the work, and the work itself is on, or for the primary benefit of, lands under your jurisdiction, it matters little by whom the work is performed.

It is true that the Plan transfers the "functions of the Soil Conservation Service in the Department of Agriculture with respect to soil and moisture conservation operations conducted *on* any lands under the jurisdiction of the Department of the Interior * * *," and that under a narrow construction it might be held that the Department of Agriculture is thereby deprived of authority to do any work *on* Interior Department lands. However, the division of authority effected by the transfer did not destroy the pre-existing powers of the two Departments to obtain cooperation and assistance in carrying out their respective functions, and, as long as the provinces of *authority* remain clearly defined, the physical invasion of Interior Department lands by such operations of the Soil Conservation Service as may have been requested and authorized by you does not itself violate the provisions of the Plan.

While the Plan vests sole authority in you to carry on soil and moisture conservation operations on Interior Department lands, and appropriations have been made available for you to carry on such operations, there is nothing which requires that all such operations shall be carried on by employees of your Department and with equipment which is under the control of your Department. On the contrary, you may contract for such work to be done by private individuals, corporations, or public or quasipublic associations or organizations. Such being the case, no reason appears why the Soil Conservation Service, being well equipped for such work and familiar with its performance, cannot also be permitted to do such work under a proper arrangement. The only limit on your authority to make such an arrangement is the proviso to section 601, *supra*, which provides that in any case where any work

of the type under discussion can be as conveniently or more cheaply performed by private agencies, such work shall be let by competitive bids to such private agencies.

Accordingly, the Director's second question is answered in the negative.

Approved:

JOHN J. DEMPSEY,

Acting Secretary of the Interior.

DEPOSIT OF SECURITY BY PAYING AGENTS OF PUERTO RICO MUNICIPAL BOND ISSUES

Opinion, November 19, 1941

PUERTO RICO—MUNICIPALITIES—BONDS—PAYING AGENTS—COLLATERAL SECURITY.

Banks acting as paying agents for the payment of principal and interest due on bonds issued by municipalities of Puerto Rico are not "depositories of the government of Porto Rico" within the meaning of section 15 of the Organic Act, requiring the deposit of security with the insular treasurer, since other provisions of the Organic Act reflect an intention to distinguish between the fiscal affairs of the insular government and those of municipalities.

MARGOLD, *Solicitor*:

My opinion has been requested as to whether certain banks in New York City which, now, and for many years past, have been acting as municipal paying agents for the payment of the principal and interest due on various bonds issued by the municipalities of Puerto Rico are depositories of the "government of Porto Rico," within the meaning of section 15 of the insular Organic Act, and are hence required to furnish the collateral security described by that section. Section 15 of the Organic Act of Puerto Rico reads as follows:

The treasurer shall collect and be the custodian of public funds, and shall disburse the same in accordance with law, on warrants signed by the auditor and countersigned by the governor, and perform such other duties as may be provided by law. He may designate banking institutions in Porto Rico and the United States as depositories of the government of Porto Rico, subject to such conditions as may be prescribed by the governor, after they have filed with him satisfactory evidence of their sound financial condition and have deposited bonds of the United States or of the government of Porto Rico or other security satisfactory to the governor in such amounts as may be indicated by him; and no banking institution shall be designated a depository of the government of Porto Rico until the foregoing conditions have been complied with. Interest on deposits shall be required and paid into the treasury.

It is my opinion that the quoted section of the Organic Act refers only to depositories of the insular government and not to depositories of the municipalities. It is conceivable that certain hypothetical re-

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strictions imposed upon the "government of Porto Rico" might be held to refer to the municipalities of the island, upon the theory that the latter are creatures of the insular government and cannot for that reason transcend the restrictions imposed upon the entity to which their existence is due. But there appears to be no reason for supposing that section 15 of the Organic Act, which is addressed to the Treasurer of Puerto Rico with respect to the "government of Porto Rico," is intended to direct that official to act for the municipalities as well. The Organic Act, in connection with other fiscal matters, takes care to distinguish between the insular government and the municipalities. Thus section 3 sets up different indebtedness limitations for the insular government and the municipalities. Again, the same section states that "all bonds issued by the *Government of Puerto Rico*, or by its *authority*, shall be exempt from taxation * * * *by the Government of Puerto Rico or of any political or municipal subdivision thereof.*" [Italics supplied.]

Moreover, while by insular statute the Treasurer is obliged to retain so much of the taxes belonging to a municipality as may be necessary to pay loans contracted by the municipality, the insular legislature has never construed the Organic Act to require that the Treasurer of Puerto Rico must designate municipal depositaries. It is the function of the board of administration of each municipality, and not that of the Treasurer of Puerto Rico, to choose the bank in which funds of the municipality shall be deposited. See section 68 of Act No. 53, Laws of Puerto Rico, 1928. In fact, it is my understanding that it is the practice of the municipal boards of administration to designate both the banks which are to act as paying agents with respect to the bonds issued by the various municipalities and the banks to which the proceeds resulting from the sale of these same bonds are to be transmitted for safekeeping.

For the reasons stated, I conclude that banks acting as municipal paying agents for the payment of principal and interest due on bonds issued by the municipalities of Puerto Rico are not depositaries of the "government of Porto Rico" within the meaning of section 15 of the Organic Act, and therefore need not comply with the security requirements of that section. In reaching this conclusion, I express no opinion as to whether, even in the case of the insular government, a bank acting merely for the purpose of effecting the payment of public obligations is a depositary within the meaning of section 15 of the Organic Act.

Approved:

JOHN J. DEMPSEY,
Under Secretary.

SIMULTANEOUS FEDERAL AND PRIVATE EMPLOYMENT

Opinion, November 19, 1941

FEDERAL EMPLOYEES—SIMULTANEOUS PRIVATE EMPLOYMENT—SUPPLEMENTAL COMPENSATION.

There is no express statutory prohibition against the holding of a Government position simultaneously with a position in private industry. The prohibition in the act of March 3, 1917 (39 Stat. 1106, 5 U. S. C. sec. 66), against the receipt of supplemental salary by a Government employee in connection with his official duties from any source other than the Government of the United States, with certain exceptions as to contributed funds, is applicable only when the salary from the private source is paid for duties which are performed pursuant to Federal employment.

FEDERAL EMPLOYEES—DUAL EMPLOYMENT—COMPENSATION.

The prohibition in section 1765, Revised Statutes (5 U. S. C. sec. 70), against dual employment is only against receiving extra or double compensation out of United States funds. In the absence of specific reason to the contrary, there is nothing to prevent an employee of the United States receiving compensation from outside sources and at the same time his salary from the Government.

FEDERAL EMPLOYEES—DUAL EMPLOYMENT—INCONSISTENCY.

The questions of conflict of duties of dual employments or of diminished efficiency, are ones of administration which do not affect the payment of salary so long as employment by the Government exists.

MARGOLD, *Solicitor*:

You [Secretary of the Interior] have requested my advice on the question whether an appointee to a proposed office to be established pursuant to the President's letter of November 5, 1941, in connection with solid fuels coordination for national defense, may accept appointment and pay from the Federal Government, and at the same time continue to occupy, and accept pay in, a position in private industry.

It is my opinion that he legally may do so.

There appears to be no express statutory prohibition against the holding of a Government position simultaneously with a position in private employment.

The receipt of supplemental salary by a Government official or employee in connection with his services as such official or employee from any source other than the Government of the United States, with certain exceptions as to contributed funds, is prohibited by the act of March 3, 1917 (39 Stat. 1106, 5 U. S. C. sec. 66). The prohibition of this act is not applicable, unless it can be shown that the salary from the private source is paid for duties which are performed pursuant to Federal employment. *Cf.* 31 Op. Atty. Gen. 470 (1919).

Apart from the question of double payment for the same work, there is the question of whether the holding of a private and a public posi-

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tion involves any inconsistency. This has been answered in an opinion of the Comptroller of the Treasury, on May 25, 1905 (11 Comp. Dec. 702), dealing with section 1765 Revised Statutes, (5 U. S. C. sec. 70).¹ In that opinion the Comptroller declared:

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

In *United States v. Saunders*, 120 U. S. 126, 129 (1887), it was held, in construing this section, that it has "no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case, he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations."

Dual employment in the Federal Service of Federal civil officers is prohibited by the act of July 31, 1894 (28 Stat. 205, as amended, 5 U. S. C. sec. 62).

The holding of *State, Territorial, or municipal* office by Federal civil officers is prohibited by Executive Order No. 9, approved January 17, 1873.

The act of July 31, 1894, *supra*, concerning dual employment in the Federal service, and the Executive Order of January 17, 1873, *supra*, clearly do not apply to a person holding a position as a Federal officer or employee who is also *privately employed*.

It is my conclusion therefore that there is no statutory prohibition or other legal objection to employing a person as a Federal officer or employee while he continues to hold a position in private industry and receive a salary therefor. An employee may accept appointment to perform duties in connection with solid fuels coordination for national defense, therefore, and continue to hold his private position and accept the salary for it.

¹This statute provides: "No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

S. J. GROVES AND SONS COMPANY

Decided December 1, 1941

CONTRACTS—MODIFICATION—UNKNOWN CONDITIONS OF AN UNUSUAL NATURE.

During excavation in a borrow pit the contractor under a contract for the construction of a dam encountered rhyolite, a substance which, after extended examination by the Government engineers, was rejected as unsuitable for the earthfill required by the contract specifications, thereby necessitating the utilization of borrow pits farther removed from the construction site, with resultant increased costs. Geological data available prior to the execution of the contract had indicated with certainty to both the Government and the contractor that the area in question would yield adequate suitable material. *Held*, that the occurrence of rhyolite constituted an "unknown" condition "of an unusual nature materially differing from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," within the meaning of article 4 of the contract, and that the contract therefore should be modified to provide for payment of the increased costs to the contractor.

BURLEW, *Acting Secretary*:

On October 5, 1936, a contract was entered into between S. J. Groves and Sons Company and the United States for the construction of Grassy Lake Dam, Upper Snake River project, Idaho, under items 1 to 55, inclusive, of the Schedule of Specifications No. 693. All work under the contract was satisfactorily completed on October 14, 1939.

The contractor presented claims for additional compensation under the contract, the basis of which will be considered later in this finding, and on March 15, 1941, the contracting officer issued findings of fact denying the claims in their entirety. On March 21, 1941, an appeal was taken to the Secretary from this decision by the contractor, and on April 21, 1941, a supplement to the appeal was filed which includes a sworn statement by F. M. Groves, President of the contracting company, and a joint affidavit of Carleton Cravens, Superintendent of the contractor, and Henry Lobnitz, a partner in the Lobnitz Brothers Company, subcontractor for the earthwork at Grassy Lake Dam.

The contractor bases its claim for additional compensation upon two grounds: (1) that changed subsurface conditions entailed extra costs amounting to \$28,057.70, and (2) that the Government misrepresented the length of working season to the damage of the contractor in the sum of \$70,000.

Upon the receipt of the evidence submitted by the contractor in its appeal and supplement thereto, copies thereof were sent to the contracting officer who, in turn, sent the information on May 2, 1941, to Senior Engineer H. A. Parker, Construction Engineer of the Grassy Lake Dam, and to I. Donald Jerman, Resident Engineer and Acting Construction Engineer on the work, requesting that they examine the

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matters set forth in the appeal and affidavits and submit their comments with respect thereto. The two engineers have submitted their reports and in many respects they substantiate the statements and claims made by the contractor and its several engineers.

On September 5, 1941, the contracting officer submitted, in a letter addressed to the Secretary of the Interior, a further report which is in fact a reconsideration of his original findings of fact as will appear from the letter of the Commissioner of the Bureau of Reclamation, dated September 20, 1941, in which he stated:

* * * As will appear from his report, the Chief Engineer as contracting officer, has reexamined the contractor's claim, has reconsidered his prior findings, and has concluded that the contractor is entitled to an adjustment in the sum of \$23,615.70.

With respect to the claim of the contractor for damage on account of misrepresentation of the length of the working season in the amount of \$70,000, the contracting officer in his reconsideration states that in his opinion the claim as to this item is not well founded and that the finding and decision originally rendered should stand. A careful examination of the original findings of fact and the contractor's claims with respect thereto, having in mind all of the circumstances and the provisions of the contract, including information furnished to bidders, would appear to indicate no error on the part of the contracting officer in this part of his finding, and no new evidence having been presented which is persuasive in support of the contractor's claim, his appeal as to that item accordingly is dismissed.

There remains the question of the contractor's right to recover additional compensation under article 4 of the contract, which provides:

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and (or) difference in time resulting from such conditions.

The claim of the contractor with respect to this item may be summarized briefly as follows: It was expected by the contractor, by the geologist who submitted the geological data, and by the Government engineers, as a consequence of their several examinations of the test pit materials furnished and after an examination of the locus, that

borrow pit No. 1 would furnish adequate material for all of the earthfill required to be performed under this contract. Construction Engineer Parker states in his letter of May 7, 1941:

* * * At the time prospective bidders were looking over the work, all of us, including Messrs. Savage and Berkey, confidently expected that the ridge on which test pits 7, 8 and 28 to 32 inclusive, were located would yield sufficient material to complete the dam. * * * If I were to testify on the matter, I would admit that the contractor was advised that we expected the ridge in question would yield substantially all the required borrow material. * * *

Assistant Geologist I. M. Murphy, who was in charge of the exploratory work at the dam site, furnished the following report:

It is believed that deposits of materials suitable for earthfill in amounts in excess of requirements have been exposed by exploration. The average length of haul from the dam site will be about a half a mile.

It developed, however, during the course of construction and after excavation had been made to a depth of 12 feet in the borrow pit, that the expectation as to the amount of usable earthfill which the pit would provide could not be realized. At that level a formation called rhyolite was encountered which, after extended examination by the Government engineers, was rejected as being unsuitable for the embankment fill.

It thereupon became necessary to utilize borrow pits further removed from the scene of operation with the resultant extra costs as set forth by the claimant.

The following excerpts from the findings of the contracting officer upon reconsideration are pertinent:

The existence of rhyolite under the surface of the borrow pit No. 1 area was unknown to the Government and the contractor. * * * After a review of all the facts it must be concluded that presence of the rhyolite in the borrow area was an unknown condition.

Drawing 42-D-474, attached to the specifications, shows the locations and logs of drill holes and test pits. Only one borrow area was explored. On the basis of the test pits that were dug in this area (referred to in the findings as borrow pit No. 1), it was believed that substantially all the required borrow material could be obtained from this location.

* * * * *
 Drawing 42-D-474 shows the logs of 18 borrow area test pits. These pits are located south and east of the dam in the general area referred to in the findings and appeal as borrow pit No. 1. These pits, were carried down only to shallow depths, the deepest being 20 feet. None disclosed the presence of rhyolite, and the record indicates that these explorations were deemed sufficient to warrant the belief that sufficient suitable materials could be obtained from the prospected area. But, as quoted from page 16 of the findings of fact:

"The contractor's statement, in the appeal (exhibit 3), that rhyolite was encountered at depth of about 12 feet in borrow pit No. 1 and was also encountered in borrow pits Nos. 2 and 3, and that this rhyolite was rejected as being unsuitable for embankment is in accordance with the facts."

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The contracting officer, upon reconsideration, after reviewing all the facts and reports before him, states on page 7:

After due consideration of the facts presented in the original record together with the supplementary data, it is now concluded that an adjustment of compensation should be made under the provisions of article 4 of the contract.

* * * In this case, which must be considered on the basis of its own peculiar facts, the geological examinations and the logs of such tests indicated to the Government and to the contractor that materials needed for construction could be obtained from a certain area. There existed such certainty (based on the geological data obtained) in the minds of both the contracting parties that such condition would prevail, that the occurrence of the contrary condition did, in fact, differ the contract within the above quoted provisions of article 4.

He finds that the contractor is entitled to be paid for the following items directly related to borrow pit costs:

Clearing and grubbing of areas not originally designated as borrow pits-----	\$5,881.00
Expense of providing drainage for borrow pits-----	2,731.05
Expense in constructing haul roads to additional borrow pits-----	3,435.65
Extra costs incurred due to general borrow pit conditions----	11,568.00
	<hr/>
	\$23,615.70

The contracting officer concludes with the following statement:

Each of the above items of claim has been carefully examined. It is believed that the items of cost as presented by the contractor represent his actual unpaid cost and that it is entitled to payment as stated under these items, as a proper adjustment under the provisions of article 4 of the contract.

It is not clear that the conditions encountered by the contractor in the borrow pit operations were "conditions at the site materially differing from those shown on the drawings or indicated in the specifications," within the meaning of article 4 of the contract. The question remains, however, whether they constituted "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," within the meaning of the same article.

As heretofore stated, the test pit operations did not disclose the existence of rhyolite in the borrow pit area and both the Government engineers and the contractor are shown to have had every reason to believe, after careful examination, that the borrow pit would yield sufficient usable material to complete the earthfill requirements of the dam. It was on this basis that the contractor submitted its bid, which was accepted by the Government. During the course of construction, however, the rhyolite was encountered and after extended examination

by Government engineers it was rejected as being unusable for the required earthfill.

While the occurrence of the rhyolite in itself clearly was an unknown condition, this fact need not be controlling. Rather, the significant fact is that after its discovery there was a determination that, by reason of its presence, the borrow materials would be unusable. In the circumstances, including the various preliminary tests made as to the borrow materials and the materials likely to be found in the general area, and the opinion of those qualified to judge the suitability of the borrow area, this subsequent determination must be regarded as unusual. I therefore find that, within the meaning of article 4 of the contract, the contractor encountered unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications. I further find that the items of increased costs incurred by the contractor by reason of these conditions are properly payable in the amounts found by the contracting officer to be reasonable, as quoted above. The contractor's appeal accordingly is allowed to the extent of \$23,615.70, and payment in this amount should be made.

Allowed in part.

PRESIDENTIAL AUTHORITY TO CAUSE DIVERSION AND APPROPRIATION OF WATERS OF SAN CARLOS IRRIGATION PROJECT

PHELPS-DODGE COPPER COMPANY

Opinion, December 2, 1941

IRRIGATION PROJECTS—PRESIDENTIAL AUTHORITY—WATER RIGHTS—NATIONAL DEFENSE—STATUTORY CONSTRUCTION—CONDEMNATION—INDIANS.

While there may be some doubt as to whether authority exists under the act of October 16, 1941 (55 Stat. 742), to permit the diversion and appropriation of some of the waters of the San Carlos Irrigation Project for the use of a corporation ordered to produce copper, authority is conferred by the act of June 3, 1916 (39 Stat. 166, 213), as reaffirmed and extended by section 9 of the Selective Training and Service Act of September 16, 1940 (54 Stat. 885, 892). Condemnation is also available as a means of acquiring the needed water supply under 40 U. S. C. secs. 257 and 258 and 50 U. S. C. sec. 171. The desired action may be effected by an order to the company prepared in this Department and signed by the President.

MARGOLD, *Solicitor*:

You [Secretary of the Interior] have requested me to express an opinion on the question whether under any act conferring emergency or war powers upon the President, the Chief Executive has authority to cause certain action to be taken which would have the effect of

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diverting and appropriating some of the waters of the San Carlos Irrigation Project.

The facts as informally presented to me are briefly as follows:

Near Morenci, Arizona, the Phelps-Dodge Copper Company owns a large body of low grade copper ore which has been stripped ready for pit operations. The company has constructed an ore reduction plant which will handle about 25,000 tons of ore daily. The plant will be ready to go into operation about December 1, 1941. Informal negotiations with the Indian Service were started in 1940, which had for their purpose the acquisition of a right to store some water to meet the company's requirements at the plant. Early in 1941, the company suggested that it would like to construct a dam with 5,000 acre-feet capacity, in the San Francisco River; that while it did not know what its maximum requirements would be, it thought 10,000 acre-feet annually would be sufficient. In brief, the proposal was to fill the reservoir twice each year out of flood flow which otherwise would have reached the San Carlos Reservoir about 120 miles downstream. The aforesaid reservoir was created by the construction of Coolidge Dam in the Gila River, for supplemental irrigation water for Indian and other lands in the San Carlos Federal irrigation project. The San Francisco River is the largest tributary of the Upper Gila and enters the Gila about 65 miles above the reservoir.

The company owns some direct diversion rights, but the priorities are so late that these rights are not of much importance on a stream already overappropriated. However, the company has constructed some tunnels and deep wells with which to divert water from the sub-flow of the San Francisco River and from Eagle Creek and in smaller quantities from some other small tributary streams.

Because of the urgent need of copper in the defense program, this copper mine has become a source of supply to meet the emergency requirements of the Government. It appears that the Defense Plant Corporation is going to construct another mill at Morenci with 20,000 tons daily capacity at a cost of about \$28,000,000. It appears that the new mill will be leased to and operated by the copper company. The copper to be produced will be sold by the company into defense channels specified by the Government. When that plant goes into operation the company's operations will undoubtedly require 8,000 to 10,000 acre-feet of water annually when operating at full capacity. The proposal of the company involves no use of water for power. It wants to store the water and then lift it by pumping about 1,600 feet where it will be used in leaching and other ore reduction processes.

Apart from general provisions applicable to the instant case and contained in 40 U. S. C. secs. 257, 258, and 50 U. S. C. sec. 171, there

are three special statutes conferring emergency or war powers on the President in which authority may be found for him to take the desired action. They are the act of June 3, 1916 (39 Stat. 166, 213, 50 U. S. C. sec. 80), section 9 of the Selective Training and Service Act of September 16, 1940 (54 Stat. 885 at 892), and the Property Requisition Act of October 16, 1941 (55 Stat. 742).

While there may be some doubt as to the applicability of the 1941 act, there is, in my opinion, clear authority for the action contemplated in the other statutory provisions hereinabove enumerated.

The act of June 3, 1916, authorizes:

The President, * * * when war is imminent, * * * through the head of any department of the Government, * * * to place an order with any individual, firm, * * *, company [or] corporation * * * for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company * * * [or] corporation * * *.

Section 9 of the Selective Training and Service Act of September 16, 1940, authorizes;

The President * * * through the head of the War Department or the Navy Department * * * to place an order with any individual, firm, * * * company, [or] corporation * * * for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, * * * [or] corporation, * * *.

Both statutes, thus, are substantially alike in the authority they confer, except that the 1916 act requires a finding by the President that war is imminent.

It is clear that an order for the copper to be mined by the Phelps-Dodge Corporation is an order that comes squarely under the requisition authority conferred by this language. The question whether it also authorizes by necessary implication expropriation of the rights of third parties including water and water rights when necessary to the operations of the company filling the order given under section 80 has been decided affirmatively by the Supreme Court of the United States in a case arising under the act of June 3, 1916.

In the case of *International Paper Company v. United States*, 282 U. S. 399, the Secretary of War had ordered the Niagara Falls Power Company to extend its operations to the maximum production possible of electric power by use of all the water of the Niagara River which the company could make use of and to deliver this power to other companies working on orders from the United States Government. Under this order the power company diverted water well in excess of the quantity given to it under letters patent from the State of New York and acts of the legislature of that State. As a conse-

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quence of this excessive use of water, the International Paper Company, which was taking water from the same source, was deprived of its water supply and had to shut down operations. Thereupon the paper company claimed damages for the loss sustained in consequence of this order of the Secretary of War and the requisition through the power company of its water rights. The Government urged as a defense "that it does not appear that the action of the Secretary was authorized by Congress," apparently believing that the authority granted by the act of June 3, 1916, did not extend to permitting condemnation of water rights necessary for the production of war materials which were being ordered under that act. The Supreme Court rejected this defense and Mr. Justice Holmes who wrote the opinion said:

We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

* * * There is no room for quibbling distinctions between the taking of power and the taking of water rights. [At pp. 406-7.]

Under this decision, it is clear that the act of June 3, 1916, as reaffirmed and extended by section 9 of the Selective Service and Training Act of September 16, 1940, contains ample authority to enable the Government to order the production of copper by the Phelps-Dodge Corporation through the use of such waters as may be necessary to obtain the required production. The case holds that the Government would be liable to compensate the owners of water rights under the San Carlos Irrigation Project whose rights would be impaired as a result of the action taken. Both of the cited acts expressly provide for fair and just compensation.

Direct authority also is available for the institution of condemnation proceedings to secure whatever water may be necessary for the operation of the copper mill. Title 50 U. S. C., section 171, authorizes the Secretary of War to

cause proceedings to be instituted * * * for the acquirement by condemnation of any land * * * or right pertaining thereto, needed for the * * * construction and operation of plants for the * * * manufacture of * * * munitions of war * * *

The reference to "land or right pertaining thereto" obviously embraces water rights. The only doubtful question is whether the operation of a copper ore reduction plant is one of the purposes for which the right of condemnation was granted by this section. It thus becomes necessary to inquire whether a copper mine producing copper for the manufacture of arms and munitions for the national defense may itself be called "a plant for the manufacture of munitions of war." Black's Law Dictionary (3d ed.), at page 1215 defines "munitions of war" as follows:

In international law and United States statutes, this term includes not only ordnance, ammunition, and other material directly useful in the conduct of a war, but also whatever may contribute to its successful maintenance, such as military stores of all kinds and articles of food. [See *United States v. Sheldon*, 2 Wheat. 119, 4 L. ed. 199.]

Similarly, "Words and Phrases" (permanent ed. 27), states at page 814:

Living fat cattle are "munitions of war," within Act of July 16, 1812, prohibiting American vessels from trading with the enemies of the United States and transporting munitions of war from the United States to Canada. [See *United States v. Sheldon*, *supra*.]

Funk & Wagnall's New Standard Dictionary of the English Language states at page 1631:

1. Ammunition, military stores and provisions; all requisites in war fare, exclusive of money and men: frequently in the plural.

Webster's New International Dictionary (2d ed., unabridged), states at page 1612:

1. Fortification: also, a rampart or defense. Obs.

2. Whatever materials are used in war for defense or for offense; ammunition; also, military stores of all kinds; hence, necessary equipment or provision in general; as, *munitions* for a political campaign;—usually in pl.

From these definitions it should become clear that the term "munitions of war" is not to be restricted to "ammunition" but must be interpreted to include all such materials as are directly or indirectly necessary for national defense. Copper, which is one of the important metals entering into the manufacture of armaments is thus clearly to be considered "munitions of war." Since, moreover, water rights are "rights pertaining to land," they may be condemned under the authority granted by section 171. Indeed sections 80 and 171 may be regarded as complementary provisions. The one furnishes authority to order production while the other may be invoked as an express foundation of the Government's right to condemn to make possible the operation of any plant for the production of munitions of war. However, as already indicated, a broad right to condemn is recognized in the *International Paper Company* case.

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It should be noted also that the act of August 1, 1888 (25 Stat. 357, 40 U. S. C. secs. 257 and 258), provides in general terms that where an officer of the United States is authorized to procure real estate for a public use he is authorized to acquire it by condemnation.

While it is thus my conclusion that the above statutes provide ample authority for the action contemplated by the President, it would appear desirable to consider finally the property requisition act of October 16, 1941 (55 Stat. 742). In view of the importance of this statute and of its recent date, making it particularly appropriate for measures to be taken during the present emergency, I shall discuss it in full detail.

The property requisition act of October 16, 1941, authorizes the President whenever there is an "immediate and impending" need in connection with the defense of the United States to requisition "any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions." The act further provides for the payment of "fair and just compensation" for property so requisitioned, and for its return to the owner, if so desired, not later than December 31, 1943. The act also contains certain provisos not here material and authorizes the President to delegate his authority to any "department, agency, board, or officer."

It is obvious that the act confers very wide powers on the President in order to enable him to cope with the present national emergency but it appears not only from its language but from its legislative history that they are not limitless. As originally introduced, the act was still more sweeping in its terms. It authorized the President,

to requisition and take over, either temporarily or permanently, property of any kind or character, whether real or personal, tangible or intangible, or any part thereof, or any right or interest therein or with respect thereto, whether by virtue of contract, patent, license, or otherwise, which itself or through its exercise or control can be used or is adaptable for use directly or indirectly in any way for national defense or in the construction, manufacture, production, transportation, repair, testing, or storage of military or naval supplies or other articles, commodities, materials, machinery, or equipment for national defense; and (b) to use and, on such terms as he shall deem satisfactory, to sell or otherwise dispose of, either temporarily or permanently, any property, right, or interest requisitioned or taken over pursuant to the provisions of this Act.

After the bill was introduced into the Senate by Senator Reynolds the President wrote to him on June 21, 1941, setting forth his view of the bill and the objective sought to be accomplished by the Government by its enactment. He stated its intent to be "To reinforce the defense program by providing for the use or acquisition of certain kinds of defense materials and properties now in private hands." The

President did not further specify the nature of the materials or properties which might be acquired under such legislation but he nevertheless made it perfectly clear that he was seeking legislation which would give him very wide powers, and pointed to the experience of the Government in the first World War as the reason for seeking such legislation. "During the last similar emergency," he wrote, "the Government's need of broader requisitioning powers was met piecemeal. When a particular kind of property was needed, a particular requisitioning statute was drafted to cover that need. These piecemeal statutes separately gave the Government requisitioning power over virtually everything from distilled spirits required in the making of munitions to lumber needed for making aircraft. This procedure caused unwarranted delays in waiting for the necessary legislation, and it resulted in the enactment of at least 17 different statutes, all containing language substantially similar to that of the present bill."

It is clear that the authority required in the instant case must be one extending to realty and not limited to the requisition of personal property. Water, of course, may be an article of personal property, as when it is appropriated, bottled, and stored, and it may be possible to argue that it is a material. The same is true of gravel and earth which are ordinarily part of the land but which may be removed and enter into certain manufacturing processes. But what is proposed to be taken here is not a specific quantity of water owned by any given landowner. No landowner on the project can say that any particular water is his. He owns only a usufructuary right which is appurtenant to the land, and such an immaterial right is an interest in real estate. This proposition is too well settled to require the citation of authority. But see the cases collected in Long, *A Treatise on the Law of Irrigation* (Denver, 1916) sections 166-168. "In its nature," Long observes, "a water right or an interest in a water right and ditch is real estate. So, also, the right of a riparian proprietor, as such, to the use of water flowing by his land, is identified with the realty, and is a real and corporeal hereditament."

There can be not the slightest doubt that if the bill sponsored by Senator Reynolds had been enacted as it then stood there would have been ample authority for the action now proposed to be taken. But the Committee on Military Affairs almost entirely rewrote the bill, and it was enacted only in the form already set forth. Senator Chandler submitted a report (Report No. 565), which stated that in the judgment of the Committee on Military Affairs the bill originally recommended by the War Department was "broader than the presently demonstrated needs of the Government and lacking in adequate safeguards." The Senator then proceeded to specify the nature of the safeguards which had been provided by the Committee. Among them

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was a change in the definition of property. The Senator pointed out that "In the original bill the definition of property subject to requisition was without any restriction," but that the present bill specified the type of property that could be taken. "The definition is similar," continued the Senator, "to that adopted by the Congress in Public, No. 703, Seventy-sixth Congress, approved July 2, 1940, authorizing the President to prohibit the exportation of property. It is sufficiently broad to cover generally any property which may be necessary in the preparation of our military and naval defense, without attempting the impossible task of naming the exact articles or materials; and yet sufficiently limited so that it does not include property having no connection with military or naval defense."

The House report on the bill (Report No. 1120) employed almost identical language in referring to the limitation which had been introduced in defining property. It is apparent that this language is somewhat vague. The House Committee on Military Affairs, however, did commit itself to one definite limitation, stating it to be "the view of the Committee, and their intention in reporting the bill, that it did not and should not authorize the seizure of an industrial plant for war purposes or otherwise, and is so understood by the Committee." In this connection the report contains a colloquy between Congressman Harness and Under Secretary of War Patterson which indicates that the War Department did not contemplate that realty could be taken under this Act. In response to a question of the former the latter explained: "Of course, a plant is partly realty, and there is no mention of realty in here."

While these statements are in themselves not conclusive as to the final intent of Congress, they do raise some doubt, as to whether this Act may be used for the taking of realty or rights therein. This doubt would appear to be somewhat strengthened by the following colloquy (Congressional Record, Senate, July 21, 1941, page 6298) which took place between Senator Taft and Senator Chandler (who, it must be remembered, reported the bill to the Senate and managed it before that body), in the course of which the latter conceded that the act could not be interpreted so as to apply to real estate. Although Congressman Andrews expressed the opinion in the House that what the act proposed was virtually limitless, he also had doubts as to its applicability to real estate. "It includes," he observed, "virtually all of the property described in the original bill, with the possible exception of real estate, inasmuch as it embraces every species of personal property needed for the defense of the United States" (Congressional Record, House, page 6935). Congressman Thomason, who favored the passage of the bill and the conferring of the broadest possible

powers upon the President, remarked that the bill "does to personal property only what the present law does to real property * * *," thus expressing his opinion that if the act applied to personalty only, this was so because similar authority for the condemnation of realty was already on the statute books.

The language of the act itself would not seem to be conclusive, either. The term "requisition," in common parlance at least, applies to personal rather than real property. See for instance, *Filbin Corporation v. United States*, 266 Fed. 911, at 913, where the court said:

In ordinary parlance—perhaps in legal parlance—the word "requisition" is the more often used in reference to the taking of personal property, and the word "condemnation" to the taking of real estate.

In international law, too, the term "requisition" refers to the power of a military commander to take when necessary articles of personal property and to require such services as may be necessary to maintain his forces. The most inclusive noun in the text of the act, however, "supplies," could mean anything necessary to meet a given need. When used as a verb, "supply" is commonly applied to such activities as the supply of transportation, water, electricity, and even labor. The noun "supply" particularly is protean. Within the meaning of various statutes even money and the rental values of various articles of equipment have been held to be supplies (see the many cases collected in *Words and Phrases*, permanent edition, vol. 40, pp. 784-796). Such cases, to be sure, have been decided with reference to the terms of particular statutes, as for instance, statutes requiring contractor's bonds for the payment of supplies or authorizing municipalities to purchase supplies without advertising for bids, or giving landlords liens on the crops of tenants for "supplies." If any generalization is permitted it would be that in certain circumstances and within the meaning of certain statutes certain immaterial rights may be treated as "supplies." While none of the cases construing the use of the term "supplies" has involved real property, such use of the term could not altogether be excluded.

It will readily be seen from the foregoing analysis that, while the powers conferred by the act are quite broad, their limit is somewhat vague. It is, therefore, my opinion that the action here to be taken will be on safer ground if it is based on the other statutory provisions discussed above. In that case a desirable procedure may consist in the preparation by this Department of an order to be signed by the President and addressed to the Phelps-Dodge Copper Company. This order would be based on the authority contained in section 9 of the Selective Training and Service Act of 1940 and if the President should find that war is imminent, also on the act of June 3, 1916. In it, and in language similar to that used in the *International Paper Company*

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case, the President would place an order with the Company for, and requisition, the total quantity and output of copper which is capable of being produced and/or delivered by it through the use of such waters from the San Francisco River, as may be necessary.

Such an order, in form and substance, would clearly be within the statutory authority granted to the President by the 1916 and the 1940 acts, to mention only these two.

It should be added here that the expropriation of the water rights in the San Carlos irrigation project which is here contemplated would consist rather in a continuous operation than in one single act. This is due to the character of the rights which relate not to a specific mass of water but rather to the continuous taking by each riparian owner of water flowing by his land. For this reason, it would appear that these water rights may be expropriated only as long as the additional quantities of copper for the processing of which the water is needed are, in fact, required and requisitioned by the Government.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

PARK SADDLE HORSE COMPANY

Opinion, December 5, 1941

NATIONAL PARK SERVICE—CONTRACTS—HIRE OF ANIMALS—RECOVERY FOR LOSS—AVAILABILITY OF FUNDS.

Claims for the loss of animals rented to the National Park Service under contracts entered into pursuant to the provisions of the act of May 26, 1930 (46 Stat. 381), are reimbursable from any available funds in the appropriation to which the hire of such equipment would be properly chargeable.

GRAHAM, *Assistant Solicitor:*

My opinion has been requested as to whether payment may be made to the Park Saddle Horse Company, of Babb, Montana, for the loss of three saddle horses rented by it to the National Park Service under a contract approved by the Assistant Secretary on April 19, 1939, which provided that "Any horses not returned or horses crippled and rendered unfit for further service will be paid for by the Government at the rate of \$50.00 per head."

It is my opinion that payment legally may be made to the Park Saddle Horse Company for the loss of the three horses under the act of May 26, 1930 (46 Stat. 381). Vouchers in payment, heretofore returned without certification by the General Accounting Office should, however, be returned to that office for further consideration in view of

the existence of the authorized contractual provision for the payment of such claims, which apparently was not made known to that office when the vouchers were submitted for preaudit.

In an opinion rendered by this office, approved August 26, 1940 (M. 30774), a claim filed by the Park Saddle Horse Company was considered under the act of December 28, 1922 (42 Stat. 1066), for the loss of one of the three horses in question, and was rejected because no showing had been made of negligence on the part of the Government employee, as required by that act. A memorandum, dated October 11, 1940, from the Chief Counsel to the Acting Associate Director, National Park Service, discloses the fact that the claim was erroneously submitted for consideration under the act of December 28, 1922, *supra*, and that payment thereof, as well as of a claim for the loss of the two other horses involved should be considered, in accordance with the terms of the contract for rental of the horses, under the act of May 26, 1930 (46 Stat. 381), which provides in part as follows:

SEC. 7. That hereafter the Secretary of the Interior in his administration of the National Park Service is authorized to reimburse employees and other owners of horses, vehicles, and other equipment lost, damaged, or destroyed while in the custody of such employee or the Department of the Interior, under authorization, contract, or loan, for necessary fire fighting, trail, or other official business, such reimbursement to be made from any available funds in the appropriation to which the hire of such equipment would be properly chargeable.

The record discloses that the General Accounting Office, by preaudit difference statement dated December 16, 1940, returned without certification a voucher (Bur. Vou. No. 14-992) in the amount of \$50, covering the loss of the first-mentioned horse, stating that funds sought to be charged would appear not to be available for payment to the owner for loss of the horse "in the absence of showing of negligence or failure on the part of the Government employee of this service, which caused the death of the horse" (citing 16 Comp. Dec. 68 [1909], and a decision of the Comptroller General, A 67206, unpublished, dated March 18, 1936). By preaudit difference statement, dated March 3, 1941, the General Accounting Office returned without certification a voucher (Bur. Vou. No. 14-1360), in the amount of \$100, for the loss of the two other horses, with a notation to the effect that the facts stated were not sufficient for a determination of whether or not the Government is liable for the loss of the horses, again citing 16 Comp. Dec. 68. The first-named voucher was designated as payable from funds appropriated under the Public Works Administration Appropriation Act of 1938 (52 Stat. 809), which made available certain funds for expenditure in bureaus of the Interior Department, and the second voucher was designated as payable from regularly appropriated funds available to the National Park Service under the Interior Department Appropriation Act for the fiscal year 1940 (53 Stat. 725). Neither

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act contains language precluding payment of claims covered by authorized contractual provisions.

The opinion of the Comptroller of the Treasury, referred to, *supra*, disallowed payment for a horse lost while in the custody of a Department of the Interior employee because of the insufficiency of the record to establish the liability of the Government for its death, but held that, if upon investigation it was ascertained that the Government did not take ordinary care of the horse, and because of that fact the death of the horse resulted, then the Government would be liable for the reasonable value of the horse, to be agreed upon by the claimant and the Department. In that case there was a contract under which the horse was hired providing that the United States should "exercise ordinary care" of the horses hired thereunder. The opinion of the Comptroller General (unpublished), *supra*, disallowed payment for the loss of a horse while in the custody of a National Park Service employee, which was used in connection with the activities of a Civilian Conservation Corps camp, holding that such use may not be regarded as in the custody of an employee of such service "under authorization, control, or loan, for necessary fire fighting, trail, or other official business" within the purview of section 7 of the act of May 26, 1930, *supra*, and further stated:

The general rule is that in the absence of an authorized provision therefor the United States is not liable for injuries sustained, without fault or negligence on the part of any officer or employee of the Government, by horses when being used for the purposes for which hired. 16 Comp. Dec. 68; 1 Comp. Gen. 192; 3 *id.* 505; 4 *id.* 1028.

It would appear from the foregoing that since there was an authorized contractual provision for payment by the Government of claims for any horses not returned, or horses crippled and rendered unfit for further service, and since there appears no specific prohibition in either of the appropriation acts, *supra*, barring their payment, the claims may be paid under the authority of the act of May 26, 1930, *supra*. It is suggested, however, inasmuch as no reference appears to have been made to the existence of a contract with the Park Saddle Horse Company at the time the vouchers were submitted to the General Accounting Office for preaudit, that the vouchers be resubmitted for further consideration by that office, calling specific attention to the fact that payment is sought, in accordance with an authorized contractual provision for the payment of such claims, under the authority of the act of May 26, 1930, *supra*.

Approved:

E. K. BURLEW,

First Assistant Secretary.

LINE MATERIAL COMPANY

Decided December 10, 1941

CONTRACTS—DELAY—LIQUIDATED DAMAGES.

When there is a delay in furnishing materials beyond the date set by the contract for delivery and the materials could not sooner have been procured in the open market, it is proper to assess the liquidated damages prescribed in the contract, notwithstanding the fact that the total damages thus assessed exceed the purchase price of the materials furnished. Distinguishing 11 Comp. Gen. 384, and 16 Comp. Gen. 344.

BURLEW, First Assistant Secretary:

On November 10, 1939, Invitation for Bids No. 49065-A was issued for furnishing 10 solid ground rods, under item 7 of Schedule No. 3 for the Central Valley Project, California. The Line Material Company, being the lowest bidder, equalizing elements considered, it was awarded the contract. Under its bid the company agreed to make delivery f. o. b. cars at Oakley, California, and to make shipments from Glassport, Pennsylvania, within 21 calendar days after the date of receipt of notice of award of the contract. The award was made on November 28, 1939, and notice of the award was received by the contractor on November 30, 1939, thus establishing the shipping date as of December 21, 1939. Instead of shipping from Glassport, the shipment was made from Bridgeport, Connecticut, on January 5, 1940. This was 15 days later than the date of shipment stipulated in the contract. The contract provided for liquidated damages at a rate of \$10 for each day's delay in shipment.

By a letter of January 28, 1940, the chief clerk of the Denver office of the Bureau of Reclamation notified the contractor that the delay of 15 days in shipment required the assessment of liquidated damages at the rate of \$10 a day, or a total of \$150. Findings of fact were made by the Government contracting officer on February 15, 1940, and a copy thereof was furnished the contractor. In his findings, the contracting officer ruled that the delay was due to acts of the contractor, and also that the contractor failed to give notice of the cause of the delay within the 10-day period specified in the contract. The contractor has appealed.

This is a case wherein a time limit was placed on a shipment of materials and liquidated damages were stipulated for the reason that a determination of the actual damages would be difficult. The contractor agreed to make the shipment within the time allowed but failed to do so. The failure is conceded by the contractor to have been its own fault, for in its letter of February 2, 1940, addressed to the Denver office of the Bureau of Reclamation, it stated:

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The fact that the shipment was delayed is acknowledged. For your information, it was due to the confusion resulting from the removal of our general offices from South Milwaukee to Milwaukee. At the same time we were faced with a threatened strike which added to the confusion. As a result, your letter of December 2 in some manner was not properly connected with the file and was not acted upon promptly, resulting in the change in routing to the factory at Bridgeport being delayed. Just what happened to your letter during the existence of this confusion unfortunately cannot be reconstructed at this time.

Notwithstanding its acknowledgment that the delay in shipment was its own fault, the contractor appeals from the payment of the liquidated damages on the ground that the payment of \$150 damages in connection with a purchase of only \$20.04 worth of material seems excessive. In support of its appeal, two decisions by the Comptroller General are cited.

The first decision cited (11 Comp. Gen. 384) dealt with the question of the collection of liquidated damages in cases of ordinary supplies that can be purchased in the open market, and in that case it was stated that provisions for liquidated damages should not appear in contracts for the purchase of such ordinary supplies, but if and when they do appear, there should not be a running of time indefinitely which would result in the liquidated damages exceeding the contract price of the supplies. It was then stated that, in such case, if procurement has not been made in the open market, "it is not ordinarily believed there can be a charging of liquidated damages beyond the value of the thing as it would result in taking the thing and demanding from the defaulting party a further sum."

The second decision cited (16 Comp. Gen. 344) involved a contract for the purchase of test tubes for the use of the Veterans' Administration and in that case it was shown that the delivery on the delivery date of the entire number of test tubes covered by the contract was not necessary to the conduct of the work in which they were to be used, and that if one contractor had been the successful bidder on the entire schedule of supplies upon which bids were asked (it apparently included not only the test tubes but numerous other articles) his liquidated damages for failure to deliver the entire list of supplies would have been only \$10 a day. From this it was argued that there was no relation between the amount of the liquidated damages and the actual damage that may have resulted, and that as such an attempt to assess liquidated damages was invalid (citing *Wise v. United States*, 249 U. S. 361), the form of stipulation in the contract had left the Government without any right to assess liquidated damages for the delay involved and without compensation for the intangible damages which such delay may have caused. Neither of the decisions cited is of benefit to the contractor in this case.

The chief clerk of the Denver office of the Bureau of Reclamation has stated in a letter to the Commissioner of that Bureau that the ground rods could have been purchased on the open market upon default in shipment by the contractor. However, in this connection the chief clerk has offered the following comment:

In investigating this matter it is found that one bid was received offering ten-day shipment from Oakland, California on this particular item of the invitation. Another bid was received under this invitation offering 14-day shipment from Pittsburgh, Pennsylvania, and also two additional bids offering 15-day shipment from Ansonia, Connecticut. Assuming * * * that a direct purchase order was issued on December 22, upon delinquency in shipment by the Line Material Company; direct purchase order would have been received within one to two days, an additional two days required for the order and shipping instructions to be transmitted to the source of supply at Oakland; and as per terms of the bid shipment within ten days would have scheduled shipment of this theoretical order to go forward from Oakland about January 2 or 3, 1940, with a probable time in transit between Oakland and Oakley, California of two or three days; thus indicating that delivery under an open market purchase would probably, if issued, have arrived at destination, Oakley, California about January 5, the same date on which the delayed shipment actually reached destination.

These assertions appear reasonable and, assuming their correctness, it is clear that a purchase of the ground rods in the open market would have left the Bureau in no better position than that which resulted from awaiting the receipt of the rods from the contractor. Furthermore, there is nothing to show that the Bureau of Reclamation was advised that there would be a delay in shipment by the contractor and accordingly it was proper for it to assume that the rods would arrive on time. In fact, it appears that it did not know of the delay until the rods finally arrived, and manifestly it was then too late to take any action which would have served to reduce the damages.

It may also be pointed out that this case differs materially from the case involving the purchase of the test tubes, in that this was not a contract to furnish materials only a part of which would be used from time to time. So far as is disclosed by the record, and judging from the small number of ground rods purchased, the entire shipment was intended for use immediately upon delivery, and it was not a purchase made for the purpose of laying in a supply to be used from time to time in the future.

Furthermore, this is not a case wherein the liquidated damages were to apply to a large number of varied items and wherein an attempt is being made to assess the same damages for failure to make timely shipment of a part as would have been assessed in case the contract for the entire number of schedules had been obtained by one contractor and he had failed to make timely shipment of the whole. It is true that the invitation for bids had attached to it a series of schedules listing eight separate commodities, but the invitation was restricted solely to schedule 3, which included only the ground rods.

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Thus it is apparent that the contractor submitted its bid with knowledge of the fact that the liquidated damages of \$10 a day applied in full to the ground rods alone and was not applicable only to a case wherein there was a failure to make timely shipment of all the items listed.

It is therefore apparent that this case involves liquidated damages for failure to deliver certain specified materials for which there was present need, that the actual damages resulting from the failure to make timely shipment were not ascertainable, that the goods could not have been so purchased in the open market as to meliorate the damages, and that the delay in shipment was the contractor's fault. Accordingly, the liquidated damages assessed in the amount of \$150 are properly payable and should be collected. The appeal is therefore—

Dismissed.

W. E. BARTLETT ET AL.

Opinion, December 10, 1941

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—OPERATION OF IRRIGATION WORKS—BLOWING OF SILT—DIRECT RESULT.

Claims for damage to privately owned property resulting from silt blown from a lowered reservoir may not be paid under an appropriation for the payment of damages caused "by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since the damage was not the direct result of the direct act of Government employees.

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—IMPLIED TAKING.

The intermittent and incidental blowing of silt from a lowered reservoir to privately owned property does not constitute such a permanent invasion of the property as to amount to an appropriation of it and hence an implied taking.

GRAHAM, Assistant Solicitor:

Seven claims, aggregating \$17,485.47, have been filed against the United States for compensation for damage to real and personal property alleged to have been caused by the lowering of the Shoshone Reservoir in Wyoming.

The following is a list of the claimants and the amounts claimed by each:

W. E. Bartlett, Cody, Wyo.....	\$4, 785. 00
Arland Andren, Cody, Wyo.....	5, 081. 47
Christine Andren, Cody, Wyo.....	1, 958. 50
E. R. Cox, Cody, Wyo.....	1, 208. 00
Chas. A. Bradbury, Cody, Wyo.....	1, 292. 00
G. A. Wright, Cody, Wyo.....	405. 00
L. A. Buchanan, Cody, Wyo.....	2, 755. 50

The question whether the claims either should be allowed and certified to the Congress under the act of December 28, 1922 (42 Stat. 1066), or should be paid under the Interior Department Appropriation Act, 1942 (55 Stat. 303) has been submitted to me for an opinion.

These claims arise as a consequence of the lowering of the surface water of the Shoshone Reservoir and the subsequent blowing of the exposed dry silt over the adjacent lands by the prevailing winds.

It is my opinion that the Department is without authority to give the claims favorable consideration under any existing legislation.

First, the claims cannot be allowed and certified to the Congress for payment under the act of December 28, 1922 (42 Stat. 1066), which provides:

That authority is hereby conferred upon the head of each department and establishment acting on behalf of the Government of the United States to consider * * * any claim * * * on account of damages to or loss of privately owned property where the amount of the claim does not exceed \$1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. * * *

An examination of the record discloses no evidence of negligence on the part of any Government officer or employee. It has not been shown nor is it contended that the blowing of the silt could have been prevented by the exercise of ordinary care. It may be argued that the exposure of the silt and its consequent distribution over the land by the wind constituted a nuisance. But in the absence of negligence in the operation of the reservoir, as in the case of other public works authorized by statute, there can be no recovery on that basis and the courts have held generally that damages arising out of such non-negligent operations are *damnum absque injuria*. *Transportation Company v. Chicago*, 99 U. S. 635, 645, 25 L. ed. 336 (1878); *Richards v. Washington Terminal Company*, 233 U. S. 546, 58 L. ed. 1088 (1914); *Howell v. Big Horn Basin Colonization Company*, 14 Wyo. 14, 81 Pac. 785 (1905). Furthermore, all of the claims, with the exception of that of G. A. Wright, in the amount of \$405, are substantially larger in amount than the limit of liability provided by the 1922 act, namely, \$1,000. In no event, therefore, could these six claims be considered under this 1922 act. Solicitor's opinion on claim of *Martin Bridges* (M. 28223), approved by the Department January 3, 1936. See 39 Op. Atty. Gen. 102 (1937).

Secondly, while the Interior Department Appropriation Act, 1942 (55 Stat. 303), appropriated funds

* * * For all expenditures authorized by the Act of June 17, 1902, and Acts amendatory thereof or supplementary thereto, known as the reclamation law, * * * including * * * payment of damages caused to the owners of lands or other private property of any kind by reason of the operations of the

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United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works * * *

it is my opinion that the instant claims do not arise in circumstances permitting such settlement. It appears that the surface water of the reservoir was lowered to permit the installation of certain control works, thus exposing silt deposits which, when dry, were blown by the wind over the claimants' lands. The immediate question presented is whether the damage caused by the wind-blown silt, which covered the claimants' land, was the *direct result* of the operations of the Government officers or employees.

It is true that the Comptroller of the Treasury approved the settlement of a claim, under the Interior Department Appropriation Act, 1916 (38 Stat. 859), containing language similar to that under consideration, for damage caused by the discharge of water from the Shoshone Reservoir, which flooded the claimant's lands. *D. W. Scott*, decided June 15, 1915. In the case of *C. J. Mast* (A-45268, decided October 22, 1932), however, the Comptroller General disapproved a claim under the Indian irrigation act of February 20, 1929 (45 Stat. 1252), the provisions of which are similar to those in the annual appropriation acts, thus distinguishing the case from the *Scott* case:

The claim is unlike that considered in the decision of June 15, 1915, of the former Comptroller of the Treasury to your predecessor in connection with the operation of the Shoshone Reservoir. There employees of the Reclamation Service discharged a large volume of water from the reservoir in order to clean and repair it, causing a greatly increased flow of water in the Shoshone River below the dam and reservoir which overflowed the banks of the river and resulted in damage to the owners of the adjoining lands. *The one was a direct consequence of the other. Here the damage was not caused by any direct action of officers or employees of the United States* * * *. [Italics ours.]

While the facts of the *Mast* case are in no way analogous to those presently under consideration, the application of the law is undoubtedly the same.

Presumably all of these claimants own property adjoining or in close proximity to the Shoshone Reservoir and are beneficiaries of the irrigation water.

In this respect, the Comptroller General further stated in the *Mast* case:

Furthermore, Mr. Mast, who is apparently a beneficiary of the water resulting from the operation of the Flathead Irrigation Project, is presumed in law to have anticipated the risk of the operation of irrigation canals and in connection with the benefits to his lands to have assumed his part of such risk *not directly resulting from acts of the United States, its officers or employees in connection with the operation and maintenance of the irrigation works.* [Italics ours.]

In *Christman v. United States*, 74 F. (2d) 112, (C. C. A. 7, 1934), quoting from *Loiseau v. Arp*, 21 S. D. 566, 14 L. R. A. (n. s.) 855, the court said at page 114:

* * * "damages are either direct or consequential. The former are such as result from an act without the intervention of any intermediate controlling or self-efficient cause. The latter are such as are not produced without the concurrence of some other event attributable to the same origin or cause. * * * "

In *Sanguinetti v. United States*, 264 U. S. 146, 68 L. ed. 608 (1924), the Government had built a canal and a diversion dam with the intent of diverting water from one river to another. Plaintiff's land was subject to overflow, but it was contended that the canal, being insufficient to carry the water, increased the amount of overflow. The Court refused to allow recovery and said at page 149:

* * * in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the *direct result* of the structure, * * *. [Italics ours.]

And in the case of *Goodman v. United States*, 28 F. Supp. 497 (D. C. S. D. Iowa, 1939), the court, referring to the *Christman* and *Sanguinetti* cases, *supra*, said at page 503:

In the *Christman* and *Sanguinetti* cases, *supra*, there was even the construction of a dam and yet the court determined that the damages were consequential.

It must be recalled that in the use of the term consequential damages the court had in mind any damage occasioned by public works that did not amount to a taking. (See cases cited.)

It is my opinion, in the light of the above decisions and the facts herein relied upon that the damage sustained was not the *direct result* of the operations of the officers or employees of the Government in connection with the construction, operation or maintenance of the Shoshone Reservoir; that the damage was consequential, at most, and not recoverable under the reclamation act within the limitation established by the Comptroller General in the *Mast* case, *supra*.

Thirdly, in the cases where damages have been allowed on the theory of an implied taking of property in violation of the Fifth Amendment to the Constitution the courts have said in substance that the Government's action must constitute an actual, permanent invasion of land amounting to an appropriation of and not merely an injury to the property. *Pumpelly v. Green Bay Company*, 80 U. S. 166, 20 L. ed. 557 (1871); *Richards v. Washington Terminal Company*, 233 U. S. 546, 58 L. ed. 1088 (1914); *Christman et al. v. United States*, *supra*; *Sanguinetti v. United States*, *supra*; *United States v. Cress*, 243 U. S. 316, 61 L. ed. 746 (1917); *Goodman v. United States*, *supra*; *John Horstmann Company v. United States*, 257 U. S. 138, 66 L. ed. 171 (1921).

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In *Richards v. Washington Terminal Company, supra*, the Court said, at page 554:

* * * Any diminution of the value of the property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision.

The taking must be permanent. *United States v. Lynah*, 188 U. S. 445 (1903); *United States v. Cress, supra*. The taking must be more than a damage. As in the case of *United States v. Lynah, supra*, at page 472:

* * * There have been many cases in which a distinction has been drawn between the taking of property for public uses and a consequential injury to such property, by reason of some public work. * * *

And before recovery can be had under the Tucker Act, 28 U. S. C. A. sec. 41 (20), (24 Stat. 505), there must be an actual or implied agreement to take the land and pay for it. *Portsmouth Company v. United States*, 260 U. S. 327, 331, 67 L. ed. 287 (1922). There must be an implied agreement on the part of the Government to pay. See *Goodman v. United States, supra*, in which the Court said at page 502:

* * * But if the circumstances show a contemplation by the government that land is or will be taken, or an intention, express or implied, to take the land, then the implied agreement to pay therefor must necessarily follow.

In the case of *Sanguinetti v. United States, supra*, the Court said (pp. 149, 150):

* * * It was not shown that the overflow was the direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the Government.

However, again quoting from *Goodman v. United States, supra*, the Court said (p. 503):

On the other hand, there is a long line of authorities to the effect that where an improvement in the river is for the purpose of narrowing the river to create a constricted channel, or to otherwise improve navigation, the damages resulting from such work do not constitute a taking, but are consequential. *Northern Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336 (1878); * * * (And cases cited at top of page 503, 28 F. Supp.)

In the cases before the Department, it does not appear that there has been a permanent invasion of the land of any of the claimants. The invasion, if any, is intermittent and incidental and one not contemplated by the Government at the time the reservoir was constructed. No intention to take the land, express or implied, has been shown nor can such an intention be implied from the facts submitted and known. It is my opinion that a consideration of all the facts and circumstances

does not justify the finding of a taking, either express or implied, in these cases.

No basis for recovery under existing law being apparent, there has been no attempt made to survey the reasonableness of the damages claimed or the sufficiency of the evidence submitted in this respect.

A careful examination of the record indicates that the damage was not caused by the negligence of a Government officer or employee and therefore that it is not within the provisions of the act of 1922, *supra*; that the damage was not caused by the operations of a Government officer or employee in the construction, operation or maintenance of an irrigation works and so cannot be paid under the current appropriation act, *supra*; that there was no actual invasion of land justifying the finding of an implied taking and that there was no implied contract to pay as required to recover under the Tucker Act, *supra*. The claims therefore should be rejected.

Approved:

E. K. BURLEW,

First Assistant Secretary.

ENFORCEMENT POWERS OF COAL MINE INSPECTORS OF BUREAU OF MINES

Opinion, December 12, 1941

BUREAU OF MINES—COAL MINE INSPECTORS—RIGHT OF ENTRANCE TO MINES— REPORTS OF MINE OWNERS—INJUNCTION TO ENFORCE.

Refusal to admit an inspector of the Bureau of Mines to a coal mine is a violation of the act of May 7, 1941 (55 Stat. 177). If unopposed by physical force, an inspector may enter a coal mine in spite of the opposition of the owner, but the use of force to gain entrance is not justified. Entrance to mines and reports from owners may probably be compelled by injunction.

MARGOLD, *Solicitor:*

At a recent conference between representatives of the Bureau of Mines and members of the Solicitor's Office the question was raised as to what enforcement or police powers inspectors of the Bureau of Mines will have under the act of May 7, 1941, in regard to health and safety in coal mines (55 Stat. 177). In particular it was desired to know what representatives of the Bureau of Mines may do to gain entrance to a mine if entrance is refused, and to obtain information as to mine accidents if the furnishing of reports is refused.

The relevant powers which the act confers on the Secretary of the Interior, acting through the Bureau of Mines, and the inspectors of the Bureau are few, and may be stated as follows:

1. To make or cause to be made inspections and investigations in coal mines, the products of which regularly enter commerce or the

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operations of which substantially affect commerce, for the purpose of obtaining information relating to health, safety, and accidents, as particularly specified in the act (sections 1 and 2).

2. For the purpose of making said inspections and investigations, representatives of the Bureau of Mines "* * *" shall be entitled to admission to any coal mine the products of which regularly enter commerce or the operations of which substantially affect commerce * * *" (section 3).

3. To request of owners, lessees, agents, managers, superintendents, or other persons having control or supervision of such coal mines, information concerning accidents (section 5).

4. To cooperate with the official mine inspection or safety agencies of the several States and territories, and, with the consent of the proper authorities thereof, to utilize the services of such agencies in connection with the administration of the act (section 7).

5. To designate other bureaus and offices in the Department of the Interior to cooperate with the Bureau of Mines in the execution of the act (section 7).

The investigatory powers conferred on the Department and its representatives necessarily imply correlative duties on the part of owners and their agents. In the case of the power to request information concerning accidents, the act expressly states that the owner or his agent "* * *" shall furnish "* * *" such information. In respect to the power to enter the mine, the act does not in terms impose upon the owner or his agents the duty to admit. However, the only penalty imposed by the act is for refusal to admit to the mine, the penalty being that one who so refuses "* * *" shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding \$500 or by imprisonment not exceeding 60 days, or by both" (section 4).

The way in which these powers on the part of representatives of the Bureau of Mines and the duties on the part of owners and their agents are stated, and the provision or failure to provide for a penalty for violation, have direct bearing on the methods that may be used to enforce the powers and duties.

With respect to gaining entrance to the mine, the act provides that representatives of the Bureau "* * *" shall be entitled to admission "* * *;" and imposes penalties upon anyone "* * *" who refuses to admit "* * *" them. A physical encounter between an inspector on one side and the owner or his agent on the other is not a necessary element of a violation of the act in regard to entry of the mine. The act is violated when the owner, his agent, or anyone else, by word or act, refuses admission to an inspector. Upon this

occurrence the criminal proceedings contemplated by the act may be instituted, and the penalty imposed upon conviction.

Of course, the weakness of this proceeding is that it does not afford a summary and certain method of getting into the mine. The penalty provided is comparatively mild, and not such as to inspire much fear of violating the act. The question inevitably arises if entry can be gained in spite of opposition of the owner or his agents.

If the threat of criminal prosecution under the act for refusal to admit is deemed to be or is in fact insufficient, two other possibilities remain for gaining summary entrance. In the first place, an inspector, in spite of opposition of the owner or his agents, may enter the mine if he is not physically opposed, and if he can do so without the use of force. As he would be entering under an express statutory privilege or right, he would not be a trespasser upon land. In the Restatement of the Law of Torts, section 211, the rule is stated as follows:

A duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority in so far as the entry is reasonably necessary to such performance or exercise, if, but only if, all the requirements of the enactment are fulfilled.

It may be seen that in entering in spite of the opposition of the owner or his agents, the first care of the inspector must be that he enters strictly in conformance with the power conferred by the statute under which he is working. For instance, the mine must be one that is subject to entry under the terms of the statute; the time and circumstance should be reasonable; the purpose of entry must be to inspect and investigate under the terms of the statute.

The foregoing contemplates no physical opposition on the part of the owner or his agents and no necessity for the use of force on the part of the inspector. The problem remains, as to what force, if any, representatives of the Bureau of Mines may use to gain entrance for the purposes of the act. It is believed that representatives of the Bureau would not be justified, in the absence of a court order or writ, in using any force whatever to gain entrance to the mine, and that they will be trespassers if they do so. The rule is stated (Restatement of Torts, section 211, Comment m, p. 534) as follows:

Whether a privilege to enter land pursuant to a legislatively created duty or authority carries with it the subsidiary privileges to use force to the person and to break and enter an enclosure, a building or even a dwelling, depends on the provisions of the statute. Many statutory duties or authorities deal with situations in which there is a corresponding common law duty or authority. If so, in the absence of a specific statement in the statute, the fact that there is or is not such a subsidiary privilege attached to the corresponding common law privilege to enter land is of importance in determining whether or not the statutory privilege carries with it such a subsidiary privilege.

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In respect to the foregoing comment, there was no common law duty or authority to enter coal mines to inspect and investigate, and so no possible subsidiary common law privilege to use force or to break and enter enclosures or buildings to accomplish entry. It follows that no right to use force to gain entrance under the terms of the present act can be inferred from anything in the common law. And as this statute does not in terms provide for the use of force, if the right to use it exists at all, it can be only by reason of inference from or construction of some expression in the statute. This statute does not provide much from which to draw any such inference or to make such construction. The language is that representatives of the Bureau " * * * shall be entitled to enter any coal mine * * *" and provides penalties for refusal of admission. It is hard to find in these words anything more than the creation of a statutory right of entry, without any suggestion or inference of any right of physical enforcement of the power. The language used in the act, "entitled to," is often used with reference to property rights, and even an owner of property, entitled to possession, has no right to enter by force against one who is in possession under a claim of right. It would seem that if it had been intended to confer upon the Bureau of Mines and its inspectors any right to force entrance, this would have been expressed in suitable language in the act.

In the case of several other Federal agencies the functions of which involve inspections and investigation, the Federal act under which they work affords the officers a much greater degree of protection than does this health and safety act at hand. In those cases, the Federal statutes impose severe penalties for interfering with the inspection officers in the performance of their official duties. See the following:

- 8 U. S. C. sec. 152, *re* immigration officers;
- 18 U. S. C. sec. 118, *re* Bureau of Animal Industry;
- 18 U. S. C. sec. 121, *re* internal revenue officers;
- 18 U. S. C. sec. 628, *re* service of search warrants;
- 18 U. S. C. secs. 253, 254, *re* various specified officers.

In this health and safety statute for coal mines there is no such Federal provision imposing penalties for interference in general with performance of official duties by representatives of the Bureau of Mines.

It is true that for assaults upon inspectors of the Bureau of Mines prosecutions could be instituted in the State courts, but this does not provide so certain and effective a remedy as the Federal statutes above referred to in the case of various other agencies of the Government.

It may be seen from the foregoing that the right of inspectors of the Bureau of Mines to force their way into any mine is at best doubt-

ful and uncertain. There remains the question whether entrance could be enforced by application to a court for some sort of summary order and ancillary writ directed to a police officer. The act does not in terms provide any such remedy. The most likely petition that can be suggested is one for an injunction.

Ordinarily, courts of equity do not have jurisdiction in criminal matters. Another way to state the rule is that ordinarily an injunction will not be granted to prevent crime (Hughes, Federal Practice, sec. 1060; 32 C. J. 275, sec. 438, *et seq.*). However, "where an injunction is necessary for the protection of public rights, property or welfare, the criminality of the acts complained of does not bar the remedy by injunction" (32 C. J. 279, sec. 442). The rule above stated is based on cases where the act complained of was in violation of some statute, but was also detrimental to some public or private right, such as the following: dangerous use of explosives; obstructing a ditch; polluting a stream; obstructing a highway; unlawful practice of medicine.

A leading case on the granting of injunctive relief to the Government to enforce the observance of law is *In Re Debs*, 158 U. S. 565 (1894). In this case an injunction was granted against a labor union and its officials to restrain interference with rail traffic in and out of Chicago. The court uses language much quoted in later cases as follows (p. 584):

Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

In the three cases of *United States v. Shissler*, 7 F. Supp. 123 (N. D. Ill., 1934), *State v. Knudtsen*, 121 Nebr. 270, 236 N. W. 696, and *State v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 117, injunctions were granted upon the application of the Government to enforce compliance with the various statutes involved; but the force of these authorities is somewhat weakened by the fact that in each case injunction was one remedy provided by statute. In the *Shissler* case an injunction was granted under the provisions of the Agricultural Adjustment Act to prevent dealers in milk from doing business in violation of the act after their licenses had been revoked. The court made no reference to the fact that the statute provided for its enforcement by injunction, nor did it discuss the grounds upon which it granted that form of relief. In the *Knudtsen* case an injunction was granted to prevent interference with officers of the State's Department of Agriculture in applying the tuberculin test to cattle. The court

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indicated that it did not rely particularly on the fact that the statute provided in terms for its enforcement by injunction. In the *Newark Milk Co.* case an injunction was granted upon application of the State to enforce compliance with a milk control act. Here, also, injunction was one of the statutory remedies provided; but the court plainly indicated that it would grant the relief anyhow. The court said:

Moreover, the milk business, as will be hereafter pointed out, is affected with a public interest; and it is the settled rule in this state that equity may intervene to restrain a course of conduct, in respect of a business of this character, which tends to affect the public interest injuriously. [p. 121].

It would seem that the coal business is at least as much "affected with a public interest" as is the milk business, if this, by itself, is sufficient to warrant the granting of injunctive relief.

In *United States v. American Bond and Mortgage Co.*, 31 F. (2d) 448 (N. D. Ill., 1929), an injunction prohibiting radio broadcasting without license under the Radio Act of 1927 was approved. The action for the injunction was brought without reference to any statute providing for it, and in this respect the court particularly remarked that:

The Attorney General, by virtue of his office, may bring this proceeding, and no statute is necessary to authorize the suit (citations) [p. 450].

However, in this case the court places the right to an injunction largely on the ground that operation without a license amounts to a public nuisance. In this respect the court says:

The persons affected are numerous and widely separated and their injuries severally may be small. The interference complained of amounts to a public nuisance and is within the jurisdiction of equity because of the irreparable damage to individuals and the great public injury which are likely to ensue. That the acts complained of may be violations of the criminal law also does not destroy the jurisdiction of equity [p. 450].

In *State v. Ak-Sar-Ben Exposition Co.*, 121 Nebr. 248, 236 N. W. 736, an injunction was allowed to restrain defendants from operating a lottery and gambling device in violation of statute. Here the statute imposed penalties for its violation, and it does not appear that the injunction was granted under the terms of any statute providing for this remedy. The court quotes with approval from *United States v. Debs, supra*. As in the *Ak-Sar-Ben* case, however, the court rests its decision largely on the ground that the acts enjoined amounted to a public nuisance.

We now come to a case which is significant in that an injunction was granted at the instance of the State to enforce compliance with a law the violation of which plainly did not amount to a public nuisance, and the decision in which was not put on that ground, and was not for-

tified by any statutory provision for remedy by injunction. The case is *Funk Jewelry Co. v. State*, 46 Ariz. 348, 50 P. (2d) 945, in which an injunction was granted to prevent violation of the State statute regulating the practice of optometry. The court put the decision solely on the ground of public health and welfare, as follows:

The optometry law is one passed for the general welfare of the people of the state. Its purpose is to protect the health of the state's inhabitants, and, while the state may not have any pecuniary interest in the enforcement of the law, it has a very much higher interest, and that is the protection of the health and well-being of its people [p. 947].

The court further said:

The civil process of injunction, as a rule, may not be used to prevent persons from committing crime, but where the crime is a public nuisance, or affects the interests of the state, or those entitled to protection against its commission, injunction will lie [p. 946]. [Italics supplied.]

The principles upon which the *Funk* case rest are quite similar to those involved in the enforcement of the health and safety act at hand, which seems to affect the general welfare, health, and safety, in an even wider degree. However, in the *Funk* case the statute did not provide any penalty whatever for its violation, and the court indicated that this fact had some bearing on its willingness to grant the injunction.

Finally, in *State v. Allen*, 180 Miss. 659, 177 So. 763, is found a case in which a mandatory injunction was granted at the instance of the State to enforce compliance with a statute which provided a penalty for its violation, and, as far as the decision discloses, did not provide for the remedy by injunction. From a procedural standpoint, the case is a good authority for allowing an injunction to enforce the provisions of the health and safety act at hand. It is also pertinent from a substantive standpoint, in that the purpose of the mandatory injunction was to compel compliance with the requirements of the State sales tax law, including the keeping of records, violation of which prevented the State officers from effectively assessing and collecting the tax. Applying the case to the matter at hand, it may be seen that refusal of admittance to a mine, or refusal to make reports of accidents, prevents the Bureau of Mines from effectively carrying out the health and safety provisions of the act. The court says:

2. The appellees are engaged daily in making sales of merchandise on each of which arises a tax payable to the appellant at a fixed time thereafter. According to the allegations of the bill of complaint, the efficiency of the appellant's tax collector in ascertaining and collecting the tax is being impaired by the failure of the appellees to obey the statute. The appellant being without an adequate remedy at law therefor, a ground for relief by injunction is thereby presented [p. 764].

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It may be seen from the foregoing authorities and discussion that the question of granting an injunction to enforce compliance with the Federal statute for health and safety in coal mines depends in general upon three procedural and substantive questions, as follows:

1. Is any statutory provision made for enforcement by injunction?
2. Is the penalty provided for refusal of admission to any mine intended to be the exclusive remedy for any violation of the statute?
3. Is the enforcement of the provisions of the statute a matter of such public interest, or so affecting the general public welfare, health, or safety, as to justify the extraordinary remedy of injunction?

Although there is no statutory provision for the enforcement of the act by injunction, yet it seems doubtful if the comparatively mild remedy provided for one only of its provisions (entry to the mines) is necessarily designed or intended as a sufficient or exclusive remedy for the enforcement of the whole act. On the contrary, the enforcement of the act seems to be a matter of such general and public welfare as to invite its enforcement by injunction, and the provisions are such that injunction readily lends itself to their enforcement.

Although the cited cases indicate the propriety of injunction as a remedy to aid the Government in the enforcement of statutes relating to public welfare, health, and security; yet *State v. Allen, supra*, provides the closest analogy that has been found for securing an injunction and forcing compliance with the duty of owners or their agents to furnish upon request information regarding accidents. The fact that no penalty is provided for violation of this provision seems to enhance rather than detract from the likelihood of securing an injunction for its enforcement. In view of the public interest in the promotion of health and safety in coal mines, and its importance to the general public welfare and national security, it is believed that compliance with this provision, as well as compliance with the provision for entry to the mines, is properly enforceable by injunction. In the nature of the case, it is impossible to predict with certainty.

Although the problem at this time is hypothetical, if the Bureau of Mines recommends such action, this Department can address an inquiry to the Department of Justice to determine whether that Department would be willing to direct its attorneys to institute proceedings for an injunction should the occasion arise.

If information or reports regarding accidents cannot be secured in any other way, it is possible that they could be secured by cooperation with the mine inspection or safety agencies of the various States, as provided in the act (sec. 7). Of course, the effectiveness of this method would depend upon the cooperation of the State agencies, which could not be compelled.

Such reports might be compelled also by cooperating with the Bituminous Coal Division, pursuant to section 7 of the mine safety act, and section 14a of the Bituminous Coal Act. The Division has the power “* * * to investigate * * * the safe operation of mines for the purpose of minimizing working hazards, and for such purpose shall be authorized to utilize the services of the Bureau of Mines.” The Coal Act further provides (sec. 8a) that the Division, “* * * for the purpose of conducting its investigations, shall have full power to issue subpoenas duces tecum, * * *”; and (sec. 10) the Division “* * * may require reports from producers * * *” The penalty for failure to file a required report is a fine of \$50 for each day of the continuance of such failure, to be recovered in a civil suit at the instance of the Attorney General (sec. 10c).

In view of the foregoing analysis it is suggested that if this act for health and safety in coal mines is to be strengthened some time in the future, the following additions be considered:

1. State in positive and affirmative terms the right of inspectors to enter coal mines and the duty of owners and their agents to admit them.
2. Provide that failure or refusal to provide facilities for entering constitute a refusal of admission and an interference with the duties of inspectors.
3. Provide severe penalties for any interference with inspectors in the performance of their official duties.
4. Provide for enforcement of the act by injunction in addition to all other remedies.

EXTENT AND METHOD OF REVIEW BY SECRETARY OF THE INTERIOR OF GENERAL MINIMUM PRICE PROCEEDINGS OF BITUMINOUS COAL DIVISION

Opinion, December 12, 1941

BITUMINOUS COAL DIVISION—ADMINISTRATIVE REVIEW OF PRICE FIXING DECISIONS OF DIVISION OF DEPARTMENT—RIGHT OF APPEAL—SUPERVISORY AUTHORITY IN SECRETARY OF INTERIOR—DISCRETION OVER EXTENT AND METHOD OF REVIEW.

The allowance of appeals to the Secretary from the orders of the Director by dissatisfied parties is not required by law.

It would be proper as a matter of law for the Secretary to review the docket to determine whether the conclusions of the Director conform with the law and general administrative policy.

The determination of the relative advantages and disadvantages of review by appeal over other methods of review is an administrative function for the discretion of the Secretary.

MARGOLD, *Solicitor*:

You [Secretary of the Interior] will shortly be called upon to consider whether and in what manner review by you should be given to

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the determinations of the Bituminous Coal Division in General Docket No. 21. At the instance of the General Counsel of the Bituminous Coal Division I am advising you of my opinion as to the legal requirements respecting such review.

The Bituminous Coal Division is nearing completion of phase (a) of General Docket No. 21. This docket is a general proceeding: (a) to determine what changes in the weighted average of the total costs of production in minimum price areas have occurred since the cost determinations made by the National Bituminous Coal Commission for the original establishment of minimum prices, and (b) to make such revision of the minimum prices as may be indicated. Phase (a) of the proceeding is restricted to the first part of the problem, namely, the determination of the extent of the changes in costs. Hearings have been held before the examiner at which all parties interested were permitted to appear and submit documents; the examiner's report has been prepared; and hearings on exceptions to the report have been held before the Director.

The question arises what review, if any, should be given by the Secretary of the Interior to this proceeding, including either or both phases (a) and (b). You will remember that after the Director issued his order of August 8, 1940, at the conclusion of the proceeding before the Bituminous Coal Division in General Docket No. 15, fixing minimum prices, review by the Secretary occurred through a process of appeals by parties dissatisfied with the Director's findings. More than 100 such parties appealed. This review resulted in an order of the Secretary (dated September 24, 1940) modifying the Director's order in part and approving the Director's order as modified. Preceding this review there was an interchange of memoranda between the Director and the Secretary in which it was agreed that appeal to the Secretary was unnecessary as a matter of law but was desirable as a matter of administrative expediency because of the general importance of the subject and in order to eliminate any possible legal doubt (memoranda of December 6, 1939, from the Director to the Secretary; and of December 8, 1939, from the Secretary to the Director). The same procedure was followed in connection with General Docket No. 12, which was a proceeding to prescribe maximum discounts by code members to distributors and to establish regulations governing distributors in the resale of coal.

I have inquired into the question whether allowance of appeals to the Secretary from the orders of the Director, particularly in general dockets, is a legal necessity and have reached the conclusion that there is no such right of appeal in parties to proceedings before the Division and no duty upon the Secretary to hear such appeals. The question is a novel one in administrative law because the administrative or-

ganization in this situation is novel. Apparently there is no other instance where a price-fixing or rate-making agency is under the direction and supervision of a Department head. Moreover, the cases defining statutory provisions for "direction and supervision" in the head of a Department deal with the power and privilege of the Secretary to exercise the supervision he has chosen to exert and do not define the minimum duty of the Secretary. Thus, in the various cases concerning the supervision of the General Land Office it is recognized that the Secretary has authority to supervise the public business by reviewing, reversing, annulling, and amending all proceedings in the Department relating to the disposition of the public lands and that the procedure available to him is such as his discretion may dictate. See *Knight v. Land Association*, 142 U. S. 161, at 177, 178; *Orchard v. Alexander*, 157 U. S. 372; *Snayder v. Sickles*, 98 U. S. 210. I have found no holding that the Secretary is bound to hear appeals by dissatisfied individuals wherever he has a statutory power of supervision.

The nature of the relationship between the Secretary and the Bituminous Coal Division is indicated in the purpose and language of Reorganization Plan No. II (5 U. S. C. A., following sec. 133t). The report of the President's Committee on Administrative Management, presented to the President on June 8, 1937, which report underlay the proposals for reorganization later presented by the President to Congress, recommended that in the placement of independent agencies within executive departments, flexibility in the relationship should be observed and the agencies should be permitted to retain a semi-autonomous position and not necessarily be placed on the same level with other bureaus. The purpose of the reorganization of the National Bituminous Coal Commission is stated in the President's message to Congress on Reorganization Plan No. II, in which he explained that he sought to attain coordination in this Department of the conservation of fuels. Section 4 (a) of the Reorganization Plan provides for the transfer as follows:

The functions of the National Bituminous Coal Commission (including the functions of the members of the Commission) are hereby transferred to the Secretary of the Interior to be administered under his direction and supervision by such division, bureau, or office in the Department of the Interior as the Secretary may determine.

These considerations lead to the conclusion that the Reorganization Plan contemplates administration of the Coal Act by a division which stands in the stead of the Coal Commission, but adds a supervision over that administration for the purpose of coordinating coal administration with related activities of the Department. The Secretary's function is not the administration of the act, but the supervision of its administration by others. The issuance of price orders is part of

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the administration of the act; the supervision of their issuance is a matter of Secretarial discretion. Nothing in the Reorganization Plan makes the exercise of supervision in any particular form or in any particular circumstance mandatory.

This has been the consistent interpretation of the Reorganization Plan and of the Coal Act by this Department. In creating the Bituminous Coal Division the Department, pursuant to the Plan, gave it authority to administer the Coal Act, and has subsequently recognized the Division as substituted for the Commission for all purposes of the Coal Act, including the issuance of price orders.

Because the Commission is now the Division, a principle announced in *Butterworth v. United States*, 112 U. S. 50, may serve as a guide. That case held that because appeal from the Patent Office directly to the courts was provided by statute no right of appeal to the Secretary of the Interior who had supervision and direction of the office could be asserted. The National Bituminous Coal Act provides for appeal from the orders of the Commission to the Circuit Courts of Appeal (sec. 6 (b)). As a result of the reorganization, appeals lie direct to the Circuit Court of Appeals from the orders of the Director. Individual litigants have already appealed to the courts from the orders of the Director in a number of cases in which no action by the Secretary was sought or taken. The existence of this judicial appeal from the orders of the Director is an important factor in my conclusion that no right of appeal to the Secretary can be claimed by any party to the Division's proceedings. The Court in the *Butterworth* case went so far as to assert that because of the provision for judicial appeal the Secretary had no power to permit appeal to him. I consider that the view thus expressed as to the power of the Secretary is not controlling in the issue now presented, for the reason that the Patent Office was created by statute while the Division is the creation of the Secretary who was empowered by the Reorganization Plan to determine the extent of its powers. Therefore, I think that you would be legally justified either in granting or in denying to individual parties a right of appeal from the Bituminous Coal Division.

If some review by you of General Docket No. 21 is deemed advisable such review would be in keeping with your supervisory authority, since the docket is a matter of general public interest. The question then presented would be whether the review should be by appeal of individual parties or by some other method. The advantages which attach to review by appeal are (1) the avoidance of law suits by a possible reduction of the number of dissatisfied parties; and (2) the avoidance of question in court of the need for Secretarial action on orders of the Director. The first advantage has more relevance to phase (b) than to phase (a) of the docket, since the order of the

Director at the conclusion of phase (a) does not determine prices for any individual producer and is, in my opinion, an order which is only preliminary in character and therefore not subject to judicial review. The second advantage, to my mind, merely postpones ultimate decision as to the necessity for permitting review by appeal to the Secretary. Certainly, the more often precedent is created for such appeals, the less likely will be any future departure from the practice. Thus far in the proceedings in General Docket No. 21 there has been no disposition by the coal industry to demand such appeal, nor has there been any disposition by the industry in individual dockets to seek such appeal before utilizing the judicial remedy.

Review by appeal has certain disadvantages. It may result in substituting an order of the Secretary determining cost changes for the order of the Director, and thus cast doubt on the validity of other orders of the Director which are not appealed. It duplicates hearings and arguments before the division and to that extent negatives the economy and efficiency and prevention of duplication of effort sought by the President in the reorganization plans. Particularly as it relates to the fixing of individual prices, it directs attention to the minutes in the docket of interest to the individual party, and may fail to raise questions of general public interest and major administrative policy.

It would be proper as a matter of law, in my opinion, for you as Secretary to review the docket as you review other matters arising in the Department and presented for your consideration. Under this suggestion the Director would submit for your review the record in Docket No. 21, including the transcript of hearings, copies of the briefs filed, the examiner's report and the Director's findings and order, for your determination whether the conclusions conform with the law and general administrative policy. An appropriate procedure could readily be devised for calling particular attention to the decisions on questions of law and policy made by the Division and the objections thereto of interested parties. If upon your review you found yourself in doubt as to the correctness of the decision on any such question, it would be proper and advisable for you to ask for oral or written arguments on such question by the parties in interest. If this form of administrative review were agreed upon, the Director would provide in his order that it would become effective upon its approval by you. If you approved the order of the Director, it would thereupon become effective. If you did not approve the order, you would return it for reconsideration by the Director in the light of your specific objections of law or policy. This method of review would be particularly appropriate at the close of phase (a), since the important questions in that phase consist of the determination of basic principles in the measurement of costs.

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The procedure of review of the record I have outlined would be fully consistent with the procedural requirements which the Supreme Court in the first two *Morgan* cases (298 U. S. 468; 304 U. S. 1) found to be necessary in an administrative hearing, which, like the hearing in Docket No. 21, is provided for by statute and is partly judicial and legislative in character. The first case held that the lower court erred in excluding an allegation that the Secretary of Agriculture who determined the maximum rates for packers and stockyard transactions had not heard or considered the evidence. The statutory requirement of a full hearing was held not to be met unless the officer authorized to determine the rates considered the evidence. With respect to General Docket No. 21 it is the Director who issues the order, after not only considering the evidence but hearing argument. The Secretary will not determine the rates nor weigh the evidence nor make findings, but will assure himself of the correctness of the decisions of law and policy made by the Division, returning to the Division the order for redetermination of the rates in the light of any such correction. In any event, if the procedure outlined is followed, the Secretary's action will be taken with the entire record before him and after receiving argument upon any point on which he might differ with the Division. Nor would the review be contrary to the second *Morgan* case which held that private persons are entitled to see and to combat a proposed order of the Government establishing rates. This opportunity has already been afforded the industry and consumer interests in the written and oral arguments before the Director on the Examiner's report, which report was provided to all interested parties. If, in addition, parties are permitted to argue questions of law and policy before the Secretary upon his invitation, as I suggest, after being informed of the Director's order, compliance with the *Morgan* principles would be beyond question.

For the foregoing reasons it is my opinion that General Docket No. 21 may be appropriately reviewed by you without inviting or entertaining formal appeals by individual dissatisfied parties. Conceivably a court might come to another conclusion on the right of parties to appeal. Particularly because of this possibility, the Acting Director of the Division is inclined toward review by appeal as the desirable method of review. The weighing of the relevant advantages and disadvantages and the determination of the best procedure are administrative functions which I must leave to your discretion.

For your information and convenience I am reporting herewith the views of the Acting Director as he has stated them to me:

The review procedure in General Docket No. 15 was not contested by any of the parties. The circumstances since the close of General Docket No. 15 have not changed. Therefore the same procedure should be followed unless (a) there

is some legal objection to that procedure, or (b) you do not desire to review the proceedings after having appraised the importance of the issues, the administrative burden that such review would impose on you, and the increased hazard of litigation which might result in the absence of review by you. It is true that the risk involved in General Docket No. 21 is that absence of review by you may prompt a court to upset the anticipated price revision; the unrevised price structure would remain until lawfully changed. The risk in General Docket No. 15 was that absence of review by you might prompt a court to prevent altogether the establishment of the minimum price structure despite the costly effort which had been expended for several years. Moreover, in General Docket No. 15, many parties to the proceeding specifically raised the question of your power to confer upon the Director the authority to make a final determination of minimum prices; no document filed in General Docket No. 21 raises this issue, although it has been clearly intimated in oral argument by at least one party that it expects review by you. It is none the less true that successful litigation with the attendant delays in the establishment of the revised prices might lend a helping hand to the arguments already presented to the Congress that the Act is too difficult and cumbersome to administer.

In the interest of assuring to the determination of General Docket No. 21 a finality as free from doubt in respect to procedural matters as the determination in General Docket No. 15, I believe that there is much to recommend the following of a procedure similar as nearly as possible to the procedure followed in General Docket No. 15. That judgment is, of course, subject to any legal considerations which might make following of the General Docket No. 15 procedure objectionable, as well as to your views as to the need for and importance of review in the light of the time and effort which would necessarily be consumed by you in the process of any such review.

In view of the considerations which I have outlined in this memorandum, I do not concur in the judgment of the Acting Director as to the advisability of only the one type of review, that by appeal.

THE CONSTITUTIONAL POWER OF THE STATE OF MISSISSIPPI TO DONATE A RIGHT-OF-WAY OVER LANDS IN SIXTEENTH SECTIONS TO THE UNITED STATES

Opinion, December 30, 1941

NATIONAL PARKS—RIGHTS-OF-WAY OVER SIXTEENTH SECTIONS IN MISSISSIPPI.

The acquisition of fee simple title to lands in sixteenth sections in the State of Mississippi is not authorized by its constitution of 1890. Right-of-way easements over sixteenth sections in Mississippi may be acquired by the Government, pursuant to the act of May 18, 1938 (52 Stat. 407), as amended by section 3 of the act of June 8, 1940 (54 Stat. 249, 250).

MARGOLD, *Solicitor*:

There has been presented for my consideration and opinion the question whether the State of Mississippi can donate to the United States for the Natchez Trace Parkway a valid title to any lands or easements for rights-of-way over lands in sections 16 in the State of Mississippi.

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This Parkway, in traversing 315 miles of land in Mississippi, in addition to land in Alabama and Tennessee, will cross 14 sixteenth sections in the State of Mississippi. The total area of the proposed rights-of-way in these 14 sections amounts to about 1,000 acres. In each of the sections affected the proposed rights-of-way involve the use of not less than 40 acres nor more than 125 acres. I have been informed that these rights-of-way do not duplicate any existing highway but that the establishment of the proposed Parkway will create additional modern transportation facilities. The grant of rights-of-way will thus, according to the information available to this Department, result in increasing, rather than decreasing, the value of the sixteenth sections of land crossed by the Parkway.

Although the easements are to be acquired by the Government without monetary consideration, it is expected that the State of Mississippi, as a result of the greater usefulness and accessibility of the lands in sixteenth sections adjoining the proposed rights-of-way, will profit by a resulting enhancement in the land values. The acquisition of the easements is authorized by the act of May 18, 1938 (52 Stat. 407), as amended by section 3 of the act of June 8, 1940 (54 Stat. 249, 250). Under this act, as amended, the Secretary of the Interior is authorized to approve and accept on behalf of the United States "title to any lands and interests in land heretofore or hereafter conveyed to the United States for the purposes of the Blue Ridge or the Natchez Trace Parkway, or for recreational areas in connection therewith."

A series of acts were passed by the legislature of the State of Mississippi empowering the State and county authorities to donate to the United States any lands, rights-of-way, and scenic easements required for the Natchez Trace Parkway.¹ There can be no doubt from a reading of these acts that the State was granted clear and adequate power by the legislature to donate land or interests in land to the Government.

Now, it is necessary to determine whether the legislature of Mississippi, in passing the acts just noted, contravened the Constitution of Mississippi. Section 211 of the 1890 Constitution of Mississippi, provides:

The legislature shall enact such laws as may be necessary to ascertain the true condition of the title to the sixteenth section lands in this state, or land granted in lieu thereof, in the Choctaw purchase, and shall provide that the

¹ Act of February 14, 1936, Miss. Laws, 1936, ch. 195, p. 421; Act of March 26, 1936, Miss. Laws, 1936, ch. 201, p. 438; Act of September 19, 1936, Miss. Laws, 1st Extra Sess. 1936, ch. 7, p. 37; Act of February 7, 1938, Miss. Laws, 1938, ch. 204, p. 503; House Concurrent Resolution No. 34, Miss. Laws, 1938, ch. 385, p. 763; Act of May 8, 1940, Miss. Laws, 1940, ch. 151, p. 287.

sixteenth section lands reserved for the support of township schools shall not be sold, nor shall they be leased for a longer term than ten years for a gross sum; but the legislature may provide for the lease of any of said lands for a term not exceeding twenty-five years for a ground rental, payable annually; and, in case of uncleared lands, may lease them for such short term as may be deemed proper in consideration of the improvement thereof, with right thereafter to lease for a term or to hold on payment of ground rent.

The Supreme Court of Mississippi has interpreted section 211 of the constitution as permitting the sale of standing timber, which is an interest in real property, on section 16 lands reserved for the support of township schools. *L. N. Dantzer Lumber Co. v. State*, 97 Miss. 355, 53 So. 1 (1910). And in the case of *Washington County v. Board of Mississippi Levee Commissioners*, 171 Miss. 80, 156 So. 872 (1934), section 16 lands were permitted to be used for levee purposes. In *Board of Supervisors of Covington County v. State Highway Commission*, 188 Miss. 274, 194 So. 743 (1940), construing the constitution, the court held that a highway system is essential for school purposes, and if not specifically authorized may be necessarily implied. The court said:

* * * The Legislature has the power to deal with sixteenth sections in such way as to make them accessible to the ways of travel, and it does not divest the inhabitants of the township of the proper use of their property in any constitutional sense. The provisions of Section 211 of the Constitution were not designed to prevent laying out highways through sixteenth sections * * *. We think it was the intention, as it has been practiced, to permit highways to be laid through sixteenth sections for the general good and for the special benefit of the inhabitants * * * [p. 748].

I have given careful consideration to *Bridgforth v. Middleton*, 186 Miss. 185, 186 So. 837 (1939); *Yazoo Mississippi Valley R. R. Co. v. Sunflower County*, 125 Miss. 92, 87 So. 417 (1921); *Pace v. State ex rel. Rice*, 191 Miss. 780, 4 So. (2d) 270 (1941); *Moss Point Lumber Co. v. Board of Supervisors of Harrison County*, 89 Miss. 448, 42 So. 290, 315 (1906), and the opinion of January 27, 1908 (Biennial Rept. Atty. Gen. Miss., 1907-09, p. 95). None of these authorities compel a holding that the grants of the easements for the rights-of-way here involved are in contravention of the Constitution of Mississippi.

It should be observed that the constitution precludes the conveyance of the fee title of section 16 school lands but it does not preclude the disposition of an easement for a right-of-way which, I have been informally advised, will be administratively acceptable as the State of Mississippi will remain the record owner of a fee simple title, subject to an outstanding easement in the United States. Since the State will be permitted to retain the fee, the Constitution of the State of Mississippi will not be violated. If it is administratively determined

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by the National Park officials that an easement for a right-of-way over section 16 school lands is sufficient for the purpose for which the land is intended to be used there can be no legal objection to the acquisition of an easement as such an interest in land is authorized by the act of May 18, 1938, as amended by the act of June 8, 1940, *supra*. The acquisition of fee simple title to lands by the Government, which are noted in the memorandum from the National Park Service of December 31, 1940, is unauthorized as it is clear that title to these lands should never pass out of the State. It is suggested that easements for rights-of-way be obtained from the State of Mississippi. The easements for rights-of-way need not necessarily be perpetual, but may be easements for rights-of-way for so long as the land continues to be used for the purpose for which the easements are granted, if such a limitation is administratively acceptable.

It is a fundamental principle of constitutional law that no act of the legislature should be declared unconstitutional unless it clearly contravenes the constitution of a State. I do not think the legislation clearly contravenes the Constitution of the State of Mississippi. In my opinion there is no valid reason for holding the State statute unconstitutional, in view of what the courts of Mississippi have said and in view of the opinion of September 22, 1941, by the Attorney General of Mississippi, and in view of the opinion of December 2, 1941, by the attorney for the State Highway Commission. These opinions constitute the best administrative interpretations of the validity of the statute here involved and would be controlling even if the constitutionality of the statute were doubtful. Nor should I shut my eyes to the motive that has led the legislature of Mississippi to pass clear and unambiguous legislation to effect a cooperative arrangement with the Government to promote the welfare of the people of Mississippi by making school lands more useful and accessible. I feel that the legislature of Mississippi must have determined that the statute it passed did not violate the constitution.

I am reluctant to hold that the legislation under consideration is unconstitutional since the judicial, legislative and administrative branches of the State of Mississippi have spoken in favor of the constitutionality of the act. I am constrained, therefore, to come to the conclusion that easements for rights-of-way over sixteenth section lands in Mississippi may be acquired by the Government.

Approved:

JOHN J. DEMPSEY,
Under Secretary.

**LIABILITY FOR RENT ACCRUING UNDER CANCELED OIL
AND GAS EXCHANGE LEASE**

Opinion, January 8, 1942

**OIL AND GAS EXCHANGE LEASE—CANCELATION—DEMAND UNDER SECTION 2 (a)—
AFTER ACCRUING RENT.**

Upon failure to comply with the provisions of section 2 (a), as amended, of an oil and gas exchange lease, after 30 days' notice to furnish a rental bond, it may be canceled for such reason as of the end of such period although rent would otherwise thereafter accrue, since the lease was then ripe for cancellation. The demand under section 2 (a), as amended, is only for a bond because that section merely authorizes prepayment of rent as a substitute for furnishing a bond. Since there is no demand for rent as such, the forfeiture, being based on another ground, bars the collection of after accruing rent, in the absence of a lease provision preserving rental liability after forfeiture.

MARGOLD, *Solicitor*:

At the request of the Acting Commissioner of the General Land Office, you [Secretary of the Interior] have asked my opinion concerning the answer to a question which may be stated as follows:

Whether, when an oil and gas exchange lease is canceled after rental for the ensuing lease year would have accrued, such rental is a debt due the United States, notwithstanding that the cancellation after notice is based upon a breach occurring prior to the accrual of such rental.

The question arises in this way: These leases were issued in exchange for prospecting permits pursuant to section 1 of the act of August 21, 1935 (49 S. at. 674, ch. 599, 30 U. S. C. sec. 221). They are rent free for the first two years provided that no discovery is made during that period. There is no need, therefore to enforce the rent-security clause of Section 2 (a) of the lease, as amended, in this interval. That section requires that a

\$1,000 bond must be filed not less than 90 days before the due date of the next unpaid annual rental, but this requirement may be successively dispensed with by making payment of each successive annual rental not less than 90 days prior to its due date. In the absence of the payment of the rental in advance as herein authorized, the requirement for the filing of the bond within the time prescribed must be complied with strictly and upon the failure of the lessee to comply therewith the lease shall be subject to cancellation by the Secretary in accordance with the provisions of the lease.

It is the practice of the General Land Office to notify a lessee under this form of lease more than 90 days before the second anniversary of his lease that the bond must be filed or the rent paid not less than 90 days before the rent for the third year will become due. If there is no compliance with this notice, action is begun within the 90-day period directed toward the cancellation of the lease. A decision is served

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upon the lessee, pursuant to Section 7 of the lease, that if the requirement of Section 2 (a), as amended, is not obeyed within 30 days after receipt of decision, the lease will be subject to cancellation without further notice. The 30-day notice period is required by section 17 of the act of February 25, 1920 (41 Stat. 437, 443, ch. 85), as amended by the act of August 21, 1935, *supra*, at 676 (30 U. S. C. sec. 226). This period usually expires before the rental for the third year is due.

At the end of this period, if the lessee has not heeded the decision, the lease is subject to immediate cancellation for failure to file a rental bond. There can be no termination at this point for nonpayment of rent since the amendment to section 2 (a) does not make the rent due in advance but merely *authorizes* its prepayment as a substitute for the bond. The General Land Office encounters no problem if the recommendation that the lease be canceled for failure to file a bond is made to and acted upon by you before the rent for the third year has accrued. Its difficulty arises when, because of the inherent lag in administration, the recommendation to cancel or the cancellation for such a breach is not made until after the rent for the third year normally would have accrued. In such a case, is the rent a debt due the United States, notwithstanding that the lease is canceled for a breach occurring prior to the accrual of the obligation to pay such rent?

This question must be answered in the negative because an oil and gas exchange lease does not provide for the survival, after cancellation, of future liability. The termination of such a lease releases the lessee from all future obligations under it, see *Gardiner v. Butler & Co.*, 245 U. S. 603, 605 (1918); *Hartford Wheel Club v. Travelers Ins. Co.*, 78 Conn. 355, 62 Atl. 207, 209 (1905), including liability for after-accruing rent. *Cannon v. Fifty-Sixth Street Garage*, 45 F. (2d) 110 (C. C. A. 2, 1930); *Burns Trading Co. v. Welborn*, 81 F. (2d) 691, 695 (C. C. A. 10, 1936), *cert. den.* 298 U. S. 672 (1936); *Watson v. Merrill*, 136 Fed. 359 (C. C. A. 8, 1905).

It is submitted that "after-accruing rent" must have the same meaning in ascertaining the effect of a forfeiture as it has in determining whether there can be a forfeiture. In the latter situation, the rule is that a forfeiture is waived if there is either an unqualified demand for rent accruing after the act which is the basis of the forfeiture, *Hartford Wheel Club v. Travelers Ins. Co.*, 78 Conn. 355, 62 Atl. 207, 209 (1905); see *In Re Hook*, 25 F. (2d) 498, 499 (D. C. D. Md. 1928); 2 *Tiffany, Landlord and Tenant* (1912), sec. 194i (1) (b), p. 1387, or a suit for such rent, *Rich v. Rose*, 124 Ky. 669, 99 S. W. 953, 955 (1907), or an acceptance of such rent, *Title Ins. & Trust Co. v. Hisey*, 95 F. (2d) 555 (C. C. A. 9, 1938); *Woollard v. Schaffer Stores Co.*, 272 N. Y. 304, 5

N. E. (2d) 829 (1936); *Stover v. Hazelbaker*, 42 Nebr. 693, 60 N. W. 597 (1894); 1 Tiffany, Real Property, (3d ed. 1939), sec. 207, p. 345; Note, 34 Harv. L. Rev. 203 (1920-21).

Since the assertion of a right to after-accruing rent would bar the forfeiture of the lease, then the forfeiture clearly is a bar against collecting such rent. *Bohning v. Caldwell*, 36 F. (2d) 222, 223 (C. C. A. 5, 1929); *Locke v. Fahey*, 288 Mass. 341, 193 N. E. 26 (1934); *Jones v. Carter*, 15 Mees. & W. 718, 726, 153 Eng. Rep. 1040, 1043 (Exch. 1846); see *Coburn v. Goodall*, 72 Calif. 498, 14 Pac. 190, 195 (1887). The ground of forfeiture in the question presented is the lessee's failure to comply with Section 2 (a) of the lease, as amended, by furnishing a bond in advance to secure payment of the third year's rent. This breach occurred prior to the accrual of such rent. Hence, even though the cancelation is consummated after the rental for the third year normally would have accrued, the Government cannot consider such rent as a debt due it.

Nor is it possible, because the cancelation has not been made before the rental became due, immediately to cancel the lease for failure to pay the rent, making it a debt due to the United States. This is because of the rule that where nonpayment of rent is a ground of forfeiture, a demand for the rent is a prerequisite to the enforcement of a forfeiture. *Henderson v. Carbondale Coal and Coke Co.*, 140 U. S. 25, 33 (1891); see *Prout v. Roby*, 15 Wall. 471, 476-7 (1872); 1 Tiffany, Real Property (3d ed. 1939), sec. 200, p. 332.

Since no demand for the rent *qua* rent has been made pursuant to the lease, this would have to be done in order to comply with this rule. Action on the pending cancelation, therefore, would have to be suspended. This could be done and cancelation be made for nonpayment of rent since your power to cancel is an option (see *Smith v. United States*, 113 F. (2d) 191, 193 (C. C. A. 10, 1940); *American Surety Co. of New York v. United States*, 112 F. (2d) 903, 906 (C. C. A. 10, 1940); 2 Tiffany, Landlord and Tenant (1912), sec. 194d, p. 1369), whose exercise is probably not effective until the final step has been taken. Cf. *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N. Y. 285, 130 N. E. 295 (1921). However, there would be no benefit in adopting this policy and in abandoning the policy now followed by the General Land Office, that of recommending cancelation when there is a failure to provide a rental bond or prepay the rent.

The present policy is based upon the provisions of the lease intended to safeguard the interests of the United States. Section 2 (a) originally required a bond so that, among other things, the United States

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would have adequate security for the rent if not paid when due. The necessity of this is apparent, especially, since these exchange leases were converted from permits issued for "wild-cattling." To ease the burden on these lessees, this clause was amended so as to dispense with the bond if the rent were prepaid each year 90 days before it became due. Laxity in the enforcement of this amended provision would leave the Government without any security for rent.

There can be no doubt that postponement of cancellation until it could be made because of nonpayment of rent is the equivalent of such laxity. Furthermore, by shifting to this ground in the present instances, the General Land Office would have to begin anew the necessarily slow administrative process in order to comply with the requirements of the law and the lease. This would mean expenditures whose net result would be to establish that a debt, most likely uncollectible, was due the United States, as well as to tie up the land for an additional period. It would also entail needless expense in a probably unsuccessful effort to collect the manufactured debt.

A further consideration is the contrary policy which has been followed in the surrender of such leases. Where a surrender is offered, it is accepted by you as of the date of the offer filed in the General Land Office, even though another year's rent would otherwise have become due in the interim between offer and acceptance. There can be no different policy in the case of a cancellation since there is no valid distinction.

There being no sound reason for suspending the process of cancellation once it has been begun, merely because in accounting chronology rent would have become due, it is recommended that a lease which has been submitted to you for cancellation because of the failure to furnish a rental bond should be canceled on that ground. The Commissioner of the General Land Office should be instructed that when a lease is actually canceled for this reason, there is no debt due the United States, and no account, therefore, should be set up against the former lessee looking towards the collection of this item. Since the administrative process is not always of the same length, it would tend to simplify matters if each forfeiture were to be made effective as of the end of the 30-day notice period, at which time each breached lease would become ripe for cancellation.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

EXEMPTION OF MENOMINEE INDIAN MILLS FROM FEDERAL AND STATE TAXATION ON SALES OF OLEOMARGARINE

Opinion, January 8, 1942

MENOMINEE INDIAN MILLS—EXEMPTION FROM STATE TAXATION—FEDERAL TAXATION—FEDERAL AND STATE LICENSES.

The Menominee Indian Mills are not subject to Wisconsin state statutes imposing a license requirement and a sales and use tax on retail sale of oleomargarine.

The Federal oleomargarine tax must be paid on all oleomargarine purchased by the commissary of the Menominee Indian Mills for resale to individual employees.

The Menominee Indian Mills are not subject to the payment of a Federal license fee for retail sale of oleomargarine.

MARGOLD, Solicitor:

In connection with the desire of the commissary of the Menominee Indian Mills to sell oleomargarine, several questions have been referred to me for an opinion. These questions may be formulated as follows:

1. Are the Menominee Indian Mills exempt from the provisions of the Wisconsin statutes requiring the taking out of a license for the sale at retail of oleomargarine and the payment of a sales and use tax on oleomargarine sold at retail.

2. Are the Menominee Indian Mills exempt from the provisions of the Internal Revenue Code requiring (a) the payment of a pro rata tax on oleomargarine; (b) the payment of a license tax for the sale at retail of oleomargarine.

1. Chapter 97, section 42, of the Wisconsin Statutes (1939, 15th edition), provides that a person selling oleomargarine at retail shall obtain a State license at the price of \$25 per year and shall pay a sales or use tax of 15 cents per pound on all oleomargarine sold by him.

This constitutes a regular sales tax of the type dealt with in my opinion of May 8, 1940, 57 I. D. 124, *supra*, in which I held that "purchases made by Indians on Indian reservations are not subject to * * * sales taxes" and that "persons trading with the Indians on Indian reservations are not subject to * * * sales tax laws." A similar result was reached in my opinion of May 31, 1940, 57 I. D. 129, *supra*, where I held that a Wisconsin statute (chs. 443, 518, Wisconsin Laws of 1939), placing an occupational tax on the sale or other disposition of tobacco products and using much the same language as that used in the instant statute, did not apply to tobacco products sold through the commissary of the Menominee Indian Mills to employees for their personal use. For a more detailed analysis of this question, I refer to the discussions contained in those two opinions.

2. (a) Section 2301 of the Internal Revenue Code provides for a tax of one-fourth of one cent or 10 cents per pound of oleomargarine,

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depending on the color. This tax is paid by the manufacturer. Section 3331 provides:

The privilege existing by provision of law on December 1, 1873, or thereafter, of purchasing supplies of goods imported from foreign countries for the use of the United States, duty free, shall be extended, under such regulations as the Secretary may prescribe, to all articles of domestic production which are subject to tax by the provisions of this subtitle.

The effect of this provision would be that oleomargarine purchased for the use of the United States could be withdrawn tax free from the manufacturer. The oleomargarine to be purchased by the commissary of the Menominee Indian Mills will be resold to employees of the mills. None of it, of course, will be used directly in the operations of the mills. The question then is, whether, under these circumstances, it can be said that the purchases of oleomargarine by the commissary are "for the use of the United States."

In my opinion of May 31, 1940, 57 I. D. 129, *supra*, I considered a similar question concerning the Federal tax on sales of gasoline through the Menominee Indian Mills. Subtitle (C) of the Internal Revenue Code, in which provision is made for the gasoline tax, contains a provision similar to section 3331 quoted above, namely section 3443, which provides as follows:

A credit against tax under this chapter, or a refund, may be allowed or made to a manufacturer, producer, or importer, in the amount of tax paid by him under this chapter with respect to the sale of any article to any vendee, if the manufacturer, producer, or importer has in his possession such evidence as the regulations may prescribe that such article was, by any person, resold for the exclusive use of the United States, * * *

This provision, I held, could serve to exempt only those quantities of gasoline purchased by the mills which were used in the operation of the mills themselves, but the tax would have to be paid on gasoline sold through the mills' commissary to individual employees for their private use. On the basis of the reasoning set forth in detail in that opinion, I am constrained to hold that in the instant case the Federal oleomargarine tax will have to be paid on all oleomargarine purchased by the commissary of the mills for resale to individual employees, and that, therefore, none of it may be withdrawn tax free from the manufacturer.

(b) In addition to this pro rata tax on oleomargarine, a Federal tax in the nature of a license fee is imposed on persons selling oleomargarine at retail by section 3200 (c) of the Internal Revenue Code. This section provides for an annual tax of \$6 or \$48, depending on the color of the oleomargarine sold. It is clear that in imposing a license fee on the operations of a retailer, the Federal Government does not in-

tend to impose this requirement on itself or its own instrumentalities wherever they may engage in such retail operations. While the sales of oleomargarine to employees by the commissary of the Menominee Indian Mills cannot be considered as governmental operations, the general activity of the commissary is undoubtedly a Government activity. Thus, I held in my opinion of May 31, 1940, 57 I. D. 129, *supra*, in considering the Federal tax on gasoline sold through the commissary of the mills, that, "The management and supervision of the mills is clearly an Indian Service operation." I also pointed out that:

The proceeds from the operations of the mills are not wholly devoted to per capita payments but large sums are used to carry on Government functions on the Menominee Reservation which otherwise would be paid for from Government funds, * * *. Federal use of the proceeds of the operations is significant in determining the application to the operations of a Federal tax, which reduces such proceeds, although it might not have such weight in determining the application of Federal laws regulating the method of operations.

In other words, a clear distinction would appear to exist between a pro-rata tax on oleomargarine to be carried in the final analysis by the individual employee who purchases it, and a license fee on the operations of the commissary which would result in diminishing the overall revenue of the mills themselves. It should be added that without the payment of such a license fee a retailer would not be permitted to engage in the sale of oleomargarine. There would appear to be no reason for the assumption that the Federal Government intended by this provision to restrict its own operations and those of its instrumentalities. It is, therefore, my conclusion that the mills may sell oleomargarine at retail without the payment of the license fee prescribed by section 3200 (c).

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

EXCHANGE OF TIMBER ON PARK LANDS FOR PRIVATELY OWNED LANDS WITHIN THE BOUNDARIES OF NATIONAL PARKS

Opinion, January 21, 1942

TIMBER ON PARK LANDS—EXCHANGE—SECTION 3 OF THE ACT OF AUGUST 25, 1916.

Whether the Secretary of the Interior is authorized under section 3 of the Act of August 25, 1916, to exchange timber on park lands within the Olympic National Park for privately owned cut-over lands within the boundaries of said park. *Held*, section 3 of the act of August 25, 1916, authorizes the exchange of timber on park lands for privately owned cut-over lands where the cutting of the timber is found by the Secretary of the Interior to be required for the purposes set forth in said section.

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MARGOLD, *Solicitor*:

My opinion has been requested as to whether the Secretary of the Interior is authorized under section 3 of the act of August 25, 1916, to enter into an agreement to exchange timber on park lands within the Olympic National Park for privately owned cut-over lands within the boundaries of said park when it appears that the timber on the park lands is isolated and exposed to windthrow, thereby causing serious fire hazard as well as possible beetle infestation, and the timber and the cut-over lands to be exchanged have equal value.

In my opinion the Secretary of the Interior is authorized to enter into such an agreement.

Section 3 of the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. sec. 3), provides in part as follows:

* * * He [The Secretary of the Interior] may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. * * *

These broad provisions authorizing the Secretary of the Interior to "sell or dispose of timber" upon "terms and conditions" to be fixed by him are by their terms comprehensive enough to warrant any mode of alienation of such timber and upon any terms and conditions which, under the circumstances of a given case, may be reasonable and appropriate. *Cf.* Op. Atty. Gen., dated September 29, 1937 (39 Op. Atty. Gen. 107), construing section 5 of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115, 118); and *State ex rel. Cross v. Board of Land Commissioners*, 50 Wyo. 181, 62 P. (2d) 516, 517. Consequently, unless restricted by other statutory provisions, an exchange of timber required to be cut for the reasons set forth in the statute for lands of at least equivalent value is clearly within the scope of the act. This is especially true when it appears that the land to be received in the exchange, as in the instant case, will contribute to the conservation of the timber and the scenery within the park. Moreover, the acquisition by the Secretary of privately owned lands within national parks is in accord with general congressional policy. For example, the act of June 5, 1920 (41 Stat. 917, 16 U. S. C. sec. 6), provides that:

The Secretary of the Interior in his administration of the National Park Service is authorized, in his discretion, to accept patented lands, rights-of-way over patented lands or other lands, buildings, or other property within the various national parks and national monuments, and moneys which may be donated for the purposes of the national park and monument system.

The only statute which might conceivably restrict the broad authority of the 1916 act is section 3736 of the Revised Statutes, which provides that "No land shall be purchased on account of the United

States, except under a law authorizing such purchase." The Attorney General has held that section 3736 is applicable to exchanges and to all acquisitions of estates in realty by the United States for which a substantial consideration is paid and that consideration is not limited to money to be paid out of the public Treasury (35 Op. Atty. Gen. 183). But even if the exchange here contemplated were to be considered a purchase within the meaning of section 3736, since the exchange is authorized "by law" to wit, the 1916 act, it cannot reasonably be said to be prohibited by that section.

In my opinion, therefore, section 3 of the act of 1916 authorizes the exchange of timber on park lands for privately owned cut-over lands within national parks where the cutting of the timber is found by the Secretary to be required for the purposes set forth in section 3.

Approved:

JOHN J. DEMPSEY,
Under Secretary.

MAINTENANCE AND CONTROL OF STATE AND COUNTY HIGHWAYS WITHIN THE BOUNDARIES OF OLYMPIC NATIONAL PARK

Opinion, January 21, 1942

SECRETARY OF THE INTERIOR—NATIONAL PARK SERVICE—NATIONAL PARKS—JURISDICTION OVER HIGHWAYS WITHIN:

Cession by the State of Washington by act approved March 8, 1941 (ch. 51, *Laws of Washington, 1941*), of its jurisdiction over lands included in Olympic National Park, reserving only right to serve process and certain rights of taxation, upon acceptance thereof by the United States, terminates the right or duty of State and counties to maintain and police the highways therein and the Government of the United States will assume exclusive maintenance and control under broad powers of the Secretary of the Interior in relation to roads in, and approach roads to, national parks under the acts of April 9, 1924 (43 Stat. 90, 16 U. S. C. sec. 8), and January 31, 1931 (46 Stat. 1053, 16 U. S. C. secs. 8a, 8b), and the encouragement of travel within the United States under the act of July 19, 1940 (54 Stat. 773).

MARGOLD, *Solicitor:*

In connection with the establishment of the Olympic National Park in the State of Washington and the cession by the State of Washington to the United States of its jurisdiction in and over the lands included in the park, the National Park Service has advised me that it is administratively desirable that the State continue to maintain and police the 14 miles of State Highway No. 9 which are within the park area, and has requested my opinion on the following questions:

1. If the State's cession of jurisdiction is accepted by the United States (a) has the State retained the right to maintain and police State Road No. 9 within

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the area covered by the cession of jurisdiction, and (b) have the counties also retained the right to maintain and police county roads within such area?

2. If the above-mentioned questions are answered in the affirmative, will the Federal Government have authority to expend roads and trails funds on (a) the portions of the state and county roads over government lands, and (b) on portions of the state and county roads crossing privately owned lands?

For the reasons hereinafter set forth my answer to the first question is in the negative. Hence an answer to the second question is not necessary.

Congress by act of June 20, 1938 (52 Stat. 1241), established the Olympic National Park, and therein provided that the administration, protection and development of the park shall be exercised under the direction of the Secretary of the Interior by the National Park Service in accordance with the provisions of the act of August 25, 1916, as amended (39 Stat. 535, 16 U. S. C. sec. 1, *et seq.*). By the provisions of the last-mentioned act and amendments thereto the National Park Service is required to promote and regulate the use of the national parks by such means and measures as conform to the fundamental purpose of the parks, and, is also required, under the direction of the Secretary of the Interior, to supervise, manage and control the national parks under the jurisdiction of the Department of the Interior.

By the provisions of the act of April 9, 1924 (43 Stat. 90, 16 U. S. C. sec. 8), the Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct and improve roads and trails and necessary bridges in the national parks under the jurisdiction of the Department of the Interior. By the provisions of the act of January 31, 1931 (46 Stat. 1053, 16 U. S. C. secs. 8a, 8b), the Secretary of the Interior is authorized to designate, construct, reconstruct and improve national park approach roads. By the act of July 19, 1940 (54 Stat. 773), the Secretary is authorized and directed, through the National Park Service, to encourage, promote and develop travel within the United States and to administer all existing travel promotion functions of the Department of the Interior through such service.

All highways in a national park fall within its external boundaries and naturally become subject to Federal control unless excluded by the act of Congress creating the park or reserved by the State in its cession of jurisdiction. *Robbins v. United States*, 284 Fed. 39, 44 (C. C. A. 8). To the same effect are: *Colorado v. Toll*, 268 U. S. 228; Opinion of Solicitor, Department of the Interior, M. 29807, July 28, 1938; 35 Op. Atty. Gen. 305, 309.

The legislature of the State of Washington, by act approved March 8, 1941 (ch. 51, Laws of Washington, 1941), ceded to the United States

exclusive jurisdiction over the territory within the exterior boundaries of the Olympic National Park in terms as follows:

SECTION 1. Exclusive jurisdiction shall be, and the same is hereby ceded to the United States over and within all the territory that is now included in that tract of land in the State of Washington, set aside for the purposes of a national park, and known as the Olympic National Park; saving, however, to the said state, the right to serve civil and criminal process within the limits of the aforesaid park, in suits or prosecutions for or on account of rights acquired, obligations incurred or crimes committed in said state, but outside of said park; and saving further to the said state the right to tax persons and corporations, their franchises and property on the lands included in said park: *Provided, however,* This jurisdiction shall not vest until the United States, through the proper officer, notifies the Governor of this state that they assume police or military jurisdiction over said park.

A State has the right to incorporate reservations and conditions in its act of cession of jurisdiction to the United States which are not inconsistent with the carrying out of the purpose of the acquisition of that jurisdiction by the United States. *United States v. Unzeuta*, 281 U. S. 138; *James v. Dravo Contracting Co.*, 302 U. S. 134, 146-149.

The act of the State in ceding full jurisdiction to the United States without reservation is sufficient to cede or transfer to the United States such interest, jurisdiction and control as the State possesses over the highways in the park. *Robbins v. United States, supra.*

It will be observed that there is no reservation by the State of any highways or roads of any kind, and no reservation of any right to maintain or control any highway or road. Obviously the reservation of an existing highway within a ceded area for a national park would not necessarily be inconsistent with the carrying out of the purpose of the park. It must be presumed, therefore, that the State did not intend to reserve any road rights. The national parks being established primarily for the enjoyment of the general public, a road system within the parks and approach roads to the parks are absolute necessities. Both the State and the United States are interested therein. The reservation on the part of a State of a highway would give the State the right to unmolested use of that highway so long as such use did not become repugnant to its grant or to the purpose of the national park. In this sense it would be tantamount to a joint use (16 Op. Atty. Gen. 592, 593, 594).

There being no reservation in the cession act of the State of Washington relating to highways; and, in view of the broad powers given the Secretary of the Interior in relation to the construction, maintenance and improvement of roads in national parks and approach roads to national parks; and considering the necessity and utility of such roads for use by the general public in visiting the national parks, it is manifest that Congress contemplates, if it accepts the State's sur-

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render of jurisdiction without such reservation, that the National Park Service shall assume exclusive control and maintenance of the roads in the Olympic National Park. Without such reservation on the part of the State of Washington I regard it as plain that the Federal Government cannot expect the State or any subdivision thereof to maintain the highways in question. This conclusion seems self-suggestive because surrender of exclusive jurisdiction over a given territory by a State contravenes an obligation or duty on the part of that State to maintain utilities within that territory.

Congress has not to date accepted the surrender of jurisdiction by the State of Washington. By the bill passed by the House, H. R. 4336, and now before the Senate, if passed* in its present form, the United States will assume sole and exclusive jurisdiction over the territory known as the Olympic National Park with only the reservations named in the cession act of the State of Washington, and the Secretary of the Interior will be required to notify the Governor of the State of Washington of the passage and approval of the act and of the fact that the United States will assume police jurisdiction over the park.

Approved:

JOHN J. DEMPSEY,
Under Secretary.

HARRY L. GOSS

Decided January 23, 1942

AMENDMENT OF ENTRIES—LEGAL GROUNDS—MISTAKE—REVISED STATUTES, SEC. 2372 AND ACT OF FEBRUARY 24, 1909—EQUITABLE GROUNDS—SUPERVISORY AUTHORITY AND REGULATIONS OF APRIL 22, 1909—ACT OF DECEMBER 29, 1916—PERMANENT IMPROVEMENTS—DRY WELL.

After rejection of his proof for insufficiency of permanent improvements, entryman, alleging financial embarrassment, applied to amend his stock-raising entry to comprise the same tracts in an enlarged homestead entry and an additional stock-raising entry in order to obtain final certificate to all the desired tracts without supplying the deficiency in improvements required for the original entry. *Held*, that the Secretary's supervisory power does not authorize him to abrogate a provision of the stock-raising act for the convenience of an entryman; that this entryman was not entitled to the statutory relief of amendment prescribed by Rev. Stat. sec. 2372, as amended by the act of February 24, 1909, having made no mistake in the designation of the tracts entered; that he was not entitled to the equitable relief permissible under the supervisory authority of the Secretary and the regulations of April 22, 1909, to prevent unmerited loss or hardship arising through ignorance, misinformation or unsound advice as to the lands entered, his

*Act of March 6, 1942, 56 Stat. 185. [Ed.]

debts not constituting any such equitable ground for amendment; and that his deficiency in improvements was greater than had been calculated, a well having water but no equipment to make it available being considered a dry well and therefore not a permanent improvement.

MENDENHALL, *Acting Assistant Secretary*:

Harry L. Goss has appealed from a decision of the General Land Office holding his final proof on his stock-raising homestead insufficient as to improvements by \$330 and denying his request for a change in the character of his entry. Goss had applied to amend his entry so that part of it would stand as an enlarged homestead entry and the rest as an additional stock-raising entry. This change he said he requested because it would relieve him of the necessity of making further expenditures for the additional improvements required should the whole entry remain under the stock-raising homestead act.

The following are the pertinent details as to the Goss entry. On October 9, 1930, Goss, who resides in Phoenix, Arizona, filed application, Phoenix 068969, to make original stock-raising homestead entry of 600 acres, about 30 miles north of Phoenix, as follows:

T. 6 N., R. 4 E., G. and S. R. M. Sec. 21, E $\frac{1}{2}$ SE $\frac{1}{4}$; Sec. 27, NW $\frac{1}{4}$ NW $\frac{1}{4}$; Sec. 22, W $\frac{1}{2}$ SW $\frac{1}{4}$; NE $\frac{1}{4}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ SE $\frac{1}{4}$; S $\frac{1}{2}$ NE $\frac{1}{4}$; Sec. 23, S $\frac{1}{2}$ NW $\frac{1}{4}$; SW $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 24, SE $\frac{1}{4}$ NE $\frac{1}{4}$.

These tracts had all been designated under the stock-raising act as well as under the enlarged homestead act, both designations being effective October 12, 1920, and neither having ever been revoked. On December 11, 1930, the register allowed the application.

On June 9, 1931, Goss applied for a six months' extension of time within which to establish residence on the entry. On July 10, 1931, the General Land Office granted the request, extending the time to December 11, 1931. Goss established his residence nine days later, on December 20, 1931.

Final proof was due on December 11, 1935, but was not submitted. On January 24, 1936, Goss by corroborated affidavit asked for an extension of two years within which to make the proof. He alleged that he had resided on the land for 11 months from December 20, 1931, that he had erected a substantial frame house and had sunk a well but that he had been unable to raise any crops because there was no water available for them. Further, he said that he had suffered great financial losses since allowance of the entry, that he was a physician and that the prevailing depression had made it impossible for him to collect enough funds to make the necessary improvements on the land and complete his residence. He stated that he would be able to do both within two years, should the extension be granted. On July 9, 1936, the General Land Office granted an extension to December 11, 1937.

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On that date, however, no proof was made. Accordingly, on January 26, 1938, the General Land Office notified Goss that the statutory period for submission of final proof had expired and gave him 30 days to show cause why his claim should not be declared forfeited and his entry canceled for noncompliance with the law's requirements. On March 3, 1938, Goss filed notice of intention to file 3-year proof on April 13, 1938. On that date he submitted his final proof. This the register rejected for an insufficiency of improvements to the value of \$350 but he advised Goss that he might request suspension of action on the proof for a period not exceeding six months, in order that he might place the necessary improvements on the land and also give evidence of his honorable discharge from the army.

On May 13, 1938, Goss filed a copy of his record as a first lieutenant in the Medical Corps and of his honorable discharge after $19\frac{1}{2}$ months service but he did not request time for making the required improvements as suggested by the register. Instead, he filed an application to amend his stock-raising entry in T. 6 N., R. 4 E., to comprise two entries, namely, an enlarged homestead entry embracing 320 of his original 600 acres as follows: Sec. 22, S $\frac{1}{2}$ NE $\frac{1}{4}$; NE $\frac{1}{4}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ SE $\frac{1}{4}$; Sec. 23, S $\frac{1}{2}$ NW $\frac{1}{4}$; and an additional stock-raising entry embracing the remaining 280 acres as follows: Sec. 21, E $\frac{1}{2}$ SE $\frac{1}{4}$; Sec. 22, W $\frac{1}{2}$ SW $\frac{1}{4}$; Sec. 27, NW $\frac{1}{4}$ NW $\frac{1}{4}$; Sec. 23, SW $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 24, SE $\frac{1}{4}$ NE $\frac{1}{4}$. The tracts thus to be embraced in the proposed enlarged entry are in compact form but of those in the proposed additional stock-raising entry the two forties in sections 23 and 24 are widely separated not only from each other but from the five other forties in sections 21 and 22. Those five forties, however, are in compact form.

In support of this application, Goss by formal, corroborated affidavit said that should the request be granted the improvements which he had already made would be sufficient to entitle him to obtain final certificate on both tracts of land without making any further improvements. But he feared that should the application be disallowed he would be unable to make the additional improvements, having lost practically his entire life's savings and being now practically without resources. He pointed out that had he applied originally for 320 acres instead of 600 he could have acquired patent thereto merely by residence thereon; that it was the Government's policy to assist ex-service men who like himself were in good faith attempting to secure patent to a tract of land; that the amendment sought was a matter between the Government and himself alone and would injure no third person. He believed that he should have the same relief that the Department had previously accorded to certain

ex-service men in similar circumstances, namely, Ralph Peterson and Timothee Dion. Goss did not state under what law such relief had been accorded nor under what law he was applying for this amendment.

On April 18, 1939, the General Land Office advised the register that the application was denied; that applicant had made no error at the date of his original entry and that his only reason for desiring the change was to avoid compliance with the stock-raising homestead law in the matter of improvements. The law called for permanent improvements of the value of \$1.25 per acre, a total of \$750 on the 600 acres in this entry. But the final proof, the General Land Office stated, showed improvements valued at only \$420, a deficit of \$330. The register was therefore instructed to allow entryman 30 days to apply for suspension of action on the final proof during a period not exceeding six months within which to place additional improvements on the entry to the value of \$330. Meantime the final proof would be held for rejection.

On May 12, 1939, Goss filed formal appeal through his attorney on the ground (1) that the decision was contrary to the past policy of the Department; and (2) that the decision was

* * * harsh, unjust and inequitable, inasmuch as it would impose upon the entryman the duty of placing additional improvements upon the land for which at present he is unable to pay.

The appeal repeated the arguments previously made by Goss and stressed his financial inability to make the additional improvements. It stated that Goss had a laboratory in Phoenix and made X-ray pictures but that there was a lack of business; that Goss was heavily indebted for part of his equipment; that he owed about \$2,500 for back office rent; and that—

While \$330 might mean little to the average homestead entryman, it means much to this claimant, and in fact there is grave doubt as to whether he, if required to put on the improvements, would be in a position to do so, even should he make a great financial sacrifice in an attempt to secure the money necessary therefor.

The appeal further urged that the Department should not adhere to a harsh, "hard-boiled" policy but instead should follow that adopted toward Ralph I. Peterson and Timothee Dion, the two ex-service applicants mentioned above (Phoenix 056748 and 050883). Their final proof, like that of Goss, had showed insufficient stock-raising improvements. They had therefore applied for the same kind of amendment of entry as that here requested and the Department had allowed the amendment. The appeal also invited attention to the decision amending the stock-raising entry of Jacob Broolsma, Phoenix 066274; to an enlarged homestead.

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But the appeal nowhere explains upon what legal principles the Department is to join appellant in pronouncing the Land Office decision "harsh, unjust and inequitable" because "it would impose upon the entryman the duty of placing additional improvements upon the land for which at present he is unable to pay." The General Land Office, of course, has no authority to abrogate statutory requirements because an entryman is financially distressed. Its insistence upon an entryman's observance of the law can be termed "harsh, unjust and inequitable" only if there are legal rules permitting a different course which the General Land Office arbitrarily refuses to follow. Appellant, however, does not point out any such rules. He does not state or even refer to the legal basis of the alleged unreported precedents. Nor does he cite any express authority in either law or equity for the action which he requests the Department to take.

These are striking omissions but in the circumstances they are seen to be necessary. The statutes, departmental regulations and reported decisions do nothing to support appellant's application. There is, of course, no doubt as to the propriety of amendment of record claims in certain cases or as to the Secretary's power in regard thereto. Concerning the character of the circumstances in which the power is to be exercised and the sort of evidence to be required regarding the need for its use there have been numerous decisions and the regulations are clear. In 1921 the Department in *Loyd Wilson*, 48 L. D. 380, 381, gave a summary of amendment principles. This was quoted with approval in *Fred C. Barron*, 1924, 50 L. D. 597, and was as follows:

* * * it has been long settled that the Secretary of the Interior has, through the exercise of the power given by section 441 of the Revised Statutes to supervise the Government's business relating to public lands, the inherent or incidental power to sanction in his discretion, the amendment of entries of any kind on equitable grounds, and for the purposes not only of correcting mistakes but to prevent unmerited loss or hardship on the part of the entryman, and it is well settled that he has that power independent of any statute specifically authorizing such amendments. *William A. Calderhead* (36 L. D., 446), paragraph 10 of instructions of April 22, 1909 (37 L. D., 655, 657). And it has been repeatedly held that that power should be liberally exercised and not abridged, particularly by technical rules or in cases where entries have been made, as in this case, through misinformation given entrymen, or for similar reasons. *Crall Wiley* (3 L. D., 429), *Samuel Meek* (18 L. D. 213), *Josiah Cox* (27 L. D., 389).

In the same case the Department also pointed out that while there were statutes¹ expressly providing for amendment of entries in certain circumstances those statutes had been enacted not for the purpose of taking away by implication or otherwise the Secretary's inherent power but for the purpose of taking away his discretion and making

¹ For an early list of such statutes see *Christoph Nitschka*, 7 L. D. 155, 156 (1888).

amendment mandatory upon him in the circumstances specified. As an instance it mentioned section 2372 of the Revised Statutes. This had originated in the act of May 24, 1824 (4 Stat. 31), but had been amended by the act of February 24, 1909 (35 Stat. 645), to read as follows:

SEC. 2372. In all cases where an entry, selection, or location has been or shall hereafter be made of a tract of land not intended to be entered, the entryman, selector, or locator, or, in case of his death, his legal representatives, or, when the claim is by law transferable, his or their transferees, may, in any case coming within the provisions of this section, file his or their affidavit, with such additional evidence as can be procured showing the mistake as to the numbers of the tract intended to be entered and that every reasonable precaution and exertion was used to avoid the error, with the register and receiver of the land district in which such tract of land is situate, who should transmit the evidence submitted to them, in each case, together with their written opinion both as to the existence of the mistake and the credibility of every person testifying thereto, to the Commissioner of the General Land Office, who if he be entirely satisfied that the mistake has been made and that every reasonable precaution and exertion has been made to avoid it, is authorized to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, if the same has not been disposed of and is subject to entry, or, if not subject to entry, then to any other tract liable to such entry, selection, or location; but the oath of the person interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize such change of entry, nor shall anything herein contained affect the right of third persons.

The General Land Office instructions, or regulations, of April 22, 1909 (37 L. D. 655, 657), cited in the passage above quoted from the *Wilson* case, set forth the rules governing consideration of applications to amend entries, selections, or locations under section 2372, Revised Statutes, as thus amended. They also stated in paragraph 10 that in certain cases the Department would allow amendment under the supervisory authority of the Secretary. The language of paragraph 10 was as follows:

The act in terms provides for amendment in all cases where an entry, selection, or location has been or shall hereafter be made of a tract of land not intended to be entered, and therefore, perhaps, if strictly construed, provides for amendment only in cases where there has been a mistake in description or numbers of the land originally intended to be entered. However, under the supervisory authority of the Secretary of the Interior, the Department will allow amendments of entries made under laws which require settlement, cultivation, or improvement of the land entered in cases where, through no fault of the entryman, the land is found to be so unsuitable for the purpose for which it was entered as to make the completion of the entry impracticable if not impossible. In such cases at least one legal subdivision, approximating 40 acres in area, of the land embraced in the original entry shall be retained, and the tracts included by way of amendment must be contiguous thereto. Furthermore, in such cases and as an assurance of good faith, the application to amend must be filed within one year from date of the original entry. Applications for such amendments

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may be made under the rules given above, and on the prescribed form in so far as the same are applicable. A supplemental affidavit should also be furnished, if necessary, to show the facts.

These 1909 instructions were succeeded by Circular No. 423, issued by the General Land Office on July 10, 1915 (44 L. D. 181). These new regulations contained a new introductory paragraph declaring in terms the two sources of authority for amendment. This read as follows:

For the purpose of governing the administration of the provisions of this statute and to define the circumstances under which amendments of entries will be granted pursuant to its provisions, *or by virtue of the authority of the department to recognize and establish rights and equities not strictly within the purview and contemplation of such statute*, the following rules are provided and will be followed: * * * [Italics supplied.]

Further, the new regulations revised the 1909 version of paragraph 10 as follows in paragraphs 10 and 12:

10. The statute to which the foregoing regulations refer does not, in terms, provide for amendment of an entry, selection, or location for the purpose of correcting any error other than such as affects and pertains to the description of the lands entered and intended to be entered. Nevertheless, in the exercise of its equitable power and authority, the department will grant amendment of an entry, made for the purpose of securing a home upon the public lands, or for the purpose of effecting reclamation in accordance with the provisions of the desert land law, in any case where it is satisfactorily shown that, through no fault or neglect of the entryman, the land embraced by his entry is so far unfit for, or insusceptible of, occupancy, cultivation, or irrigation, as to render it practically impossible to perform the requirements of the law thereon.

* * * * *

12. Applications for amendment presented pursuant to rule 10 will not be granted, except where at least one legal subdivision of the lands originally entered is retained in the amended entry, and any such application must be submitted within one year next after discovery by the entryman of the existence of the conditions relied upon as entitling him to the relief he seeks, or within one year succeeding the date on which, by the exercise of reasonable diligence, the existence of such conditions might have been discovered: * * *. Applications for such amendments may be made under the rules given above and on the prescribed form, in so far as the same are applicable. A supplemental affidavit should also be furnished, if necessary, to show the facts.

The doctrine of amendment as thus permitted is basically a purely equitable one and cannot be insisted upon as a matter of abstract right. The power has been exercised in a manner analogous to the practice of courts of equity in granting relief in cases of accident and mistake in the making of contracts. The essential ground for relief from the consequence of mistake is that because of an erroneous impression, arising from incorrect information as to existing facts, whether that be attributable to ignorance or to misinformation, an entryman acting

in good faith has been induced to act in a manner different from that which a correct impression would have led him to adopt and thus has been misled to his prejudice. In such cases the act done is not properly his deliberate act and he is equitably entitled to be relieved of the consequences in so far as is compatible with the rights of innocent third parties. *Green Piggott*, 1906, 34 L. D. 573, 574; *William A. Calderhead*, 1908, 36 L. D. 446, 448; *Charles Carson*, 1903, 32 L. D. 176, 177.

The doctrine of amendment being equitable, its application necessarily depends upon the circumstances and merits of each case. The Department has been unwilling to try to establish a hard and fast rule whereby to determine allowance or rejection and has applied the doctrine liberally but it insists that the supporting equities be clearly established in each case. *Green Piggott*, *supra*; *Craik Wiley*, 1885, 3 L. D. 429, 430; *Christoph Nitschka*, 1888, 7 L. D. 155, 163; *Samuel Meek*, 1894, 18 L. D. 213, 214; *Josiah Cox*, 1898, 27 L. D. 389, 390.

It is clear that the application of Goss meets none of the conditions in the rules stated. Goss is not seeking to be relieved from the consequences of any mistake recognized as equitable ground for amendment but is trying to avoid the consequences of his own deliberate act because they are inconvenient. He does not allege that he has been misled to his prejudice by ignorance, misinformation or unsound advice; by any mistake as to the designation of the tracts which he intended to enter or by any ill-founded opinion as to their suitability for stock-raising purposes. The only circumstances which, according to his frank statement, make his compliance with the act of difficult and doubtful accomplishment are his debts.

Having had considerable experience with desert entries between 1920 and 1935, Goss was not uninformed as to public land matters. In applying for a stock-raising homestead in 1930 he presumably knew better than most applicants what that entailed. He selected 15 designated forties, lived on them for the requisite time, a period considerably shortened by the fact of his military service, and finally offered a much delayed final proof, all without ever alleging either desire or necessity for any change in his original plans. But when his proof is rejected for insufficient permanent improvements and his debts make it difficult for him to complete them he requests a purely formal change in the name and character of the entry whereby he may keep all the tracts originally entered and obtain patent to them without spending another dollar.

Such a change for such reasons is not contemplated by the law of amendment described. To grant the request would not apply an equitable principle on the basis of equitable grounds; it would abrogate

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a provision of the stock-raising act for the convenience of the entryman. The Secretary's supervisory powers do not authorize him thus to nullify a law and there can be no valid precedent for an opposite conclusion. The General Land Office was therefore entirely correct in denying the application to amend.

As for the unreported decisions cited as granting amendment of the same kind as that here sought and in similar circumstances and as therefore controlling the instant case, there is no reason for analysis of them here since all applications for amendment are to be considered on the basis of their individual facts and merits and since nothing whatever in the Goss case brings it within the purview of amendment rules. It may however be said that if the cases cited present no facts distinguishing them from those narrated here or bringing them under the recognized rules of amendment, the decisions reached in them must be deemed to have been unsound.

As concerns the decision as to the original entry, the General Land Office had no course but to reject the final proof. In all the circumstances its offer to suspend action on the proof for a time to enable entryman to make additional improvements, should he express a desire to do so, was exceedingly liberal. The register had pronounced the insufficiency in improvements to be \$350 and the office made it \$330. But upon scrutiny of the record the Department finds both figures too small. In lieu of cultivation the stock-raising act requires permanent improvements tending to increase the value of the land for stock-raising purposes to the value of \$1.25 per acre. The act also requires residence and a habitable house on the land but it does not credit the house as among the permanent improvements described. Accordingly, upon an entry of 600 acres there must be improvements worth \$750 exclusive of the house.

But the final proof testifies to improvements worth only \$620 as follows:

1. A house on Sec. 27, NW $\frac{1}{4}$ NW $\frac{1}{4}$ -----	\$200
2. Clearing, one acre, around the house-----	20
3. "Well, 400 feet deep, has water, (no equipment with well and have not brought water to surface)." Location: "Don't know except that it is on this land somewhere."--	400
Total value-----	\$620

This showing would be short by \$130 even if all its items were to be considered permanent improvements. But in the first place neither the house nor the well can receive any credit, the house for the reason above stated and the well because in its present condition it in no way tends to increase the value of the land for stock-raising purposes. The

well may indeed have water, although the final proof does not indicate whether in practical quantity, but until the water is made available for use on the land in reasonable quantity the unequipped well can be considered no better than a dry well, which in land office practice is not counted a permanent improvement. In the second place it is questionable whether credit can be given for the clearing around the house. This undoubtedly increases the value of the house site but whether it tends to increase the value of the entry for stock-raising purposes remains to be determined.

In these circumstances, a total of at least \$600 must be deducted from the showing, \$200 for the house, \$400 for the well. Hence, even if credit of \$20 may properly be given for the clearing, the showing must be considered short not by \$330 but by \$730. Of course, should the well be brought in, both its cost to date and the cost of the equipment could be credited to the permanent improvements account. In that case the deficiency would be either \$330 or \$350 less the cost of completing the well, the amount of the minuend depending upon whether the clearing around the house be determined to be a permanent improvement. On the other hand, if the water in the well be inadequate and not worth the cost of further development, the well's cost to date must remain without credit. In that event other improvements to the value of either \$730 or \$750 would have to be added. But whatever the deficiency may prove to be on either of the bases described it must be supplied in full if the entryman wishes to perfect his proof and obtain patent to his original entry of 600 acres.

The Department, however, can properly allow entryman to pursue a different course. It can permit him to reduce his original stock-raising entry to one of 320 acres in compact form and to relinquish the remaining 280 acres. The value of the required improvements on 320 acres is only \$400, a sum which the entryman alleges he has already expended on the incomplete well. If therefore he retain in his diminished entry both the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 27, on which the house stands, and the undesignated tract which is the site of the unfinished well, he can meet the requirements of the law either by bringing in the well in a manner entirely satisfactory to the General Land Office or by placing other improvements to the value of \$400 on the diminished entry.

The decision of the General Land Office is modified in accordance with the views above expressed and the Commissioner will give appellant a reasonable time within which to make the application appropriate to the course which he may decide to adopt.

Modified.

**RIGHT TO ANNUAL LEAVE EARNED AS FORMER OFFICER OF
GOVERNMENT OF PUERTO RICO**

Opinion, February 2, 1942

PUERTO RICO—OFFICERS—VACATION LEAVE—AUTHORITY TO GRANT.

Authority for granting leaves of absence to persons employed in the Government of Puerto Rico is contained in Civil Service Rule XXXIX, promulgated by the Puerto Rico Civil Service Commission under the provisions of section 10 (11) of an act passed by the Puerto Rico legislature on May 11, 1931. Since the supreme executive power of Puerto Rico is vested by its Organic Act in the Governor, applications for leave by a former officer of the Government of Puerto Rico should be presented for appropriate consideration by the Governor.

PUERTO RICO—OFFICERS—VACATION LEAVE—NATURE OF PRIVILEGE.

The granting of vacation leave under Rule XXXIX is discretionary with the officers in whom it is vested. It is not an inherent right of an employee. Such leave may be earned at the rate of two and one-half days (Sundays and legal holidays included) for each month of employment under the Insular Government. An employee may postpone the taking of the leave and allow it to accumulate.

GRAHAM, Assistant Solicitor:

Reference is made to your [First Assistant Secretary] memorandum of December 11, 1941, with which you transmitted a letter dated December 4, 1941, addressed to the Governor of Puerto Rico by the Director of the Division of Territories and Island Possessions. You request an opinion as to whether the Director is entitled to payment for vacation leave accumulated while serving as a Presidential appointee in the Government of Puerto Rico, first as Auditor, and then as Governor.

It is my opinion that while no legal objection exists to the filing of an application for leave allowance earned but not taken, the final authority to approve such an application lies with the present executive officers of Puerto Rico.

Authority for the granting of leave of absence to persons employed in the Government of Puerto Rico is contained in Civil Service Rule XXXIX, promulgated by the Puerto Rico Civil Service Commission under the provisions of section 10 (11) of an act passed by the Puerto Rico legislature on May 11, 1931, titled: "To create the Porto Rico Civil Service Commission and outline its duties and functions; to regulate and improve the civil service of Puerto Rico; to repeal the civil service act approved March 14, 1907, as amended, and for other purposes." The pertinent sections of Rule XXXIX are as follows:

Leave of absence, with pay may be granted by the administrative heads of each of the several departments, and of the other public services of the Insular Gov-

ernment of Puerto Rico, when not inconsistent with the needs of the service, to any assistant, chief of bureau, clerk or other employee employed in their respective branches of the public service of Puerto Rico, except as provided in Section 8, subject to the following conditions:

(1) Vacation leave.—For a period of not to exceed two and one-half days (Sundays and legal holidays included) for each month of employment under the Insular Government, vacation leave may be granted, *but an employee may postpone the taking of the leave and allow it to accumulate; * * ** [Italics supplied.]

(8) Leave of absence under the provisions of this rule *shall be discretionary with the officers in whom is vested the power of granting such leave, and it is not an inherent right of an employee*, except in cases of illness or physical impediment. Leave of absence shall not be granted to an employee when, in the opinion of the officer in whom is vested the power to grant such leave, the absence of such employee would seriously embarrass the work of the office in which he is employed, or interfere with the proper conduct of the public service. [Italics supplied.]

The foregoing Rule suggests several questions in connection with the instant application. First, while the Rule in terms refers only to the granting, by the "heads of each of the several departments," of leaves of absence "to any assistant, chief of bureau, clerk or other employee," and does not specifically mention the Governor, it is to be presumed in the absence of any other provision that the executive officers of the Insular Government are to be regarded as entitled to the benefits of the Rules.

Secondly, assuming this to be true, the question arises whether the Director, by leaving the service of the Insular Government, has forfeited any right to the leave allowance earned but not taken. The Rules are silent on this point and it is to be noted that leave of absence in any event is "discretionary with the officers in whom is vested the power of granting such leave," and that it is not an "inherent right." In the absence of an express provision for forfeiture upon separation from the service, therefore, it would seem reasonable to suggest that authority for the exercise of the discretion continues after the separation of the employee.

Thirdly, the question of the officer "in whom is vested the power of granting such leave" in this particular case arises. If it be correct to assume that there is discretionary authority in someone to approve a leave application by one who formerly occupied the offices of Auditor and Governor, but who now is separated from the Insular Government, it would seem appropriate that that discretion be exercised by the present Governor.

Before concluding, reference should be made to section 15 of the Organic Act of Puerto Rico (act of March 2, 1917, 39 Stat. 956, 48 U. S. C. secs. 731, *et seq.*), which authorizes the Treasurer of Puerto Rico to disburse public funds, in accordance with law, or warrants

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signed by the Auditor and countersigned by the Governor. Section 20 of the Organic Act authorizes the Auditor to—

* * * examine, adjust, decide, audit, and settle all accounts and claims pertaining to the revenue and receipts from whatever source of the government of Puerto Rico and of the municipal funds derived from bond issues; and he shall examine, audit, and settle, in accordance with law and administrative regulations, all expenditures of funds and property pertaining to or held in trust by the government of Puerto Rico or the municipalities or dependencies thereof.

In conclusion, it is my opinion that, while the reasoning embodied in the foregoing discussion would justify favorable action by the present Governor and Auditor on the application of the Director, the Department has no authority to take administrative action on it and that it should be presented to the Governor, in whom the supreme executive power of Puerto Rico is vested by section 12 of the Organic Act, *supra*, for appropriate consideration by him and by the Auditor.

ABORIGINAL FISHING RIGHTS IN ALASKA

Opinion, February 13, 1942

ALASKAN NATIVES—ABORIGINAL FISHING RIGHTS.

Aboriginal occupancy of particular areas of water or submerged land creates legal rights which, unless they have been extinguished, the Department is bound to recognize.

Such rights were not extinguished by Russian sovereignty or action taken thereunder.

Such rights have not been extinguished by the sovereignty of the United States or by any treaty, act of Congress, or administrative action thereunder. With respect to areas which may be shown to have been subject to aboriginal occupancy, regulations permitting control by non-Indians would be unauthorized and illegal.

MARGOLD, *Solicitor*:

My opinion has been invited on the question:

Whether Indians of Alaska have any fishing rights which are violated by control of particular trap sites by non-Indians under departmental regulations, and whether such rights require or justify the closing down of certain trap sites or the allocation of trap sites to Indian groups or other remedial action by the Secretary of the Interior.

I am of the opinion that this question must be answered in the affirmative. The nature and the extent of the right so affirmed are delineated more precisely by the materials to which we must turn in order to determine the validity of this right.

The principles governing the recognition of aboriginal occupancy rights are clearly set forth in the opinion of the Supreme Court re-

cently delivered in the *Walapai* case (*The United States of America, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona v. Santa Fe Pacific Railroad Company*, 314 U. S. 339 (1941)). In this opinion the Supreme Court made it clear (a) that aboriginal occupancy establishes rights of possession; (b) that this policy extends to "land under the prior sovereignty of the various European nations"; (c) that a tribal right of occupancy need not be based upon a treaty, statute, or other formal Government action; and (d) that extinguishment of tribal occupancy rights may not be inferred from general legislation that does not refer specifically to Indian rights or from administrative action taken under such legislation, even though such administrative action may in fact interfere with the full enjoyment of such possessory rights. Each of these principles is relevant to the claimed Indian occupancy rights in Alaskan waters and submerged land.

Under the foregoing principles, the first question that arises is whether the use of waters or submerged lands by Alaskan natives was of such a character that it can be considered a continuous occupancy, in the same sense that use of uplands by an Indian tribe for agriculture, hunting, or seed-gathering, to the exclusion of other tribes, is considered as occupancy in the *Walapai* case and numerous other cases therein cited.

Without attempting at this time to mark out the locality and extent of particular Indian claims, we may note that available information shows that the Indians clearly recognized, *inter se*, private and exclusive rights to take fish in designated waters. A memorandum submitted by Mr. Paul W. Gordon, then Director of Education for Alaska, approved by the Commissioner of Indian Affairs on June 8, 1934, describes the Indian concept of fishing rights in the following terms:

But perhaps even more important, since their life was based largely on the salmon catch, the natives of southeastern Alaska had a well defined recognition of the rights of individuals and families to the use of certain streams, channels and ocean areas for fish taking. These locations were honored just as faithfully as if the sites were patented and recorded with a clerk of records. This system may be seen still operating on the Kuskokwim where without recourse to written records but with great fidelity to the dictates of custom, enforced by unwritten community decrees fish net locations are considered as belonging to a certain person, subject to disposal by deed or testament.

Although the natives of Alaska did not enter into formal treaties with the United States, such treaties are not essential to the maintenance of rights based upon aboriginal occupancy. As the Supreme Court said in *United States v. Winans*, 198 U. S. 371 (1905), "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." (At p. 381.) Thus, un-

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less the rights which natives enjoyed from time immemorial in waters and submerged lands of Alaska have been modified under Russian or American sovereignty, it must be held that the aboriginal rights of the Indians continue in effect. Such was the advice given by the Attorney General in 1 Op. Atty. Gen. 465 (1821) :

* * * The practical admission of the European conquerors of this country renders it unnecessary for us to speculate on the extent of that right which they might have asserted from conquest and from the migratory habits and hunter state of its aboriginal occupants. (See the authorities cited in Fletcher and Peck, 6 Cranch. 121.) The conquerors have never claimed more than the exclusive right of purchase from the Indians, and the right of succession to a tribe which shall have removed voluntarily, or become extinguished by death. So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. * * * Although the Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent. They do not hold under the States, nor under the United States; their title is original, sovereign, and exclusive. [At pp. 466-467.]

The foregoing views have been confirmed by a long series of cases.¹

We must consider, therefore, in the second place, whether Russian sovereignty or any action taken thereunder extinguished the original possessory rights of the Indians in Alaskan waters and submerged lands. That Russian sovereignty had no such effect is clear from the fact that Russia, with other European nations, accepted the principles of international law recognizing prior possessory rights in conquered or discovered territory.² There is no record of any attempt by the Russian Government to abolish Indian fishing rights. In fact, meager historical evidence that is available indicates that the Russians recognized Indian fishing rights and encouraged the exercise thereof. Thus, the second chapter of the Russian American Company, issued on September 4, 1821, contains the following provisions :

SEC. 42. The peoples inhabiting places governed by the company are: Islanders, Kuriles, Aleutians and others and also the tribes living along the coast of America, such as Kenais, Chugach, and others.

SEC. 43. These peoples are considered by the government equally with all other Russian subjects. They constitute a separate estate while they are living in the Colonies and through excellent merit or other occasions do not pass into a different estate.

¹ *Johnson v. McIntosh*, 8 Wheat. 543 (1823); *Worcester v. Georgia*, 6 Pet. 515 (1832); *Choteau v. Molony*, 16 How. 203 (1853); *Holden v. Joy*, 17 Wall. 211 (1872); *Buttz v. Northern Pacific Railroad*, 119 U. S. 55 (1886); *United States v. Shoshone Tribe*, 304 U. S. 111 (1938).

² See Wharton, *A Treatise on the Conflict of Laws or Private International Law*, 3d ed., 1905, vol. 1, sec. 9; Wheaton, *Elements of International Law*, 5th ed., by Phillipson (1916), pp. 66-68; Alaska Boundary Tribunal, Appendix, vol. 11, p. 23; *Wall v. Williamson*, 8 Ala. 48, 51 (1845). And see other authorities cited in Cohen, *Handbook of Federal Indian Law*, Chap. 7, sec. 2, and Chap. 15, secs. 4 and 9.

SEC. 44. In this standing of Russian subjects they are subject to obedience, to general state law, and have their protection.

SEC. 50. Everything acquired by an Islander either through his own labor or inherited or purchased or bartered is his inalienable property and anybody attempting to take it away from him or to cause him personal insult will be prosecuted to the full extent of the law.

SEC. 56. The Islanders not in the service of the Company may, for their own and their families' food, fish along the shores which they inhabit, but not to absent themselves to the neighboring shores without special permission from the Company * * *.

SEC. 57. The Company * * * shall not extend their searches * * * to the interior of those Countries * * * and shall by no means meddle with oppression of the inhabitants, living along those coasts; and in case the Company should think it for their interest, to establish factories in some places of the American Continent in order to secure their commerce, they may do so after having acquired the consent of the Natives and shall do everything in their power to maintain their arrangements and avoid everything that might create the suspicion or thought as if they intended to deprive them of their independence.

SEC. 58. The Company is prohibited to demand gifts, dues, tribute or any such sacrifices from these people, equally during the time of peace * * *.³

Since it appears that whatever possessory rights Alaskan Indians enjoyed in waters or submerged land were not impaired under Russian rule, it becomes necessary to consider whether the fact of American sovereignty, or any action taken thereunder, effected an extinguishment or impairment of the rights. An examination of the authorities compels the conclusion that no such extinguishment or impairment has been effected and that the law of the United States has not paid less respect to Indian property rights than did the law of Russia.

In the first place, it must be recognized that the mere fact that the common law does not recognize several rights of fishery in ocean waters or rights in land below the high water mark does not mean that such rights were abolished by the extension of American sovereignty over the waters in question. It is well settled that Indian legal relations, established by tribal laws or customs antedating American sovereignty, are unaffected by the common law. As was well said in *Ex parte Tiger*, 2 Ind. T. 41, 47 S. W. 304, (1898):

* * * If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law. They derive their jurisprudence from an entirely different source, and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew. [At p. 305]

³The translations of secs. 57 and 58 are taken from the Alaska Boundary Tribunal, Appendix, vol. 11, p. 25. Those of other sections are based upon a translation made by the University of Washington Library and reported in an unpublished manuscript of William L. Paul, Jr., "Historical and Legal Materials Relative to the Tlingit and Haida Claims Act of 1935," at pp. 48-49.

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The proposition that, in the absence of express Federal legislation to the contrary, Indian property rights are to be defined in terms of tribal law rather than on the basis of the common law, finds square support in the holding in *Delaware Indians v. Cherokee Nation*, 38 Ct. Cl. 234 (1903), decree mod. 193 U. S. 127 (1904). In that case the plaintiffs sought to establish rights in the property of the Cherokee Nation based upon common law rules respecting land conveyances. In reaching the conclusion that this claim could not be supported, a conclusion later confirmed by the Supreme Court, the Court of Claims declared:

The law of real property is to be found in the law of the situs. The law of real property in the Cherokee country therefore is to be found in the constitution and laws of the Cherokee Nation. [At p. 251.]

After analyzing the provisions of Cherokee law on the subject, the Court went on to declare:

With this system of land law before us, it is unreasonable that this agreement was intended to be in derogation of the system and contrary to the usages of occupants throughout the entire Indian country from the Atlantic to the Pacific. At the time the agreement was entered into the citizens of the Cherokee Nation held no other right or interest in the land than the right of occupancy as communal owners. The common law did not prevail in the Cherokee country, and an estate in fee simple absolute was a thing utterly unknown. * * * The agreement must be construed with reference to the constitution and laws of the Cherokee Nation. [At p. 253.]

Accordingly, the fact that the Indian rights here in question are not such as the common law recognizes is irrelevant to the question of their validity. This conclusion gains added force from two opinions of the Supreme Court dealing with fishing rights in Hawaii.

The specific question of aboriginal fishing rights was before the Supreme Court in *Damon v. Hawaii*, 194 U. S. 154 (1904), where Mr. Justice Holmes, in upholding the validity of such rights wrote, on behalf of a unanimous Court:

This is an action at law, somewhat like a bill to quiet title, to establish the plaintiff's right to a several fishery of a peculiar sort, between the coral reef and the ahupuaa of Moanalua on the main land of the Island of Oahu. The organic act of the Territory of Hawaii repealed all laws of the Republic of Hawaii which conferred exclusive fishing rights, subject, however, to vested rights, and it required actions to be started within two years by those who claimed such rights. Act of April 30, 1900, c. 339, §§ 95, 96; 31 Stat. 141, 160. At the trial the presiding judge directed a verdict for the defendant. Exceptions were taken but were overruled by the Supreme Court of the Territory, and the case comes here by writ of error.

The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing within the limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is some-

what different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. [pp. 157, 158.]

The fact that the right in question had been exercised for 40 years was considered important, and the fact that the common law recognizes no private rights of fishery distinct from land ownership was held no obstacle to the recognition of the rights advanced in *Damon v. Hawaii*. The common law was held equally irrelevant in the interpretation of the extent of these rights. On this point the Court declared:

* * * We assume that a mere grant of the ahupuaa without mention of the fishery would not convey the fishery. But it does not follow that any particular words are necessary to convey it when the intent is clear. * * * There is no technical rule which overrides the expressed intent, like that of the common law, which requires the mention of heirs in order to convey a fee. [p. 161]

A similar question was before the Supreme Court in *Carter v. Hawaii*, 200 U. S. 255 (1906), where Mr. Justice Holmes again delivered an opinion for a unanimous Court upholding the rights in question. That opinion declares:

* * * They (the plaintiffs) offered evidence at the trial that, before the action of the king in 1839, those under whom the plaintiffs claim title had enjoyed from time immemorial rights similar to those set out in the statutes, and also that they had been in continuous, exclusive and notorious possession of the konohiki right for sixty years. They offered in short to prove that their predecessor in title was within the statutes and therefore owned the fishery, it not being disputed that if he did, the plaintiffs own it now. The judge rejected the evidence and entered judgment for the defendant, and on exceptions this judgment and that in *Damon v. Hawaii* were sustained at the same time in one opinion by the Supreme Court. 14 Hawaiian, 465.

We deem it unnecessary to repeat the ground of our intimation in the former case, that the statutes there referred to created vested rights. We simply repeat that in our opinion such was their effect. The fact that they neither identified the specific grantees nor established the boundaries, is immaterial when their purport as a grant or confirmation is decided. It is enough that they afforded the means of identification, and that presumably the boundaries can be fixed by reference to existing facts, or the application of principles which have been laid down in cases of more or less similar kind.

The omission of the plaintiffs' predecessor in title to establish his right to the fishery before the Land Commission does not prejudice their case. See *Kenoa v. Meek*, 6 Hawaiian, 63. That commission was established to determine the title to lands as against the Hawaiian Government. In practice it treated the fisheries as not within its jurisdiction, and it would seem to have been right in its view. See *Akeni v. Wong Ka Mau*, 5 Hawaiian, 91. [pp. 256, 257.]

A similar problem was raised in the case of *Knight v. United States Land Association*, 142 U. S. 161, (1891), where the Supreme Court up-

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held private rights in areas below the high water mark where it was shown that such rights had been recognized by prior sovereignties, in this case Spain and Mexico.

Thus no extinguishment or impairment of pre-existing Indian possessory rights in waters or submerged lands can be deduced from the nature of the common law, any more than from the fact of United States sovereignty. If such prior rights have been abolished or impaired, this can only have taken place by virtue of some clear and unmistakable provision of a treaty or act of Congress. No treaty or act of Congress containing any such provision can be found.

There is, to be sure, legislation that limits the exercise of Indian, as well as non-Indian, fishing rights in terms of conservation principles, and it is not within the scope of the inquiry presented to me to question the validity of such legislation. This legislation, however, does not prevent the recognition of prior existing rights in waters or submerged land, even though such rights be private rights which could not, under the Federal statutes, be newly created by the Secretary of the Interior.

The general scheme of Federal control over Alaskan fishing is embodied in the act of June 6, 1924 (43 Stat. 464), as amended (U. S. C. tit. 48, secs. 221-228). Under this legislation administrative control of Alaskan fishing, for conservation purposes, is vested in the Secretary of the Interior. The scope of his authority is defined in the first two sections of the statute, which declare:

SECTION 221. Fishing areas; closed season; limitation on fishing.

For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable (June 6, 1924, ch. 272, sec. 1, 43 Stat. 464; June 18, 1926, ch. 621, 44 Stat. 752; Reorg. Plan No. II, sec. 4 (e) eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433).

SECTION 222. Unlawful fishing in areas; no exclusive rights to be granted; citizens.

From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of the Interior shall be of general

application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior (June 6, 1924, ch. 272, sec. 1, 43 Stat. 464; June 18, 1926, ch. 621, 44 Stat. 752; Reorg. Plan No. II, sec. 4 (e), eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433).

Certainly nothing in the foregoing legislation constitutes an extinguishment of any property rights or compels the Secretary of the Interior to extinguish any rights of Indians or of anyone else. The first sentence quoted advisedly uses the word "may" four times: the Secretary of the Interior "may set apart" certain areas, within which he "may establish closed seasons," and during those seasons fishing "may be limited or prohibited as he may prescribe." There is nothing in this language that compels the Secretary to "set apart and reserve" for the application of fishing control regulations any particular area, and it would be consistent with the act if the Secretary were to omit from such designations all areas subject to Indian (or, for that matter, non-Indian) possessory rights. Moreover, even if areas subject to Indian possessory rights were designated as being subject to fishing control regulations, there is nothing in the statute that requires the Secretary to extinguish or to ignore pre-existing Indian possessory rights therein. He might, therefore, under the statute, while recognizing such rights, merely limit the beneficial utilization of these rights in the interests of conservation.

It is true that the proviso of section 222 prohibits any grant of any exclusive right of fishery, but this clearly refers to grants under the statute and not to rights existing long prior to the statute.

A more serious question, however, is raised by the final clause of this proviso, which declares that "in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior" no citizen of the United States shall "be denied the right to take * * * fish." It may be argued that this is not merely a limitation upon the regulatory powers of the Secretary, but a positive grant of equal rights to all citizens which, being inconsistent with the existence of any special Indian possessory rights, necessarily effects extinguishment of such special Indian rights.

Such a conclusion would raise a serious question of constitutionality, for it has often been held that extinguishment of Indian possessory rights, without the consent of or compensation to the Indians affected, is forbidden by the Fifth Amendment. *Choate v. Trapp*, 224 U. S. 665 (1912); *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110 (1919); *United States v. Creek Nation*, 295 U. S. 103 (1938); *Shoshone Tribe v. United*

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States, 299 U. S. 476 (1937). On this issue, the Supreme Court, *per* Mr. Justice Van Devanter, recently declared:

Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own. [*Chippewa Indians v. United States*, 301 U. S. 358, 375-376 (1937).]

Under well recognized principles of constitutional interpretation we must reject an interpretation of the proviso in question that raises serious constitutional doubts. Moreover, any construction of the proviso in question as affecting an extinguishment of possessory rights not mentioned in the statute would run counter to the well-established canon of construction that Federal statutes will not be read as constituting an extinguishment or limitation of Indian rights unless such an intent is clearly expressed. *Choate v. Trapp, supra*; *Leavenworth, Lawrence and Galveston R. R. Co. v. United States*, 92 U. S. 733; 34 Op. Atty. Gen. 171 (1924).

In the opinion last cited, Attorney General (now Chief Justice) Stone, in holding a mineral leasing law inapplicable to lands subject to Indian occupancy rights, declared:

The long settled rule of construction is that general laws providing for the disposition of public lands or the public domain do not apply to lands which have been set aside or reserved for particular public uses, unless the contrary clearly appears from the context or the circumstances attending the legislation. * * * Concerning Indian reservations, Indian lands, and Indian affairs generally, Congress habitually acts only by legislation expressly and specifically applicable thereto. [at p. 172.]

And in the *Walapai* case, above cited, the Supreme Court, considering the aboriginal occupancy rights of the Walapai Indians and the general Federal policy of protecting such rights, said:

Certainly it would take plain and unambiguous action to deprive the Walapais of the benefits of that policy.

Neither the Alaska fishing law above cited nor any other statute constitutes or authorizes any such "plain and unambiguous action."

I note, then, that even if areas subject to Indian possessory rights were to be designated for the application of conservation regulations issued by the Secretary of the Interior, this would not impair any Indian possessory rights that were in existence prior to 1924, and that such rights might be appropriately safeguarded by regulation. If, however, I am mistaken in this observation, and if the mere extension of such regulations to areas subject to Indian possessory rights would

interfere with those rights, it does not follow that the rights in question have been abrogated. Rather it would be necessary to conclude that if application of conservation controls to an area would automatically wipe out vested rights therein, then, since the Secretary of the Interior has no right to use otherwise discretionary powers in such a way as to effect a confiscation of Indian possessions (*Lane v. Pueblo of Santa Rosa, supra*), he would have no right to extend the application of those controls to any areas subject to Indian possessory rights. If the Secretary of the Interior has no authority over such areas, they certainly cannot be called areas where "fishing is permitted by the Secretary of the Interior," and it cannot then be argued with any show of reason that the proviso in question has any application at all to, or any effect upon, Indian possessions.

Therefore, whatever construction be put upon the final proviso of section 222, the conclusion is inevitable that this proviso does not extinguish Indian possessory rights in waters or submerged land that were valid before 1924.

Apart from this legislation, the validity of such aboriginal possessory rights is not put into question by any other Federal statute affecting Alaska. A number of Federal statutes provide that Indian possessions in Alaska shall be respected (act of May 17, 1884, sec. 8, 23 Stat. 24; act of June 6, 1900, sec. 27, 31 Stat. 321, 330) or shall not be adversely affected by various provisions for the disposition of the public domain. (Act of March 3, 1891, 26 Stat. 1095, 1100; act of May 14, 1898, sec. 10, 30 Stat. 409, 413.)

These and other related statutes have been liberally construed by the Department and by the courts for the protection of native rights of occupancy.⁴ Conceivably, the term "land" in these statutes might be narrowly constructed as referring only to land above water, but although this narrow construction has been several times presented, it has been in each instance flatly rejected. The statutes in question have been consistently interpreted as protecting Indian occupancy not only of lands above water but also of land under natural waterways or ditches,⁵ of tide-lands, and of waters adjacent to occupied shores.⁶ The case of *Heckman v. Sutter*, 119 Fed. 83 (C. C. A. 9, 1902), aff'g *Sutter v. Heckman*, 1 Alaska 188, presented the question of whether parties claiming lands and waters by virtue of transfer from an aboriginal occupant were entitled to enjoin other private parties from fishing in waters adjacent to the shore. The Federal District Court for

⁴ 26 L. D. 512 (1898); 28 L. D. 427 (1899); 28 L. D. 535 (1899).

⁵ 24 L. D. 312 (1897).

⁶ 49 L. D. 592 (1923).

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Alaska issued such an injunction. The court, with reference to the common right of fishery, said:

It may be conceded, for the purpose of this case, that in all navigable waters and arms of the sea in Alaska, and in all rivers where not forbidden by law, the right of navigating said waters and fishing therein is a common one to all the citizens of Alaska, and that no one, other perhaps than the natives, can acquire any exclusive right, either in navigating said waters or fishing therein. * * * [P. 192.]

Notwithstanding this concession, the court pointed out that the principle by which a littoral owner may construct wharves in waters adjacent to his land, although by such construction he deprives all others of the right to fish therein, is properly applicable to a situation where the littoral owner clears or improves shallow waters. The court concluded:

* * * It is believed that the principle which gives the littoral owner the right of way and the right to construct a wharf in front of his upland across the tide flats to the deep water may be also as clearly and reasonably applied to a right of way that shall permit the littoral owner to exercise certain possessory rights as a right of way to the deep water of the sea over the tide flats, and that he may acquire certain possessory rights in such right of way by cleaning away the debris and material deposited thereon, and making it a clear and proper roadway from the deep water to the upland, over which he may pass and repass with his nets in the act of fishing, unobstructed and uninterrupted by the acts or appliances of those who have a common right to fish in the waters of the sea and the rivers of Alaska. [Pp. 196-197.]

The effect of the injunction issued in this case was to recognize possessory rights not only in tidelands but in waters adjacent thereto. The Circuit Court of Appeals for the 9th Circuit, in reviewing and affirming the decision below, paid special attention to the question of Indian rights in such waters, declaring:

The prohibition contained in the act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high-water mark. Nor is it surprising that congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands, of whatever character, by means of which they eked out their hard and precarious existence. The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known to the legislative branch of the government, as well as the fact that that business, if conducted on any substantial scale, necessitated the use of parts of the tide flats in the putting out and hauling in of the necessary seines. Congress saw proper to protect by its act of 1884 the possession and use by these Indians and other persons of any and all land in Alaska against intrusion by third persons, and so far has never deemed it wise to otherwise provide. That legislation was sufficient authority, in our opinion, for the decree of the court below securing the

complainants in the use and possession of land which the evidence shows and the court found was held and maintained at the time of their disturbance therein by the defendants, and for years theretofore had been so held and maintained. [Pp. 88-89.]

Light upon Federal policy, as laid down by Congress and interpreted by this department and by the Supreme Court is found in the case of *Alaska Pacific Fisheries v. United States*, 248 U. S. 78 (1918). In issuing an injunction against the maintenance of a fish trap off the shore of the Annette Islands Reservation, the Court declared:

The fish-trap was erected in 1916 without the consent of the Indians or the Secretary of the Interior. It is a formidable structure consisting of heavy piling and wire webbing, is located in water of considerable depth, approximately 600 feet from the high tide line of the island on which the Indians settled, is intended to catch about 600,000 salmon in a single season, and its operation will tend materially to reduce the natural supply of fish accessible to the Indians.

The principal question for decision is whether the reservation created by the Act of 1891 embraces only the upland of the islands or includes as well the adjacent waters and submerged land. The question is one of construction—of determining what Congress intended by the words "the body of lands known as Annette Islands."

* * * * *
 * * * The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. [Pp. 87, 89.]

Further recognition of the importance which the Indians of the Northwest Pacific coast attached to fishing rights is found in the Supreme Court's opinion in *United States v. Winans*, 198 U. S. 371 (1905), which, in declaring illegal a non-Indian fishing wheel that interfered with the exercise of Indian fishing rights in the Columbia River, guaranteed by treaty, declared:

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. [At p. 381.]

Although the question of the power of the Secretary to reserve waters for the use of Alaskan natives is not now in question, and although it would appear that the power to make reservations may be subject to limitations not applicable to the recognition of pre-existing rights, the comments made in the opinion of Acting Solicitor Kirgis, approved April 19, 1937, (56 I. D. 110) on the construction of section 2

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of the act of May 1, 1936 (49 Stat. 1250), authorizing the establishment of reservations of "land" for Alaskan natives, substantiate the policy that runs through the foregoing decisions. After referring to the decision in the *Alaska Pacific Fisheries* case, *supra*, the Acting Solicitor declared:

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

The express language of section 2 of the Alaska Act is not materially more confining in its application than that which was used in the act reserving the Annette Islands Reservation. Instead of the words "body of lands" the words are used, "any area of land" and "additional public lands adjacent thereto * * * or any other public lands which are actually occupied by Indians or Eskimos." The term "public lands" is synonymous with the term "public domain," and the tidewaters of the territories of the United States and the lands under them have been classified as part of the public domain since they belong exclusively to the United States Government and are subject to its disposition. *Shively v. Bowlby*, 152 U. S. 1; *Alaska Pacific Fisheries v. United States*, 248 U. S. at 87; 240 Fed. at 281, 282. [Pp. 113-114.]

The national policy which runs through the statutes, judicial decisions, and administrative rulings is a policy of respecting and

protecting rights of the Alaskan natives, who, until very recently, have constituted the larger, as well as the more permanent, part of the territorial population. Those rights have, in consideration of historic tradition and economic necessity, been construed to include the occupancy of water and land under water as well as of land above water.

This national policy finds embodiment in the act of June 19, 1935 (49 Stat. 388), authorizing suit against the United States by the Tlingit and Haida Indians of Alaska. These are the Indians inhabiting the southeast coast of Alaska and most directly interested in the question considered in this opinion. It is reported that their chief interest in the jurisdictional act in question arises from interferences with fishing rights.⁷ The language of the jurisdictional act is very broad. Its substantive provisions are contained in section 2, which declares:

All claims of whatever nature, legal or equitable, which the said Tlingit and Haida Indians of Alaska may have, or claim to have, against the United States, for lands or other tribal or community property rights, taken from them by the United States without compensation therefor, or for the failure or refusal of the United States to compensate them for said lands or other tribal or community property rights, claimed to be owned by said Indians, and which the United States appropriated to its own uses and purposes without the consent of said Indians, or for the failure or refusal of the United States to protect their interests in lands or other tribal or community property in Alaska, and for loss of use of the same, at the time of the purchase of the said Russian America, now Alaska, from Russia, or at any time since that date and prior to the passage and approval of this Act, shall be submitted to the said Court of Claims by said Tlingit and Haida Indians of Alaska for the settlement and determination of the equitable and just value thereof, and the amount equitably and justly due to said Indians from the United States therefor; and *the loss to said Indians of their right, title, or interest, arising from occupancy and use, in lands or other tribal or community property, without just compensation therefor, shall be held sufficient ground for relief hereunder*; and jurisdiction is hereby conferred upon said Court to hear such claims and to render judgment and decree thereon for such sum as said court shall find to be equitable and just for the reasonable value of their said property, if any was so taken by the United States without the consent of the said Indians and without compensation therefor; that from the decision of the Court of Claims in any suit or suits prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United State. [Italics supplied.]

It will be seen that under the foregoing underlined language the Federal Government undertakes to make good the losses suffered by Alaska Indians from private invasions of their rights. The question of the extent of these rights is thus no longer simply a question between the Indians and those private individuals or firms who are

⁷ See unpublished manuscript of William L. Paul, Jr., "Historical and Legal Materials Relative to the Tlingit and Haida Claims Act of 1935."

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displacing the Indians from their possessions. The Department of the Interior, therefore, if Indian rights have hitherto been invaded, is under a double duty—a duty to the taxpayers of the United States as well as to the Indians—to exercise whatever powers it has to prevent the continuance of such invasions and to prevent the piling up of losses which are to be made good out of the Federal Treasury.

The national policy expressed in the foregoing statutes is not negated by the fact that in its administration of the 1924 Alaska fishing law the Department of Commerce for many years, and the Department of the Interior since July 1, 1939, have given no special recognition to Indian rights, although Indians have frequently protested against their displacement from waters that have been an ancestral source of food and livelihood. It may be that the Indians, in the assertion of their claims, have not had adequate legal representation, and it may be that the departments concerned have not made effective provision for the formal presentation and consideration of such claims, but as a matter of law even if such claims had heretofore been fully considered and formally rejected such action would not be legally effective to destroy any Indian possessory rights. The Supreme Court in the *Walapai* case, rejecting the argument of the railroad that the Government had administratively recognized the right of the railroad and the absence of Indian right, declared:

Such statements by the Secretary of the Interior as that "title to the odd-numbered sections" was in the respondent do not estop the United States from maintaining this suit. For they could not deprive the Indians of their rights any more than could the unauthorized leases in *Cramer v. United States, supra*. [314 U. S. 339, 360.]

Furthermore, it must be remembered that the Indians of Alaska, like those of the continental United States, are largely dependent upon the Federal Government for the vindication and protection of their property rights.⁸ Only within the past two or three years have the Indian groups of Alaska achieved, under Federal supervision, a form of community organization which permits them to act on their own behalf, as legal entities, in the protection of their legal rights.⁹ The fact therefore, that Indian fishing rights have not received adequate protection in the past is not a ground upon which the Federal Government could rely in denying the present existence of these rights. As I

⁸ *Alaska Pacific Fisheries v. United States*, 248 U. S. 78 (1918), aff'g 240 Fed. 274; *Territory of Alaska v. Annette Island Packing Co.*, 289 Fed. 671 (C. C. A. 8th, 1923), cert. denied, 263 U. S. 708; 49 L. D. 592 (1923); 28 L. D. 535 (1899). "The extension of the Wheeler-Howard Act to Alaska has removed almost the last significant difference between the position of the American Indian and that of the Alaskan native." Cohen, *Handbook of Federal Indian Law* (1940, 406).

⁹ See Cohen, *Handbook of Federal Indian Law*, 413-415.

had occasion to point out in my opinion on "Powers of Indian Tribes," approved October 25, 1934 (55 I. D. 14):

It is a fact that State governments and administrative officials have frequently trespassed upon the realm of tribal autonomy, presuming to govern the Indian tribes through State law or departmental regulation or arbitrary administrative fiat, but these trespasses have not impaired the vested legal powers of local self-government which have been recognized again and again when these trespasses have been challenged by an Indian tribe. "Power and authority rightfully conferred do not necessarily cease to exist in consequence of long nonuser" (*United States ex rel. Standing Bear v. Crook*, 5 Dill. 453, 460). The Wheeler-Howard Act, by affording statutory recognition of these powers of local self-government and administrative assistance in developing adequate mechanisms for such government, may reasonably be expected to end the conditions that have in the past led the Interior Department and various State agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves. [Pp. 28-29.]

Finally, it must be noted that the allowance of non-Indian fishing in areas subject to Indian possessory rights is a continuing wrong, rather than a wrong which, once committed, creates supervening and inalienable rights in third parties. It is well settled that by allowing and licensing the use of particular areas for fish traps the Federal Government does not recognize any permanent or proprietary interest therein.¹⁰ Thus while preexisting Indian proprietary interests have been violated they have not thereby been permanently extinguished. The Indian who has been forbidden from fishing in his back yard has not thereby lost his aboriginal title thereto.

I conclude that aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and that such rights have not been extinguished by any treaty, statute, or administrative action.

The foregoing considerations are determinative of the question presented for my opinion. The first part of this question, i. e., whether Indians of Alaska have any fishing rights which are violated by control of particular trap sites by non-Indians under departmental regulations, must be answered in the affirmative, subject to the taking of proof on the facts respecting the location and extent of such rights.

¹⁰ The fact that one has occupied the site the season before or for a number of seasons gives no prescriptive right to the site. *Thlinket Packing Co. v. Harris & Co.*, 5 Alaska 471 (1916); *Columbia Salmon Co. v. Berg*, 5 Alaska 538 (1916); *Alitak Packing Co. v. Alaska Packers Ass'n*, 6 Alaska 277 (1920); *Alaska General Fisheries v. Smith*, 7 Alaska 635 (1927).

It is true that the Secretary of War, under section 10 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1121, 1151), issues permits which certify that the erection of a fish trap at the point named will not interfere with navigation. These permits give no property right, and the War Department makes no determination between several applicants as to their right to occupy the trap site. The Territory of Alaska issues licenses to take fish from Alaskan waters, but these licenses confer no property right and no determination is made between applicants as to the right to occupy a trap site. *Thlinket Packing Co. v. Harris & Co.*, *supra*; *Columbia Salmon Co. v. Berg*, *supra*; *Alitak Packing Co. v. Alaska Packers Ass'n*, *supra*; *Alaska General Fisheries v. Smith*, *supra*; *Cummins v. Chicago*, 188 U. S. 410 (1903).

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The second part of the question presented, i. e., whether such rights require or justify the closing down of certain trap sites or the allocation of trap sites to Indian groups or other remedial action by the Secretary of the Interior, must likewise be answered in the affirmative, and the question of what particular method of redress should be selected must be considered primarily a matter of policy.

Available evidence indicates that the possessory rights traditionally asserted by Alaskan natives are exclusive rights, under which the right to exclude others from a given area is an integral part of the right itself. In this situation the Interior Department would have no authority to open up to public fishing any areas subject to such possessory rights, any more than it could open to the public a private cannery, whether on land or afloat.

There may, however, be certain native groups that assert and show only *non-exclusive* rights. These would still be property rights, as easements are property rights, and entitled to protection and respect. The opening up of such areas to non-Indian holders under circumstances resulting in the actual exclusion of the interested Indians would be, this Department has heretofore held, a violation of these native property rights, beyond the legal powers of the Department (26 L. D. 512 (1898)). Regulations heretofore issued, which allow the first comer to set up a trap in designated areas and thereafter provide that no other person may trap fish within a specified distance (e. g., 50 C. F. R. 205.10), do result in the actual exclusion of interested Indians, if applied to areas of water or submerged land in which such Indians have private rights.¹¹ Therefore the allowance of fish trap sites to non-Indians within such areas would be legally unauthorized.

Under these circumstances the Department might either forbid the establishment of fish traps except by persons having possessory rights in such areas, or forbid the establishment of any fish traps at all therein, or, as a final alternative, exclude such areas entirely from the domain of departmental control. In no event would there be occasion for a positive allocation by the Department of fish trap sites to Indians, but the effect of recognizing pre-existing Indian possessory rights in waters or submerged land would be to render "allocation" unnecessary for the protection of those rights. All that would be

¹¹ In actual practice, though not in law, holders of trap sites are considered owners. If a trap site is once occupied, others will not attempt to jump it the following season. The high cost of trap equipment makes it uneconomic to race for new sites each season (Gregory and Barnes, "North Pacific Fisheries," pp. 52, 85 fn. 4), and the person who has once occupied a trap site has his equipment close at hand, giving him an advantage in gaining prior possession each year which would be costly to overcome. The result of this practical situation is that trap sites are in fact considered as owned to the extent that they are bought and traded and large companies can obtain and hold numerous traps in spite of the fact that each year theoretically all trap sites are open to competition for prior possession.

necessary would be the exclusion of private parties attempting to interfere with the enjoyment by the Indians of the rights to which they may lay just claim.

The foregoing considerations determine the validity and character of Indian possessory rights in Alaskan waters and submerged lands. The question of the localities in which such rights exist is one of fact which this opinion does not purport to foreclose.

Approved:

HAROLD L. ICKES,
Secretary of the Interior.

NEED FOR CONSENT BY COAL PROSPECTING PERMITTEE AND APPLICANT FOR COAL LEASE TO GOVERNMENT EXPLORATION FOR COAL

Opinion, February 13, 1942

MINERAL EXPLORATION AGREEMENTS—INTEREST OF COAL PROSPECTING PERMITTEE UNDER 1920 LEASING ACT—INTEREST OF APPLICANTS FOR LEASES BASED ON DISCOVERIES AND IMPROVEMENTS—TERMS OF EXPLORATION AGREEMENTS WITH PERMITTEES AND LEASE APPLICANTS—EXPLORATION FOR OTHER MINERALS.

Since a coal prospecting permittee under the leasing act of February 25, 1920, possesses a valuable right which may be interpreted as exclusive even against the Government, the Government should obtain the consent of the permittee to exploration for coal by the Government in an instrument defining the interests of both parties.

It is recommended that such an agreement provide that any discovery made by the Government shall not prevent the granting to the permittee of a lease without competitive bidding covering all coal discovered, provided the permittee has cooperated in the exploration by the Government in the manner specified in the agreement, and with the understanding that any such lease shall provide such special terms of rental and royalty and such other requirements with respect to minerals discovered by the Government as the Secretary of the Interior may deem appropriate.

A similar agreement should be executed with an applicant for a lease who has made a coal discovery under a prospecting permit and with an applicant for an extension of a prospecting permit who has made substantial improvements or investments for prospecting under his permit.

No agreement is required where there has been filed and not yet granted an application for a permit or for an extension of a permit under which no substantial improvements nor investments have been made. The Bureau of Mines should request the General Land Office to deny any such application when the Bureau of Mines intends to explore the area itself.

No agreement with a prospecting permittee is necessary where the Bureau of Mines intends to explore for minerals other than those covered by the prospecting permit.

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MARGOLD, Solicitor:

There was submitted informally to this office a letter addressed to Mr. Charles F. Jackson, chief of the Mining Division of the Bureau of Mines, from Mr. John B. Muskat, Associate Attorney, dated December 9, 1941, which raises the question whether the Government, before exploring for coal on land as to which a prospecting permit has been issued to prospect for that same mineral under the Leasing Act of February 25, 1920 (41 Stat. 437, 30 U. S. C. A. sec. 181 *et seq.*), should enter into an agreement with the prospecting permittee. The letter also raises similar subsidiary questions as to the need for the Government entering into agreements with applicants for permits and leases, under the same act, on land to be explored by the Government.

The immediate case covered by the letter to Mr. Jackson refers to two exploration agreements with the Government, dated September 23, 1941, signed by the parties other than the Government, and now awaiting signature for the Government. One agreement purports to be with Arthur E. Moreton and associates, who are the owners of certain coal prospecting permits issued in 1940; although since the letter was written, a further permit was issued to Arthur E. Moreton on December 17, 1941 (Serial No. 062919). The other agreement purports to be with Margaret N. Wilson and Utah Steel Corporation, and involves a coal prospecting permit now owned by that corporation and a pending application for a lease based upon an expired permit. The lands covered by the coal prospecting permits and lease application are in the Manti National Forest, Sanpete County, Utah, and are owned in fee by the United States; other lands covered by the agreements are owned in fee by, or under lease to, the other parties to the agreements.

Because of the anomalous situation presented by the need of the Government to explore lands on which it has already arranged for exploration by a private party, it is difficult to solve the problem of the proper legal relationship equitably to the private party and consistently with the national interest. A prospecting permittee is in a sense an agent of the Government to explore for the mineral covered by his permit (51 L. D. 416). If the prospecting is not diligently executed, the permit should be revoked (30 U. S. C. sec. 183). If prospecting is diligently executed and a discovery is made, the permittee becomes entitled to a lease without competitive bidding as a reward for his discovery (30 U. S. C. sec. 201). However, if the prospecting is carried on with due diligence and nevertheless it is desirable for the

Government to prospect for the same mineral according to its own methods, my conclusion is that some agreement should be executed by the Government and the permittee adjusting the interests of the parties.

Under the regulations of the Department (43 CFR sec. 193.19) and the terms of the prospecting permit (43 CFR sec. 193.22), a coal prospecting permittee is given the exclusive right to explore for coal. The question evidently has not been raised previously whether this right is exclusive even against the Government. However, a reasonable argument can be made that it is exclusive even in that case. Prospecting permits evidently are used only on Federal and State lands. The cases dealing with them analogize the permits to private leases which give the right to the lessee to prospect for minerals (*Aronow v. Bishop*, 86 P. (2d) 644 (Mont. 1938) and cases cited therein). Such leases are said to be exclusive even against the owner of the land (*Summers Oil and Gas*, perm. ed., sec. 432). The permit gives the permittee a valuable right, since the permit may ripen into a lease (*Witbeck v. Hardeman*, 51 F. (2d) 450 (C. C. A. 5, 1931)). This valuable right is destroyed if the Government makes its own discovery, benefit of which is not given to the permittee. These considerations lead to the conclusion that the Government should respect the right granted to the permittee by obtaining the consent of the permittee to exploration by the Government for the same mineral. Moreover, aside from these considerations of law, I understand that, as a matter of administration, it may be desirable to obtain production of any coal discovered through a lease to the permittee without competitive bidding, thus avoiding unnecessary public disclosure of information which may be deemed strategic in time of war.

My recommendation is that a special form of exploration agreement be executed between the Government and the permittee which will adjust their interests definitely and equitably. The permittee on his part will want to know, in giving his consent to exploration by the Government, how discovery by the Government will affect his preferential right to a lease. The Government on its part should make definite the advantages it will receive if it bears the burden of work from which the permittee will profit.

The adjustment of interests involves administrative determinations upon which the Bureau of Mines and the General Land Office may wish to act and consult. My suggestions for such adjustment are as follows: The Government would agree to inform the permittee of the results of its explorations and to allow the permittee a preferential right to lease the lands to develop all coal discovered, whether by the Government or by the permittee, provided certain conditions of cooperation were met by the permittee, and with the understanding that the lease would provide for higher rentals and royalties and other

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appropriately revised requirements in so far as it covered coal discovered by the Government. The conditions of cooperation might be that the permittee will make available his mine workings and the prospecting equipment which he has available for use on the land, that he will continue his explorations so long as they do not interfere with the work of the Government, and that he will undertake such reasonable exploratory activities as the Government may direct. In case of disagreement as to the reasonableness of any such direction, the decision of the Secretary of the Interior would be final.

I have embodied the foregoing suggestions in a revised form of the exploration agreement, which is attached hereto for your consideration.¹ The revision extends to the opening statement and paragraphs 1, 2, 3, 5, 8, and 9 and omits paragraph 14. Paragraph 3 has been transposed to become paragraph 7.

A related question raised by the letter to Mr. Jackson concerns the necessity for an agreement where an application for a lease is pending, based upon discoveries made under a prior permit. Under the Leasing Act of 1920 the applicant has a right to a coal lease on the lands, more perfect and valuable than that of a holder of a permit prior to discovery, and I recommend that an exploration agreement, appropriately modified, be used to obtain his consent to exploration by the Government.

Similarly, where an applicant for an extension of a permit has made substantial improvements or investments under the permit through diligent drilling or other exploratory operations, and is otherwise entitled under the regulations to an extension of the permit for the completion of such operations, a similar agreement providing for cooperative exploratory work should be made with him. Since an agreement may be terminated by notice by the Government, it may be terminated in the event any application is denied or any permit is revoked.

A further question raised by the letter to Mr. Jackson is whether an agreement is necessary where a person has only applied for a permit and such a permit has not yet been granted. In such case the applicant has no claim of right against the Government. He is seeking a privilege the Government has no obligation to grant. The same is true of an applicant for an extension of a permit who has not already undertaken substantial exploratory work under the permit. The regulations permit but do not guarantee extensions in such cases (43 CFR sec. 193.25). If the Government intends to investigate the area upon which such applications are pending, the applications should be denied. In order that the actions of the Department may be coordinated in this situation, I suggest that the Bureau of Mines inform the

¹ Attachment referred to may be found in the files of the Solicitor's Office. [Ed.]

General Land Office promptly of decisions made as to areas of land, in which the Government owns the fee or the mineral rights, which it expects to explore for minerals.

The recommendations made herein for execution of exploration agreements with prospecting permittees and applicants for leases based on discoveries made under a permit relate only to cases where the Government intends to explore for the mineral covered by the permit. The Government need not obtain the consent of any permittee to explore for minerals not covered by the permit since the minerals belong to the Government and since, in any case, the exploration for other minerals is permitted under the reservation in every permit of the right to permit easements for the working of the land under authority of the Government (30 U. S. C. sec. 186; 53 I. D. 508.)

In this particular case the two exploration agreements of September 23, 1941, must, in any event, be re-executed. In the first place, both agreements recite as authority the Strategic Materials Act of June 7, 1939 (53 Stat. 811). However, the exploration in this case is not being carried on under the authority of that act, since coal has not been designated as a strategic material. The authority for the exploration is the appropriation in the First Supplemental National Defense Appropriations Act, 1942, approved August 25, 1941 (55 Stat. 669), which provides for the investigation of raw material resources for western steel production. This appropriation expressly provides for exploration of the amount and quality of coking coals essential to expanding steel production. In the second place, these agreements have not been properly executed. Arthur E. Moreton should execute the agreement on behalf of himself and his associates, in accordance with the designation in the agreement of the party of the second part. Similarly, the Utah Steel Corporation should execute the agreement as a corporation and not by its individual stockholders.

In the re-execution of these agreements I recommend that the lands now under coal prospecting permits or covered by the pending application for a lease be eliminated from the agreements which cover lands of which the parties of the second part are the owners or lessees. The permit lands can then be covered by the special exploration agreements proposed.

In view of the necessity for coordination between the Bureau of Mines and the General Land Office in the matters discussed in this memorandum, I suggest that exploration agreements entered into with prospecting permittees and permit and lease applicants be routed through the General Land Office before they are executed for the Government by the Bureau of Mines.

**HABENDUM AND PAYMENT PROVISIONS IN OIL AND GAS
LEASE ON CHOCTAW INDIAN LAND**

Opinion, February 13, 1942

**INDIAN OIL AND GAS LEASE—CANCELTION AFTER PRIMARY TERM—PRODUCTION
FROM GAS WELL IN PAYING QUANTITIES—SHUT-IN GAS WELLS CAPABLE OF
PRODUCTION—GAS WELL RENTAL.**

Where a lease is for a term of 10 years and as much longer thereafter as oil or gas is found in paying quantities, and where the development of only one gas well in paying quantities is sufficient to continue the life of the lease, the lease is not subject to cancelation after the expiration of the primary term if there is a gas well thereon capable of producing gas in such quantities upon which the required royalty of \$300 per annum is paid, even though such well is shut in because of market conditions and gas is not sold therefrom.

Where payment is made by the lessee of \$300 annual royalty on one shut-in gas well, which payment continues the life of the lease, he may pay \$100 annual rental on a second shut-in gas well under the provision in the lease providing for forfeiture of an unprofitable gas well unless a \$100 annual rental is paid for retaining gas producing privileges.

MARGOLD, Solicitor:

You [Secretary of the Interior] have requested my opinion on certain basic questions presented to you by the Geological Survey, through the Office of Indian Affairs, concerning the interpretation of lease No. 37992, contract 127ind-858, Susan Riddle, Choctaw Indian allotment 15694, upon which decisions are desired in order that the proper royalty accounting may be made.

The lease in question is dated May 31, 1918, and was approved by the Department on July 18, 1918. The assignment by the original lessee, The Quinton Spelter Company, to the Utilities Oil Production Corporation, pertaining to the W $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 12, T. 7 N., R. 18 E., Ind. M., was approved by the Department on October 11, 1929. The lease is for a term of "ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, * * *."

Development of the oil and gas deposits underlying the lease consisted of two dry gas wells completed in 1918 and 1921, which were producing until March 1930, when they were shut in. The open flow of each well is approximately 200,000 cubic feet per day and the shut-in pressure is approximately 150 pounds per square inch. Gas from well No. 1 was sold prior to its being shut in during March 1930. Gas from well No. 2 was never sold but was used only for lease operations. Since the wells were shut in the lessee has continued to pay royalty for

well No. 1 at the rate of \$300 per annum and rental for well No. 2 at the rate of \$100 per annum. The reasons given for not utilizing the gas subsequent to 1930 are insufficient pressure to enter the main shipping line and marketing conditions which do not justify the installation of equipment to boost the pressure to line requirements.

The provisions in the lease relating to the payment of royalty and rental on gas wells are as follows:

* * * And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: *Provided*, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty, which will become effective as a part of this lease: *Provided, further*, That in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such extent that the gas in [is] unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there shall be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

The questions presented are:

- (1) Did the lease expire when production ceased in March 1930, or may it properly be considered as continued in force by existence of wells capable of producing gas which are now shut in?
- (2) What is the annual royalty or rental due from well No. 1, from which gas formerly was sold, while it is not producing?
- (3) What is the annual amount due for well No. 2 from which gas was used only for lease operations, while it is not producing?

Since the answer to question (1) depends to a certain extent upon the answers to questions (2) and (3), I shall discuss all of the questions together.

As the habendum clause of the lease provides that after the expiration of the 10-year term (1928) the lease shall remain in effect so long as "oil or gas is found in paying quantities," it is necessary to deter-

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mine whether or not after March 1930 gas has been found in such quantities within the contemplation of the law.

There is a well-established rule that where an oil and gas lease is for a definite term and as long thereafter as oil or gas is found (or produced) in paying quantities, the lease terminates after the definite term as soon as the wells cease to yield an operating profit, whether or not such cessation is due to market conditions. Summers, Oil and Gas, Perm. Ed., Vol. 2, sec. 306. However, there is an equally well-established exception to the rule in the case where only dry gas wells have been produced under the lease, where these have had to be shut down because of market conditions but are capable of production, where only a flat sum is due the lessor for production from a gas well, and where such sum has been paid by the lessee. If these conditions exist, the courts do not permit the lessor to cancel the lease for expiration, abandonment or forfeiture, on the theory that gas cannot be stored above ground and the lessor is not injured since he receives the same amount as he would if the gas were being produced and sold. Summers, Vol. 2, sec. 299; *Summerville v. Apollo Gas Co.*, 207 Pa. 334, 56 Atl. 876 (1904); *McCutcheon v. Enon Oil Co.*, 102 W. Va. 345, 135 S. E. 238 (1926); *McGraw Oil Co. v. Kennedy*, 65 W. Va. 595, 64 S. E. 1027 (1909). Note that the exception fails if the wells have become incapable of production. *United States v. Brown*, 15 F. (2d) 565 (N. D. Okla. 1926).

In *Smith v. McGill*, 12 F. (2d) 32 (C. C. A. 8, 1926), the court had under consideration an Indian lease the terms of which were identical with this lease. There gas from a gas well brought in during the primary term was sold for about two months thereafter. It was then discovered that the gas was not feeding into the pipe line because of lack of pressure and the lessee began to drill the well to a greater depth. The lessee tendered the lessor \$300 as payment for the gas-producing well but the money was refused because the lessor did not consider the well as producing gas in paying quantities. The lessor failed in his effort to have the lease canceled. I shall quote at length from the opinion in this case because it summarizes the position taken by the courts in construing leases involving gas alone:

* * * In the construction of leases of this nature, a distinction has generally been recognized between a covenant by the lessee to pay the lessor an amount proportioned to the oil which is produced, and a covenant to pay the lessor a fixed sum as a periodic rental for a gas well. As to the first-mentioned covenant, due diligence on the part of the lessee to produce and market the oil is usually implied, if not expressed, because the lessor's remuneration for the grant depends upon it. *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 72 C. C. A. 213; *Union Gas & Oil Co. v. Adkins* (C. C. A.) 278 F. 854. But where the lessor is to receive a fixed sum, in the nature of rental, for a gas well, the lessee is not held to the

same degree of diligence in producing and marketing the gas which has been found in paying quantities.

Gas can ordinarily be marketed (except for minor uses) only through pipe lines, which often belong to others, and may have to be extended from a distance. Gas cannot profitably be brought to the surface and stored to await a market. Even if gas is marketed through a pipe line, if the pressure from a particular line falls below the pressure in the pipes by gas from other wells, the gas from the weaker well will cease to flow in the pipe lines. A temporary cessation of production and marketing of gas may not be unremunerative, because the final disposition of the gas may make the cessation advisable. *McKnight v. Manufacturers' Natural Gas Co.*, 146 Pa. 185, 23 A. 164, 28 Am. St. Rep. 790; *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836; *Transcontinental Oil Co. v. Spencer* (C. C. A.) 6 F. (2) 866.

While these problems present difficulties to the lessee, the lessor suffers no loss as to a well in which gas has been found, so long as the rental is paid to him for the gas well. It is therefore the generally accepted rule that, where an oil and gas mining lease provides for the payment to the lessor of a fixed sum, in the nature of rental, for a gas well, and the lease also provides that gas must be found in paying quantities, or in quantities large enough to transport, the question whether the gas, which is found, is in paying quantities, or in quantities large enough to transport, is to be left to the judgment of the lessee, acting in good faith. [Numerous cases cited.] [P. 34.]

Under the theory of the exception to the general rule it is apparent that the reason for the exception and its application would fail unless the lessor were paid for a gas well the same amount as he would be entitled to receive under the lease if the gas well were actually in profitable operation. This basic requirement that the lessor receive an equivalent payment so that he is not injured by the failure of production and the other conditions of the exception are seen in the foregoing quotation from the *Smith v. McGill* case and in the following quotations from other cases where the exception to the general rule has been applied or discussed:

It is contended on the part of the appellant that the question of whether oil or gas is produced in paying quantities is one solely for the determination of the lessee. There is some force in this contention in so far as it applies to gas wells, where the contract provides that the lessor shall receive a fixed annual rental for each gas well, and the lessee is ready and willing to pay that rental. *In such case the landowner receives the same revenue from the operation of his land as he would receive if the gas well were in fact a paying one to the lessee.* [Italics supplied.] [*Union Gas and Oil Co. v. Adkins*, 278 Fed. 854 (C. C. A. 6, 1922) at 857.]

Upon the discovery thereof in quantities large enough to transport, the plaintiff was entitled to \$100 per year for the product of each and every well so transported, and this sum was tendered to her by defendants in accordance with the terms of the lease. The amount of her revenue did not depend upon the amount of gas transported, but was a fixed and definite sum, with the additional privilege of using gas for domestic purposes. So long as she received payment of the \$100 per annum and had the use of gas for domestic purposes, she was entitled to claim no other revenue or consideration from lessee on account of the

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well in question. [*Roach v. Junction Oil & Gas Co.*, 72 Okla. 213, 179 Pac. 934 (1919) at 936.]

It may be that for some time the lessee was not able to find a purchaser for the gas, but that was not the affair of the lessors. They were not interested in the proceeds of the sale of the gas. Their rights under the agreement extended only to the receipt of a stipulated annual rental for each well, and the free use of gas for domestic purposes. Beyond this, the question of whether or not the quantity of gas was profitable was for the decision of the lessee. It may be that the final disposition of the product of the well was such as to amply remunerate it for the delay in finding a market. [*Summerville v. Apollo Gas Co.*, 207 Pa. 334, 56 Atl. 876 (1904) at 878.]

* * * What right has Evans [the lessor] to say that no estate vested by reason of insufficiency of gas, when the lease makes no such provision, and the lessee chooses to regard it as sufficient and pay as if it were? * * * He gets the same pay as if the well produced a larger quantity. * * * [*McGraw Oil Co. v. Kennedy*, 65 W. Va. 595, 64 S. E. 1027 (1909) at 1028.]

* * * However, the lease does not in terms say the well must produce gas in "paying quantities" and be marketed. Having no market, the lessee had the right to shut the gas in and pay the stipulated price. It would be of little concern to lessor what was done with the gas, if he gets his payments. * * * [*McCutcheon v. Enon Oil Co.*, 102 W. Va. 345, 135 S. E. 238 (1926) at 241.]

* * * In this connection regard must be had to the distinction between gas and oil wells. This distinction lies in the nature of the product and the provisions of the lease: First, oil may be stored in tanks, while gas can be stored only in the stratum where found; and second, a lessor's income from oil is a share of the oil produced, while the income from gas, except under recent leases, is based, as here, on a *flat royalty* for each well. 2 Summers, Oil and Gas, Perm. Ed., sec. 299, pp. 140, 141. * * * [*Ketchum v. Chartiers Oil Co.*, 121 W. Va. 503, 5 S. E. (2d) 414 (1939) at 416.] [Italics supplied.]

The factual conditions which make up the exception to the general rule are true in all respects in the present case: Only dry gas wells were produced under the lease; these had to be shut in because of market conditions but they have remained capable of production; and only a flat sum was due the lessor as royalty for production from a dry gas well. Accordingly, since the royalty of \$300 is the amount which the lessor was entitled to receive for a gas well producing in paying quantities, it is my conclusion that the payment of the \$300 annual royalty on gas well No. 1 operated to keep the lease in effect, at least with respect to that gas well. A payment of any lesser sum than \$300 would not have had this result, for the good reason that the lessor would have been injured by not receiving the full amount due if the gas well were producing in paying quantities; the exception to the general rule would not apply, and the lease would have to be held to have expired in March 1930 when the lessee failed to continue production in paying quantities.

My conclusion is borne out by the distinction in this particular lease between the terms "royalty" and "rental." The lease provides that

the \$300 payment is a royalty payment and the \$100 is a rental payment. Technically, royalty is the return for minerals produced, and rental is the payment for the privilege of boring for oil or gas or for permitting delay in development. See *Dixon v. Mapes*, 181 Okla. 376, 73 P. (2d) 1131 (1937). If the lease in this case is to be considered still alive on the basis that gas is being produced in paying quantities, the royalty for gas production should be paid for at least one well. If only the rental for the privilege of boring for gas or delayed development were paid, it would be a clear admission that no gas was being produced and that the lease should terminate. In the opinion approved by you on April 19, 1934, 54 I. D. 422, the lease owned by the Deep Rock Oil Corporation there considered was identical with the lease in question. It was there held that the tender only of the rental sum of \$100 per annum was an admission in effect that the lease was not producing gas in paying quantities and, therefore, that the lease should be found to have expired as of the date the lessee failed to continue production in paying quantities.

The question immediately occurs whether it was necessary for the lessee to pay the \$300 annual royalty on gas well No. 2 in order to keep the lease in effect as to that well or as to the rest of the lease. My answer is that a consideration of the terms of the lease as a whole and of the law on the subject shows that it was necessary for the lessee to pay the \$300 annual royalty only on one gas producing well developed under the lease in order to keep the lease in existence over the whole area covered by the lease. It is clear from the terms of the lease that one producing gas well is all that is necessary to continue the life of the lease after the definite term. Section 4 gives the lessee 10 years to produce one well and requires the payment of delay rentals each year until one well has been developed. This indicates that if at the end of 10 years there is one gas well producing in paying quantities (or being paid for on that basis because of the lack of a market) the entire lease remains in effect.

While it is possible for a lease to be forfeited as to a portion of the acreage covered, this result has ordinarily occurred only for the reason that an abandonment or forfeiture was found in a failure to drill wells in an undeveloped portion of the lease where prudent operation or the protection of the lessor would require it. See for example *Sauder v. Mid-Continent Petroleum Corp.*, 292 U. S. 272; *Scott v. Price*, 123 Okla. 172, 247 Pac. 103 (1926). But with respect to the present oil and gas lease, the question has not been presented to this office whether the lessee should be required to undertake any further initial production operations; nor can there be any question of abandonment by the lessee on the facts presented, since the failure to market gas because of market conditions is not an abandonment of the lease

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or of any of the gas wells. *Strange v. Hicks*, 78 Okla. 1, 188 Pac. 347 (1920). In the single case found brought for the cancelation of an area under lease on which there was a shut-in gas well, at one time a producing well, there is the flat holding that there can be no cancelation of the lease by the lessor so long as any part of the development under the lease is producing in paying quantities, because the lease must be treated as a unit. *Pearson v. Black*, 120 S. W. (2d) 1075 (Tex. Civ. App. 1938). This holding was made in spite of the fact that the area sought to be canceled was under a separate assignment and the entire lease embraced the large area of over 10,000 acres.

However, any question of partial cancelation is answered sufficiently by the express language of the lease which provides in effect for forfeiture of the gas rights to unprofitable wells unless gas producing privileges are retained by the lessee through the payment of a \$100 annual rental. This provision, contained in the terms relating to payment for gas wells, recited at the outset of this opinion, reads as follows:

* * * Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease.

This provision evidently applies throughout the life of the lease, whether during the definite term or the indefinite extension thereof which depends upon production in paying quantities. My conclusion, therefore, is that since the payment of the \$300 annual royalty on gas well No. 1 operated to keep the entire lease in effect the lessee was permitted under the lease to pay only \$100 annual rental on gas well No. 2 for the purpose of preventing forfeiture of the well and retaining gas producing privileges.

In summary, the answers reached in this opinion to the three questions raised by you are (1) that the lease may be considered as continued in force since production ceased in March 1930 by reason of the existence of wells capable of producing gas, but shut in because of market conditions, and by reason of payment by the lessee of an annual royalty since that date of \$300 on gas well No. 1; (2) that the annual payment due for well No. 1 is the \$300 annual royalty paid by the lessee; and (3) that the annual payment due for well No. 2 is the \$100 annual rental which the lessee has paid for that well.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

LIABILITY OF NON-GOVERNMENT AGENCIES FOR STATE SALES OR USE TAXES ON EQUIPMENT USED UNDER COOPERATIVE RESEARCH AGREEMENT WITH INTERIOR DEPARTMENT

Opinion, February 17, 1942

COOPERATIVE AGREEMENT—SALES OR USE TAXES—INSTRUMENTALITIES OF FEDERAL GOVERNMENT—BURDEN ON FEDERAL GOVERNMENT.

A non-Government agency engaged in research under a cooperative agreement with the Bureau of Mines is not an instrumentality of the Federal Government, so as to exempt it from nondiscriminatory sales or use taxes imposed by a State. Such taxes are not a direct burden on the Federal Government even though the cost of a purchase is borne by the Government.

MARGOLD, Solicitor:

My opinion has been requested concerning the applicability of State sales or use taxes to nonprofit sales on equipment used for research in which the Bureau of Mines is interested. The question arises in connection with a cooperative research program extending over seven or eight years, which the Bureau of Mines has conducted in conjunction with the American Society of Mechanical Engineers with respect to the effect of boiler water upon the cracking of boiler steel.

The American Society of Mechanical Engineers, acting through the Joint Research Committee on Boiler Feed Water Studies in a cooperative agreement with the United States Department of the Interior, acting through the Bureau of Mines, agreed to pay, among other things, for the costs of materials, supplies, and special apparatus not available in the Bureau. Among the purchases made by the Society is certain equipment to be attached to boilers. This equipment is sold by the American Society of Mechanical Engineers to individual clients and firms throughout the country, either directly, or through consulting firms. The payments received by the Society are placed in a fund to be used for further research. The Society, the consulting firms, and the individual purchasers involved all sustain financial losses upon these transactions, but have expressed their willingness to continue the work in order to help the research program.

After the testing units are purchased by the Society, they are sent to the Bureau of Mines for checking before they are installed in the various plants. These plants report the results of their tests to the Bureau of Mines, and return the worn-out equipment for further investigation and study. The Bureau thus has physical custody of the equipment both before installation and after its removal, although the primary liability for all expenses is that of the Society.

The question presented is whether sales or use taxes may be levied with respect to this equipment, which is sold at a financial loss and in accordance with a cooperative agreement with a branch of the Federal Government.

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No general principle of law exists which exempts nonprofit sales of equipment from taxation. Nor is the American Society of Mechanical Engineers, by virtue of the contract, so integral a part of a Government agency that taxing it either as vendor or vendee would be taxing the Federal Government or burdening its operations.

The leading case upon the subject is *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937), in which it was decided that a contractor constructing locks and dams for the Federal Government is not an instrumentality of the Federal Government, and that a nondiscriminatory State tax upon its gross receipts under the contract with the Federal Government is not unconstitutional as a tax on the contract or as a direct burden upon the Federal Government. Upon the latter point the Court says, on page 160:

But if it be assumed that the gross receipts tax may increase the cost to the Government, the fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work.

Two cases directly dealing with sales and use taxes were decided by the Supreme Court on November 10, 1941: *State of Alabama v. King & Boozer et al.*, 314 U. S. 1, 62 Sup. Ct. 43, and *Curry v. United States of America et al.*, 314 U. S. 14, 62 Sup. Ct. 48, holding that contractors building army camps for the United States under cost-plus-fixed-fee contracts were liable for Alabama sales and use taxes, even though the economic burden of the Government was materially increased thereby. Although the connection with the Government was more direct than that between the American Society of Mechanical Engineers and the Bureau of Mines, the Court decided that the contractors were not acting in the capacity of agents for the Government. As said in the *King & Boozer* case:

* * * The contractors were thus purchasers of the lumber within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.

* * * * *

But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States v. Algoma Lumber Co.*, 305 U. S. 415, 421, 59 S. Ct. 267, 270, 83 L. Ed. 260; *United States v. Driscoll*, 96 U. S. 421, 24 L. Ed. 847. It can hardly be said that the contractors were not free to obligate themselves for the purchase of

material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. [*State of Alabama v. King & Boozer*, 314 U. S. 1, 62 Sup. Ct. 43, 47.]

In both cases, the fact that the added cost of the sales taxes was borne by the Government did not prevent the imposition of such taxes. In the situation before me, the effect, if any at all, upon the Bureau of Mines is entirely problematical.

Therefore, no general exemption from sales taxes exists with respect to this test equipment because of any connection with the Federal Government. It is even more clear that if the American Society of Mechanical Engineers, engaged in cooperative research with the Bureau of Mines, is not exempt as vendor, the purchasers, engaged in commercial operations throughout the country, are not exempt as vendees.

There may, however, be grounds for exemptions in the individual States, depending upon State laws such as those of Michigan, which exempt casual sales or sales in interstate commerce. But such a determination, involving as it does the question whether a private organization comes within the exemptions or exceptions of an individual state under a particular set of circumstances, is beyond the scope of this opinion.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

POLLY IBATUAN

Opinion, February 17, 1942

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—NEGLIGENCE.

Failure to clean grille in irrigation ditch siphon held to constitute negligence making Government liable for damage resulting from overflow on private property.

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—NEGLIGENCE—ACT OF FEBRUARY 20, 1929 (45 Stat. 1252).

A claim for damage to land flooded by irrigation ditch as result of negligence of Indian Service employees may not be paid directly under act of February 20, 1929, authorizing the Secretary of the Interior to "pay * * * for damages caused to owners of lands or other private property * * * by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since this provision has been uniformly held to cover only damage resulting from direct, nonnegligent acts of the Government.

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—NEGLIGENCE—MEASURE OF DAMAGES—OBLIGATION TO MINIMIZE.

A claimant, whose land was subject to intermittent overflow from irrigation ditch, was obligated to make reasonable efforts to minimize the resulting

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damage, and since he could have prevented recurrent losses by the improvement of a roadway his recovery is to be measured by the reasonable expense which thereby would have been incurred, rather than by the entire damage sustained.

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—NEGLIGENCE—MEASURE OF DAMAGES—LOSS OF PROFITS.

Recovery for loss of profits alleged to have resulted from negligence cannot be allowed where the anticipated profits are vague and speculative and the business in question has not been operated for a sufficient period of time to give it permanency and recognition.

GRAHAM, *Assistant Solicitor*:

Polly Ibatuan, of Wapato, Washington, has filed a claim in the amount of \$8,747.50 against the United States for compensation for damages he alleges to have sustained as the result of the overflow from an irrigation canal of the Wapato irrigation project, operated by the Bureau of Indian Affairs. The claim is submitted for consideration under the act of February 20, 1929 (45 Stat. 1252, 25 U. S. C. sec. 388), with the request that, in the event recovery is denied under this act, it be considered in the reduced amount of \$1,000 under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215).

The claimant and the Government appear to agree substantially on the facts upon which this claim is based. Polly Ibatuan operated a fruit and vegetable farm in the vicinity of Wapato, Washington. On August 3, 1939, he entered into a 5-year lease for a certain small tract of land located some 12 miles south of Yakima, Washington, and adjacent to a paved highway running between Wapato and Donald, Washington. The Government operates an irrigation project in this locality and one of its lateral canals, designated as the A-1 Extension, borders the above tract of land. The claimant, in accordance with the terms of his lease, constructed a warehouse on this property, presumably shortly after the lease was entered into, a short distance from both the irrigation ditch and the highway. The building was to serve the two-fold purpose of providing general storage facilities and a place of business from which the claimant could sell his produce to so-called "shopping buyers", who purchased fruits and vegetables for resale in surrounding cities.

The irrigation ditch above mentioned is siphoned under the highway at this point, and there is an iron grille installed at the entrance to the siphon for the purpose of removing weeds and other debris which might clog the passage. The grille is located on the same side of the road as the claimant's warehouse. It appears that during certain times of the year, principally in the late summer months, the grille would fill with green moss and weeds, stopping the normal flow of water and causing an overflow onto the adjacent lands, including those on which the warehouse stood and the roadway which connected this building

with the main highway. The grille apparently was cleaned with fair regularity, but not often enough to prevent an intermittent overflow of water onto the claimant's premises. The record indicates that this was the situation for many years prior to 1939 and 1940, when this claim arose, but that it was remedied thereafter. Before 1939 there apparently had been no complaint, since the land leased by the claimant was not then in use. There is some controversy as to the notice given to the Government by the claimant concerning this situation, but this is not material since the condition was undoubtedly known, or should have been known, to the Government during the period in question.

As a result of this overflow condition, it is alleged that at frequent intervals the earth roadway leading to the warehouse from the highway became soft and muddy and impassable, so that the claimant's customers could not reach the warehouse with their trucks, resulting in a considerable loss of business, for which he now makes claim. He also makes claim for the loss of an onion crop which, it is alleged, spoiled as a result of the claimant's not being able to move it from the field into the warehouse, and for the loss of certain produce stored in the warehouse. He states that the produce deteriorated and became unsalable because it could not be removed.

It is my opinion, based upon an examination of the record submitted, which includes numerous lengthy affidavits for the claimant and various reports and opinions of the Office of Indian Affairs, that the Government's failure to correct this obvious overflow condition was clearly negligence for which it is responsible to the extent provided in the statutes.

The claimant requests that his claim be considered under the act of February 20, 1929, *supra*, which provides in part:

That the Secretary of the Interior be, and he is hereby, authorized to pay out of funds available for the Indian irrigation projects for damages caused to owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works of such projects. * * *

The Comptroller General in the case of *C. J. Mast* (A-45268), decided July 6, 1933, had this statute before him for interpretation. Later, on August 5, 1933, he gave an opinion in the case of *Sam Wade* (A-47614) regarding an almost identical provision in the appropriation act for the Bureau of Reclamation. Act of April 22, 1932 (47 Stat. 114). This later act was also considered by the Attorney General in an opinion to this Department dated April 18, 1940 involving the claim of *Joseph Micka, Jr.* These opinions clearly establish two principles in regard to the application of the act of 1929. First, it does not extend to cases involving negligence on the part of the Government, and second, it does not impose liability on the Government for

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remote causes. For further discussion of these principles see opinion of this Office on the claims of *W. E. Bartlett et al.*, 57 I. D. 415. Here it appears that the irrigation project employees were negligent in the operation and maintenance of the canal, and it further appears that the damage alleged is anything but a direct result of an act on the part of the Government. Rather, the alleged results are entirely consequential. The direct result of the Government's failure properly to operate and maintain its canal was the overflow of water, making the road to the claimant's warehouse muddy, allegedly making the road impassable, thus preventing trucks from using it, all of which resulted in the damage complained of. There can be little doubt that the alleged damage is a consequential rather than a direct result of the Government's negligence.

In view of the clear expressions of the Comptroller General and the Attorney General, and considering the factual situation in this case, it is my opinion that the claim cannot be allowed under the act of 1929, *supra*.

However, the act of 1922, *supra*, permits the allowance of claims grounded upon the Government's negligence, generally upon the same basis as if two private citizens were involved. Recovery under this act is limited to \$1,000. The claimant requests that if recovery is not allowed under the act of 1929, *supra*, the claim be given consideration under this act, and for this purpose he reduces the claim to \$1,000. As stated, it appears evident that the Government was remiss in its duty in failing to prevent the intermittent overflow of water on the claimant's land over this long period of time. No doubt some damage may have been caused from this neglect. The problem of determining the proper measure of damages is difficult. It is fundamental that the claimant could not sit by idly for a period of two years and permit the overflow to continue to interfere with the use of his warehouse and expect the Government to reimburse him for all possible losses resulting therefrom. It is the established rule that there can be no recovery for losses resulting from negligence which might have been prevented or reduced by reasonable efforts on the part of the injured. *Messenger v. Frye et al.*, 176 Wash. 291, 28 P. (2d) 1023 (1934); *Peninsular Savings and Loan Association v. C. J. Breier Company*, 137 Wash. 641, 243 Pac. 830 (1926); *Anderson v. Hayes*, 281 Ky. 484, 136 S. W. (2d) 558, 128 A. L. R. 774 (1940), see also annotation page 780, at 785. While some jurisdictions have made an exception to this rule in the case of nuisances or where the wrong is intentional, it is not contended here, nor can it be seriously claimed that the Government's omission in this case is willful or that it constituted a nuisance.

The case of *Theiler v. Tillamook County*, 81 Ore. 277, 158 Pac. 804 (1916) deals with an analogous situation. The County had constructed a bridge and culvert across a highway in such a manner as to divert the water from a creek into a different channel, thereby damaging the plaintiff's soil. The court, in affirming the decision of the lower court, upheld an instruction to the jury which placed upon the plaintiff the obligation to exercise reasonable and ordinary diligence in protecting himself against the consequences of the defendant's negligence. In the case of *Belnap v. Widdison et al.*, 32 Utah 246, 90 Pac. 393 (1907), the defendant had permitted his irrigation ditch to overflow, causing injury to the plaintiff's crops. One of the questions involved was whether the plaintiff had a duty to exercise ordinary care to protect his crop from this overflow. In this connection, the court upheld an instruction of the jury which, among other things, stated:

The court charges you that it was incumbent upon the plaintiff, or her duly authorized agents, if they saw the plaintiff's land being overflowed by water or had knowledge that her land was being overflowed by water to use ordinary and reasonable care to drain off said water, if possible, and remove any obstructions which might be in defendant's ditch which would cause said water to overflow—that is to say, that the plaintiff cannot sit passively by and see her property injured or damaged without attempting to use ordinary and reasonable care to stop or remove the thing that was causing her injury, if it was in her power or within the power of her duly authorized agents to do the same— * * *

Also, see the case of *Anderson v. Hayes, supra*, and the annotation which follows, holding that where the defendant has obstructed a highway which affords access to the plaintiff's land, it is the plaintiff's duty to remove the obstruction if it can be done for a reasonable cost.

There would seem to be little doubt in this case that the claimant was obligated to make reasonable efforts to reduce or prevent any possible loss. It seems probable that he could have used various means to prevent the overflow from damaging the road. Several methods suggest themselves, such as cleaning the grille whenever the overflow commenced—apparently this is all that was required—or building a dike to keep the water away from the warehouse area, or, as is suggested by Mr. N. W. Irsfeld, Project Engineer, the claimant could have graveled his roadway at an estimated cost of \$150, which would have made it usable regardless of the overflow. This latter possibility seems the most reasonable and is the one which suggests the proper measure of damage in this instance. The rule which places upon the claimant the duty to make reasonable efforts to minimize losses likely to result from the Government's negligence has as its necessary corollary the rule that the claimant is entitled to damages measured by the expense he might reasonably have incurred in an effort to prevent such loss. *Sargent v. North End Water Co.*, 190 Calif. 512, 213 Pac. 33 (1923);

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Anderson v. Hayes, supra, and annotation which follows; Restatement, Torts (1939), section 918.

The claimant offers various reasons for his failure to gravel the roadways, stating as one reason that he did not have sufficient capital to purchase the necessary gravel. In reply to this, it need only be observed that it seems highly improbable that a man with a business allegedly netting a yearly profit of over \$5,000, and who has just completed the construction of a warehouse, could not raise \$150 with which to build a proper road thereto and to prevent a possible loss of \$8,747.50.

The claimant also argues the Government led him to believe that it would remedy the condition and that he was entitled to rely on such representations, and that therefore he reasonably could not have been expected to incur this expenditure. The Government disclaims making any representations in this regard and, in fact, denies that adequate notice of the condition ever was given. However, it appears that the effect of the overflow should have been obvious to irrigation project employees, and, as a general proposition, a person is entitled to believe that a wrongdoer will discontinue his wrongful acts when he has proper notice thereof. But again, the claimant cannot with impunity stand by with a possible loss of over \$8,000 confronting him and refuse to spend \$150 to prevent such loss. The difference between the expense involved and the possible loss of profits is so great as to indicate to a reasonable man that he should take immediate steps to remedy the situation. If there were positive evidence showing that the Government had made strong and repeated promises in this regard, there might be some merit in the claimant's position. But, in any event, it does not appear that the Government was advised of Mr. Ibatuan's claim until receipt of his attorney's letter dated June 5, 1941. The act of 1922, *supra*, contains a 1-year limitation upon the filing of all claims which precludes the consideration of any part of his claim which accrued during the 1939 season. We therefore are concerned only with that portion of the claim which accrued during the 1940 season. Even though the claimant might reasonably have delayed graveling the road during the early part of 1939, believing that the Government would take remedial action, certainly he, as a reasonable man, should not have remained passive during the entire season, and particularly during all of 1940. The claimant's argument in this respect is not impressive.

The claimant further states that graveling the road would not have been a satisfactory solution since, according to him, the water sometimes was two feet deep in front of the warehouse. This, he contends,

would have required a road more than two feet thick, which would have been exorbitant in cost, as well as impractical. To controvert this contention, the Government has prepared an engineer's plot of the area in question, showing that if the water had been two feet deep in front of the warehouse, it would have been nearly one foot deep over the highway. There is no evidence that the water ever was so deep as to overrun the highway at this point. The Government's investigation as to the greatest depth of water caused by the overflow, together with the benefit of the engineer's plot, indicates a maximum depth of seven-tenths of one foot in front of the warehouse. The project engineer's estimate of the gravel required for the roadway is based upon this computation. However, even if the water did at one time reach a depth of two feet, it does not mean that the gravel necessarily had to be of sufficient thickness to raise the road completely above the water. If properly constructed, it would have permitted of travel even if temporarily inundated. The claimant has submitted no convincing evidence that the expenditure of \$150 for a gravel road would not have given him satisfactory access to the warehouse.

Finally, the claimant contends that the use of gravel would have injured the land for agricultural purposes, and that the terms of the lease prevented him from disturbing the natural condition of the soil. For this reason, he states, he would have rendered himself liable for damages to the lessor. However, there is no evidence in the record to show that the land was or could be used for agricultural purposes. On the contrary, it appears that it had been idle for many years prior to 1939. Moreover, if the land were usable for farming, the damages caused by gravel would have been negligible compared to the loss of expected profits alleged. In the circumstances, it would seem that this excuse of the claimant is not valid. A further point to be considered is that since the land was leased for the express purpose of building a warehouse and a place of business, it should have been, and probably was, understood by the lessor that adequate means of ingress and egress would have to be provided by the lessee. In fact, it appears that the lease itself recognized the necessity for altering the condition of the land by providing in part:

The Party of the Second Part agrees to take immediate possession of said tract and agrees to level, gravel and build a loading platform or storage and packing building, all at his own cost and expense and in addition to the rental hereinafter set forth and to be paid, * * *

Presumably, in accordance with this provision, the claimant admits to having spread several loads of gravel on the ground in front of the warehouse and on the road, although he now contends that it was insufficient to make it impassable when the overflow occurred. It does

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not seem that the lease in any way precluded the use of gravel on the land.

It is my opinion that the claimant has shown no tenable reason for his failure to take the simple precaution of graveling this roadway, which the evidence shows would have prevented the loss complained of, and that the only fair measure of damages is the estimated cost of making the suggested improvement.

Entirely aside from the question of mitigation of damages, it does not appear that the claimant has offered adequate or satisfactory proof of his alleged loss of profits. While it is the general rule to permit recovery for loss of profits, in the proper case, the proof thereof must be specific and positive. Recovery is not permitted for vague, speculative, anticipated profits. There must be definite and positive proof of the loss. *Blakiston v. Osgood Panel and Veneer Company*, 173 Wash. 435, 23 P. (2d) 397 (1933); *Andreopoulos v. Peresteredes*, 95 Wash. 282, 163 Pac. 770 (1917). Here the claimant merely gives general estimates of the profits he thinks he may have lost over the 2-year period in question. This is entirely inadequate.

Further, it has been held that there can be no recovery for loss of profits unless the business has been in successful operation for such period of time as to give it a certain permanency and recognition, so that alleged loss of profits can be reasonably approximated. *Carolene Sales Company v. Canyon Milk Products Company*, 122 Wash. 220, 210 Pac. 366 (1922). In this case, the claimant, while apparently having operated a truck farm for some period of time, had only constructed the warehouse and commenced this new business venture in 1939, at which time he contends the damage started to accrue by reason of the overflow. However, despite the present inadequacy of the proof with regard to loss of profits, it probably can be assumed safely that the claimant can offer satisfactory evidence of losses to the extent of \$150, which fact justifies the allowance of the cost of graveling the road as the fair measure of damages.

The other two items of damage, namely, the loss of an onion crop and the spoilage of certain fruits and vegetables stored in the warehouse, both of which it is claimed resulted from the muddy road conditions, are entirely too remote to warrant serious consideration.

Having carefully considered the entire record, including the reports, statements, and arguments presented, it is my opinion that recovery cannot be allowed under the act of 1929, *supra*, for the reason that it does not apply to damages resulting from acts of negligence on the part of the Government, or to damages resulting from remote causes, and that recovery under the act of 1922, *supra*, should

be limited to the estimated cost of graveling the road from the main highway to the warehouse. Accordingly, the claim should be allowed and certified to the Congress in the amount of \$150, contingent upon the claimant's indication of his willingness to accept the reduced amount.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

ALGOMA LUMBER COMPANY ET AL.

Opinion, February 27, 1942

INDIAN LUMBER CONTRACTS—PRACTICAL CONSTRUCTION.

The practical construction given to a contract by both parties for several years may not be repudiated by a party that has profited therefrom even though such construction is incompatible with the literal terms of the contract.

INDIAN LUMBER CONTRACTS—ALLOWABLE INCREASES OF STUMPAGE PRICES—PRACTICAL INTERPRETATION—ESTOPPEL.

Where an Indian lumber contract authorized the Commissioner to readjust stumpage prices at three-year intervals on the basis of prices prevailing during such periods, and stumpage price readjustments were made at other times and on other grounds to the benefit of the contractor, the contractor is estopped from objecting to a continuance of the practice when it runs to his disadvantage.

INDIAN LUMBER CONTRACTS—ALLOWABLE INCREASES OF STUMPAGE PRICES—AUTHORITY OF COMMISSIONER OF INDIAN AFFAIRS—DAMAGES.

The Commissioner of Indian Affairs, authorized by contract to readjust stumpage prices by a given date, and having done so, had exhausted his authority and was not empowered to make a further adjustment a few days later. The profit drawn from such unauthorized action would be properly deductible from any claim against the Government based upon the same contract.

INDIAN LUMBER CONTRACTS—WAIVER.

Express consent by the contractor to a proposed course of action constitutes a waiver barring any claim grounded on the illegality of such action.

INDIAN LUMBER CONTRACTS—ASSIGNMENT.

An assignee is bound by the practical interpretation of the assigned contract concurred in by his assignor.

INDIAN LUMBER CONTRACTS—INTERPRETATION—READJUSTMENT OF STUMPAGE PRICES.

Where an Indian lumber contract provided for readjustment of stumpage prices every three years such readjustments could be fixed at rates varying during the period before the next readjustment.

CLAIMS OF CONTRACTORS—OFFSETS.

Moneys legally due the Government under a contract and not paid, by reason of a mistake of law, may be set off against a subsequent claim of the contractor.

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INDIAN LUMBER CONTRACTS—INTERPRETATION—BURDEN OF PROOF.

Where a contract has been loosely construed by both parties for many years, the contractor seeking to establish a breach must bear the burden of showing that the interpretation put upon the contract by the Government was unreasonable.

BOARD OF APPEALS (Felix S. Cohen, Chairman, W. H. Flanery, Leland O. Graham).

By reference from the Solicitor, the Board of Appeals has considered the claims of the Algoma Lumber Company, the Lamm Lumber Company and the Forest Lumber Company, which are embodied in S. 943, upon which this Department has been asked to submit a report. In the course of such consideration, on March 20, 1941, the Board conducted a hearing relative to the said claims. The purpose of this bill is to authorize payments in accordance with the decisions of the Court of Claims handed down on January 12, 1938, in favor of the above-mentioned three corporations in the sum of \$25,094.56 for Algoma, \$12,126.39 for Lamm and \$44,772.62 for Forest. These decisions of the Court of Claims were reversed by the Supreme Court on January 3, 1939 (*Algoma Lumber Co. v. United States*, 305 U. S. 415), on the ground that the Court of Claims had no jurisdiction of the controversy. The Supreme Court did not consider the cases on the merits.

At the hearing so conducted before Messrs. Felix S. Cohen, William H. Flanery, and Leland O. Graham, Members of the Board of Appeals, there were present: William S. Bennet, Attorney for the lumber companies; Ernest L. Wilkinson, Attorney for the Klamath Tribe; Boyd Jackson, Delegate of the Klamath Tribe; W. Barton Greenwood, Finance Officer and Business Manager, Office of Indian Affairs; LeRoy D. Arnold, Director of Forestry; J. Donald Lamont, Assistant Director of Forestry; and S. J. Flickinger, Assistant Chief Counsel, Office of Indian Affairs. Subsequent to the hearing a brief was submitted on April 14, 1941, by W. S. Bennet, attorney for the three lumber companies, and an answering brief was submitted on May 31, 1941, by Ernest L. Wilkinson, attorney for the Klamath Indians, following which a reply brief was submitted on behalf of the claimants. These three briefs are made a part of the Department's record in this matter.

The amounts claimed by the respective companies grow out of an increase of 40 cents per thousand feet in the stumpage price of lumber alleged to have been illegally imposed by the Commissioner of Indian Affairs in 1928 in administering contracts for the sale of the lumber to be cut by the companies on various units of the Klamath Indian Reservation. The contract in each case fixed the price to be paid for stumpage during its initial period but provided for adjustment of the price at regular intervals by the Commissioner of Indian Affairs. Under the Algoma and Lamm contracts, which were made in 1917,

stumpage prices were to be adjusted as of April 1, 1920, 1923, 1926, and 1929, while under the contract in the Forest case, which was originally made in 1920 with the Williamson Logging Company but subsequently assigned to the Forest Lumber Company, stumpage prices were to be adjusted as of April 1, 1924, 1927, 1930, 1933, and 1936. All three contracts provided that, in determining whether to increase stumpage rates, the Commissioner should take into consideration whether there had been any increase in the cost of logging operations and lumber manufacture, as well as whether there had been any increase in the wholesale price of lumber. No increase in stumpage rates could be made unless there had been such an increase in wholesale lumber prices, and any increase in stumpage rates could not exceed 50 percent of the increase in wholesale prices in the periods to be compared under the contracts. Under the Algoma and Lamm contracts, before stumpage rates could be increased, there had to be an increase in wholesale prices "during the three years preceding January 1 of each year in which each new schedule of prices is fixed." However, the language of the contract in the Forest case was different with respect to the method of comparison. The provision was the same for the period beginning April 1, 1924, but with respect to the *subsequent* 3-year periods the wholesale prices to be compared were stated to be those "determined *and used* for the preceding three-year period." All three contracts on the other hand, contained the uniform provision that the parties could request a hearing 30 days before new price scales became effective, although declaring that "the determination of new rates shall be wholly within the discretion of the Commissioner of Indian Affairs." There was another important difference between the Algoma and Lamm contracts and the contract in the Forest case. The latter expressly provided that any increase in stumpage rates could subsequently be canceled, while the former contained no provision for reduction.

All three of the lumber companies contend that the 40 cents increase in stumpage rates made effective April 1, 1928, was illegal for two reasons (1) that it was not made at a time permitted by the contract and (2) that there had been no increase in the level of wholesale prices in the preceding 3-year period. The main argument made on behalf of the Government when the three cases were before the Court of Claims was that the action of the Commissioner was lawful in view of the practical interpretation put upon the contracts by the parties themselves. The Board of Appeals, having before it a question involving mixed elements of policy and of law, has felt obliged to give consideration to equities involved in these cases which the Court of Claims apparently was not free to consider. Furthermore, the Board, having examined the history of the administration of the contracts, is

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of the opinion that other legal questions, which are raised by facts peculiar to each of the three cases, must also be considered. The Court of Claims did not deal with these questions, which, if they had been presented to the court, might have induced it to dismiss the suits. In view of the peculiarities of each case, each will be examined separately.

1. *Algoma case*: The principal question to be considered in this case is whether the parties did not put such a practical construction upon the contract that, even if it is at variance with its terms, the company is now estopped to contest the Commissioner's action, in view of the financial or other benefits which it obtained thereby.

When the first adjustment period of the contract arrived in 1920, the Commissioner increased the stumpage rate by 67 cents, effective April 1. The Commissioner arrived at this figure by subtracting the amount of the increase in the cost of lumber production from the amount of the increase in wholesale prices of lumber during the preceding 3-year period. This was the method of determining the extent of any stumpage price increase followed by the Commissioner in every adjustment period except 1923. The Commissioner was directed by the contract to take into consideration any increase in production costs although his discretion was expressly limited only by the provision that an increase in stumpage rates could not be made which exceeded 50 percent of the increase in wholesale prices during the preceding 3-year period. Thus the deduction of any increase in production costs was within the framework of the contract but only as long as it was not understood to be obligatory.

The company in its letter of March 30, 1920, explained that it was accepting the increase imposed not because of the rise in wholesale prices during the preceding 3-year period but because it was "justified by present conditions," and declared that its "greatest objection" to it was that no price increase had been made upon the lumber unit of a competitor—factors that had nothing to do with the permissibility of stumpage rate increases under the contract. The letter noted also the Commissioner's promise that he would consider reducing the price at the end of the contract year if conditions warranted, and concluded by thanking the Commissioner for this "additional concession." The company itself thus characterized the Commissioner's promise as a departure from the strict terms of the contract. Moreover, by calling it an "additional concession," the company must have been referring either to the fact that the Commissioner had taken into consideration "present conditions," or to the fact that he had deducted the increase in the cost of production from the increase in wholesale prices during the preceding 3-year period. On April 5, 1920, the Commissioner, pursuant to this promise, instructed the Superintendent of the Klamath

Reservation to make "a very thorough study of production costs and lumber prices in the Klamath region" in order to determine whether the 67-cent increase should be continued in 1920 and 1921.

When the second price adjustment period arrived in 1923, the Commissioner increased the stumpage rate by 66 cents, effective April 1. If he had followed the same formula as in 1920, namely, of deducting the increase in the cost of production from the increase in wholesale prices, he should have imposed an increase of no less than \$3.87, and the company would have had to pay \$283,029.92 more than it did during the period 1923-1925 alone. Moreover, since an increase once added to the stumpage price could never thereafter be canceled, it would have had to pay an additional \$596,608.45 during the period from May 1, 1925, to April 30, 1930.

In 1923 the Commissioner certainly considered only current conditions in determining what increase to make in the price of stumpage. The increase in wholesale prices from 1920 to 1923 had been the result of a post-war boom that had skyrocketed lumber prices, and the Commissioner relieved the company of its consequences by imposing an increase of only 66 cents. Before the increase was announced, the company in its letter of January 8, 1923, had pleaded against any increase "*in view of the heavy increase which was made three years ago,*" and the fact that the margin of profit had declined during the last three years. The first reason had nothing to do with any factor which was applicable under a strict interpretation of the contract, and moreover, hardly accorded with the facts. After the increase was determined, the company protested in its telegram of February 28, 1923, on the ground that no increase was justified "by prospect for next three years although present market temporarily very high." On March 24, 1923, the company, however, offered to withdraw its protest if it could have the assurance of the Commissioner that he would reduce the price if the market declined in 1924 or 1925, and this assurance the Commissioner gave in his letter of April 5, 1923. In this letter the Commissioner also stated:

The purpose of the office in increasing stumpage prices has consistently been that of securing to the Indians every advantage to which they are justly entitled under the terms of the contract, and at the same time giving the fullest consideration to the legitimate interests of the purchaser of the timber.

The Commissioner did not increase the stumpage price in 1926. There had been in fact a decline in wholesale prices during the preceding 3-year period. Yet the Commissioner did proceed to consider whether to increase the price, and it is highly significant that when in his letter of January 2, 1926, he asked for an extension of time to make the price determination, the company did not take the position that an increase in the price of stumpage could not be made because the

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wholesale price of lumber had declined in the preceding 3-year period. As usual, it pleaded rather in this letter as well as in its next letter of February 24, 1926, that the *prospects for the next 3-year period were bad*. Thus in its letter of January 2, 1926, it argued that "certainly no increase in prices can be made without subjecting us to further severe losses unless lumber prices for the next three years should greatly exceed those of the past three years." Moreover in its letter of February 24, 1926, it even argued that it was the purpose of the contract "to divide the prospective advance in timber values between the Indians and ourselves" but that in fact it had made nothing on its investment during the last two years.

Some significance must also be attached to the fact that the Commissioner's telegram of February 26, 1926, contains no indication that the decision not to increase the price of stumpage was to remain undisturbed for the following three years. The telegram reads, "Advise Algoma and Lamm companies there will be no increase in stumpage prices *on April first*," which would suggest that the Commissioner was merely deferring his right to make a price determination until the following year when the market might be more favorable. The language of this telegram should be compared with that of February 19, 1920, in which the Commissioner had informed the company that the increase "for *second three year period* should be sixty seven cents * * *," and with that of February 27, 1923, in which he announced to the company that the stumpage rate " * * * should be advanced sixty-six cents on *April first*, nineteen twenty three, making new price four dollars and ninety cents per thousand feet *thereafter* * * *." On February 27, 1926, a letter was also sent from the Commissioner's office to the company which observed that the "office has your letter of February 24, 1926; urging that no increase in price be made *on April 1, 1926* * * *." The letter did not say "as of April 1, 1926." This letter also stated:

Prior to the receipt of your letter, final consideration had been given to the question of whether an increase of the price would be justified in view of market conditions and the terms of your contract for the purchase of this timber; and the Commissioner had instructed Superintendent Arnold of the Klamath Indian Reservation to advise your company that no increases would be made in the prices of the various species *on April 1, 1926*.

Again, when on February 26, 1927, the Commissioner informed the company that there would be no increase in the price of stumpage "April first, nineteen twenty-seven," it did not take the position that a price increase would not be permissible because there had been no increase in the average or wholesale prices during the preceding 3-year period. It simply expressed surprise that the Commissioner should be thinking of a price increase then because, it supposed, a price once

fixed was to remain undisturbed for a 3-year period. This was, however, entirely inconsistent with the understanding which had already been arrived at that stumpage prices could be reduced. The company took entirely inconsistent positions depending on the nature of its interest in the particular circumstances. In his letter of March 30, 1927, the Commissioner explained:

April 1, 1926, was the *regular* period for the increase of stumpage prices on this unit. Because of unfavorable market conditions, this office did not think it advisable to increase the prices at that time, and so advised you by letter of February 27, 1926. It was hoped at that time that there would be a substantial improvement in conditions prior to April 1, 1927. However, conditions have been such during past years and the outlook for increased lumber prices during the year beginning April 1, 1927, is such that the Office thought it inadvisable to require any increase of price effective April 1, 1927, for the remaining two years of the three year period.

The company in replying to this letter on April 20, 1927, reiterated that it understood from the Commissioner's letter of April 1, 1926, that the price was then fixed for the following three years but added:

If you could see your way clear, we would like to have you confirm these prices for the remaining two years of the three year period.

Certainly in this request there is no insistence upon any strict legal rights under the contract.

On April 27, 1927, the Commissioner wrote to the company to point out how fairly they had always been treated in the past, in view of the fact that he had always considered depressed market conditions in determining whether to make an increase. The company's reply to this letter on May 6, 1927, is perhaps the most significant in the whole correspondence considering that the right of the Commissioner to make a price determination at this time was a matter of dispute. In the first place, the letter again says nothing of any decline in wholesale prices during the past three years. On the contrary, the letter says:

Our contract provides to the effect that an increase could be made every three years *if conditions should warrant*.

In the second place at this late date the company still did not definitely say that it would accept no increase in stumpage prices in 1928. While it still insisted that the stumpage rate could not be increased that year, it conceded: "However, as you say, *we have always been treated fairly in the past*, and we will hope for the same fair treatment in the future, *meeting this problem of price adjustment later if it should arise.*"

It is not to be wondered therefore that the Commissioner imposed the stumpage price increase of 40 cents, effective April 1, 1928. The market was improving, and the Commissioner, feeling that he had been lenient in the past, decided to balance accounts by increasing the

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price then, although the next adjustment period would not arise until April 1, 1929. In view of the dispute that had arisen, he wrote to the company on January 20, 1928, to ask the company whether it would voluntarily accept an increase of 56 cents, pointing out that both in 1920 and 1923, the company had pleaded that "the provisions of the contract of purchase be not strictly enforced but that sympathetic consideration be given to the probabilities of greatly reduced prices in the future * * *." That the Commissioner's motive was to make an equitable adjustment appears also in his letter of April 4, 1928, to the company, finally announcing the increase of 40 cents rather than 56 cents. He pointed out therein that "the increase in price effective April 1, 1928, is considered in the light of an adjustment of stumpage value to this date," and that the new price partook "of the nature of a compromise as to the increase that may be imposed on the basis of market prices to the end of the year 1925 * * *."

During this correspondence in 1928, the company never gave its consent to the making of the proposed 56 cent increase but it certainly consented to the making of a price determination by the Commissioner. In view of this fact it would indeed be reasonable to conclude that the company waived its right to object to an increase in 1928. In its telegram of January 30, 1928, it even waived any right to insist upon a price determination by February 1, and extended the time to April 1, although no such extension of time had been requested by the Commissioner.

As to the justification for an increase, the company, as usual, pleaded the depressed state of the market. In its letter to the Commissioner on January 30, 1928, the company indicated that he ought to be guided in determining whether to increase the price by the profit of the company "for this past year." When the Commissioner notified the company of the increase of 40 cents on March 24, 1928, it expressed "regret," saying:

We feel that any raise at all is entirely unwarranted by present conditions and is also unwarranted and unfair under the rights given you by our Middle Mount Scott contracts.

Nevertheless it concluded by offering to accept the 40 cent increase if the Commissioner would promise not to make any increase in 1929, and to reduce the price if no profit accrued to the company in 1928. Thus even while it was asserting a presumed illegality, the company was urging the Commissioner to commit another in its favor. This the Commissioner declined to do in view of the questions as to the legality of his past conduct that had been raised by the company.

It is apparent from this course of dealing that the parties had agreed that the contract should be enforced equitably rather than

strictly. Their acts must be judged in their totality and interrelationships, and it is necessary to consider what was implicit in their actions rather than to look merely at their words. It must be particularly borne in mind that the record shows that there were oral conferences, as well as exchanges of correspondence, and great weight must be attached to the considered statement of the Commissioner that it had been understood that the contract would not be enforced according to its letter.

It is well to remember, too, that the contract contained some apparent ambiguities, and was susceptible of interpretations which, although objectively regarded may have been inconsistent with its terms, may have not unreasonably been entertained by the parties. Although the contract seemed to require that stumpage rates be adjusted for 3-year periods, it did not expressly say that the price must be the same for each of the years of a 3-year period. Certainly at the time when price adjustments had to be made, the parties could reasonably have supposed that a different price could be fixed for each of the three following years. The contract could certainly seem ambiguous to the parties with respect to the permissibility of a reduction of stumpage rates. After all, it contained no *express* provision governing reduction. Since the adjustment of prices was in the discretion of the Commissioner of Indian Affairs, an interpretation which permitted an increase as well as a decrease in stumpage rates would seem not unreasonable. It is true that the contract limited the discretion of the Commissioner by the provision that no increase might exceed 50 percent of the net average increase in wholesale prices during the preceding 3-year period, but it might well seem to the Commissioner that if the whole 50 percent had not been added to the stumpage price at the beginning of one 3-year period, the balance would be added during the next 3-year period. As has already been pointed out, the Commissioner in fact regarded the price increase in 1928 as in the nature of such an adjustment. On the other hand, there is the fact that the company at one time argued that it was the intention of the contract to divide the *prospective profits* equally between the Indians and the company. Another rather obvious question which was actually discussed by the parties was whether the Commissioner was bound under the contract to deduct the increase in the cost of production from the increase in wholesale prices. It was the view of the Indian Office that the 50 percent limitation was designed to take care automatically of any increase in production costs.

Under these circumstances the parties themselves put a practical interpretation upon the contract that in effect contemplated a periodic reappraisal of stumpage rates. Certainly a definite understanding had

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been reached that prices could be reduced annually. This was found as a fact by the Court of Claims. But if interim reductions of stumpage prices were permissible, in order to accord fair treatment to the company, surely it must have been expected by the company that an interim increase might also be made, when necessary to protect the interest of the Indians. Indeed to say that it was understood that the stumpage rate could be reduced annually if the market declined is only another way of saying that the guide was to be the current condition of the market rather than the past level of wholesale prices. Again if an annual increase or decrease was contemplated, it could hardly have been expected that the Commissioner would still be bound by the contract method of determining the amount of the increase, i. e., by the limitation that there must have been an increase in wholesale prices during the preceding 3-year period. It would in fact no longer be the 3-year period stipulated under the contract. The silence of the company with regard to this question is most eloquent. It is highly unrealistic to attempt to treat the question of the legality of the time of the increase as a separate question, unrelated to the method of calculating the amount of an increase. The company in 1923 had pleaded against an increase in price "in view of the heavy increase which was made three years before." Surely the Commissioner was justified then in taking into consideration in 1928 the size of the increase in 1920 and 1923. The company repeatedly asked that it be treated fairly and the Commissioner repeatedly declared that he would do so. While not compelled by the language of the contract to deduct increases in production costs, the Commissioner always did so. Although he never actually reduced the stumpage rate, he made investigations to determine whether to take such action. The constant urging by the company of considerations outside the terms of the contract was only another way of appealing for equitable treatment. Thus, while the contract was never entirely set aside, a new method of reappraisal of stumpage rates was in fact established.

The fact that it was never understood that the contract was to be abandoned in all respects accounts for what seem to be inconsistencies in the action of the Commissioner. He seemed to behave sometimes as if the provisions of the contract were not necessarily set aside entirely. Thus the Commissioner spoke of the "regular" adjustment periods under the contract, and it was no doubt contemplated that normally a price fixed at the beginning of an adjustment period would not be disturbed. But obviously a price could not be "fixed" for three years if it could be reduced at the end of the first or second years, as the parties had certainly agreed. Nevertheless it was an economy of

effort, as well as a technical honoring of the literal requirement of the contract, to determine the price for three years. If circumstances did not change, it would remain unaltered for the 3-year period. That such an interpretation of the contract was not necessarily inconsistent with a general requirement that prices be fixed for a 3-year period is apparent from the contract in the Forest case, which, although it also provided for the fixing of stumpage prices for designated periods, nevertheless expressly permitted interim reductions. A good deal can be made, too, of the fact that the Commissioner himself in his letter of January 20, 1928, to the company admitted that any increase in stumpage rates at that time might be attacked on the ground of illegality. But such a statement, after the issue had been sharply raised, can hardly be regarded as an adequate guide to the intentions of the parties before the controversy arose.

It is extremely doubtful that the Algoma contract, in the absence of any element of estoppel, could have been modified by any express agreement altering the method of adjusting stumpage rates. Where a contract made by Government officers expressly provides a mode of change it must be followed (*Plumley v. United States*, 226 U. S. 545; *Brant v. United States*, 46 Ct. Cl. 409). However, the doctrine of "practical interpretation" differs from that of modification. "Practical interpretation" does not presuppose an express understanding achieved by offer and acceptance. It may grow by almost imperceptible degrees. The limitations upon modification do not apply to a practical construction because the doctrine of practical construction is based upon the supposition that the contract has not really been changed. It is true that, as it is normally applied by the courts, the doctrine governs only when the language of the contract itself harbors some ambiguity. It is this ambiguity that presumably takes it out of the rules against modification, for there is no change when the construction of the parties is not inconsistent with the terms of the contract.

It is, however, unnecessary to determine whether the practical interpretation put upon the contract was conceivably consistent with its literal terms. There are at least two cases involving Government contracts in which the Supreme Court of the United States has assumed that a practical construction will prevail even over the literal meaning of a contract. In *District of Columbia v. Gallaher*, 124 U. S. 510, the Court said:

* * * We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which defendant seeks to obtain a deduction in the contract price.

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In *Old Colony Trust Company v. Omaha*, 230 U. S. 100, the Court declared:

Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling influence. * * * Although not strictly such, this rule is sometimes treated as a branch of the law of estoppel. * * * [p. 118.]

The doctrine of practical construction is also normally applied by the Court of Claims only when there is an ambiguity in a contract. But there are also cases in the Court of Claims that seem to dispense with the limitation of ambiguity. Thus in *Manely v. United States*, 68 Ct. Cl. 623, the Court even quoted *District of Columbia v. Gallaher* with approval, as follows:

The principle that the construction which the parties to a contract put upon it will prevail over the literal terms thereof, adopted in *District of Columbia v. Gallaher*, 124 U. S. 505, 510, is applicable in construing the contract.

In *Zimmerman et al. v. United States*, 43 Ct. Cl. 525, there was a contract which literally required only two inspections of stone but the resident engineer ordered three. The court interpreted the first inspection as only "preliminary," and concluded that

* * * there was no violation of the contract by the preliminary examinations. It is shown that the contractors assented to this course. The interpretation given the contract was beneficial to each party to the agreement and was not unreasonable. As it is shown that this interpretation was accepted without objection by the contractors and acted upon by them throughout they can not now be heard to complain. [p. 564.]

The principle underlying these cases is that a practical construction should be given effect even though it is not within the framework of the contract if to allow a party to repudiate such construction will enable him to reap an advantage which he otherwise would not have had. The rules limiting the modification of Government contracts are after all for the protection and benefit of the Government and not the private contractor. If the contractor has benefited by acquiescing in an "interpretation" which was really a departure from the contract, and which served his interests, should he be heard to complain? This factor is clearly recognized in *Old Colony Trust Co. v. Omaha*, and it played a subordinate role in *Zimmerman et al. v. United States*, where the element of the reasonableness of the interpretation was also present. The doctrine is stated in J. F. Donnelly, "*A Treatise on the Law of Public Contracts*" (1922), page 296:

Parties may be bound by estoppel to accept a practical construction put upon the contract by themselves, * * *

citing *Walker v. United States*, 143 Fed. 685; *Bowers Dredging Co. v. United States*, 211 U. S. 176; *State ex rel. South Bend v. Mountain Spring Co.*, 56 Wash. 176, 105 Pac. 243. See also *International Contracting Co. v. United States*, 47 Ct. Cl. 158, and R. P. Shealey, "*The Law of Government Contracts*" (3d ed. 1938) secs. 110, 111.

Even assuming, therefore, that there was no valid modification of the contract, nor a practical interpretation thereof consistent with its strict terms, the Board concludes that the Algoma Lumber Company is nevertheless estopped from asserting its claim. There can be no doubt that it benefited from the method of periodic reappraisal applied by the Commissioner. The company by urging an equitable rather than a strict interpretation of the contract saved in 1923 an amount far greater than the amount of its present claim. The company knew in 1920 that the Commissioner had arrived at the 67 cents increase in stumpage prices by deducting the amount of the increase in production costs from the amount of the rise in wholesale prices and it expected that this was the method by which the Commissioner would determine the amount of the increase in 1923. By urging in 1923 that the contract be given an equitable rather than a strict interpretation, the company in effect urged the disregard of the method (followed in 1920) under which, if applied in 1923, it might have been bankrupted. It may therefore be said that the amount it saved was the difference between the increased wholesale prices and increased production costs—an amount far in excess of the amount of its claim. But even if it be argued that because of the discretion always possessed by the Commissioner it is impossible to determine the exact amount of its savings, the fact that it benefited would still remain. The company also obtained a benefit from the assurance that the stumpage prices would be reduced if conditions warranted even though the price was never actually reduced. Thus in objecting to a price increase in 1927 when none had been made in 1926 the company wrote:

Under our contract, prices were to be fixed for three years at that time, and we assumed that the prices made by your letter of Feb. 27th would hold for three years, and have planned accordingly.

Having accepted benefits under one interpretation of the contract, the company should be estopped to assert losses arising as a result of the same interpretation.

2. *Lamm case*: The practical construction put upon the contract by the parties was the same in this case. But the facts here differ in two respects, which are additional reasons for denying relief, even if the application of the doctrine of practical construction is rejected.

When the time came for an adjustment of stumpage prices in 1923, the Commissioner as usual wrote to the company for a month's exten-

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sion of time in making the price determination. This letter, which is dated January 3, 1923, required the company to give the extension not later than January 15. Not having heard from the company, however, the Commissioner on January 29, 1923, notified it by telegram that the price would be increased by 86 cents unless further information received should modify this conclusion. The company pleaded that there would be a slump in the market, and on February 27, 1923, the Commissioner informed the company that he had decided to reduce the 86 cents increase to 83 cents. The 83 cents increase, the Commissioner informed the company, would be effective April 1, 1923, and he added: "*This is the formal notice of new prices required by contract.*" But on April 6, 1923, the Commissioner informed the company that the increase in price would be reduced from 83 cents to 78 cents, and this was the increase actually applied until April 1, 1926. The Commissioner thus reduced the increase from 83 cents to 78 cents *after* the date specified in the contract for final action, and after he had taken formal and definitive action in fixing the price for the ensuing contract period. It is true that the contract contemplated that although the determination of the Commissioner should lie wholly within his discretion, the company could request a hearing during the 30 days preceding the date of final determination, which would be during the month of March, but, while the company wrote some letters of protest during March, it did not request a hearing. When April 1 arrived the determination of the Commissioner became final.

The company thus saved 5 cents per thousand feet of lumber not only for the ensuing but for the subsequent contract periods. During the remainder of the period of the contract the company cut 206,469,290 feet of lumber. If it had had to pay 5 cents more per thousand feet, it would have had to pay an additional \$10,323.46, which is \$1,802.93 less than the amount of its claim.

The action of the Commissioner in reducing the increase from 83 cents to 78 cents was clearly unauthorized by the terms of the contract. Once he had definitely increased the price his authority under the terms of the contract was exhausted; his discretion had been exercised in accordance with these terms, and he could take no further action. See *Moore v. Robbins*, 96 U. S. 530; *United States v. Schwarz*, 102 U. S. 378; *Noble v. Union River Logging Railroad*, 147 U. S. 165; *Lane v. Watts*, 234 U. S. 525; *West v. Standard Oil Company*, 278 U. S. 200; *Arizona Grocery v. Atchison Ry.*, 284 U. S. 370; *Garfield v. United States ex rel. Frost*, 30 App. D. C. 165; *Wilder v. United States*, 5 Ct. Cl. 468.

On January 20, 1928, the Commissioner asked the company whether it would not voluntarily agree to an increase in stumpage prices of 56

cents. On January 30, 1928, the same question was put to the company by wire, and to this it replied :

We will not contest proposed increase of price if established by Department. Stop. However, we had expected hearing and would like same delayed until after last year's figures in and after bids received on present advertised unit. Stop. We believe Department idea of values will change.

On February 1, 1928, the company gave the same assurance by letter as follows :

In our wire of January 30th, we advised that we would not contest an increase in stumpage price up to the 56¢, which you suggested, if the Department saw fit to make such increase, but requested that your decision be deferred until after last figures and the bids on the newly advertised units were received.

The assurance thus twice given was revoked by the company after the Commissioner had decided to increase the price by only 40 cents.

This conduct of the company has two bearings. In effect it was an acknowledgment by the company that the Commissioner had interpreted the contract equitably in accordance with a mutual understanding, and therefore this claim must be regarded as even weaker than that of the Algoma Lumber Company. In this connection a decision of the Court of Claims is of particular interest. In *Vulcanite Cement Co. v. United States*, 74 Ct. Cl. 692, there was involved a contract for the purchase of cement at a fixed price initially but this price was made subject to adjustment by a Government committee by a supplemental agreement. Interpreting the effect of this agreement, the Court said :

* * * Conceding *arguendo* that as new contracts they are not valid for want of a consideration, nevertheless they may be considered as showing the construction which the parties themselves placed upon the original proposal of the defendant which culminated in the collateral contract. The statements contained in the supplemental contracts are a recital of the effect of the collateral agreement and a declaration made by both parties as to how the contract would be construed by them. [p. 711.]

The Board is finally of the opinion that quite apart from any question of practical construction or estoppel the company waived any right it might have to object to the 40 cents increase in 1928. In *Champion Spark Plug v. Automobile Sundries Co.*, 273 Fed. 74, the court stated the doctrine of waiver thus :

Waiver depends upon the intention of the party who is charged with the waiver. It is an intentional abandonment or relinquishment of a known right or advantage. But for such waiver, the party who enjoys it could not be released from the obligations of the contract. It is a voluntary act, and does not require or depend upon a new contract or a new consideration. Nor does it depend upon estoppel, and, once made it cannot be recalled or expunged. [Italics ours.] [p. 79.]

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3. *Forest case*: This case differs in two important respects from the Algoma and Lamm cases. The Forest Lumber Company, having acquired its rights as a result of the assignment of the original contract to it by the Modoc Pine Company, which assignment was approved by the Secretary of the Interior on January 14, 1927, the question arises whether it is subject to the same equities as the Algoma and Lamm Companies. On the other hand, in view of the language of the contract in the Forest case, the question is presented whether the action of the Commissioner in increasing the stumpage price 40 cents per thousand feet in 1928 is justified by its strict terms.

As a general rule an assignee takes subject to all the equities against his assignor (Williston, *On Contracts*, rev. ed. sec. 438). This rule is applicable also to the assignment of contracts (2 *Ruling Case Law*, pp. 629-30). Since the Secretary of the Interior did not release the Modoc Pine Company, and his consent to the assignment was given only in his capacity as guardian of the interest of the Indians, and not as a party to the contract, this transaction must be deemed an assignment rather than a novation (Clark, *Handbook of the Law of Contracts*, 1914, pp. 454, 528; *American Jurisprudence*, vol. 4, pp. 233-34). However, even if a novation were deemed to have been accomplished, the Forest Lumber Company would be bound by the pre-existing understanding since the contract cannot be regarded as entirely unambiguous in its terms (*Arkansas Amusement Corporation v. Kempner*, 57 F. (2d) 466).

Moreover, while there is no direct proof, there are some indications in the record that the Forest Lumber Company had knowledge of the interpretation put upon the contract by the Commissioner of Indian Affairs prior to the assignment. The record shows that the companies operating in the Klamath region were acquainted in a general way with the stumpage rates of their competitors; that the Forest Lumber Company, before taking over the contract, made a careful investigation of the whole situation on the Reservation; that the Forest Lumber Company not only took over the contract but purchased the whole of the capital stock of the Modoc Pine Company. In view of the nature of this purchase, it is particularly difficult to believe that the Forest Lumber Company did not acquire a knowledge of the preexisting situation with respect to the lumber contract covering the Calimus-Marsh Unit. This situation had resulted in a large saving to the predecessor, and was also to benefit itself. If the Commissioner had imposed in 1924, under the formula he usually followed in determining stumpage rate increases, the minimum increase of 58 cents, the Forest Lumber

Company and its predecessors would have had to pay an additional \$75,327.72 during the period from April 1, 1924 to April 1, 1928.

Finally, knowledge on the part of the Forest Lumber Company would seem to be indicated by the fact that when confronted with the proposed stumpage rate increase of \$1 in 1927, and the increase of 40 cents in 1928, it behaved in the same manner as the Algoma and Lamm Companies. It pleaded, in other words, that the present market was bad; that the cost of logging was increasing; that the quality of the lumber on its unit was deteriorating. But it did not take the position that the Commissioner had no right to make an increase under the terms of the contract either by virtue of the fact that wholesale prices had declined, or that no increase at all could be made in 1928 because it was not an adjustment year. (See the letter of the company to the Commissioner dated April 2, 1927; its telegram to the Commissioner dated January 19, 1928, and its letters to the Commissioner dated February 25, 1928, and August 30, 1928.)

The actions of the Commissioner in increasing the stumpage rate by \$1 in 1927 but postponing the increase until 1928, and then in reducing the increase to 40 cents were dictated primarily by the current market conditions, as in the case of the Algoma and Lamm Companies. The 40 cent increase was regarded by the Commissioner as in the nature of an adjustment of the stumpage rates up to this time. But in the case of the Forest company it was also the view of the Indian Office that the increase was justifiable under the strict terms of the contract.

The language of the contract in the Forest case was susceptible of the interpretation that the Commissioner could compare the period 1924-1925-1926 with the period 1917-1918-1919 in order to determine whether there had been an increase in the average of wholesale prices for lumber. It had been *determined* that there had been an increase in wholesale prices since the 1917-1918-1919 period but this determination had not been *used* in imposing an increase in the stumpage prices. The Commissioner therefore concluded that an increase in stumpage rates of \$1 for the period beginning April 1, 1927, was justifiable. That the Indian Office thought that the contract could actually be interpreted in this way is shown by the memorandum dated December 20, 1929, prepared by J. P. Kinney, the Chief Forester, who appears to have been chiefly responsible for the drafting and administration of the lumber contracts, and the statement contained in the memorandum of Lee Muck, Forest Valuation Engineer, introducing the timber revaluation survey of March 15, 1927, which shows that the Indian Office also interpreted the Algoma and Lamm contracts in the same way. (Page 2 of section entitled "Review of Revaluation effec-

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tive April 1, 1927"; page 29 in red pencil.) The Forest Valuation Engineer observes:

The review of the case which was conducted by the Office recognized the fact that there was no justification for an increase in price on the basis of the trend in the lumber market, covering the three year period ended March 31, 1927. However, it concurred with the field examiners with reference to the interpretation placed on the price stipulations incorporated in the contracts and held that the action made effective as of April 1, 1924, did not operate to deprive the Commissioner of the authority to impose an increase on this basis. Although the construction placed on the terms of the contract by the Office was substantially the same as that suggested by the field examiners it was held that since no increase was made on April 1, 1924, the original agreed prices for the period 1917-1919 should be taken into consideration in the determination of the increase in price which should be made effective April 1, 1927. Proceeding on this basis it was determined that an advance of \$1.00 per thousand was justified on all units but owing to the depressed conditions obtaining this would not be made effective until April 1, 1928. Accordingly under date of February 25, 1927, Superintendent Arnold was instructed to advise all operators concerned that the price of yellow pine and sugar pine would be increased by a margin of \$1.00 per thousand effective April 1, 1928.

In determining the amount of the increase the Commissioner proceeded under the rule he recognized as proper but which he had not followed in 1923 because the companies alleged that its application would be unfair, i. e., by deducting the amount of the increase in production cost from the amount of the increase in market value. The following calculation taken from the memorandum of J. P. Kinney, dated December 20, 1929, shows how the figure of \$1 was obtained:

	Average cost of production	Average price
1924-1925-1926-----	\$24.75	\$27.00
1917-1918-1919-----	21.25	22.50
	3.50	4.50
Net increase in margin of profit of 1924-1925-1926 over 1917- 1918-1919-----		3.50
		1.00

¹ Stipulated price.

The Commissioner, however, while he determined that the price should be increased by \$1 decided not to make the increase effective until April 1, 1928. But before April 1, 1928, the Commissioner decided to reduce the \$1 increase to 40 cents. This figure was obtained in the same manner except that instead of taking the *stipulated price* of \$22.50 as the average wholesale price for the period 1917-1918-1919, the Commissioner decided to use the *actual price* of \$23.10 which, in-

vestigation since the execution of the contract had shown, represented the true average of wholesale prices for this period. The 40 cents increase was obtained thus:

	<i>Average cost of production</i>	<i>Average price</i>
1924-1925-1926-----	\$24.75	\$27.00
1917-1918-1919-----	21.25	¹ 23.10
	<hr/> 3.50	<hr/> 3.90
Net increase in margin of profit of 1924-1925-1926 over 1917- 1918-1919-----		<hr/> 3.50
		<hr/> .40

¹ Actual, not stipulated price.

Assuming that this method of price determination was valid, both the announced increase of \$1 and the increase of 40 cents actually collected were perfectly legal in so far as the provision of the contract was concerned that limited the amount of the increase to not more than 50 percent of the advance in wholesale values beyond the prices "determined and used for the preceding three-year period," which was the period ending January 1, 1920, since no price increase was imposed on April 1, 1924. If the stipulated price of \$22.50 for the 3-year period ending January 1, 1920, is used in determining the legality of the 1927-1929 increase, then there was an increase in wholesale prices of \$2.48 (\$24.98-\$22.50). Fifty percent of this amount is \$1.24 or more than the \$1 increase imposed.

The interpretation put upon the stumpage price determination feature of the contract seems to be supported not only by the provision of the contract which fixed the original stumpage rate under the contract at \$5.08 (a much higher figure than the original stumpage rates under the Algoma and Lamm contracts) but also by the provision which permitted a cancelation of any increase. In view of the high original rate for stumpage, it would normally have been expected that a greater time would elapse before an increase became permissible, in which case a long range comparison would not be unfair, and, on the other hand, in view of the fact that a reduction was always permissible, any injustice which might result from any such long range comparison could be easily rectified.

In view of the fact that the contract in the Forest case contained a provision expressly permitting a reduction in stumpage rates, was the Commissioner authorized in announcing a \$1 increase in 1927 which would be effective only as of April 1, 1928, and then in reducing the \$1 to 40 cents before this date arrived? Did he violate the time stipulations of the contract governing stumpage price adjustments? In his telegram of February 25, 1927, the Commissioner had informed the company: "Stumpage price yellow and sugar pine Calimus-Marsh

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Unit *increased* one dollar per thousand to become effective April first Nineteen Twenty-eight." Then in his telegram of March 24, 1928, the Commissioner informed the company: "*Increase* one dollar price yellow pine Calimus Marsh Unit *reduced* to forty cents effective April first, nineteen twenty eight * * *." It is apparent that the Commissioner was reducing a price which he had previously imposed. Clearly under the terms of the contract in this case he did have authority to reduce the price in 1928, so that his action in doing so was certainly authorized. The price which was thus reduced had also been fixed at the proper time under the contract, since it was fixed in 1927. In view of the price reduction provision of the contract, it would not be a valid argument that a price had to be the same for each year of an adjustment period. If the company argued thus it would be in the paradoxical position of complaining of an act by which it not only sustained no damage but by which it actually benefited. The Commissioner in effect suspended the operation of the \$1 increase from April 1, 1927, to April 1, 1928. If this action was unauthorized, the company should have paid during this period a dollar more per thousand feet for stumpage. Since it cut 42,656,230 feet of lumber during this period, it would have had to pay an additional \$42,656.23, which is only \$2,116.39 less than the amount of its claim. In any event, in the case of a price increase which, although it was not uniform, was made at the proper time under the contract, and which was permitted by virtue of the fact that there had been an increase in wholesale prices, the company would be able to prove no damage.

The Board does not deem it necessary to decide whether under the strict canons of contract interpretation the language of the contract in the Forest case required comparison of wholesale prices for the period 1924-1925-1926 with those for the period 1917-1918-1919. Where a contract has been loosely construed throughout its history, the Board is of the opinion that a burden rests upon the claimant to show that the interpretation put upon the contract by the Government was unreasonable. This burden cannot be maintained by the evidence in this case.

Conclusions.—It is clear that the Algoma and Lamm companies benefited by the practical interpretation which they at least knew had been put upon the contract by the Commissioner of Indian Affairs. Accordingly, under the cases cited, they are estopped to plead the illegality of that practical interpretation. In fact, the Lamm company was the beneficiary of an unauthorized reduction which saved it a sum almost as large as its claim, and the same may have been true of the Forest company. The defense of waiver is available in the Lamm case and possibly also in the Algoma case. It is doubtful in the Forest

case that the increase was unauthorized by the literal meaning of the contract. All three companies benefited in one way or another from some unauthorized concession in the course of the administration of the contract.

On the facts of the cases, even if it is conceded that there were illegalities in the administration of the contract, the companies have not succeeded in showing that they were damaged. The rule concerning recoupment is thus stated, with citation of numerous supporting cases, in Sutherland, *On Damages*, sec. 180, vol. I, p. 536:

Whatever the nature of the contract, however numerous or varied its stipulations, and whether they are all written and embodied in one or several instruments, or only partly written or partly implied, if they are connected, so that what is undertaken to be done on one side altogether is the consideration, or part of the consideration, either in promise or performance, for what is engaged to be done on the other, the range of the right of recoupment is co-extensive with the duties and obligations of the parties, respectively, both to do and to forbear,—as well those imposed at first by the language of the contract as those which subsequently arise out of it in the course of its performance.

A public also differs from a private contract in that payments made by Government officers under a mistake of law may be recovered by the Government (*Hunter v. United States*, 5 Pet. 173; *United States v. Gillmore*, 189 Fed. 761; *Wisconsin Central R. R. Co. v. United States*, 164 U. S. 190), and also in that illegal payments may be offset by way of counterclaim when the person to whom the payment was made sues the Government (*Steele v. United States*, 113 U. S. 128; *United States v. Burchard*, 125 U. S. 176; *United States v. Stahl*, 151 U. S. 366). If an amount legally paid to a claimant may be offset, it would seem to follow that an amount not collected under a mistake of law should be likewise set off. In *Steele v. United States*, the amount set off by the Government was really the amount it had failed to obtain by reason of its mistake of law.

It is the opinion of the Board that there are no good grounds for affording pecuniary relief to the companies.

TRANSPORT OIL COMPANY

GIBSON OIL COMPANY, INC.

Decided February 28, 1942

Motion for Rehearing August 8, 1942

OIL AND GAS—LEASE—DISCRETION OF THE SECRETARY—ACT OF AUGUST 21, 1935.

The Secretary of the Interior has full discretion to refuse to issue, under section 2 (a) of the act of August 21, 1935, exchange leases for lands within one mile of a Naval Petroleum Reserve.

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OIL AND GAS—LEASE—EFFECT OF TRANSMITTAL TO APPLICANT OF LEASE FORMS FOR SIGNATURE.

The transmittal of a lease form for signature by the applicant does not, upon signature of the lease form by the applicant, immediately operate to prevent the Secretary from exercising his discretion to give final approval or disapproval to the issuance of the lease, irrespective of the preliminary negotiations.

OIL AND GAS—LEASE—MEASUREMENT OF DISTANCE OF LANDS FROM PETROLEUM RESERVE.

The distance of lands covered by lease applications from a Naval Petroleum reserve is computed on the basis of legal subdivisions of land and not on actual distance from the boundary of the Reserve.

CHAPMAN, *Assistant Secretary*:

TRANSPORT OIL COMPANY

In a decision dated September 10, 1940, the Commissioner of the General Land Office gave consideration to an application by the Transport Oil Company to exchange under section 2 (a) of the act of August 21, 1935 (49 Stat. 674), its 20-year term oil and gas lease, Sacramento 019654, which as extended, will not expire until December 15, 1951. He said:

The records show that on July 6, 1923, the Secretary approved a suspension of the drilling requirements of the lease, and by letter of October 3, 1934, payment of annual rental was suspended effective December 15, 1933. On March 4, 1940, the Geological Survey reported that inasmuch as no production of oil and gas has been developed within the boundaries of the lease, the exchange will have no effect on current royalties.

Pursuant to section 2 (a) of the act of August 21, 1935, and the regulations thereunder in paragraph 20 of Circular 1386, triplicate forms of the lease are transmitted herewith, to be executed by the lessee and returned, together with the resolution of the board of directors authorizing the execution of the exchange lease and bond. The lessee must also furnish a \$5,000 corporate surety lease bond.

The executed leases should be returned promptly for the signature of the Secretary of the Interior.

The land involved is the NE $\frac{1}{4}$ sec. 26, T. 30 S., R. 24 E., M. D. M., California, part of which is within one mile of Naval Petroleum Reserve No. 1. On May 28, 1941, the Director of Naval Petroleum Reserves, in response to a request from the Commissioner of the General Land Office to be advised whether the Navy Department had objections to the issuance of exchange leases under section 2 (a) *supra*, in this case and certain other specified cases, stated:

The Navy Department has no objections to the issuance of the exchange leases provided each new lease contains the amended section 2 (c) drilling requirements heretofore approved and subject to the condition that the restrictions therein

shall not be waived or modified by the Secretary of the Interior without first affording the Navy Department an opportunity to express its views relative thereto.

Section 2 (c) of the standard oil and gas lease form, which is also used for renewal and exchange leases, is as follows:

Wells.—(1) To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor or lands of the United States leased at a lower royalty rate, or in lieu of any part of such drilling and production, with the consent of the Secretary of the Interior, to compensate the lessor in full each month for the estimated loss or royalty through drainage in the amount determined under instructions of said Secretary; (2) at the election of the lessee, to drill and produce other wells in conformity with any system of well spacing or production allotments affecting the field or area in which the leased lands are situated, provided such system is authorized and sanctioned by applicable law or by the Secretary of the Interior; and (3) promptly after due notice in writing to drill and produce such other wells as the Secretary of the Interior may require to insure reasonable diligence in the development and operation of the property.

In the case of the B. & M. Oil Company, Sacramento 019527, this Department, the Navy Department, and the lessee which sought a renewal of its lease, compromised upon a section 2 (c) as follows:

Wells.—That, since the leased lands are within one mile of the boundary of Naval Petroleum Reserve No. 1, no additional wells shall be drilled nor shall any existing wells be deepened on the lands covered hereby; provided, however, that additional wells necessary to protect the leased lands from drainage by wells drilled on adjoining lands not owned by the United States or on lands of the United States leased to others may be drilled upon the approval of the Secretary of the Interior. The lessee further agrees that, if in the interests of conservation or for any other reasons, producing operations are suspended on adjoining lands not owned by the United States, on request of the Secretary of the Interior to suspend production on the leased lands for the period production is suspended on the adjoining lands aforesaid, with the understanding that the term of the lease shall be extended by adding any such suspension period thereto.

On March 6, 1941, the Department granted a renewal lease, dated as of February 1, 1941, to the B. & M. Oil Company thus modified.

By decision of August 13, 1941, the Commissioner returned the triplicate lease forms, signed by the lessee, "for the initialing of the typewritten amendment to section 2 (c) thereof." The typewritten amendment is the same as in the B. & M. Oil Company lease. Thirty days were allowed for compliance with the requirement, under penalty of final rejection of the application for an exchange lease for failure to comply.

The Transport Oil Company by its attorney has appealed. The attorney bases the appeal on the grounds stated in the Gibson Oil Company, Inc., appeal, *infra*, p. 526, which are as follows:

1. There is no statutory authority which gives the Navy Department any jurisdiction over lands outside of the Naval Petroleum Reserves.

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2. There is no statutory authority which gives the Interior Department any jurisdiction over lands within the Naval Petroleum Reserves.

3. The statutory authority granted to the Secretary of the Interior by the Act of August 21, 1935, in Sec. 2 (a) of said Act, is modified by the following language: * * * "and upon such other terms and conditions as the Secretary of the Interior shall by general rule prescribe," and Sec. 3 in part says "nothing in this amendatory act shall be construed as affecting any lands within the borders of the naval petroleum reserves * * * or agreements concerning operations thereunder or in relation to the same."

4. The only general regulations or general rule that was prescribed before the filing of the application for exchange in the instant case appears to be Circular No. 1446, dated March 21, 1938, which is silent on the drilling restrictions sought by the Navy Department to be imposed in this case.

5. The land in this case is not in fact "within one mile of Naval Petroleum Reserve No. 1" as there are $2\frac{1}{2}$ acres without and $117\frac{1}{2}$ acres within one mile, "or the land is in part within one mile," and the requirement should be changed at least to be identical with the Sec. 2 (c) modification executed by the B. & M. Oil Company for its lease "in part" within one mile of the said Reserve line or more accurately measured from one extreme "point" on said line.

6. The southwest corner of Sec. 26 is but a "point" on the line of the Petroleum Reserve, i. e., the exterior boundary of said Reserve; and all other points on the Reserve line or exterior boundary of said Reserve are successively more distant from the land involved in this appeal, and it is inequitable therefore to base a measurement of "one mile" from the Naval Reserve from this point.

7. The land involved is not located in the Elk Hills Field. The Pliocene production in the Elk Hills Field all lies south and west of a sub-sea elevation of -3000 feet on the "scalez petroliia" and has been proved not to extend to the north and east thereof by the Interstate well in the southeast corner of Sec. 22, the No. 3 well of the Gibson Oil Company, Inc., and the Transport Oil Company well in southwest corner of the $SE\frac{1}{4}NE\frac{1}{4}$ Sec. 26, and that but approximately 14 acres are above the lowest producing structure line of the Elk Hills Field and 106 acres of the land lies without the Elk Hills Field, $2\frac{1}{2}$ acres of which lies without one mile from the nearest "point" on the Reserve line.

8. The nearest Upper Miocene production is that of the Standard Oil Company on Sec. 19, T. 30 S., R. 25 E., M. D. M., about $1\frac{3}{4}$ miles to the east of the land involved in this appeal, and if production is found in this land it may well be the Coles Levee-Tupman Field it is on.

9. The amendment of Sec. 2 (c) of the lease as requested by the Navy Department should not be required for any acreage in this lease, as at this particular area with respect to the Naval Reserve exterior boundary line the producing wells of the Standard, Union, and B. & M. Oil companies lie between this land and the Naval Reserve lines, and these together with the protective wells of the Belridge and Pan American Oil Companies beyond these and in the Reserve itself, all taken together, form an absolute barrier to any drainage of oil from the Reserve by any well drilled by this appellant; further, the patented land of the Standard Oil Company, Sections 35 and 27, adjoins the Reserve boundary at every "point" between this land and the Reserve boundary, and it is humorous to suggest that it would permit drainage of oil from the Reserve by Gibson Oil Company wells as a fact with its intervening locations.

10. The decision appealed from says that this land is located within one mile of Naval Petroleum Reserve No. 1. It would be just as accurate to say that the southerly line of this land, except one "point," lies $1\frac{1}{2}$ miles from the Reserve.

boundary line on the south, and that the westerly line of this land, except one "point" lies one mile from the Reserve line on the west.

The fifth specification when applied to this case covers land $112\frac{1}{2}$ acres of which are without one mile, and $47\frac{1}{2}$ acres of which are within one mile of the Naval Petroleum Reserve. From the showing it also appears that the appellant and the Gibson Oil Company, Inc., had entered into an escrow agreement with the Barnsdall Oil Company for the drilling of a well to a depth of 10,000 feet upon the land involved or on adjoining land embraced in the Government lease of the Gibson Oil Company, Inc., to test the deeper sands and that this agreement was canceled by reason of the changed terms and conditions of the offered exchange lease. In further support of the appeal there has been submitted the affidavit of a geologist who claims to be familiar with the Elk Hills Field. He states that no well on the land involved would drain the reserve since it is too far distant from it and that a "no drilling" zone of one-half mile is enough to protect the reserve. A further showing is made that the land is not in the Elk Hills Field, as proved by a well drilled in 1926 in the southwest corner of the $SE\frac{1}{4}NE\frac{1}{4}$ of Sec. 26, T. 30 S., R. 24 E., and that there could be no drainage from the naval reserve by any wells on this land. The attorney also suggests that at this time of emergency a little more encouragement from the Government would be in order, and he claims that the value of the lease to the appellant will be destroyed if no further drilling shall be allowed.

The appellant's contention that there is no authority to impose the conditions contained in the modified form of section 2 (c) seems to be correct. In section 2 (a) of the act of August 21, 1935, *supra*, it is provided:

That the Secretary of the Interior is authorized to issue new leases to lessees holding oil or gas leases under any of the provisions of this Act at the time this amendatory Act becomes effective, such new leases to be in lieu of the leases then held by such lessees and to be at a royalty rate of not less than $12\frac{1}{2}$ per centum in amount or value of the production and upon such other terms and conditions as the Secretary of the Interior shall by general rule prescribe * * *

No general rule prescribes that a new lease issued in exchange for an old lease shall contain a restriction on drilling in the form proposed in the Commissioner's decision of August 13, 1941. It follows that the requirements of that decision were erroneous and that the appellant need not comply with it. However, this does not mean that the exchange lease is to be issued to the appellant.

At the present time it is not deemed desirable to issue new leases in exchange for old ones for lands within one mile of the Elk Hills Naval Petroleum Reserve. As part of its plan for protecting such Reserve, now more than ever mandatory, the Department will not issue

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new leases within that area. See 43 CFR 192.2. Perhaps it may not be able to prevent holders of existing leases within that area from operating during the continuance of their leases. Nevertheless, since to exchange the old lease would be to change the lease term from a definite to an indefinite one and at one-half the royalty, the Secretary, in his discretion, is justified in refusing to issue such a new lease until the desired protection can be provided by general regulation for the naval oil reserve.

The appellant is not entitled as of right to a new lease under section 2(a) of the act of August 21, 1935, *supra*. It merely states that "The Secretary of the Interior is *authorized* to issue new leases to lessees holding oil or gas leases" [italics supplied]. Long before that act this Department had construed a similar power in section 13 of the mineral leasing act of 1920 (41 Stat. 437) as being only a grant of discretionary power and not mandatory. *Martin Wolfe*, 49 L. D. 625 (1923); see *I. A. Smoot*, 52 L. D. 44, 47 (1927). The interpretation of this act as permitting Secretarial discretion in the issuance of non-vested rights was sustained in *United States v. Wilbur*, 283 U. S. 414, 419 (1931). The same policy was followed under another act in *D. E. Jenkins*, 55 I. D. 13 (1934). It is not to be assumed that Congress intended that the authorization in the 1935 amendment to the Mineral Leasing Act of 1920 should be differently construed.

The appellant cannot claim that the issuance of a new lease in exchange for its old one is mandatory since the denial of its application leaves its old lease as effective as before for the remainder of the term. That appellant signed a lease form gave it no vested right to a new lease. Its signature did not constitute an acceptance since no offer of a lease was made to it.

The question of whether unrestricted development of land within one mile of Naval Petroleum Reserve No. 1 should be allowed beyond the life of existing leases is to be determined by this Department in the light of the policy recommended by the Secretary of the Navy. Appellant's arguments on this score have been carefully considered. Nothing has been presented which requires that the present protective policy be abandoned.

The decision appealed from is incorrect since the proposed special conditions in the lease are not now authorized by general regulations. As the decision appealed from is based upon the wrong grounds, the appellant need not comply with its requirements. However, it is desirable that applications for new leases in exchange for old leases covering land within one mile of a Naval Petroleum Reserve be denied. Therefore, the case is remanded with directions to deny this application for the reasons herein stated but without prejudice to appellant's

rights to apply for such other relief as it may prove itself entitled to or to the renewal of this application at an appropriate time.

Remanded.

GIBSON OIL COMPANY, INC.

This is a companion case to the appeal by the Transport Oil Company, *supra*, p. 521. On November 19, 1940, the Department approved a recommendation by the Commissioner of the General Land Office, concurred in by the Director of the Geological Survey, that a lease under section 2 (a) of the act of August 21, 1935 (49 Stat. 674, 30 U. S. C. sec. 223a), "be authorized to the Gibson Oil Company, Inc.," in exchange for its 20 year lease, Sacramento 019569, which, as extended, would expire June 23, 1946. The lease forms were personally obtained by the appellant's attorney on November 19, 1940.

The land involved is the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 26, T. 30 S., R. 24 E., M. D. M., California, and is mostly within one mile of the boundaries of Naval Petroleum Reserve No. 1. On August 12, 1941, the Commissioner rendered another decision as follows:

On May 28, 1941, the Navy Department reported no objection to the issuance of the lease, provided the drilling provisions were amended in accordance with the requirements of that Department. Accordingly, the triplicate lease forms are herewith returned to you for the initialing of the typewritten amendment to section 2 (c) thereof. Upon the return of the executed lease, properly initialed, prompt action looking to the execution of the same will be taken.

Thirty days are allowed in which to comply with the above requirement, failing in which the application for a section 2 (a) exchange lease will be finally rejected. The applicant has the right of appeal.

The Gibson Oil Company, Inc., by its attorney, took this appeal. The ten grounds upon which the appeal is based are set forth in the decision of even date in the appeal of the Transport Oil Company, *supra*, p. 521. In addition, the attorney has shown that the appellant and the Transport Oil Company had entered into an escrow agreement with the Barnsdall Oil Company for the drilling of a well to a depth of 10,000 feet upon the land involved or on adjoining land embraced in the Government lease of the Transport Oil Company to test the deeper sands, and that this agreement was canceled by reason of the changed terms and conditions of the offered exchange lease. In further support of the appeal there has been submitted the affidavit of a geologist who claims to be familiar with the Elk Hills Field. He states that no well on the land involved would drain the reserve since it is too far distant from it and that a "no drilling" zone of one-half mile is enough to protect the reserve. It is also alleged that the value of the lease to the appellant will be destroyed if no further drilling shall be allowed.

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The only difference between the two cases is that in this one the Department approved the recommendation that an exchange lease "be authorized to the Gibson Oil Company, Inc." This circumstance, however, does not compel a different decision. This action did not exhaust the Secretary's discretionary power in this matter and his approval of the recommendation is not the final step so that he cannot, if he chooses, reconsider the matter. See *Knight v. Lane*, 228 U. S. 6, 11, 13 (1913); *New Orleans v. Paine*, 147 U. S. 261, 266 (1893).

In the decision in the *Transport Oil Company* case, the Department has set forth the situation at considerable length and has come to the conclusion that there is no authority for imposing the proposed restrictions. The appellant, therefore, need not comply with the requirements imposed by the Commissioner's decision of August 12, 1941. However, for the reasons stated in the decision in the *Transport Oil Company* case, which is made a part hereof, the case is remanded with directions to deny this application but without prejudice to appellant's rights to apply for such other relief as it may prove itself entitled to or to the renewal of this application at an appropriate time.

Remanded.

MOTION FOR REHEARING

By two similar decisions dated February 28, 1942, *supra*, the Department held: (1) that the Gibson Oil Company, Inc., and the Transport Oil Company, respectively, were not obligated to comply with the General Land Office's requirements that each company agree to specific restrictions on drilling as a condition to the issuance of exchange leases under sec. 2 (a) of the act of August 21, 1935,¹ to each company on lands within one mile of the Naval Petroleum Reserve No. 1 (Elk Hills Field); (2) that neither of the companies was entitled as of right to such exchange leases; and (3) that in the interest of conserving the Naval Petroleum Reserve, the Department will not issue new leases for lands within one mile of the Reserve. The two companies have filed a consolidated motion for rehearing.

The applicants' main contention is that the Secretary of the Interior is under a mandatory duty to issue the exchange leases and is without discretion in the matter. The decisions of the courts² and of this Department³ clearly render this contention wholly without merit.

¹ 49 Stat. 674, 679, ch. 599, 30 U. S. C. (1940 ed.) sec. 223a.

² *United States ex rel. McLennon v. Wilbur*, 283 U. S. 414 (1931); *Dunn v. Ickes*, 115 F. (2d) 36, 72 App. D. C. 325 (1940); *United States ex rel. Roughton v. Ickes*, 101 F. (2d) 248, 69 App. D. C. 324 (1938); *Wann v. Ickes*, 92 F. (2d) 215, 217-18, 67 App. D. C. 291 (1937).

³ Secretary's Instructions of June 2, 1939, to the Commissioner of the General Land Office re lease under section 2 (a) to the Republic Petroleum Company (Sacramento 019387); *Martin Wolfe*, 49 L. D. 625 (1923); *D. E. Jenkins*, 55 L. D. 13 (1934); see *I. A. Smoot*, 52 L. D. 44, 47 (1927).

The distinctions which the applicants seek to draw between these decisions and their own cases are unsound. The fact that the applicants possess a valid lease interest in the lands at present does not render their applications for the *exchange leases* any the less applications "for mere privileges" than were the applications in the decisions cited. Nor does the fact that Congress intended the act of August 21, 1935, to abolish the previous system of prospecting permits require a holding that Congress intended the Secretary to be under a mandatory compulsion to issue exchange leases for leases already outstanding. The language of section 2 (a) is clearly discretionary in content; and there is nothing in the legislative history or other circumstances concerning the act which could warrant importing into that section an intention contrary to the plain meaning of the statutory language.

The applicants then contend that the transmission of the lease forms to the respective companies constituted offers which resulted in actual lease contracts as soon as the signature of each company was attached to its respective lease form. The argument is bolstered by references to the phrase "offered exchange lease" which occurs in each of the decisions of February 28, 1942, *supra* (57 I. D. 521). The use of this phrase, however, does not, and was not intended to, constitute a determination by this Department that the transmission of the lease forms to the respective companies was an offer such as would inevitably result in a completed contract when the lease forms were signed by the respective companies. Rather, that phrase was loosely used to designate the fact the exchange leases had not been executed and issued by this Department.

Furthermore, even when the Department was considering whether to grant the exchange leases, it was made plain that the leases could not be considered as issued until final determination and action thereon had been had in this Department, *after* the signatures of the respective companies had been attached to the lease forms. Thus, the General Land Office letter of September 10, 1940, transmitting the lease forms to the attorney for the Transport Oil Company for execution by it, specifically stated that "the executed leases should be returned promptly for the signature of the Secretary of the Interior." Nor does the Assistant Secretary's approval on November 19, 1940, of the General Land Office recommendation that "a lease * * * be authorized to the Gibson Oil Company, Inc." indicate a different mode of execution of the lease to be granted to that company. That further action was there also contemplated is evident from the fact that the proper bond had not then been filed, although paragraph 20 of Circular 1386 of May 7, 1936 (55 I. D. 502, 522-23; 43 CFR 192.29), specifically provides that "The lessee will be required to furnish a new and satisfactory lease bond and to discharge any indebtedness against the lease *before* the new lease will be issued." (Italics supplied.) In

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his subsequent decision of February 11, 1941, the Commissioner of the General Land Office, in requesting a proper bond under this regulation, stated that "Upon receipt of an acceptable lease bond on the enclosed form, action looking to the completion of the lease *will be* promptly taken." (*Italics supplied.*) Indeed, the attorney who here urges the motions for rehearing expressly states that—

the writer as attorney for said company was given the proposed lease personally to have executed by the company and returned for the signature of the Hon. Secretary, which he did.

It is therefore evident that the entire proceedings followed the method regularly employed in the Department in issuing a lease—namely, lease forms are transmitted to the lessee for execution by the lessee and are then returned to the Department where final consideration is then given by the Department to all the facts and necessary requirements before the leases are executed by the proper official of the Department.

The fundamental error of the applicants' argument is the assumption that the transmittal of the lease forms constitutes an offer which is to be accepted by them. The actual fact, however, is that the *application* filed by an applicant constitutes an *offer to lease* the Government's land and that offer is accepted by the Department only when the lease is issued. Until the lease is fully considered, signed and executed by the proper official of the Department, it is neither a contract nor a lease.⁴ And for the same reason, until the final step in the issuance of the lease has been consummated, the Secretary is fully authorized, in the exercise of his discretionary authority under section 2 (a), to give final approval or disapproval to the issuance of the lease, irrespective of the preliminary negotiations with respect thereto.⁵

The applicants' contention that the Department's refusal to grant a lease on lands within one mile of the Reserve does not aid in the protection of the Reserve is unsupported by evidence sufficient to warrant any change in the Department's position. And since the Department has determined that no new leases will be issued for any lands within one mile of the Reserve, it is irrelevant that restrictions on drilling, such as the General Land Office sought to impose on the applicants, were not imposed on the previous leases of McNeil (Sacramento 019264, issued as of December 31, 1938); of Interstate Oil Com-

⁴ *Filor v. United States*, 76 U. S. (9 Wall.) 45 (1869); *Darragh v. United States*, 33 Ct. Cl. 377 (1898); *Monroe v. United States*, 184 U. S. 524 (1902); 14 Comp. Gen. 170, 174 (August 29, 1934).

⁵ *United States ex rel. Johnson v. Payne*, 253 U. S. 209 (1920); *Kirk v. Olson*, 245 U. S. 225, 228 (1917); *Willbur v. United States ex rel. Kadrie*, 281 U. S. 206, 216-217 (1930); *United States ex rel. Knight v. Lane*, 228 U. S. 6, 11, 13 (1913); *New Orleans v. Paine*, 147 U. S. 261, 266 (1893).

pany (Sacramento 019265, issued as of December 31, 1938); and of Republic Petroleum Company (Sacramento 019387, issued as of June 2, 1939), which are cited in this motion for rehearing. Such restrictions were incorporated in the more recent renewal lease of the B. & M. Oil Company (Sacramento 019527, issued as of February 1, 1941). In any event, it should be observed that the McNeil and the Interstate Oil Company leases, which cover lands within the 1-mile limit, were not exchange leases under section 2 (a) but rather were leases in exchange for prospecting permits under the mandatory provisions of section 13 of the Mineral Leasing Act of 1920 as amended by the act of August 21, 1935, *supra*; and that the Republic Petroleum Company lease, which is an exchange lease under section 2 (a), covers land entirely outside the 1-mile limit.

The applicants state, however, that 112½ acres of the present Transport Oil Company lease are more than one mile from the boundaries of the Naval Petroleum Reserve and that only 47½ acres thereof are within one mile of the Reserve, and the question is asked as to whether an exchange lease can be issued for the acreage outside the 1-mile limit. It should first be observed, however, that the above computation is based on a line drawn as an arc with its radius stemming from a point on the boundary of the Reserve. The Department, however, does not ascertain the 1-mile limit in that way. Because any areas outside the 1-mile limit which may be leased are leased on the basis of legal subdivisions, the 1-mile limit is also computed accordingly. On that basis, all of the lands covered by the present lease of the Gibson Oil Company are within the 1-mile limit and only 40 acres of the lands covered by the present Transport Oil Company lease (i. e., the NE¼ NE¼ Sec. 26, T. 30 S., R. 24 E., M. D. M., California) are outside this limit. Since the Department's decision of February 28, 1942, with respect to the application of the Transport Oil Company, had been based on the assumption that all the lands were within the 1-mile limit of the Reserve, that decision is modified to afford the Transport Oil Company an opportunity to present to the Commissioner of the General Land Office an application for an exchange lease as to that tract, with the remaining acreage being left under its present lease. Such application should be accompanied by whatever evidence may be available on the question as to whether drilling on that tract would result in drainage of the Naval Petroleum Reserve. No exchange lease will be awarded on such an application unless all the facts and circumstances with respect to the lands and the leases, after full study thereof, warrant such action.

The motions are denied, except to the extent of the modification of the decision with respect to the Transport Oil Company.

So Ordered.

H. CHANNON COMPANY

Decided March 21, 1942

CONTRACTS—DELAY—LIQUIDATED DAMAGES—RELATION TO PROBABLE ACTUAL DAMAGES.

A contract for the furnishing of brass screws having a value of \$17.26 provided for the assessment of liquidated damages at the rate of \$5 per day for delay in performance. The contracting officer assessed liquidated damages in the amount of \$45 for nine days' delay in making delivery. *Held*, that the liquidated damages stipulated bore no reasonable relation to the probable actual damages and that the damages imposed therefore should be remitted. Citing 16 Comp. Gen. 344.

BURLEW, First Assistant Secretary:

On March 20, 1940, the Bureau of Reclamation entered into a contract with the H. Channon Company, of Chicago, Illinois, for the purchase of certain round head brass machine screws. The contract provided that the screws were to be shipped within 10 calendar days after receipt of the notice of the award and for the assessment of liquidated damages at the rate of \$5 per day for failure to ship within the stipulated time. The notice of award was sent to the contractor by letter dated March 20, 1940, which it is assumed, allowing for the usual period required for mail delivery, was received on March 23, thus establishing the shipment date as April 2. Shipment was not made until April 11, as evidenced by the Government bill of lading, a delay of 9 days amounting to \$45.

The contracting officer advised the contractor of the assessment of liquidated damages on May 24. This was protested, following which the contracting officer issued findings of fact dated July 10, setting out the above facts and affirming the imposition of liquidated damages. From this finding the contractor appealed. The contracting officer later attempted to secure further information from the contractor on the basis of which he expected to issue supplemental findings. However, no response was made to various inquiries and the case is therefore considered on the basis of the present record.

While both the contractor and the contracting officer discuss various considerations in connection with the assessment of these damages, it would appear that the principal and only necessary question for determination is whether the liquidated damage provision is enforceable in this particular case. The invitation to bid on this contract contained seven separate schedules, each calling for different types of hardware. This contractor submitted bids on each schedule but was given an award only on Schedule No. 7, which called for items totaling \$17.26. The liquidated damage clause, providing for the assessment of \$5 per day for delay in shipment, was contained in the

invitation to bid, which later became a part of the contract. It is a general provision applying to all or any of the schedules which might be included in any contract with any bidder to whom award was made. Thus, had this contractor been the successful bidder on all schedules, the liquidated damage rate would have been the same as that now applied to the one schedule. This is strong evidence that such provision bears no reasonable relation to the probable actual damage to be expected in the event of default. Certainly the failure to deliver the items on one schedule could not have the same significance to the Government as a complete breach on all schedules. And, aside from this, the provision for the daily assessment of \$5 liquidated damages, as against a contract calling for supplies totaling only \$17.26, appears unjust and unreasonable on its face, especially in the absence of any evidence indicating a great urgency for immediate delivery.

The Comptroller General, in a decision dated October 7, 1936 (16 Comp. Gen. 344), discusses an analogous situation where the Veterans' Administration had entered into a contract for the purchase of certain glass tubes in the total amount of \$105, complete delivery of which was delayed for 80 days. Here the invitation to bid contained two schedules, the particular contractor being successful on one schedule only, and the liquidated damage clause provided for the assessment of damages in the amount of \$10 per day, whether one or both schedules were awarded to the same bidder. On this basis damages were imposed totaling \$800, or nearly eight times the value of the entire contract. The Comptroller General held that the liquidated damage provision was not valid and enforceable. The following quotations from his decision are pertinent:

Obviously, such a proposition, without more, seems repugnant to all sense of right and justice, and it is clear from the decided cases that such a provision cannot legally be sustained where the circumstances warrant the conclusion that at the time the contract was made the stipulated liquidated damages did not bear some reasonable relation to the probable actual damages to be expected from a default. * * *

* * * Obviously such a provision in such a contract could not have been based on any calculated reasonable relation to the probable damages which might follow a breach, and negatives "any notion that the parties really meant to provide a measure of compensation"—that is, "to treat the sum named as estimated and ascertained damages."

* * * However, the form of stipulation used in the contract, being without any reasonable relation to the probable damages to be anticipated for a default, has operated to leave the Government without any right to assess liquidated damages for the delay involved and without compensation for the intangible damages which such delay may have caused.

It does not appear that the contract under consideration is distinguishable from the above case. The imposition of liquidated damages for delay at the rate of \$5 per day on an order totaling only

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\$17.26 for a common item of hardware would seem to bear no reasonable relation to the probable actual damage which might result from default on the part of the contractor. It follows that such provision in this contract is not enforceable. I therefore find that the liquidated damages imposed should be remitted.

So Ordered.

UNITED STATES v. BARNGROVER ET AL.
(ON REHEARING)

Decided March 26, 1942

MINERAL LAND—DESERT CLAY—SILT.

Placer mining locations were made for desert clay within an area subsequently withdrawn for use as a bombing and gunnery range. *Held*, that land containing clay or silt deposits suitable for use as rotary mud which can be extracted, removed and marketed at a profit is mineral land subject to location and entry under the placer mining laws.

MENDENHALL, *Acting Assistant Secretary*:

This is a motion for rehearing of a decision by the Commissioner of the General Land Office of December 24, 1941, which decision was approved by the Assistant Secretary of the Interior and which held valid certain placer mining locations within the area withdrawn for the use of the War Department for the Muroc Bombing and Gunnery Range.

The regional field examiner, Region 1, has based his motion for rehearing upon eight specific allegations of error in the Commissioner's decision, as follows:

1. In finding that the silt on these claims is recognized as a mineral by the standard authorities.
2. In finding that the silt on certain of these claims renders the land valuable on account thereof.
3. In finding that the deposit of silt possesses economic value in the arts and sciences; that the deposit contains exceptional qualities and characteristics giving it special value; and that the deposit is found in commercial quantity and is marketed at a profit.
4. In finding that the land is mineral in character.
5. In finding that valid discoveries have been made on certain of these claims.
6. In holding that the Government failed to prove the charges.
7. In affirming the decision of the Register.
8. In dismissing the adverse proceedings.

The allegations of error will be considered in order.

1. As I read the decision of the Commissioner, he did not find, nor did the issue presented require him to find, that standard scientific

authorities recognized the "silt" or "clay" in question as a mineral. The Commissioner cited and relied upon *Layman v. Ellis*, 52 L. D. 714 (1929), as the principal authority for his decision. The *Layman* case expressly repudiates the doctrine that a substance must have a definite chemical composition and be recognized by standard scientific authorities as a mineral before it is subject to location as a valuable mineral deposit under the mining laws. It was pointed out in that case that various heterogeneous combinations of minerals, including guano, granite, sandstone and certain clays, had been held to be subject to location under the mining laws. And it was held in the *Layman* case that gravel deposits which can be extracted, removed and marketed at a profit are locatable, under the mining laws notwithstanding the fact that gravel is not always composed of the same mineral substance and is not therefore subject to a strict mineralogical classification based on definite chemical composition. Consequently under the rule in the *Layman* case and also under court decisions it appears that any substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses is locatable and enterable under the mining laws. Cf. *Hendler v. Lehigh Valley R. Co.*, 209 Pa. 256, 58 Atl. 486, 487. In other words, the test as to whether a substance such as the silt or clay here in question will be regarded as a mineral under the mining laws depends on its marketability, or, as it is sometimes expressed, on its positive commercial value. Since the evidence was not controverted that the deposit in question was being marketed at a profit, it would appear that it is clearly subject to location and entry under the mining laws.

2. It would seem to be clear that desert lands which have no value for agriculture are rendered more valuable by reason of the fact that they contain marketable deposits of silt or clay. This would appear to be true even when the deposit can have but a very limited value in place because similar deposits are found elsewhere in such abundance that they will supply any foreseeable demand for thousands of years.

3. The deposit in question constitutes one of the better, if not the best, grade of rotary mud used in the oil fields of Southern California. The overwhelming preponderance of the evidence was to the effect that desert clays or muds, including the deposit in question, did possess exceptional qualities and characteristics giving them special value for use in the drilling of oil wells and that there was a demand for such muds and that the deposit in question could be marketed at a profit. That this deposit has no other use in the arts and sciences is immaterial.

4. Land containing a deposit suitable for rotary mud, which can be extracted, removed and marketed at a profit is mineral land subject

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to location and entry under the placer mining laws, whether the deposit be regarded by scientists as clay, rock, or merely a heterogeneous silt.

5. In the light of the answers to the allegations of error heretofore made, it follows that valid mineral discoveries have been made on certain of these claims. The argument that the value of the deposit in question arose from the fact that Britton monopolized the clay in the Muroc area and employed better transportation means and selling technique than his competitors, is not persuasive. The record shows that Britton did not have a monopoly on desert clays and that the material in question sold in a rather wide market area in competition with other desert materials and slough mud. It seems very doubtful that the purchasers of rotary mud are a gullible class, easily persuaded by seller's puff. They are experts in the use of this product and mistakes made in the use of wrong materials are exceedingly costly. It seems highly probable, therefore, that a rotary mud would have to have an intrinsic value of its own in order to be sold in a competitive market in the oil drilling areas of Southern California.

6. There was no error in holding that the Government failed to prove the adverse charges.

7. There was no error in affirming the decision of the register as modified.

8. There was no error in dismissing the adverse proceedings as to the claims specified.

Accordingly the motion for rehearing is

Denied.

THE MACLEOD COMPANY

Decided March 27, 1942

CONTRACTS—DAMAGES—LIQUIDATED—DELIVERY PROVISION.

Relief from payment of liquidated damages assessed for delay in delivery may be granted where contract provisions permit finding as excusable thereunder delays caused by required filling of Government national defense orders, and where needed materials cannot be procured in the open market.

CONTRACTS—DAMAGES—LIQUIDATED—SHIPMENT.

Liquidated damages are properly assessable for delays occurring between the time of delivery to an intermediate agent for subsequent delivery to a shipper and the time of actual movement from the shipping point, such intermediate action not constituting "shipment."

DEMPSEY, *Under Secretary:*

On February 21, 1941, Invitation for Bids No. C-38, 207-A was issued by the Bureau of Reclamation for furnishing a cleaning machine and separator under Schedules Nos. 1 and 2, respectively, for the

Columbia Basin project, Washington. The invitation for bids provided for liquidated damages at the rate of \$10 per day, per schedule, for failure to make shipment within 20 calendar days after the date of receipt by the bidder of notice of award of the contract, or within the period of time specified by the bidder if greater than the said number of days.

The Macleod Company, in its bid dated March 1, 1941, agreed to make delivery of the equipment under each schedule f. o. b. cars at Almira, Washington. This bid being the lowest as to price, equalizing elements considered, the bidder was notified of the award of the contract by letter dated March 28, 1941, which letter was received by the contractor on April 3, 1941, thus establishing the shipping date under the contract as April 23, 1941, for each schedule.

In reply to inquiries as to when shipment would be made, the contractor stated on May 17, and again on June 21, 1941, that it was having difficulty in obtaining long-life nozzles for the machine under Schedule No. 1, and the air motor for the separator under Schedule No. 2. On June 30, 1941, the contractor advised that complete shipment was made on June 30, 1941, and that the delay had been caused by national defense orders and inability to obtain required materials.

The contracting officer, by letter dated July 22, 1941, advised the contractor that liquidated damages for delay in shipment necessarily would have to be assessed under the terms of the contract, unless the delay could be established as directly attributable to a cause of delay specified in the contract as excusable. By letter of July 24, 1941, the contractor explained that it had been "submerged" with orders, about 90 percent of which were for national defense work, and the majority of which carried priority ratings. On October 18, 1941, the contracting officer requested an affidavit showing the extent of delay on account of orders carrying preference ratings, and on November 12, 1941, the contractor furnished a sworn statement of the national defense orders upon which it was working, together with their priority numbers and other identifying information.

The case now comes before the Department pursuant to the contractor's appeal, represented by letters of January 10, 16 and 26, 1942, protesting the assessment, under the terms of the contract, of liquidated damages in the amount of \$80, representing a delay of 8 calendar days in making shipment after June 30, 1941. The contractor outlines the difficulties experienced by it in the general conduct of its business because of conditions due to the present national emergency, and suggests that for those reasons and because of the fact that the materials were obtained at a lesser cost than would have been possible 30 days later, the assessment for the 8 days' delay in shipment after June 30, 1941, as well as that for the period April 23 through June 30, 1941, should be remitted.

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The contracting officer, in his findings dated January 6, 1942, concluded that the contractor was delayed in the performance of its contract for a period of 68 days on each schedule, or from April 23, 1941 through June 30, 1941, on account of Government national defense orders and inability to obtain the required materials, which were not procurable in the open market. Relief from payment of liquidated damages is permitted for the causes of delay specified in the contract as excusable. See 15 Comp. Gen. 313. It appears from the circumstances of the present case that the delay through June 30, 1941, was due to work which had to be performed in connection with the national defense program, and therefore, is of the character excused by the contract provisions.

The record discloses that the materials were turned over to the National Carloading Company on June 30, 1941, but that they were not moved from the shipping point until July 2, 1941, thereby incurring a delay of two days prior to shipment, for which liquidated damages were properly assessable under the terms of the contract. See the opinions of the Comptroller General in *Maremont Automotive Products, Inc.*, 16 Comp. Gen. 918, and *Grinnell Company of the Pacific*, 21 Comp. Gen. 776 (1942).

In view of the foregoing, I find that the delay of 68 days because of the present national emergency is excusable under the contract provisions. I find further that there was a delay of 2 days in making shipment, from June 30 to July 2, 1941, for which liquidated damages should be assessed under the terms of the contract, and that the liquidated damages in the amount of \$60, representing 6 calendar days' delay in excess thereof, should be remitted.

So Ordered.

NEDGUS CORPORATION

Opinion, March 27, 1942

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—NEGLIGENCE—AVAILABILITY OF APPROPRIATIONS.

A claim for damage to privately owned property destroyed by fire through the negligence of employees of the Bureau of Reclamation may not be paid directly under an appropriation act provision for the payment of damages to "private property * * * by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since such provisions have been uniformly construed as not extending to claims arising from negligent acts. The claim may be allowed and certified to Congress for payment, however, under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215), which expressly authorizes such action on claims founded in negligence of the Government.

GRAHAM, *Assistant Solicitor*:

Nedgus Corporation, of Beverly Hills, California, has filed a claim in the amount of \$1,881.55 against the United States for compensation for the loss of a part of its flax crop in Yuma county, Arizona, as the result of a fire started by employees of the Bureau of Reclamation. The claim is submitted for consideration under the Appropriation Act for the year ending June 30, 1942 (55 Stat. 303, 331), with the request that in the event recovery is denied under this act, it be considered in the reduced amount of \$1,000, under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215).

The facts are not in dispute. On the afternoon of July 12, 1941, two Bureau of Reclamation employees were engaged in burning weeds along the Graham Lateral of the Yuma irrigation project, in Yuma county, Arizona. The weeds had been cut on July 10, and the dry grass and weeds over a strip of about 10 feet between the banks of the lateral and the flax field were burned at that time. At the point where the fire moved into the flax field the lateral is some 40 feet distant. The evidence indicates that the plant growth over this area was dry, the humidity having been extremely low for a week prior to the fire. In explaining how the fire spread to the flax field, the Government employees Compton and Smith, in their joint letter of July 12, state:

In regards to the fire of the 12th.

Mr. Smith and I started the fire in the east end of the Graham Lateral about 2:00 o'clock.

The wind was from the south about 2 mi. per hr. until we had fired about 200 yards.

The wind then changed and came out of the north irregular for a time.

There was some wild asparagus on the out edge of the canal bank and the flame from the canal caught the asparagus which set the flax field, throwing the sparks about 25 or 30 ft.

Considering the dry weather prevailing at the time of the fire, the close proximity of the flax field to the original fire, the highly inflammable nature of ripe grain, and other factors indicated above, it appears, regardless of the precautions taken, that the Government was negligent in conducting its burning operations under such conditions.

The Appropriation Act for the year ending June 30, 1942, *supra*, contains the following provision relating to claims:

The following sums are appropriated out of the special fund in the Treasury of the United States

* * * * *

For * * * payment of damages caused to the owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works; * * *

The Comptroller General, on August 5, 1933, in the case of *Sam Wade* (A-47614), had before him for consideration an almost iden-

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tical provision in the Bureau of Reclamation Appropriation Act for the year ending June 30, 1932 (47 Stat. 114). Also, on July 6, 1933, in the case of *C. J. Mast* (A-45268), the Comptroller General considered the application of a similar statute, the act of February 20, 1929 (45 Stat. 1252), relating to claims arising out of Indian irrigation projects. In these cases it was held that these statutes did not extend to claims arising out of negligence of the Government. This opinion was confirmed by the Attorney General in an opinion to this Department, dated April 18, 1940, involving the claim of *Joseph Micka, Jr.*

In view of the clear expressions of the Comptroller General and the Attorney General, and considering the factual situation in this case, it is my opinion that the claim cannot be allowed under the Appropriation Act of 1942, *supra*.

However, the act of 1922, *supra*, specifically permits the allowance of claims grounded upon the Government's negligence. Recovery under this act is limited to \$1,000. The claimant requests that if recovery is not otherwise allowable, the claim be given consideration under this act in the reduced amount of \$1,000. As stated, it appears evident that the Government failed to exercise proper care in conducting burning operations under the conditions existing at the time. Allowance of the claim under this statute is therefore in order.

It appears that some 18 acres of flax were destroyed. Although there is some difference of opinion as to the probable yield per acre, the evidence fairly indicates a total yield of approximately 524 bushels. It further appears that the fair market value of the grain lost was \$1.906 per bushel, making a total loss to the claimant of \$998.74. Accordingly, the claim should be allowed and certified to the Congress in the amount of \$998.74, contingent upon the claimant's indication of its willingness to accept the reduced amount.

Approved:

JOHN J. DEMPSEY,
Under Secretary.

GEORGE W. CONDON COMPANY

Decided April 2, 1942

CONTRACTS—CHANGES IN PLANS AND SPECIFICATIONS—ESTIMATES OF AMOUNT OF EXCAVATION FOR PURPOSE OF COMPARING BIDS ONLY—INCREASE OR DECREASE IN AMOUNTS BY CONTRACTING OFFICER—UNIT PRICES.

The contracting officer under a contract for the construction of a dam ordered excavation stopped at a point sooner than allegedly anticipated by the contractor in making its bid, and additional compensation is claimed on the ground that the bid thereby was thrown out of balance. *Held*, (1) that the decrease in the amount of excavation by the contracting officer did not constitute a change in the specifications calling for an adjustment under either

Article 3 of the contract, which covered actual changes in the plans or specifications, or under Article 4, which covered changes in subsurface conditions encountered or discovered during the course of the work, (2) that the contracting officer acted properly under the contract in terminating excavation when, in his opinion, a suitable foundation had been reached, (3) that the estimate of the amount of excavation was not an actionable representation or guarantee, but was for the purpose of comparing bids only, and that the contractor was charged with the responsibility of confirming estimates by an examination of all available data and material furnished to it by the Government, together with an examination of the locus, and (4) that regardless of increase or decrease in the amount of excavation, payment should be made at the unit bid price.

BURLEW, *First Assistant Secretary*:

On February 15, 1937, the United States entered into a contract with George W. Condon Company for the construction of Boca Dam, Truckee Storage Project, Nevada-California, under items 1 to 55, inclusive, of the Schedule of Specifications No. 696.

Work under the contract was completed and accepted on August 23, 1939. The original contract price was in the amount of \$729,435 and under final voucher No. D-10401, dated November 1, 1939, which showed gross contract earnings in the amount of \$596,265.98, provision was made for final payment in the amount of \$46,092.62. Payment in the latter amount was made by the disbursing officer on November 28, 1939, upon a final release executed by the contractor on November 18, 1939, which noted the following exception:

Approximately thirty-five thousand dollars (\$35,000) additional adjustment payment of item 3 as requested in letter dated September 2, 1939, and which will be supplemented by a statement of claim.

The contractor's claim is for an adjustment of compensation under item No. 3 of the schedule of bids. Its bid, upon an estimated quantity of 160,000 cubic yards of excavation and stripping for embankment, was at a unit price of 40 cents per cubic yard. The contractor contends that the final quantity of excavation, determined by the contracting officer to be necessary under item No. 3, differed so materially from that indicated by the plans and specifications as to constitute a change in the entire contract; that the foundation materials differed materially from those indicated by the plans and test borings; that there were material changes in the design and construction of the dam; and that for these reasons the contracting officer should have made an adjustment of the unit price as to item No. 3 of the schedule. The contract contained the usual provision for increases or decreases in quantities without change in the unit price and is set forth in paragraph 5 of the specifications:

5. *Quantities and unit prices.*—The quantities noted in the schedules are approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative. Payment at the prices

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agreed upon will be in full for the completed work and will cover materials, supplies, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided.

With respect to the amount, character and extent of excavation and stripping, which would be required under item No. 3, paragraph 40 of the specifications provided:

40. *Stripping for embankment.*—The entire area to be occupied by the dam, or such portions thereof as may be directed by the contracting officer, including the areas over toe-drain and cut-off trenches, shall be stripped or excavated to a sufficient depth to remove all materials not suitable for the foundation, as determined by the contracting officer. A portion of the foundation of the river bottom upstream from the axis of the dam shall be stripped to rock where shown on the drawings or directed by the contracting officer. The unsuitable materials to be removed shall include top soil, all rubbish, vegetable matter of every kind, roots, and all other perishable or objectionable materials which might interfere with the bonding of the embankment with the foundation or the proper compacting of the materials in the embankment or which may be otherwise objectionable. If any of the materials required to be stripped from the upstream portion of the foundation for the dam are suitable, as determined by the contracting officer for use in the earth-fill portion of the embankment such materials shall be excavated separately from the unsuitable materials and shall be placed to form the bottom of the downstream portion of the earth fill, as directed or approved by the contracting officer, and mixing of the suitable and unsuitable materials will not be permitted. All stripped materials shall be disposed of as provided in paragraph 51. Measurement, for payment, of stripping for embankment will be made in excavation only and to the neat lines as staked out or otherwise established by the contracting officer. Payment for excavation, common, stripping for embankment will be made at the unit price per cubic yard bid therefor in the schedule, which unit price shall include the cost of all work provided for in this paragraph.

As pointed out in paragraph 11 of the contracting officer's findings, the drawings did not indicate that the stripping excavation would be carried to any fixed depth and the specifications specifically provide for the excavation only of such material as might be unsuitable for the foundation, and clearly provided that the contracting officer should determine when all such unsuitable material had been removed and a suitable foundation reached. It does not appear, nor is it contended by the contractor, that the excavation was stopped before such a suitable foundation was reached.

The only possible basis upon which the contractor could establish its claim for an adjustment of item No. 3 would appear to turn upon whether the decrease in the amount of excavation ordered by the contracting officer constituted such a radical change in the contract as to bring about a situation which could not have been contemplated by the parties at the time of the submission of bids or the execution of the contract. As stated in paragraph 5, *supra*, the quantities noted in the schedules are merely approximations for comparing bids. The estimated quantities upon which bids are sought and which are con-

tained in the information furnished to bidders by the Government must be reconciled with the geological conditions as indicated by the records of test pits and borings, with the appropriate specifications of the contract, and having in mind the scope of operations as indicated by the plans and drawings and the usual conditions inherent in and generally encountered in this type of construction. The contract provided with respect to test pits, borings and geological conditions, in paragraph 27 of the specifications:

27. *Records of test pits and borings.*—The drawings included in these specifications show the available records of test pits dug and borings made at or near the dam site. The Government does not guarantee any interpretation of these records or the correctness of any information shown on the drawings relative to geological conditions. Bidders and the contractor must assume all responsibility for deductions and conclusions as to the nature of the rock and other materials to be excavated, the difficulties of making and maintaining the required excavations and of doing other work affected by the geology of the site of the work, and for the final preparation of the foundations for the dam and other structures.

The most persuasive argument presented by the contractor in justification of its legal right to a change in the unit price of item No. 3, as well as its argument with respect to the moral responsibility of the Secretary to remedy an alleged injustice, is set forth in its explanation of the manner by which it arrived at the unit price of 40 cents per cubic yard under item No. 3. This bid is broken down into seven items, which include three lump sum amounts and four variable factors with respect to the different types of excavation contemplated in making it up. It assumes 102,500 cubic yards at 15 cents per cubic yard which, when averaged with its other costs, results in the 40-cent per cubic yard bid. The contractor argues that its loss, under the decrease in excavation, was brought about because of the fact that the excavation was stopped arbitrarily while there still remained 82 percent of the indicated inexpensive digging upon which it had bid 15 cents per cubic yard, whereby its bid was thrown out of balance, resulting in a much costlier unit price under this item.

An analysis of the records of the test pits and borings, the geological conditions at the site, and of the plans and drawings does not indicate conditions which would justify a conclusion that 102,500 cubic yards of such excavation would be required nor anything which would tend to mislead the contractor.

The contention that the foundation materials differed materially from those indicated by any of the records, plans or specifications is likewise untenable and the contractor's claim for a change order under either Article 3 or Article 4 of the contract cannot be allowed. Article 3 provides:

ART. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or)

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specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than \$500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however*, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4 provides:

ART. 4. *Changed conditions*.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and (or) difference in time resulting from such conditions.

Article 3 provides for changes in the drawings or specifications of the contract within the general scope thereof. No actual changes in the drawings or specifications of the contract were ordered by the contracting officer. Such changes as may have been made, during the course of construction, were clearly the usual modifications to meet particular conditions encountered during construction and were not of such a nature as to constitute a radical change in the contract not theretofore contemplated by the parties.

Article 4, which provides for changed conditions, relates specifically to natural, physical conditions which are encountered by the contractor or discovered by the contracting officer during the course of construction and provides a method of making an adjustment when the conditions encountered are unknown and of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications. It cannot seriously be contended that the conditions encountered in the construction of this dam differed materially from those indicated by the records of the test pits and borings

and the other known geological conditions. Article 4 has no application whatsoever to changes in the plans or specifications made by the contracting officer, to the manner of laying out and staking the work, or to increases or decreases in estimated quantities.

The contractor's contention that the plans, specifications or design of the structure were changed by the method employed by the contracting officer in staking out the work or by the lines and grades established by the contracting officer, is not borne out by the evidence submitted by the contractor nor by the records available to the Department. Thus, the claim of the contractor hangs on the thread that the determination by the contracting officer of the extent and depth of the stripping necessary to establish a suitable foundation differed so materially from that indicated by the specifications and plans as to constitute a change in the entire contract not contemplated by the parties. As has already been pointed out, no such change was made by the contracting officer and all of the work ordered and the extent to which such work was carried out, was strictly within the contract provisions, both as set forth in the specifications and as indicated by the records, plans and drawings. Parenthetically, it may be stated that the contracting officer would have been remiss in his duty to the Government if he had failed to stop the excavation, at the point at which he did stop it, upon arriving at a suitable foundation for the embankment of the dam.

There are many cases in which Government contracts containing similar provisions have been interpreted by the courts. In the case of *Callahan Walker Construction Company v. The United States*, 95 Ct. Cl. 314 (1942), which involved the question of an adjustment on account of changes in the amount of yardage excavated under similar contract provisions, the court said, at page 10:

The order made by the contracting officer unquestionably changed the contract and increased the amount due under it. * * *

(The contracting officer ordered that the additional work be paid for in accordance with the contract price per yard.) Continuing, the court said:

* * * It is quite evident that the order of the contracting officer fixing the contract price as a rate of payment for this additional work was not an "adjustment" required by Article 3. An "adjustment" is a change to meet changed conditions. Here no change was made although the findings show clearly changed conditions which made the additional work more costly not merely in quantity but per yard. In view of this fact, it is clear that it was not an "equitable adjustment" for no allowance whatever was made to the plaintiff on account of the additional cost per yard. * * *

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The rule as laid down by the court in this case might very well be applicable to the one presently under consideration upon a finding that a change had been made in the plans or specifications of the contract. As has been stated, the mere reduction in the amount of estimated excavation did not, in this case, constitute a change in the plans or specifications. The estimate of 160,000 cubic yards of stripping was not a representation or a guarantee upon which the claimant had a right to rely.

The Comptroller General in the case of *Morrison-Knudsen Company, Inc.* (B. 6390), June 19, 1940, in discussing a situation involving a change in indicated excavation quantities, under a contract which contained a similar Article 5, stated:

It is difficult to conceive how the contract could have been more explicit that you were to assume the full risk of the character of excavation. To say, in the face of these express provisions, that the Government's prior estimate, for the purpose of comparing bids, of the amount of steel which might be needed for tunnel supports amounted to a representation, in the nature of a warranty, of the character of the excavation, is patently untenable. See *MacArthur Bros. Co. v. United States*, 258 U. S. 6. You were paid at your stipulated unit price per pound for furnishing and installing the actual quantities of steel tunnel supports required, and at your stipulated prices per cubic yard for excavation. In this situation, the circumstances that the quantity of steel was greatly underestimated in the bidding schedules, issued for the purpose of comparing bids, would provide no legal basis for adjusting the contract price for excavation, the difficulty of which was your risk.

In one of the most recent cases (*Transbay Construction Company v. City and County of San Francisco*, 35 F. Supp. 433 (1940)), which involved the increase in the amount of excavation to be performed under a contract containing similar provisions as to quantity and unit prices, and in which the amount was increased from 30,000 cubic yards to 84,000 cubic yards, the court said:

* * * Here, I think, is a concrete example of "an unanticipated circumstance" which "made performance of the promise vitally different from what" could "reasonably have been within the contemplation of both parties when they entered into the contract." [P. 436.]

It does not appear in the instant case that there was any unanticipated circumstance which made the performance of the promise vitally different from what could reasonably have been within the contemplation of both parties when they entered into the contract. The contractor may, in fact, have expected that it would be called upon to excavate 160,000 cubic yards but the Government did not guarantee any fixed quantity nor hold forth any actionable representation with

respect to such a quantity as an inducement to bid, but rather, to the contrary, charged the bidding contractors with the responsibility of confirming this estimate by an examination of all available data and material furnished to it by the Government, together with an examination of the locus, and they were put on notice that no payment would be made, other than at the unit bid price, for or on account of any increases or decreases in the amount of excavation as set forth in the schedule.

There are many other cases in which the court has considered similar provisions under somewhat similar conditions arising out of contracts between private individuals, the United States Government and many of the State and municipal governments. In the case of *United States v. Spearin*, 248 U. S. 132 (1918), page 136, the general rules of law applicable are set forth and most of the leading cases cited. The court said in summarizing those cases:

* * * Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day v. United States*, 245 U. S. 159; *Phoenix Bridge Co. v. United States*, 211 U. S. 188. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. *Simpson v. United States*, 172 U. S. 372; *Dermott v. Jones*, 2 Wall. 1. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. *MacKnight Flintic Stone Co. v. The Mayor*, 160 N. Y. 72; *Filbert v. Philadelphia*, 181 Pa. St. 530; *Bentley v. State*, 73 Wisconsin, 416. See *Sundstrom v. New York*, 213 N. Y. 68. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by *Christie v. United States*, 237 U. S. 234; *Hollerbach v. United States*, 233 U. S. 165, and *United States v. Utah & Stage Co.*, 199 U. S. 414, 424, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications.

Most of the cases cited in the *Spearin* case, *supra*, together with many of the other leading cases, are also cited in the case of *Transbay Construction Company, supra*, at page 436.

Each assignment of error, made by the contractor, has been examined in the light of the record and the evidence presented. No new facts have been developed indicating that the findings of the contracting officer were clearly wrong, or which would entitle the contractor to administrative relief under the terms of the contract. Accordingly, the contractor's appeal must be dismissed.

So Ordered.

**RIGHTS OF INDIANS TO ALLOTMENTS IN
SAN JUAN COUNTY, UTAH**

Opinion, May 11, 1942

**INDIAN RIGHT TO ALLOTMENTS—PUBLIC DOMAIN—EFFECT OF ACT OF MARCH 1,
1933 (47 Stat. 1418)—EFFECT OF PRIOR AGREEMENTS.**

The inhibition against the making of further allotments on the public domain in San Juan County, Utah, contained in the act of March 1, 1933 (47 Stat. 1418), has no application to Indians whose rights to allotments had become equitably vested prior to the enactment of that legislation. No representative of this Department had authority to make any disposition of these lands in any manner which would defeat the rights of these Indians.

MARGOLD, *Solicitor*:

On February 21, 1940, the Assistant Secretary approved the dismissal of a protest filed on behalf of the State of Utah against the allowance of Indian allotment applications 049434, 049435, and 049495 to 049537, inclusive, Salt Lake City series, for land on the public domain in San Juan County, Utah. He likewise authorized the issuance of trust patents covering these applications. On April 6, 1940, he vacated his former decision and directed the register of the Salt Lake district land office to hold a hearing on April 29, 1940, at which evidence might be taken to determine whether there was any legal objection to the issuance of the patents on the contested allotments by reason of the existence of any prior agreement with respect to them. The hearing was held as directed.

The transcript of record of that hearing together with the brief filed by the State of Utah in support of its protest and certain files of the Department have now been examined.

In its present state, the record presents two questions for consideration:

1. Whether the declaration in the act of March 1, 1933 (47 Stat. 1418), that "no further allotments of land to Indians on the public domain shall be made in San Juan County, Utah" prevents the issuance of patents for the lands covered by the pending applications.

2. Whether any agreement which may have been entered into between the representatives of the State of Utah and employees of this Department prior to the passage of that act, providing that applications for allotment on the public domain then pending in the local land office would not be approved, may be given effect.

The history of these allotment applications and the action previously taken with reference to them is set out in some detail in the letter to the

register of the Salt Lake City land office, signed by the Commissioner of the General Land Office and approved by the Assistant Secretary on February 21, 1940. However, certain important features of these applications which have a bearing on the legal questions presented were not discussed in this letter.

I

The applications under consideration were made under the fourth section of the General Allotment Act of February 8, 1887 (24 Stat. 388), as amended by the act of February 28, 1891 (26 Stat. 794), and the act of June 25, 1910 (36 Stat. 855), which provide:

That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indian shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in the act of which this is amendatory. * * *

The applications were filed with the register at Salt Lake City, Utah, during the months of September and October, 1930, at a time when the land was public land of the United States not otherwise appropriated and subject to allotment to Indians under the above provisions. So far as the record before me discloses, 41 of the 45 applications meet the requirements of the act and the regulations of the Department in every respect. The applicants were Indians entitled to allotments on the public domain. The adult applicants had settled on the land applied for and the applications made on behalf of minors show that the parents or persons standing *in loco parentis* to the minors had settled on public land. Four of the applications made on behalf of minors, Salt Lake City 049505, 049506, 049517, and 049518 fail to show that the parents of such applicants have or have made application for public domain allotments. The register of the land office certified to allotment two of these applications but took no action whatsoever on the remaining applications, because on January 10, 1931, the Secretary of the Interior had sent the following telegram to the register:

In view of pending legislation to add large area of public land in southern Utah to Navajo Indian Reservation, you are hereby directed to suspend action on Indian allotment applications for lands in San Juan County, Utah, until further notice.

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In view of the passage of the act of March 1, 1933, it becomes necessary to determine whether it contains any inhibition against the making of further allotments on the public domain in San Juan County, Utah, which would prevent the allowance of applications pending on the date of its enactment.

It should be pointed out at the outset that there is a fundamental difference between section 4 of the General Allotment Act and its preceding sections. Section 4 has always been considered a settlement or public land law, administered by the General Land Office, while the other allotment provisions of that and other acts have been deemed to relate to the disposition of lands already in Indian ownership. This fundamental difference is readily discernible from a reading of the various provisions of the act itself. Section 1 of the act authorizes the President, in his discretion, to cause allotments to be made on reservations created for Indian use whenever the reservation may be advantageously utilized for agricultural and grazing purposes while section 4 provides that Indians entitled to allotment who shall make settlement on the public domain shall be entitled "upon application to the local land office" to have the same allotted to them. As members of the tribe occupying a reservation, individual Indians had an interest in the lands to be allotted. The rights of Indians settling on the public domain stemmed from the act of settlement. This rule, made in the early days of the administration of section 4, has been consistently followed by the Department. In the case of *Lacy v. Grondorf et al.*, 38 L. D. 553, involving fourth-section allotments, it was said:

This act was designed to afford to Indian settlers upon public lands the same privilege of entering such lands as white settlers. While allotments made under said action are necessarily on the theory that the allottees are Indians, yet they are not in the same situation as are allottees of tribal lands where rights flow from some specific act for the division of tribal property in which each member of the tribe has an inherent individual interest. Indian settlers under the above section are on practically the same footing as white settlers on the public lands. It has been held that section 4 of the act of February 8, 1887, is in its essential elements a settlement law, and that "to make such act effective to accomplish the purposes in view, it was doubtless intended it should be administered so far as practicable like any other law based upon settlement." *Indian Lands—Allotments*, 8 L. D., 647; *Instructions*, 32 L. D., 17. So that the practice, rules, and decisions governing white settlers on the public lands are, with certain reasonable modifications due to the habits, character, and disposition of the race, equally applicable to Indian settlers."

Since Congress was considering a proposal dealing with the public domain in 1933 when the provision now under consideration was enacted, it must be assumed that Congress knew that the administration

of this enactment would be undertaken in accordance with the settled public land law.

The history of the enactment affords no help in determining the intention of Congress. True, Congress had before it an agreement entered into on July 15, 1932, providing that:

In consideration of the proposed addition to the reservation contemplated by the above bill, it was agreed that no more fourth-section Indian allotments or Indian homesteads under the 1884 Act should be made in San Juan County, Utah, outside of said boundary lines.

But this agreement, like the act, is silent as to whether pending applications such as those under consideration were intended to be affected. The State, in its brief, contends that since the decisions of this Department and the courts confirm the rule that an allotment under section 4 of the 1887 act is not made until approved by the Department—and departmental approval was not given in the instant case prior to the 1933 act—the Department may not give its approval now. While it is true that there are departmental decisions containing statements to the effect that no vested rights are acquired by the mere filing of an application for allotment, most of these decisions deal with allotments of Indian lands, the authority of Congress to change the conditions under which allotments may be made and the power of Congress to include reservations in patents issued in pursuance of selections. While it is not necessary to discuss all of the departmental decisions cited by the State in support of its position, I desire to point out that some of the decisions cited have no bearing on the question here under consideration and that in some instances the statements relied on by the State are mere dicta. Other cases cited and quoted from, instead of bearing out the State's contention, give direct support to your action in approving these allotment selections after the passage of the 1933 act.

In the case of *Clark, Jr. v. Bennally et al.* (on rehearing, 51 L. D. 98), the question involved was the applicability to fourth-section allotments of the acts of Congress reserving minerals in the lands of the United States. The acts of Congress reserving the minerals were enacted prior to the filing of the applications for fourth section allotments and in fact prior to settlement by the Indian applicants on the lands applied for. No question of vested rights was, therefore, involved and the Department properly ruled that until such rights had vested it was competent for Congress to impose such conditions to the taking of the lands as it saw fit. A statement, unnecessary to the decision, was made to the effect that an applicant under the fourth section does not obtain a vested right by merely filing an application. The correctness of this statement may in general be conceded. An application without more confers no right on anyone. But an appli-

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cation by an Indian qualified under the statute and supported by settlement as required by the statute confers upon the applicant an absolute right to allotment and patent. The statute declares that such an Indian "shall be entitled upon application to the local land office for the district in which the lands are located, to have the same allotted to him * * * in manner as provided by law for allotments to Indians residing upon reservations." In the case of qualified applicants who have met all of the statutory requirements, this mandatory language not only deprives the administrative officers charged with the duty of administering the act of all discretion but also charges them with the duty, which must be regarded as purely ministerial, of confirming the allotment by patent as in the case of reservation allotments.

The state likewise quotes from the decision of the Department in the case of *Raymond Bear Hill*, 52 L. D. 688, as tending to show that equitable rights attach at an earlier stage in the case of reservation lands than when public lands are involved. While I fail to see how this argument can aid the State, it should be pointed out that immediately preceding the quotation from the decision contained in the State's brief, the following significant language bearing on the question here presented is found:

In connection with the foregoing, it may be said generally that it is well settled that a claimant to public land who has done all that is required under the law to perfect his claim, acquires a right against the Government and that his right to a legal title is to be determined as of that time. This rule is based on the theory that by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him, although no legal title passes until patent issues. *Wyoming v. United States* (255 U. S. 489); *Payne v. New Mexico* (255 U. S. 367); *Payne v. Central Pacific Railway Company* (255 U. S. 228). * * * [Pp. 690-691.]

While dealing with the allotment of reservation land, that decision contains language which, to my mind, is particularly applicable to the present situation:

The filing and recording of an allotment selection by a qualified Indian in the field, operates to segregate the land from other disposal. It gives him a prior or preference right to the land as an allotment which, upon approval by the department, vests in him an equitable right to a patent. By the filing and recording of the Indian selection, the land is necessarily withdrawn from the mass of tribal lands, and the right of the Indian becomes in its nature individual property. In this sense, that is, so long as the allotment selection remains of record and no occasion arises to disturb it, the land is "disposed of" in contemplation of the act of March 3, 1927, as it is no longer subject to other disposal or reservation. *This right of the Indian is but further confirmed by approval of the department of his allotment selection, which vests in him the right to a trust patent, denominated by the courts to be an instrument or memorandum in writing to show that for a designated period the United States will*

hold the land allotted in trust for the benefit of the allottee or his heirs. *United States v. Rickert* (188 U. S. 432, 436). Under any other view than that expressed, the position would be that land taken by an Indian in allotment does not become "disposed of" or segregated from tribal status until issuance of final or fee patent, which could not have been the intention of the law, especially in view of numerous departmental and court decisions to the contrary. The rule applicable in this matter is the same as that applying to any qualified person who performs all conditions prescribed by law to secure entry of lands open thereto—the law considers that as done and virtually views the entry made. *By-Yu-Tse-Milkin v. Smith* (194 U. S. 401). The personal property or private rights of Indians to particular lands are within the protection guaranteed by the Constitution. *Choate v. Trapp* (224 U. S. 665). All laws affecting or claiming to affect the rights of Indians are liberally construed in their favor. [Italics supplied.] [Pp. 691–692.]

Another misleading quotation from the decisions⁶ of the Department is taken by the State from the case of *Martha Read et al.*, 48 L. D. 567. There an Indian had made an allotment selection for himself and his minor children under the fourth section of the 1887 act. The right to selection in behalf of one of his minor children was denied because the child was shown to have been born after the date of the father's application. On appeal it was argued that the Indian child had a vested right to an allotment under the fourth section of the act of February 8, 1887, and that such a right to allotment became vested at the time of the child's birth. In rejecting this argument, the Department rightly held that "an Indian no more has a vested right to an allotment on the public domain than has a homesteader under the general homestead laws *prior to the performance of certain required conditions.*" [Italics supplied.] In 41 of the 45 cases before us it is conclusively shown that all required conditions have been met.

The State points to the decision of the Department in the case of *Louisa Walters*, 40 L. D. 196, as support for its contention that where an act is repealed without a clause saving previously filed applications, such applications must be rejected. That decision was placed on the ground that the rights of the applicant were still inchoate. It should be pointed out, however, that the act under consideration in that case was an act authorizing the Secretary to allot Indians on the public domain. The Indians were not required to settle on the land prior to their application for allotment or did not have to be entitled to allotment under existing law as is required by the fourth section of the General Allotment Act.

Likewise, in the decision involving the claim of *C. N. Cotton*, 12 L. D. 205, cited by the State as authority for the proposition that an act of Congress would be necessary to save an Indian's right by occupancy only where the land occupied was included by Congress in an Indian reservation, Cotton, the claimant, was not an Indian

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and was a mere squatter on the public domain without any color of title whatsoever.

Practically all of the other cases and decisions of the Department relied on by the State contained distinguishing characteristics such as the discretion vested in the Secretary to allot (which the Secretary does not possess in the case of public land allotments) or the form of trust patents by reason of intervening acts of Congress (not here involved).

Where the Secretary has no discretion in the matter, the Department has held, in the case of reservation lands as distinguished from the public domain, that subsequent legislation does not prevent the issuance of patents covering unapproved allotment selections.

In the case of *Mineral Reservations in Trust Patents for Allotments to Fort Peck and Uncompahgre Ute Indians*, 53 I. D. 538, the question was whether land selected for allotment prior to the act of March 3, 1927 (44 Stat. 1401), but unapproved on that date, was undisposed of within the meaning of the 1927 act, which reserved oil and gas in undisposed of land for the benefit of Indians having tribal rights on the Fort Peck Reservation. The Department rejected the argument that the words "undisposed of" import a final disposition of the land and held that a person holding such an unapproved selection may be regarded as having acquired at least a valid inceptive right prior to the passage of the act and that patent, without a mineral reservation, should issue covering such unapproved selection.

The State points to the opinion of the Department regarding allotment selections on the Fort Belknap Indian Reservation (55 I. D. 295), in which the meaning of the word "allot" and its derivatives is discussed at some length. The question there was whether patents could issue covering approved and unapproved allotment selections on the Fort Belknap Reservation in view of the provisions of the first section of the act of June 18, 1934 (48 Stat. 984), providing that thereafter no land on Indian reservations should be allotted in severalty to any Indian. It was remarked in that case that

* * * the courts consider an "allotment" as an assignment of the right of occupancy to an individual Indian; and that under allotment laws providing for patents an "allotment" is made when the allottee becomes entitled to a patent as evidence of the allotment and promise of a fee title; and that, as will be shown more fully later, an allottee may become entitled to a patent even before the approval of his allotment selection wherever the applicable allotment law makes such approval mandatory after the showing of certain prescribed conditions, and such conditions have been shown. [P. 299.]

After pointing out that the Fort Belknap act made every enrollee conclusively entitled to an allotment, it was held that section 1 of the 1934 act did not forbid the approval of allotment selections which under the particular allotment act were equitably vested in the allottee.

That opinion cites many cases wherein the courts have laid down the principle, particularly applicable to the present case, that where an Indian has done all that is necessary and that he can do to become entitled to land, and fails to attain the right through the negligence or misconduct of public officers, the courts will protect him in such right. Where the Indian claimant does all that is required of him, he acquires a right against the Government to have his title perfected. The date when it should have been perfected governs the existence of such a right.

The State argues that the opinion involving the Fort Belknap allotments, *supra*, is limited to the facts of the case and further that such limitation has been recognized by the Department in its opinion involving the constitutional power of Congress to repeal existing legislation relating to the allotment of lands to the Mission Indians in California (56 I. D. 102). The opinion was expressed in the latter case that the proposed repeal was constitutional because the individual Mission Indians had not acquired rights under the legislation sought to be repealed, which provided that allotments should be made to the individual Indians when, in the discretion of the Secretary of the Interior, such Indians were so advanced in civilization as to be capable of owning and managing lands in severalty. There the Secretary had discretionary authority to make allotments and until he exercised his discretion no rights vested in the individual Indians. In distinguishing the legislation affecting the Mission Indians from the legislation affecting the Fort Belknap Indians, it was pointed out that the Fort Belknap opinion rested primarily on the premise that the inhibition against further allotments was not intended to prevent the completion of allotments. Under the Fort Belknap allotment act, adopted for the benefit of certain unallotted Indians whose rights to allotment became fixed long prior to the passage of the prohibitory legislation, the allotments were mandatory. The opinion concludes:

* * * Neither that opinion nor any of the numerous decisions cited therein is authority for the proposition that an unapproved allotment selection confers an absolute property right in the selector to the extent of precluding Congress from forbidding that mode of disposition of tribal property. [Pp. 107-108.]

The unapproved allotment selections now under consideration are not tribal property but are on the public domain and no discretionary power is vested in the Secretary of the Interior to approve or disapprove the selections of the Indians, provided they have met the requirements of the 1887 act. As stated above, the principles followed in the Fort Belknap case are equally applicable to the present situation.

Subsequent to the opinion of the Department involving the Mission Indians, certain of these Indians holding unapproved allotment selec-

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tions instituted suit for the purpose of compelling the United States to recognize their selections of lands as allotments and to compel the issuance to them of trust patents. *St. Marie v. United States*, 24 F. Supp. 237 (D. C. S. D. Calif. 1938), *aff'd* 108 F. (2d) 876 (C. C. A. 10, 1940); *cert. denied* 61 Sup. Ct. 35. The court, after pointing out that the certificates of selection bore the legend "not valid unless approved by the Secretary of the Interior" and that such approval had never been given, reviewed the legislation affecting these Indians and determined that before a vested right accrued to the individual Indians their allotment selections must have been approved as provided in the act. The court said:

* * * And a study of the Act under which the selections were made leads to the conclusion that it was not the intention of the Congress to make the act of selection the source of a vested right, of which the Indian could not be deprived by the failure of the Secretary to approve it. The cases in which the act of selection called for compulsory action, were under acts in which the Congress had directed certain things be done, or in which certificates of allotment were given the effect of muniments of title. * * *

However, where, as here, discretion is lodged in the Secretary and the selector is not entitled to a patent until certain conditions precedent, dependent upon the action of the Secretary, are complied with, he cannot assert any rights until he has shown compliance with them.

* * * * *

So here the Palm Springs Indians having acquired no vested right, and the power of the Secretary to withhold approval being discretionary, we cannot compel action that would give to the Indians the benefit of a right which they did not possess. * * * [P. 241.]

The State has not pointed to any decision either of this Department or the courts, and I know of none, whereby a person who has done everything required of him under the law may be deprived of his rights by the mere failure or refusal of a Government official or employee to perform his duty. It has been established by a subsequent investigation that with the exception of the four applications mentioned above the parties making these applications had complied in every respect with the law. If the Secretary had not temporarily suspended action on the pending allotments by means of his telegram of January 10, 1931, these applications would long since have been approved and patents would have been issued. To hold that the act of March 1, 1933, prevents the patenting of the lands applied for would be to give to the act retrospective operation contrary to the familiar rule that a statute should not be construed to operate retrospectively or to affect rights existing prior to its passage unless the language is so clear as to admit of no other construction. That this particular act was not intended to be retroactive is clear from its language. The declaration is that no further allotments on the public

domain in San Juan County shall be made. This language obviously looks to the future and not to the past. It indicates a plain purpose on the part of Congress to prevent the initiation of new rights rather than to strike down or impair rights existing on the date of the enactment.

All of the applications under consideration were filed long prior to March 1, 1933. It has been conclusively shown that 41 of the applicants had by that time complied with all statutory requirements. The fact that subsequent investigation was necessary to establish compliance with the statutory requirements is immaterial. Such investigation merely resulted in the ascertainment of facts existing at the time of the filing of the applications. With those facts established, the right to allotment, under the mandatory language of section 4 of the General Allotment Act, can no longer be denied. The United States now holds the title subject to the right which the Secretary of the Interior is obligated to recognize and confirm by the issuance of patent in the manner provided by Congress. As to the four applications filed on behalf of minors without the necessary showing that the applications are based upon valid applications or allotments of parents, I suggest that a further investigation be made. The need for this further investigation arises from the identity of family name between these applicants and the applicant under Salt Lake City 049501. If the necessary family connection is shown between these applicants, these four applications should be allowed. Otherwise they should be rejected.

Disposing of my first question, it is my opinion that the inhibition against the making of further allotments on the public domain in San Juan County, Utah, has no application to applicants such as those under consideration whose rights to allotments were fully perfected prior to the enactment of that legislation. Indeed, if the statute should be interpreted to forbid the patenting of the lands applied for, a serious question of constitutionality would be presented. Where a statute is susceptible of two interpretations, one of which might permit successful assault upon its constitutionality, the other interpretation should, of course, be chosen. See *United States v. Delaware and Hudson Railroad Co.*, 213 U. S. 365, 407.

II

The State contends that, prior to the passage of the act enlarging the Navajo Reservation, certain officials and agents of the Office of Indian Affairs promised that if the proposed bill were enacted the particular applications then pending in the local land office would be rejected or cancelled. The Office of Indian Affairs insists that no such promise was made and that the only promise regarding the land

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in San Juan County was that embodied in the agreement of July 15, 1932, set out above, which contains no reference to pending applications. I deem it unnecessary, however, for the purpose of disposing of the present applications, to decide whether or not any such agreement was concluded. No representative of this Department had any authority to make any disposition of these lands in any manner which would defeat the rights of these Indians. *Cramer et al. v. United States*, 261 U. S. 219, definitely establishes this principle. In that case it was held that lands occupied by individual Indians were excepted from a grant under which lands "reserved * * * or otherwise disposed of" were excepted. There the only rights which the Indians had were possessory rights, not recognized by any statute or other formal governmental action. The court held that such possessory rights were protected by the settled policy of the Government. Are the Indian applicants in the present case no less entitled to that protection where it is shown that their rights arose under a statute? The court in the *Cramer* case in disposing of the contention that the Government was estopped by the action of its agents, said:

Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights. See and compare *Lee v. Munroe & Thornton*, 7 Cranch, 366; *Whiteside v. United States*, 93 U. S. 247, 257; *Dubuque & Sioua City R. R. Co. v. Des Moines Valley R. R. Co.*, 109 U. S. 329, 336; *Pine River Logging Co. v. United States*, 186 U. S. 279, 291. [P. 234.]

The Supreme Court of the United States on December 8, 1941, reaffirmed this principle in *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339 (1941).

Even if the alleged agreement that the pending applications would not be allowed to proceed to patent were to be proved, I am of the opinion that this Department would be without authority to refuse to issue the patents for which applications have been made. It is well established that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power and Light Co. v. United States*, 243 U. S. 389; *United States v. City and County of San Francisco*, 310 U. S. 16.

Approved: -

W. C. MENDENHALL,
Acting Assistant Secretary.

UNITED STATES v. ARIZONA MANGANESE CORPORATION

UNITED STATES v. CHAPIN EXPLORATION COMPANY

Decided May 29, 1942

MINING CLAIM—DISCOVERY.

- (a) It is settled law that no lode mining claim can be located and no patent issued without actual discovery of a vein or lode within the limits of the claim located, and that mere indications of, or belief in, the existence of mineral on the claim do not amount to discovery.
- (b) Discovery outside the location, no matter what may be its proximity to the lines of the location is not sufficient.
- (c) The Department has no authority to disregard the above rule of discovery on the ground of national emergency.
- (d) The fact of discovery is a fact of itself totally disconnected with the idea of a discovery shaft.
- (e) There is no sound reason for the position that a discovery of mineral upon each of two contiguous claims cannot be recognized as a valid discovery for each claim for the reason that the discoveries are in one shaft on a common boundary between the claims.
- (f) The Federal law does not require the sinking of a discovery shaft, and where discovery is made in a drill hole on a common boundary to two lode locations, in the absence of any authoritative decision that a discovery in a drill hole does not satisfy the requirements of the law of the State in which the claim lies as to a discovery shaft, the discovery is deemed sufficient to establish the validity of both locations in the absence of any evidence that the drill hole departs from the vertical plane drawn through the side line.

CHAPMAN, *Assistant Secretary*:

Adverse proceedings were directed against mineral entry 078721, charging "That no valid discovery of manganese or other valuable mineral has been made within the limits of any of the following mining claims:" Maggie Nos. 8, 17, 22, 23, 27; Mesa, Mesa Nos. 2, 3, 4, 5; Muroc Nos. 1, 2, 3; Rudy, Rudy No. 1. Proceedings on a like charge were brought against mineral application, Phoenix 078761, as to Chapin Nos. 4, 5, 6, 7, 8, 9, 15 and 16 lode mining claims embraced therein.

These proceedings were consolidated by stipulation for the purpose of hearing. Upon the evidence adduced thereat, the register recommended that entry 078721 be allowed to stand and final certificate be issued for the unpatented claims in application 078761. By decision of March 6, 1941, the Commissioner of the General Land Office dismissed the proceedings against Maggie Nos. 8 and 17, Rudy, Rudy No. 1, Chapin Nos. 15 and 16, finding that a discovery of manganese had been made on those claims and as to the remaining claims embraced in the charge against entry 078721, held the entry for cancellation, and as to the remaining claims embraced in the charge against application 078761 held the application for rejection. These adverse actions resulted from a finding that an actual discovery of mineral had not been

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made on any of the claims so held for elimination from the entry and application. The American Manganese Corporation, applicant under 078721, and the Chapin Exploration Company, applicant under 078761, have appealed.

There is no controversy as to the facts. Briefly stated, the evidence shows that appellants and their operators have expended many thousand dollars in exploring the field to ascertain the value and extent of manganiferous deposits whose existence is disclosed in some places by outcrops, and in others at depth in some 22 diamond drill holes passing through the overlying formations mostly of basalt and conglomerate to one or more beds of tuffs and sandstones at different horizons in which the manganese is disseminated. The defendants' expert witnesses admit that there is no outcrop or drill hole in which has been found manganese on any of the claims which the Commissioner found were without discovery, the surface of the claims being covered by unmineralized formations. The geologists who have been in charge of the development work and the mineral expert for the Government agree in the belief that the manganiferous beds underlie all of the claims in question. The reason for this belief, as expressed by the defendants' witnesses, appears to be that the various drill holes and outcrops in which manganese is found, considering their position with relation to each other and the claims in question, the similarity in the formation in which the manganese is found, the occurrence of the mineral in the same geologic horizons and other geologic evidence, strongly indicate the continuity and lateral extent of the deposit and the probability, as to most of the claims and the possibility as to a few, that all the claims in question are underlain by the beds of manganiferous deposits that have actually been discovered.

According to the evidence, the manganese is of low grade and is not commercially valuable in its present form, but an electrolytic process has been discovered to convert low grade manganese ores into metallic manganese, and it is confidently expected that by further laboratory experimentation a process will be perfected whereby manganese ore reserves, estimated as 5,000,000 tons of proven 12 percent or 13 percent ore and a large tonnage of partially explored ore running perhaps 5 percent will justify the installation of a plant in the field sufficient to handle 550 to 1,000 tons of ore a day.

It was contended in the appeal to the Commissioner, and is contended here, in effect, that the geological proof is so strong as to the existence of manganiferous beds under the claims in question that it would be a waste of money to require discovery by drilling on each contested claim; that manganese is a strategic mineral and the Bureau of Mines and the Geological Survey are interested in developing a large

and adequate domestic reserve of such mineral to provide for national defense needs in the present emergency; that large expenditures necessary to establish a plant to develop the property are not justified unless title is obtained to the entire compact and contiguous area and therefore the technical rule of actual discovery on the claim should be waived by the Department as it did in the *Rough Rider* case (42 L. D. 584) when there was no national emergency or other compelling reason.

The Commissioner held that:

A discovery of mineral is an essential of the first importance; regardless of any emergency that may exist it is a requirement that this office has no authority to waive. Section 2320 R. S. (30 U. S. C. 23), provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

The rule that no lode mining claim can be located and no patent issued until the actual discovery of a vein or lode within the limits of the claim as located and that mere indications or belief in the existence of mineral on the claim do not amount to a discovery, is well settled. See 30 U. S. C. A. sec. 23, note 124; and cases cited in *Rough Rider and Other Lode Claims*, 41 L. D. 242, 253, 254; *East Tintic Consolidated Mining Co.*, 41 L. D. 255; *Oregon Basin Oil and Gas Company*, 50 L. D. 244; *id.* 258; *Lindley on Mines*, (3d ed.) sec. 437. Also a discovery outside the location no matter what its proximity to the lines of the claim is not a discovery thereon. *Waskey v. Hammer*, 223 U. S. 85, 91. The case of *Rough Rider and Other Lode Claims* (42 L. D. 584), has plainly no application to the facts of this case. Furthermore, the case is no longer followed. *Gonzales v. Stewart*, 46 L. D. 85. If it can be shown that the prompt acquisition of title to these claims by the claimants, without compliance with the law as to discovery, would expedite the accumulation of manganese resources for the purpose of national defense, that showing might constitute an appropriate basis for congressional legislation. The Department is without authority to disregard the law for such reasons. The Commissioner was right in holding invalid the claims upon which no actual and physical exposure of manganese has been made.

After the hearing, an affidavit was submitted by the American Manganese Company, executed by Benj. N. Webber, geologist in charge of development operations, alleging the finding since the hearing, of manganese in drill holes on certain of the claims and among them that a manganese stain was encountered on the Muroc; that drill hole No. 24 on the boundary between Muroc No. 1 and Muroc No. 2 showed by assay 7.94 percent manganese; that drill hole No. 25 on the Muroc No. 3 showed manganese assaying 2.56 percent. The Commissioner held that the affidavit could not be considered as evidence unless the Special Agent in Charge stipulated with the counsel for

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defendants that the affidavit might be filed and considered as evidence. Such a stipulation was filed, whereupon the Commissioner by decision of May 24, 1941, dismissed the contest as to Muroc No. 3, but required the said company to elect as to which one of the Muroc Nos. 1 and 2 the discovery on the boundary line between them should be applied and that if no action was taken, the contest would be dismissed as to Muroc No. 1 and the mineral entry would be canceled as to Muroc No. 2. The Company elected to have the discovery applied to Muroc No. 1, reserving the right of appeal from the requirement and has so appealed.

The requirement was based upon the decision in *Poplar Creek Consolidated Quartz Mine*, 16 L. D. 1, where it is stated in the syllabus that:

A discovery of mineral must be treated as an entirety, and the proper basis of but one location, and therefore, not susceptible of sub-division for the purpose of two locations having a common end line that bisects the discovery shaft.

In that case there was a discovery in a discovery shaft bisecting the common end line of two lode-claims, located on the same day by two different locators, Bull and Braden. Braden transferred his claim to Bull, who in turn transferred both to Bigelow, who applied for patent to both claims. The discovery shaft was 60 feet deep, and developed a ledge from 6 to 10 inches in thickness. The Department affirmed the cancelation of the entry. In order that the rationale of that decision may be properly understood, it is necessary that the opinion be set forth at some length. After premising that mineral locations must be made in good faith, that the mining act requires that a discovery be made within the limits of the claim and that the location shall not exceed 1,500 feet in length and not more than 300 feet on each side of the vein, the opinion goes on to state:

The law evidently contemplates that the discoverer shall have a right to locate his claim to the exclusion of others, and, if the discovery is made by two parties, but one location can be made by them, for it is but a single discovery. No man, nor set of men, being rational, would discover a vein or lode and so describe the location as to make one of the end lines run through the center of the discovery shaft, thus leaving territory not located in which it was demonstrated ore existed, and which might have been included in the description.

There was but one discovery made upon which both these locations were based. Both Bull and Braden may have discovered the vein or lode, but each could not claim the discovery as his own. It was one discovery made by two men, and only entitled the two, or either of them, to make one location. If the law could be so construed as to allow two locations in a case like this, it would also have to be held that one discovery would entitle the discoverers to make four locations, placing one-fourth of the discovery to the credit of each. The law is not susceptible of any such a construction. A discovery is a whole, and may not be divided and parceled out among the discoverers.

Attorneys for appellant have cited the case of *Larkin v. Upton* (144 U. S., 20), as authority for holding that the one discovery shaft was sufficient for two locations, but an examination of that case fails to convince me that it is decisive of the question at issue. In that case it is held that the top or apex of a vein must be within the boundaries of the claim, in order to enable the locator to perfect his location and obtain title. It was also held that this apex is not necessarily a point, but may be a line of great length, and if this be true, and a portion of it can be found within the limits of a claim, that is sufficient discovery to entitle the locator to obtain title. In that case there was a patented claim, and its south end line formed the north end line of the claim in question, and the question arose as to whether there had been a discovery on the south claim. The discovery shaft in that case was sunk by the claimants of the unpatented claim very near, if not on the boundary line between the claims, and the owners of the patented claim asserted that the discovery was made on their side of the line. The jury below rendered a special finding, to the effect that the vein or lode was discovered south of the line and within the limits of the unpatented claim, and that the top or apex of such vein was not within the limits of the patented claim, and the supreme court affirmed the court below in its judgment that there was a valid discovery. In that case there were adverse interests, and the only question decided was as to whom the benefit of a discovery inured, while in the case at bar no discovery has been made on either of the locations, except in one shaft, and it is not a question here as to which of these locators is entitled to the benefit of the discovery, but as to whether the two locators by combining may initiate two claims. In that case one claim had been located on a discovery made doubtless at some distance from the boundary line and had been patented, while in this a right is sought to be initiated to claim two locations upon but a single discovery. It is a plain attempt to evade the law and secure a mineral claim, three thousand feet in length, where the law would allow but one thousand five hundred feet.

A single discovery should not be construed into two discoveries, in order to support two locations, by merely running an imaginary line through the discovery point. [Pp. 2-3.]

In *Lindley on Mines* (3d ed.) sec. 337, the question of discovery in a shaft bisecting a common line between two claims is discussed. Mr. Lindley refers to the case of *Reynolds v. Pascoe*, 24 Utah 219, 66 Pac. 1064, 1065, in which it was said that "The same discovery point cannot be used for the location of two or more claims located upon the public domain" and proceeds to show from the facts of the case that the question of the validity of a discovery on a shaft bisecting a line of the claim was not involved. After stating the facts in the decision of the Department above cited and quoting the second paragraph of the quotation above, Mr. Lindley's comment is as follows:

The language employed is somewhat extravagant. It would be impossible to mark off four lode locations, including a common discovery shaft, without such a surface conflict as would invalidate at least two of them, under the doctrine of the Utah case *supra*.

If we assume that a part of the apex was disclosed in each claim, we do not see why there could not be two locations, as there would then be practically two

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discoveries. Any part of the apex on the course of the vein found within a claim justifies a location. As was said by the supreme court of the United States:

"Indeed, it would seem from some of the testimony that the course or strike of this vein was not exactly along the boundary line between the Comanche and the Shannon, but varying somewhat therefrom; hence, the apex in its full width and with some portions of its length might be found in each claim and so discovered justify the discoverer in obtaining title to each." [Citing *Larkin v. Upton*, 144 U. S. 19, 23.]

He further states:

Where the state laws require the sinking of a discovery shaft on each claim as a part of the location work, a shaft sunk on a common boundary of two claims would not satisfy the law as to either unless its dimensions were larger than is customary. It is possible that some of the courts and the land department have confused the idea of the discovery with the discovery shaft. This suggestion seems to have occurred to Mr. Morrison, who says, citing the above cases as authority: "The attempt to locate two full claims upon one discovery shaft is a palpable fraud," emphasizing the word *shaft* by italics.

If we eliminate the legal necessity of a discovery shaft and confine ourselves to the disclosure of a vein, the apex of which crosses a common boundary, there is no reason in law or morals why two locations could not be made, by the same or different persons, each based upon the disclosure of a part of the apex within each claim.

In section 438A of the same work, the question of drill hole discovery on the boundary line of oil placer claims is discussed and it is there stated:

If it be conceded that the object of compelling a discovery as the basis of a location is to demonstrate the actual existence of mineral within the boundaries of the claim, as well as to reward the discoverer, and as to this there can be no dissent, it cannot be denied that a boundary line well which reaches and determines the existence of the deposit establishes the incontrovertible fact that petroleum exists and has been actually discovered in every location penetrated by the well. If any portion of an apex discovered in a lode location is sufficient to support such location, it would seem that a discovery of petroleum made through the instrumentality of a boundary line well should inure to the benefit of every location into which it penetrates. This, we think, would be true where the ownership of all the claims was in the same person; it would also be true if the well were drilled by co-operation and agreement between two or more contiguous owners.

In *Costigan on Mining Law*, sec. 54, the reason for a discovery shaft requirement is discussed. It is there said:

The chief purpose of requiring a discovery shaft is to demonstrate the presence of a vein; but it also serves another purpose, namely, "to compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws." It is this latter purpose that causes perplexity when we ask whether, by laying out two locations with a common end line, which bisects one discovery shaft in such a way as to disclose the vein as existing in each location, the locator has a discovery shaft for both.

Giving a diagram of two claims with a discovery shaft at the intersection of the common vein and the common end line between them, denominated "Figure No. 4," Mr. Costigan states:

The chief purpose of a discovery shaft has been fulfilled for both locations in the case illustrated by Figure No. 4; but the locator is endeavoring to get by one exertion twice what the law intended him to have thereby. The fact that a discovery shaft sunk by a junior locator is good, even though it be cut in two by the line of the senior location, may be disregarded, because in that case only one location is predicated upon one discovery and one discovery shaft. To claim two locations through one discovery shaft of only the depth required for one claim is clearly to act in bad faith, and in such bad faith that both locations should be held void. It is a case of excessive location, where the whole is bad because of fraud.

But if the one shaft is sunk twice the required depth for a discovery shaft, and the vein is disclosed in both claims, the requisite good faith to sustain both locations might be held to exist, though a prudent miner would not take the risk. The chief objection to letting one shaft of twice the ordinary discovery shaft depth serve to perfect two locations seems to be the uncertainty as to the real situation which it would leave in the mind of a subsequent prospector, but that objection is not overpowering. The question is often regarded as one of insufficient discovery for two claims; *but, if the vein is disclosed in both claims, it is clearly only one of a sufficient or insufficient discovery shaft.* [Emphasis supplied.]

Recurring now to decision in the *Poplar Creek Consol. Quartz Mine* case, it is plain that it rests on the proposition that whatever mineralization is found in a shaft cut by a common end line of two claims and no matter whether the mineralization extends into both claims and no matter what may be the extent and cost of the shaft, the mineral disclosed can be only considered as a single discovery, and being on a shaft on the common boundary to the two claims it is an attempt to acquire title to the area of two claims by the location of one and an evasion of the law and therefore does not serve to validate either claim.

All the mining law requires as to discovery is the finding of the mineral on the claim sufficient in quantity and quality to justify its pursuit under the reasonable expectation of opening a paying mine. It is not required that the discovery shall be on any particular part of the claim, nor does the Federal law prescribe any method or any specific character of work as a requisite to a valid discovery. The notion that all mineralization found in one discovery shaft, irrespective of the fact that it penetrates more than one claim must be considered a single discovery, seems to imply that a shaft is one of the indispensable components of a discovery. The fact of discovery is a fact of itself totally disconnected with the idea of a discovery shaft, the discovery shaft being a process of location subsequent to discovery. Morrison on Mining Rights (14th ed.) page 37, quoting *Brewster v. Shoemaker*, 63 Pac. 309. A locator may have a location contemplated

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by section 2320, Revised Statutes, although technically he had no discovery shaft. *Branagan et al. v. Dulaney*, 2 L. D. 744, 749. And it is a matter of common knowledge that the Department has frequently granted patents on exposures of mineral on the natural surface of a claim, notably in the case of oil shale claims, without inquiry as to the existence of discovery shafts. In the case where a discovery is claimed in one shaft cut by a common end line for the two contiguous claims, a question might arise as to whether the separate discoveries claimed were upon a vein that had its apex within the claim to which the discovery was ascribed. It has, however, never been the practice of the Department to require proof that the discovery was upon a vein that apexed in the claim as an essential element in establishing the validity of the discovery. *United States Borax Company*, 51 L. D. 464, 469. The Department is not aware of any sound legal ground for taking the position that a discovery of mineral upon each of two contiguous claims cannot be recognized as a valid discovery for each claim for the reason that the discoveries are in one shaft on a common boundary between the claims.

In the *Poplar Creek* case, a discovery on the boundary line in one shaft between the claims was characterized as a plain attempt to evade the law and secure a mineral claim 3,000 feet in length where the law would allow 1,500 feet. As to what requirement of law was evaded is not specifically stated. The boundaries of two claims were marked and application for patent was made for two. The owners would have been required to do the necessary annual assessment work for two, and as a prerequisite to the issuance of a patent, pay the purchase price for the acreage for two and show the expenditure of \$500 in work and improvement for each. Paragraph 9 of the Mining Regulations (43 CFR 185.13), states that the claimant should, therefore, prior to locating his claim, *unless the vein can be traced on 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, but evidently here the requirement stressed is that of discovery, the methods to be pursued in making it are merely advisory, and the requirement of discovery can be met in certain cases on each of two contiguous claims by the medium of one shaft. The only evasion suggested that may have been in the mind of the writer of the opinion was evasion of the requirement of a State law prescribing that a cut or shaft shall be sunk to a specified depth, usually 10 feet, as a necessary part of the act of location of a mining claim, and that the attempt to make one shaft serve for two claims was a fraudulent evasion of the State law. Curiously enough, however, there is no requirement in the State of California, where the claim there under

consideration was situated, requiring a discovery shaft as a step in location. See *Lindley on Mines* (3d ed.), sec. 343.

It is believed enough has been said above to show that the reasoning in the case of *Poplar Creek Consolidated Quartz Mine* is fallacious and that the decision does not rest on substantial grounds. It, therefore, should not be followed as a precedent.

In the case at bar, it is shown that the drill hole showing the manganese present therein is on a side line common to Muroc Nos. 1 and 2. It is fair to presume from the record that it is at least one or more hundred feet in depth. From the nature of the evidence as to the form, character and extent of the mineral deposit, it is reasonable to infer that it is a lode in blanket form as the official field notes state, and has no actual apex and extends to the boundaries of the claim. In the case of blanket lodes, the Department has held that the apex is coextensive with the side lines. *Homestake Mining Company*, 29 L. D. 689, 690; *Jack Pot Lode Mining Claim*, 34 L. D. 470; *Belligerent and Other Lode Mining Claims*, 35 L. D. 22; *United States Borax Company*, *supra*. No question, therefore, arises as to the regularity of either location with respect to its lateral extent on each side of the vein. In the absence of evidence to the contrary, it will be presumed that the drill hole is straight and does not depart from the vertical plane drawn downward through the side line of the claim and a part of the diameter thereof penetrates each claim at the point of discovery (*Phillips v. Brill*, 17 Wyo. 26, 95 Pac. 856, 859) and, therefore, the mineral exposed as the result of the drilling is existent in each of the claims.

There is nothing in the record to show that the claimant of the Muroc Nos. 1 and 2 did not comply "with the mining rules, regulations, and customs of the mining district, State, * * * in which the claim lies, and with the mining laws of Congress, * * *" as required to be shown in the application (43 CFR 185.54). The field notes of survey show that the applicant sunk a discovery cut on Muroc No. 1 and a discovery shaft on Muroc No. 2 to the depth of at least 8 feet. The law of Arizona, Revised Statutes of 1901, sec. 3232; sec. 65-103, Arizona Code, 1939, requires the sinking of a discovery shaft "in the claim to a depth of at least eight feet from the lowest part of the rim of the shaft at the surface, and deeper, if necessary, until there is disclosed in said shaft mineral in place." The applicant, however, made his discovery on each claim in a drill hole on the common boundary between the claims which seems to have been the only practicable way considering the depth and nature of the deposit. In the absence of intervening rights the locator may exercise the privilege of performing his discovery work at some point within the claim other than that first selected. *Lindley on Mines* (3d ed.) sec. 345.

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As the Federal law does not require the sinking of a discovery shaft on each location as a prerequisite to its validity (*id.* sec. 328, 7 L. R. A. (N. S.) 839), and as the Department is unaware of any authoritative decision that a sufficient discovery of mineral in a drill hole does not satisfy the requirements of the law of Arizona, the discovery on the boundary line between is deemed sufficient to establish the validity of both Muroc Nos. 1 and 2. The proceedings should, therefore, be dismissed as to both claims.

As modified, the decision of the Commissioner is affirmed.

Modified.

AUTHORITY TO PERMIT THE CAPTURE OF ANIMALS IN NATIONAL PARKS

Opinion, May 29, 1942

SECRETARY OF THE INTERIOR—NATIONAL PARK SERVICE—NATIONAL PARKS AND MONUMENTS—CONSERVATION OF WILDLIFE.

The Secretary of the Interior is required by the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. secs. 1-3), and related statutes, to conserve the wildlife in national parks and monuments. Under his general administrative powers, however, he may permit the taking of animal life for scientific purposes by Federal employees, but is precluded from granting permits for the taking of animal life to private individuals and institutions. The degree of protection to be afforded animals within the parks and monuments is primarily an administrative question.

MARGOLD, *Solicitor:*

In his memorandum dated October 2, 1941, the Director of the National Park Service states that it appears desirable to authorize the taking from national parks and monuments of specimens of animal life by naturalists employed by the National Park Service and by private individuals and institutions engaged in scientific research. The permits to private individuals and institutions would be issued for research purposes, subject to an understanding that the results of the research would be available to the National Park Service to aid in providing an organized body of knowledge for the care and preservation of the animal species within the park areas. It is requested that I render an opinion as to the legal propriety of this procedure.

I have been informed by officials of the National Park Service that a uniform policy in this regard is to be enforced in all national park and monument areas. In some fourteen of the national parks applicable statutes contain express prohibitions against the hunting, killing or wounding of wildlife therein. My conclusions with regard to these

areas, in the light of the uniform policy to be followed, render necessary a consideration of the legal propriety of the proposed procedure as to them only.

The general administrative and regulatory powers of the Secretary of the Interior, and the National Park Service, with regard to national parks, monuments, and other reservations are prescribed in the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. secs. 1-3). This act, creating the National Park Service, provides in part as follows:

SEC. 1. * * * The service thus established [National Park Service] shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures to conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

SEC. 2. That the director shall, under the direction of the Secretary of the Interior, have the supervision, management, and control of the several national parks and national monuments which on August 25, 1916, were under the jurisdiction of the Department of the Interior, * * * and of such other national parks and reservations of like character as may be created by Congress * * *.

SEC. 3. That the Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments and reservations under the jurisdiction of the National Park Service * * *.

Prior and subsequent to the approval of the act of August 25, 1916, *supra*, acts of Congress relating to the administration, protection and development of certain national parks were passed containing provisions prohibiting within the limits of the particular parks "All hunting, or the killing, wounding, or capturing at any time of any bird or wild animal, except dangerous animals, when it is necessary to prevent them from destroying human life or inflicting an injury." This provision was first employed in the act of May 7, 1894 (28 Stat. 73, 16 U. S. C. sec. 26), relating to the Yellowstone National Park. Statutes applicable to some thirteen other national parks were later passed containing similar language. The language of these statutes is clear and unambiguous. "All" hunting, killing, wounding or capturing of animals is prohibited, and the only express exception in the statute is in the interest of defense against injury to human life. There is another express provision constituting an exception contained in section 3 of the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. sec. 3), which authorizes the destruction of detrimental animals. The permits in question would not come within either of these exceptions. It follows that the prohibitory statutes preclude the Secretary

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from granting permits for the taking of animal life in the applicable areas to private individuals and institutions.

The taking of animal life for scientific purposes by Federal employees pursuant to the authorization of the Secretary of the Interior, while not specifically authorized, is plainly within the general delegation of power to the Secretary to "regulate the use" and of "super-
vision, management and control" of the parks and monuments. Sections 1 and 2 of the act of August 25, 1916, *supra*. Section 1 provides that the areas shall be regulated "by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, * * * to conserve * * * the wildlife therein * * * in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations." If, therefore, it is administratively determined that the taking by Federal employees of specimens of animal life for scientific research is desirable in the interest of the preservation of the animal species within the park areas and that it will result in the conservation of animal life generally, such action would in my judgment be authorized. A question arises, however, as to whether this power is restricted by the specific statutory prohibitions hereinbefore considered. General statutes of this character are not applicable to the Government. *Guarantee Co. v. Title Guaranty Co.*, 224 U. S. 152, 155. They would not, therefore, restrict the general administrative power of the Secretary to authorize National Park Service or other Federal employees to take specimens of animal life where such action is determined administratively desirable. In this connection it must be kept in mind that the national parks and monuments have been set aside by Congress as wildlife sanctuaries and that this has been stated to be one of the fundamental purposes of these areas. See section 1 of the act of August 25, 1916, *supra*. Authorizations to National Park Service or other Federal employees to take animal life within the parks and monuments, accordingly, should be kept to a minimum and amount to relatively slight reductions of the wildlife in order to conform to this congressional purpose.

It is my opinion, therefore, that as to those parks subject to specific statutory prohibitions against the killing of wildlife therein the Secretary is precluded from granting permits to private individuals or institutions for the taking of animal life, but that the power of the Secretary to authorize National Park Service employees to take specimens of animal life, where determined to be administratively desirable, is not restricted by the specific statutory prohibitions.

The memorandum of the Director of the National Park Service also raises a question concerning the degree of protection which is required

to be given the several phyla of the animal kingdom either under the specific statutes applicable to the park areas or under the act of August 25, 1916, *supra*. Specifically, he asks:

* * * Aside from the exercise of the recognized right of self-defense against dangerous animals, and the exercise of the Secretary's authority to provide for the destruction of detrimental animals, what discrimination, if any, may be exercised in protecting certain species of animals more rigorously than others. The word "animal" is here used in its scientific sense.

In my opinion this is primarily an administrative matter. The law requires the conservation and protection of the wildlife in the park and monument areas and imposes the duty of administration thereof on the National Park Service under the direction of the Secretary of the Interior. The means to be adopted to accomplish the end are left to the administrative officials. Any means or steps reasonably adapted to the conservation and protection of wildlife would be legally proper.

Approved:

E. K. BURLEW,
First Assistant Secretary.

MARTIAL LAW IN HAWAII

Opinion, June 8, 1942

SCOPE OF MARTIAL LAW IN HAWAII—AUTHORITY OF GOVERNOR OF HAWAII—JURISDICTION OF CIVIL COURTS UNDER MARTIAL LAW.

That the action of the Military Governor of Hawaii in closing the civil courts and requiring that all persons accused of crimes be tried by military tribunals is not conclusive of the necessity therefor and in the light of such facts as are of public record does not appear to have been justified. Hence the trials of two civilians by military tribunal are probably illegal.

MARGOLD, *Solicitor*:

My opinion has been requested respecting the legality of two trials recently held in the Territory of Hawaii. In both the offenders were civilians, and were tried by a military commission.

* * * * *
The question then is whether the decision of the Military Governor closing the civil courts and establishing military tribunals for the trial of all criminal offenses committed by civilians is final or is subject to judicial review and, if subject to review, whether there would appear to be legal grounds for challenging the validity of the Military Governor's action.

To set the discussion in proper perspective a definition of terms and a review of the present history of martial law in Hawaii would appear to be in order.

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It is essential when one considers a problem arising in connection with martial law that terms be defined, in order that martial law be not confused with military law or military government. Military law is simply a code for the government of the army in peace and in war, and is administered by army officers without intervention of any civil court or jury. Except in the rare instances specified by the Articles of War, civilians are never subject to military law. (Fairman, *The Law of Martial Rule*, p. 6.)

Military government is "military power exercised by a belligerent by virtue of his occupation of an enemy's territory over such territory and its inhabitants." (*Manual for Courts Martial*, War Department Document No. 1053, 1; Fairman, p. 30.) The authority of the military in such a situation is complete and extends to every function of government.

Martial rule, or martial law, the two terms being synonymous, "is the carrying on of government in domestic territory by military agencies, in whole or in part, with the consequent supersession of some or all civil agencies." (Wiener, *A Practical Manual of Martial Law*, p. 10.) Since there is a broad twilight zone between the calling out of troops on the one hand and the displacing of every function of civil government on the other, it has seemed desirable to some courts to use a term less liable to misunderstanding. Where martial law involved the replacing of every civil instrumentality by a corresponding military agency, the situation has been described as "absolute martial law," or occasionally as "punitive martial law." To avoid confusion in this paper I will use the term "absolute martial law" in this sense, and "martial law" to include the less drastic situation, where certain governmental activities are carried on through military instrumentalities, but civil tribunals continue to function.

The Present History of Martial Law in Hawaii.—On Sunday, December 7, 1941, J. B. Poindexter, Governor of the Territory of Hawaii, by proclamation invoked the broad powers granted him under the Hawaiian M-Day Law (Appendix 1).¹ On the afternoon of the same day the Governor, pursuant to section 67 of the Hawaiian Organic Act, issued a second proclamation calling upon the commanding general of the Hawaiian Department to prevent invasion, suspending the writ of *habeas corpus*, placing the Territory under martial law and requesting and authorizing the commanding general

* * * during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor; and * * * to exercise the powers normally exercised by judicial officers

¹ Appendices referred to in this opinion may be found in the files of the Solicitor's Office. [Editor.]

and employees of this Territory and of the counties and cities therein, and such other and further powers as the emergency may require * * *. [Appendix 2.]

Immediately following this proclamation Lieutenant General Walter C. Short, commanding general, Hawaiian Department, U. S. Army, issued a proclamation (Appendix 3) to the people of Hawaii in which he said,

* * * I have this day assumed the position of military governor of Hawaii, and have taken charge of the Government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense * * *.

The imminence of attack by the enemy and the possibility of invasion make necessary a stricter control of your actions than would be necessary or proper at other times. I shall, therefore, shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects.

In order to assist in repelling the threatened invasion of our island home good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function.

Pursuant to section 67 of the Hawaiian Organic Act, the fact that a proclamation of martial law had been issued was immediately communicated to the President of the United States, who approved the action of the Governor in suspending the privilege of the writ of *habeas corpus* and placing the Territory of Hawaii under martial law.

When Lieutenant General Walter C. Short was relieved of his command on December 17, 1941, he issued a proclamation stating that he had relinquished command of the Hawaiian Department in accordance with a radiogram of the War Department, and that he relinquished his position as Military Governor of the Territory of Hawaii. This proclamation was simultaneous with the proclamation of Lieutenant General Delos C. Emmons, who reported the change of command pursuant to the War Department radiogram, and announced

* * * that I have this day assumed the position of the Military Governor of the Territory of Hawaii, and as such Military Governor I adopt and confirm the instructions contained in the fifth and ninth paragraphs, inclusive, of the proclamation of the Military Governor of the Territory of Hawaii dated December 7, 1941, and the general orders and other actions taken pursuant thereto. [Honolulu Star Bulletin, December 19, 1941, at page 9.]

The Military Governor, since the creation of that office, has made known to the community his commands through the issuance of general orders. It is apparent from an examination of the orders that the Military Governor proceeds upon the theory that as a result of the declaration of martial law and the appointment of the commanding general as Military Governor of the Territory, all of the executive

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legislative and judicial power is vested in the Military Governor and that he is not bound by the laws of the Territory or the provisions of the Federal Constitution, on the ground that they are suspended by the existence of martial law.

The general orders of the Military Governor cover a wide range of subjects—the jurisdiction and powers of all civil courts, the creation of military tribunals for the trial of civilians, regulation of traffic, firearms, gasoline, liquor, foodstuffs, and feed, the possession of radios, the censorship of the press, communications by wireless, cable and telephone, the freezing of wages of all persons employed on the Island of Oahu, and the regulation of the possession of currency.

On December 7 General Order No. 4 was promulgated, establishing military tribunals for the trial of all civilians for offenses against “* * * the laws of the United States, the laws of the Territory of Hawaii, or the rules, regulations, orders or policies of the military authorities.” (Appendix 4) The day following the proclamation of martial law the territorial courts were closed by order of the commanding general, and the Chief Justice of the Supreme Court of Hawaii signed an order announcing their closing. These military tribunals are guided by, but “* * * are not bound by the limits of punishment prescribed by said law * * *.” Lesser offenses are tried before provost courts, who may impose sentences up to five years imprisonment and \$5,000 fine. Major offenses are tried before military commissions who may give sentences “* * * commensurate with the offense committed, and may adjudge the death penalty in appropriate cases.” The order provides that the record and procedure in the provost courts should follow substantially that of a summary court martial, and in the military commissions that of a special court martial. (It is interesting to note that under the Articles of War the maximum punishment that can be adjudged by a summary court martial is confinement for one month, restriction to limits for three months, and forfeiture of two-thirds of one month's pay, and that a special court martial has no jurisdiction over capital offenses, and may not impose a sentence of death or imprisonment for life.) There is no appeal from the sentence of either tribunal. The decision of the provost court takes effect immediately, but sentences of military commissions must have the approval of the Military Governor before becoming effective. The accused is not entitled, as a matter of right, to the rights and privileges of an accused in a court martial. These rights, as has recently been pointed out, are substantial (Gullion, *How the Court Martial Works Today*, 1941, 27 A. B. A. J. 765). * * *

General Order No. 4, coupled with General Orders 29 and 57 (Appendices 5 and 6), prohibiting the civil courts from exercising their statutory criminal jurisdiction, places the entire administration of

criminal law in the hands of military tribunals. The substantive crimes for which persons are tried before military tribunals are offenses against the Federal and territorial statutes, and offenses against "* * * the rules, regulations, orders or policies of the military authorities." From this it would seem that any violation of a general order (and general orders control almost every function of civil life) issued by the Military Governor would carry with it criminal sanctions. Moreover, in sentencing offenders, the statutes of the United States, the Territory of Hawaii, the District of Columbia and the Courts Martial Manual, are merely guides for the imposition of sentences. The military tribunals are not bound by the penalties prescribed in any written law.

The latest order of the Military Governor relating to civil courts is General Order No. 57 (Appendix 6), which permits the courts of the Territory "as agents of the Military Governor" to operate to a limited extent, prohibiting the summoning of the grand jury, trial of criminal cases, trial by jury, compulsory attendance of witnesses, and the maintenance of any action against any member of the armed forces or other persons employed under direction of the Military Governor or engaged in defense work, for any act done in the course and scope of their employment. The limitations thus imposed by the Military Governor upon the civil courts, for all practical purposes, render them powerless, except in cases where no jury has been demanded, or in equity and probate cases where the compulsory attendance of witnesses is not necessary. Any party wishing to avoid trial in a law case may do so by the simple expedient of demanding a jury. It is doubtful whether any equity judge would allow a matter to proceed to decree over objection of a party that he had pertinent evidence, the production of which was denied him because of the inability to have a subpoena issued. (See on this and related points, Garner Anthony, "Martial Law in Hawaii" (1942), 30 California Law Review 371.)

Basis for and Conclusiveness of the Application of Martial Law.—Strictly speaking, martial law is a misnomer in that it is not law, but is merely a course of action justified or excused by necessity, according to the circumstances of the case. "Not everything, therefore, which is done under the name of martial law is legal." (Fairman, p. 31.) It has been characterized by our Supreme Court as a jurisdiction to be called into action in the case of "justifying or excusing peril * * * in times of insurrection or invasion, or of civil or foreign war within districts or localities whose ordinary law no longer adequately secures public safety and public rights" (*Ex parte Milligan*, 4 Wall. 2 (1866)). Necessity calls it forth, necessity justifies its existence, and necessity measures the extent and degree

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to which it may be employed. There are gradations in the ascendancy of military rule, dependent in every instance on the extent of the disorder or disaster, or the imminent danger that is threatening. There is, indeed, a vast gamut of permissible measures, differing in kind as well as in degree, and those measures applied in any particular situation must be justified on the grounds of necessity.

These principles may be illustrated in terms of hypothetical degrees of martial rule. At the bottom of the scale might be that degree of martial rule necessary to protect vital installations. In this situation the military would supersede the civil functionaries to the extent necessary to restrict all movement within the area of the installation, and to protect soldiers from civil process and detention for exercising control over the area.

Next higher in the scale might be the displacement of the civil functionaries by the military to the extent necessary to control the means of communication in the interest of secrecy. This may mean the censorship of news, the control of radio, prohibition against the possession of photographic equipment, etc.

In a more crucial situation and to avoid the danger of disorder or rebellion in a time of crisis and in the face of a possible invasion the next degree of martial rule might include the restriction of the possession of firearms and of the sale of liquor, and a more rigid control of the movements of the population. Measures of home defense, such as blackout restrictions, air raid precautions, preparations for gas warfare, etc., might become functions of the military. If absolutely essential to insure effective defensive tactics upon the occurrence of disaster, the military might at this stage assume the role of policing the entire area, particularly the public utilities. It might also control the marketing and supply of commodities and provide for the detention of suspicious persons.

The final gradation, appropriate in the event of invasion or some critical exigency which prevented the courts from functioning, would be that form of martial law involving the complete displacement of the civil courts by the military.

The rulings of the Supreme Court leave little doubt of the fact that courts may and will review the question of whether the circumstances justified the particular extension of martial law. (*Ex parte Milligan*, 4 Wall. 2 (1866); *Sterling v. Constantin*, 287 U. S. 378 (1932).)

This fact, however, should not be confused with the refusal of the courts to review the question of whether the executive was justified in proclaiming a state of martial law.

The theory is that a Governor or a President is charged with the faithful execution of the laws of the State or of the United States,

as the case may be, and that therefore the question whether a rebellion, or invasion, or other disorder exists which threatens the security of the government or the ability of the Governor to faithfully execute the laws, and justifies his calling the military to aid him in discharging this duty can better be determined by him than by the courts. But the term martial law covers a multitude of possible measures, and the conclusive authority to proclaim a state of martial law does not include the conclusive authority to determine the measures that may justifiably be taken:

By virtue of his duty to "cause the laws to be faithfully executed," the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. * * * The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force. * * *

But:

It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. *What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.* [Italics supplied] [*Sterling v. Constantin*, 287 U. S. 378 at pp. 399, 400]

It may readily be admitted that in a time of war the Military Commander charged with protecting a vital outpost against the threat of invasion should be permitted to exercise a broad discretion as to the measures necessary for island security and the prosecution of the war. For this reason it is unlikely that the courts would question the necessity for the extension of martial law to the functions described in the first three gradations of martial law outlined above. This assumption may not be indulged in, however, as respects the fourth or final gradation, known as *absolute* martial law, wherein the functions of civil courts are suspended and civilians are tried by military tribunals.

During the Civil War one Milligan, a Copperhead residing in Indiana, was brought before a military commission on the charge, among others, of seeking the overthrow of the Government, holding communication with the enemy, and conspiring to seize munitions of war stored in the arsenals. He was not a prisoner of war or a member of the armed forces. He filed a petition for a writ of *habeas corpus* in the Circuit Court of the United States, sitting at Indiana. The Court, unable to agree on the disposition of the petition, certified the case to the Supreme Court. The majority of the Supreme Court went beyond the question necessary to dispose of the case, and laid down the criterion for the justification of *absolute* martial law. The Court, maintaining

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the inviolability of the Fifth and Sixth Amendments during time of war, said: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." (*Ex parte Milligan*, 4 Wall. 2, 120.) The contention that—

in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will * * *

found its appropriate answer in the following statement:

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed and certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power" * * *. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish. [*Ibid.*, p. 124.]

The power of the military commander to make arrests and to hold persons in custody was conceded, but, the Court adds, "The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law * * *" (*Ibid.*, p. 126). The Court conceded that a situation might arise wherein punitive or absolute martial law could prevail, and civilians be tried by military tribunals. But, said the Court, such an extension of

Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. * * *

Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. [*Ibid.*, p. 127]

There has been considerable controversy among writers as to whether the test of open courts as a criterion for the justification of absolute martial law may not be too mechanical in its application. That was the view of Chief Justice Hughes in 1917, in the interim between his two terms of service on the bench: "Certainly the test should not be a mere physical one, nor should circumstances be sacrificed to form." (*War Powers Under the Constitution*, 42 A. B. A. Rep. 232, 245; S. Doc. 105, 65th Congress, 1st sess., page 12.) And other commentators have made the same criticism, pointing out that a

court which is sitting and whose doors are physically open is not open in intendment of law if it functions under military protection or sufferance behind barbed wire entanglements, or if its process cannot be executed:

It may be granted that courts which are prevented by insurrection from executing their process are not open in contemplation of the law. To open them is a part of the duty devolving upon the military. [*In re McDonald*, 49 Mont. 454, 476, 143 Pac. 947]

The true test, in case of civil war, would seem to me to be whether the civil authorities are able, by the ordinary legal process, to preserve order, punish offenders, and compel obedience to the laws. If they are, then the military commander has no jurisdiction; if, on the other hand, through the disloyalty of the civil magistrates or the insurrectionary spirit of the people, the laws cannot be enforced and order maintained, then martial law takes the place of civil law, whenever there is a sufficient military force to execute it. [*In re Kemp*, 16 Wis. 359, 369]

Apparently it has been overlooked that the majority in *Ex parte Milligan* were fully aware of this aspect of open courts. They said, referring to the Federal Circuit Court, "It needed no bayonets to protect it, and required no military aid to execute its judgments." (4 Wall. p. 122) In fairness, therefore, it cannot be argued that the majority were laying down a merely physical test of openness. More likely than not Professor Dicey correctly interprets the opinion of the majority when he says that the criterion of the courts being open or closed is not an absolute test, but that where the courts fully and freely exercise their ordinary jurisdiction, there should be a presumption that absolute martial rule cannot obtain (*Law of the Constitution*, 7th ed., p. 544). On proof of some critical exigency this presumption would be rebutted.

Various arguments predicated upon the Organic Act of Hawaii, the status of Hawaii as a territory, the proclamation of the Governor and its approval by the President, have been made in the effort to show that all of the action taken by the Governor and the Military is expressly authorized and may not be questioned. In my opinion these arguments are without validity.

The act creating the Territory of Hawaii formally extended the Constitution and laws of the United States to the Territory of Hawaii: "The Constitution and * * * all the laws of the United States * * * not locally inapplicable, shall have the same force and effect within said Territory of Hawaii as elsewhere in the United States" (Hawaiian Organic Act, section 5). The constitutional safeguards, important to this discussion, are the following:

Article 3, section 2 of the Constitution. "The trial of all crimes, except in cases of impeachment, shall be by jury."

The Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or

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indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

The same act which extends these guarantees to the inhabitants of Hawaii provides, in section 67, that the Governor may,

in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, * * * place the Territory or any part thereof under martial law until communication can be had with the President and his decision thereon made known.

It has been argued, and the Military Governor is apparently persuaded of the fact, that Congress, by the enactment of section 67 of the Hawaiian Organic Act, authorized the Governor, in the event of a declaration of martial law, to suspend all territorial and Federal law, and the Constitution itself. If Congress had any such intention it is certainly not disclosed by the language employed, or by the legislative history. The effect of the Organic Act is to establish certain criteria which justify the declaration of martial law by the Governor. As such it is only an expression of a right which the Governor of every state of the union has, even though there may be no express authorization for the exercise of the right. In short, while Congress has authorized the declaration of martial law in Hawaii in case of threatened invasion, it has not said what martial law is, and has given no content to that elusive expression.

According to the Fifth Amendment the only cases in time of war or public danger in which persons accused of infamous crimes may be tried without indictment by a grand jury are those arising in the land or naval forces or in the militia when in actual service. As noted, the Fifth Amendment has been extended to Hawaii by the same act which provides in section 67 for the declaration of martial law. That section does not purport to accord the declaration of martial law the effect of nullifying the guaranties of the Fifth Amendment or to suspend the rule of necessity universally applicable in martial law situations.

It has been suggested that the confirmation by the President of the Governor's proclamation of martial law has the effect of making the orders of the Military Governor the orders of the Commander in Chief. This would seem rather tenuous, since the President has not, in fact, issued a proclamation authorizing the establishment of military commissions or the suspension of all existing law. The President approved only the action of the Governor in suspending the writ of *habeas corpus* and placing the Territory under martial law. Under

the majority decision in the *Milligan* case, the President could not authorize the establishment of military tribunals for the trial of civilians unless the criteria of closed courts established by the majority were satisfied.

Not even the minority in the *Milligan* case suggested that the President alone could erect military commissions in localities where the courts were open. They said that “* * * it is within the power of Congress to determine in what states or districts such great and imminent danger exists as justifies the authorization of military tribunals for the trial of crimes * * *” (4 Wall. at page 140).

The minority insisted that Congress could constitutionally provide for the suspension of certain civil rights, notwithstanding the fact that the district in question was not the immediate battlefield, and that the courts of the locality were open. This is far from saying that the President or the Governor of Hawaii could exercise that power in the absence of Congressional authority and, as has been indicated, no such Congressional intention is disclosed by the language employed in section 67 of the Hawaiian Organic Act.

Justification for Absolute Martial Rule in Hawaii.—Whether such an exigency exists in Hawaii as justifies the restrictions placed on the civil courts and the trial of all crimes by military courts is at least open to serious question. There is, of course, no insurrection or hostile occupation of the islands. The civil authorities have not been deposed by an invader from without or rebellion from within. The morale and the loyalty of the civil population have been attested by numerous officials in public statements and affidavits. (Radio speech by Lt. Gen. Delos C. Emmons, December 21, 1941; Press Release, Headquarters Hawaiian Dept., December 27, 1941; 4th Interim Report of the Select Committee Investigating National Defense Migration, pp. 48–58, H. Rep. 2124, 77th Cong., 2d Sess.; Statement of Asst. Sec’y of War, John J. McCloy, San Francisco News, April 3, 1942.) For aught that appears of public record the courts could and would have opened for business in their free and unobstructed scope on the Monday following the attack but for the order of the Military Governor.

Certainly, there is little reason to believe that there has existed since at least shortly after December 7 any physical forces obstructing the operation of the courts to compare with those existing in London and in other parts of England at various times in the last two years. Yet I am informed by Col. William Catron Rigby of the Judge Advocate General’s office, who has made a recent study of this question in England, that the civil courts of England have not been superseded in a single instance or to any degree by the military. In fact martial law in the present war has existed but rarely, and then only temporarily until order could be restored. In the light of the extent of the mobil-

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ization of man power in the British Isles in the prosecution of the war, the fact that jury trials and power of subpoena have continued without interruption casts at least some doubt on the view that their continuance in Hawaii would interfere with the effective arming of the islands.

The doubt which the *Milligan* case and present British experience casts upon the justification for absolute martial rule in Hawaii finds further justification by reference to the historical precedents established by the President and the army in time of war.

During the Civil War martial law frequently prevailed along the military frontiers, and even in the interior of the two belligerent communities. Except in an occasional and rare instance the civil courts were never closed nor were their functions proscribed. Even in conquered territory, where military government prevailed, the proclamations often, though there was no necessity for it, because of the complete authority of the military, provided that the courts should continue to function. Fairman has said that "There is a certain Procrustean simplicity in the view that martial rule negatives civil rule, and vice versa * * * the experience of the Civil War shows that while this is logically plausible it is artificial" (*The Law of Martial Rule*, p. 98).

Early in the war the comprehensive proclamation of the President of September 24, 1862, made "subject to martial law" not only insurgent enemies in the insurrectionary states but also "their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States."

By proclamation of the President of July 5, 1864, martial law was established in Kentucky, which was not one of the Confederate States. The reasons for the proclamation were set forth in the preamble, as follows:

Whereas many citizens of the State of Kentucky have joined the forces of the insurgents, and such insurgents have, on several occasions, entered the said State of Kentucky in large force, and, not without aid and comfort furnished by disaffected and disloyal citizens of the United States residing therein, have not only disturbed the public peace, but have overborne the civil authorities and made flagrant civil war, destroying property and life in various parts of that State; And whereas it has been made known to the President of the United States by the officers commanding the national armies, that combinations have been formed in the said State of Kentucky with a purpose of inciting rebel forces to renew the said operations of civil war within the said State, and thereby to embarrass the United States armies now operating in the said States of Virginia and Georgia, and even to endanger their safety: * * *

In conclusion it was expressly stated that :

The martial law herein proclaimed, and the things in that respect herein ordered, will not be deemed or taken to interfere with the holding of lawful elections, or with the proceedings of the constitutional legislature of Kentucky, or with the administration of justice in the courts of law existing therein between citizens of the United States in suits or proceedings which do not affect the military operations or the constituted authorities of the government of the United States.

By an order of Maj. Gen. Fremont, commanding the Western Department, dated August 14, 1861, martial law was "declared and established in the city and county of St. Louis." The order appointed Major J. McKinstry Provost Marshal, and directed that "all orders and regulations issued by him should be respected and obeyed." That officer thereupon published a proclamation in which it was recited that the power conferred upon him would be exercised only in cases where the civil law was "found to be inadequate to the maintenance of the public peace and the public safety." In a subsequent order he prohibited the wearing of concealed weapons, and later the sale or giving away of any description of firearms without a special permit.

General Fremont was succeeded in command by Maj. Gen. Halleck in November, 1861, and by G. O. 34, Dept. of the Mo., of December 26, 1861, martial law was formally declared by the latter in the city of St. Louis, and "in and about all railroads in this State, * * * in virtue of authority conferred by the President of the United States. * * * It is not intended by this declaration to interfere with the jurisdiction of any civil court which is loyal to the Government of the United States, and which will aid the military authorities in enforcing order and punishing crimes." A subsequent Gen. Order, No. 39 of 1862, reiterates that the previous declaration is not designed to affect the courts, which are to proceed as before in the exercise of their functions, or the operation of the ordinances or laws of the City or State. Later, however, the department commander was obliged to enforce more strictly the martial law status and to suspend in a measure the civil authority.

Upon the occupation by the Union forces of New Orleans in 1862, Maj. Gen. Butler, commanding Department of the Gulf, by proclamation of May 1, placed the city and its environs under martial law. In this proclamation it was declared, among other things, that—

All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States. All the inhabitants are enjoined to pursue their usual avocations. * * * All disorders, disturbances of the peace, and crimes of an aggravated nature, interfering with the forces or laws of the United States, will be referred to a military court for trial and punishment. Other misdemeanors will be subject to the municipal authority, if it desires to act. Civil causes between party and party will be referred to the ordinary tribunals. * * * No publication of newspapers, pamphlets, or hand-bills,

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giving accounts of the movements of the soldiers of the United States within this department, reflecting in any way upon the United States, will be permitted, and all articles on war news, editorial comments, or correspondence making comments upon the movements of the armies of the United States, must be submitted to the examination of an officer who will be detailed for that purpose from these headquarters. * * * All the requirements of martial law will be imposed so long as, in the judgment of the United States authorities, it may be necessary; and while it is desired by these authorities to exercise this government mildly, and after the usages of the past, it must not be supposed that it will not be rigorously and firmly administered as the occasion calls for it.

By a proclamation of Maj. Gen. R. C. Shenck, as Commander of the Middle Department, dated Baltimore, June 30, 1863, martial law was declared in Baltimore and the western counties of Maryland, "as a military necessity" by reason of "the immediate presence of a rebel army within the Department and State." The proclamation further specifies as follows:

The General commanding gives assurance that this suspension of the civil government within the limits defined shall not extend beyond the necessities of the occasion. All the courts, tribunals and political functionaries of State, county and city authority, are to continue in the discharge of their duties as in times of peace; only in no way interfering with the exercise of the predominant power assumed and asserted by the military authority. All peaceful citizens are required to remain quietly at their homes and in pursuit of their ordinary avocations, except as they may be possibly subject to call for personal service, or other necessary requisitions, for military purposes or uses hereafter. All seditious language or mischievous practices tending to the encouragement of rebellion are especially prohibited, and will be promptly made the subject of observation and treatment. Traitorous and dangerous persons must expect to be dealt with as the public safety may seem to require. To save the country is paramount to all other considerations.

By G. O. 17, Dept. of Kansas, 1862, the Department Commander declared martial law throughout the State of Kansas, with a view to the suppression of "jayhawking". In G. O. 54 of the same Department, of 1864, a further proclamation was made of martial law within the State, in anticipation of invasion by the Confederate Army under General Price. The Order specifies that, as the status thus established is intended to continue only while danger of invasion is apprehended, the functions of the civil authorities will not be disturbed nor the proceedings or processes of the courts interrupted.

In an Order of the Department of the Ohio, of 1862, martial law was declared within Jefferson County, Kentucky (in which is the city of Louisville), for the reason as stated that the civil authorities were unable to afford the proper protection to persons or property. In a further Order of the same Department, of 1863, the commanding general, in view of the threatened advance of the forces under General Morgan, declared martial law in Cincinnati, Ohio, and the cities, on the opposite bank of the Ohio River, of Covington and Newport,

Kentucky. The Order required that all business be suspended, and that the citizens organize for the common defense, but did not suspend the functioning of the courts.

By an order of July 31, 1863, the Commander of the same department, with a view of securing to loyal citizens the free exercise of the right of suffrage at a general election, declared the State of Kentucky under martial law. It is expressly specified that "The civil authority, civil courts, and business, will not be suspended by this order. It is for the purpose only of protecting, if necessary, the rights of loyal citizens, and the freedom of election." (Winthrop, *Military Law and Precedents*, 2d ed., pp. 823-826.)

These constituted the principal proclamations of martial law by Union forces during the period of the Civil War. Apparently the only instance in which the civil courts were suspended was in the case of the conquered city of New Orleans, where military government was in effect, and where the courts actually were closed by the fact of the occupation of enemy territory by belligerent forces, not by virtue of a proclamation of martial law.

Conclusion.—It is apparent that the extension of martial law in Hawaii is not conclusive of the necessity therefor. Moreover, such facts as are of public record tend to establish that the closing of civil courts to persons accused of crime is not legally justified. * * *

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

ANNA BARNES

Opinion, June 26, 1942

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—FLOODING—FERAE NATURAE— NEGLIGENCE—AVAILABILITY OF APPROPRIATIONS.

The Government is not liable in case of damage to privately owned property resulting from flooding caused by a break in its irrigation canal where the cause of the damage is shown to have been the burrowing actions of *ferae naturae*, over which the Government has no control, and not the result of a direct nonnegligent act of an employee in the survey, construction, operation, or maintenance of irrigation works, for which recovery may be had under annual appropriation act provisions, or a negligent act, for which recovery may be had under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215).

GRAHAM, *Assistant Solicitor:*

Mrs. Anna Barnes, of Klamath Falls, Oregon, has filed a claim, originally stated in the amount of \$1,500, but later reduced to \$1,000, against the United States for compensation for damages to crops and

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other property caused by the flooding of her land on July 7, 1941; as the result of a break in the "C" canal of the Klamath project of the Bureau of Reclamation, at Klamath Falls, Oregon. The question whether the claim either should be allowed and certified to the Congress under the act of December 28, 1922 (42 Stat. 1066), or should be paid under the Interior Department Appropriation Act, 1942 (55 Stat. 303), has been submitted to me for an opinion.

It is my opinion that the Department is without legal authority to allow or pay the claim under the acts cited.

The claimant describes the circumstances surrounding the mishap as follows:

The canal bank where the break occurred is built up of sandy soil, with no vegetation to hold it. The vegetation does not have time to root between breaks.

I did not notice the water in the canal the day of the break, but the canal has been carrying all the water it would hold. The rancher on whose place the break was, just north of my place, and the rancher south of my place said there was more water turned into the canal on the day of the break than the canal could carry.

The water seeps through all along the canal, and when the sandy fill gets soaked through it washes out pretty easily.

There was a serious break at the same place in the bank in May 1940. The Government put men and tractors to build the bank up again and also fixed the rancher's field. There have been eleven breaks at the same place that I know of. The bank was not fixed to prevent similar breaks.

There are ground squirrels on all the canal banks, but no more where the break occurred than on any other part of the bank. The Government puts two men along the ditch each spring to poison squirrels.

The ditchrider goes along the canal once each day. The day of the break he rode the ditch three times; he was expecting trouble. He made his last trip that night at 9:00 p. m. The break was between his last trip and morning.

When the water starts through a squirrel hole, the ditchrider calls for men and has it fixed in a short time. He doesn't ride up and down the canal waiting for it to break, and I don't think squirrels would cause the ditch to break in the same place eleven or more times.

B. E. Hayden, superintendent of the project, states:

Mrs. Barnes' statements are not wholly correct, since the 11 breaks mentioned—I am not sure that the number is correct—did not occur at the same place but were scattered along a half-mile stretch of land. This section of the canal has always given much trouble from burrowing animals and was reconstructed several years ago with dragline excavator, giving the lower bank—it is a side hill canal—greater width and strength. Notwithstanding this extra work, the gophers still cause a considerable menace.

Fred B. Mueller, ditchrider on the project, states:

Water did not go over top of bank.

Ditch bank at point of break, had been wore down some, by cattle, but apparently seemed to be as safe as many other sections of bank farther on down.

I had carried water two to four tenths higher, at different times, than it was at time of break.

I looked that section of bank over, very carefully, had there been any leaks in bank, I surely would have located them.

B. E. Hayden, superintendent of the project, describes the mishap as follows:

On July 16, 1941, Mrs. Barnes submitted claim for damage to crops and property * * *. Upon receipt of claim, I wrote to Mrs. Barnes and asked her to submit evidence within 15 days to show that the break in the canal bank was due to negligence of Government employees. Mrs. Barnes asked for more time, which was granted. She did not submit written evidence of negligence but did appear before the Board of the Klamath Irrigation District at its October meeting and offered oral evidence to the effect that in past years many breaks had occurred in the ditch adjacent to her place and that proper precautions had not been taken to insure its stability. The same argument might be offered for a considerable portion of the "C" Canal, notwithstanding the fact that the entire canal was cleaned and enlarged with dragline excavator some 10 years ago. The facts are that the sandy nature of the soil through which this canal runs is very favorable to the activities of burrowing animals, and it is next to impossible to guard against their depredations. While I think Mrs. Barnes should be reimbursed for her actual loss, I am not willing to admit that this office was negligent in not rebuilding the canal through this critical section to the extent that breaks could not occur, although perhaps extra precautions could and should have been taken. No blame could be placed on the ditchrider, who evidently used every reasonable precaution.

The District board has gone on record as favorable to allowing Mrs. Barnes actual damage, which they estimate as follows:

"The Board feels that Mrs. Barnes has suffered a total damage of about \$400, computed as follows: On six acres of potatoes, rental value of land \$20 per acre, or \$120; cost of seed, planting and care until date of break, \$150; approximately nine tons of baled hay, \$90; and one acre of oats, \$40."

The above estimate appears to be reasonable and just, and I recommend that it be submitted to the Secretary of the Interior for Congressional action on the grounds that greater precautions on the part of Government employees might have prevented the break.

Briefly, it appears from a review of the evidence that on the night of July 7, 1941, a break occurred in the "C" canal of the Klamath irrigation project which resulted in the flooding of the claimant's land, causing damage to her crops and other personal property. The immediate cause of the break was not apparent, but after a review of the physical factors reported, it appears to have resulted from the weakening of the bank of the canal by water seeping into holes which had been burrowed by ground squirrels. The volume of water carried in the canal on the day of the break appears not to have been abnormal, for, although the claimant refers to the statements of neighbors to the effect that the volume of water carried on that day was greater than that theretofore carried, the ditchrider reported that he had "carried water two to four tenths higher, at different times, than it was at the time of the break."

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I

The claimant seeks reimbursement for the damage sustained on the ground of negligence, under the provisions of the act of December 28, 1922, *supra*. That act provides for the consideration of any claim against the Government on account of damages to or loss of privately owned property where the amount of the claim does not exceed \$1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment.

A review of the circumstances as they relate to the reported activities of the Government's employees in the present case indicates that the nature of the terrain in the vicinity of the canal was conducive to habitation by ground squirrels and that this condition was a matter of common knowledge, not only to the Government but to the claimant and other water users in the vicinity. The record discloses that over a period of ten years the Bureau of Reclamation each year has attempted to exterminate the rodents in various ways, including the scattering of poisoned bait along the banks of the canal, and the permanent employment of a ditchrider for the express purpose of detecting and immediately repairing leaks or breaks in the canal. It appears from the statement of the project superintendent that because of the fact that this section of the canal has always given much trouble from burrowing animals, it was reconstructed approximately ten years ago with dragline excavator, giving the lower bank greater width and strength, but that "notwithstanding this extra work, the gophers still cause a considerable menace."

There appears to be no controversy as to the nature of the soil, the presence of ground squirrels and the frequency with which seepage occurred because of their burrowing activities, or the fact that a ditchrider constantly inspected the canal banks and immediately repaired breaks as they occurred. It appears from a review of the evidence that the exercise of reasonable diligence on the part of the Government would not require a greater degree of care or a more constant watch by its ditchriders than is shown to have been exercised here. The claimant indicates a belief, however, that the Government nevertheless was negligent, in her statement of July 16, 1941, before the Board of the Klamath irrigation district, which was to the effect that proper precautions had not been taken by the Government to insure the stability of the project's canal banks. This statement appears not to be well founded and to be based on a belief that the canal should have been entirely rebuilt in order to eliminate the rodents. The fact that this precise sort of remedy previously proved to be of no avail appears to have been overlooked. This contention, as well as other contentions of the claimant as to liability on the part of the Govern-

ment, appears to be appropriately appraised by the project superintendent in his statement to the effect that

While I think Mrs. Barnes should be reimbursed for her actual loss, I am not willing to admit that this office was negligent in not rebuilding the canal through this critical section to the extent that breaks could not occur, although perhaps extra precautions could and should have been taken. No blame could be placed on the ditchrider, who evidently used every reasonable precaution.

In view of the foregoing, it is my opinion that the claimant has not established by a preponderance of the evidence that the Government was negligent in the circumstances of the present case. It is elementary that the Government does not act as an insurer, and it has not been shown that the Government failed to exercise the degree of care which would have been required of an ordinarily prudent and careful individual in like circumstances. See the discussion, *infra*, of the *Mast* and *Micka* cases, involving similar factual situations. The claim accordingly cannot be considered under the act of December 28, 1922, *supra*.

II

The Interior Department Appropriation Act, 1942, *supra*, makes available to the Bureau of Reclamation funds for the payment of damages caused to the owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works. It has been held that in order to recover damages under appropriation acts carrying this provision the damage sustained must be shown to have been caused by the *direct action* of officers or employees of the United States, and must be due to unavoidable causes in which the element of negligence does not appear. Comptroller General's decision A-47614, April 17 and August 5, 1933 (unpublished), in the *Sam Wade* case; Comptroller General's decision A-45268, October 22, 1932, and June 30, 1933 (unpublished), in the *C. J. Mast* case; Solicitor's Opinion M. 30154, June 3, 1940, in the *Joseph Micka, Jr.* case. See also 4 Comp. Gen. 713.

Inasmuch as negligence on the part of the Government has not been established in the present case, the question now to be determined is whether the damage resulted from a direct injury caused by the direct action of officers or employees of the United States in the survey, construction, operation, or maintenance of irrigation works, in which event both direct and indirect damages, provided the latter were not too remote, would be recoverable.

In the *C. J. Mast* case, *supra*, facts identical to those in the present case were considered under the provisions of the act of February 20, 1929 (45 Stat. 1252), which are the same as the provisions of the

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appropriation act, *supra*, but refer to irrigation works of the Bureau of Indian Affairs. The Comptroller General, in a decision dated October 22, 1932 (A-45268, unpublished), said:

The claim is unlike that considered in the decision of June 15, 1915, of the former Comptroller of the Treasury to your predecessor in connection with the operation of the Shoshone Reservoir. There employees of the Reclamation Service discharged a large volume of water from the reservoir in order to clean and repair it, causing a greatly increased flow of water in the Shoshone River below the dam and reservoir which overflowed the banks of the river and resulted in damage to the owners of the adjoining lands. The one was a direct consequence of the other. Here the damage was not caused by any direct action of officers or employees of the United States, but the theory is suggested that the damages were caused in part through the ravages of muskrats notwithstanding the endeavor of the watermaster and ditchrider to eliminate them and in part because the land belonging to Mr. Mast was very level with occasional depressions into which the water would flow and from which it could not readily be drained. *The act of February 29, 1929, does not authorize the payment of damages resulting from activities of muskrats in burrowing into the banks of irrigation projects when due care was exercised by the representatives of the Government to eliminate the muskrats, * * *.* [Italics supplied.]

Furthermore, Mr. Mast, who is apparently a beneficiary of the water resulting from the operation of the Flathead Irrigation Project, is presumed in law to have anticipated the risk of the operation of irrigation canals and in connection with the benefits to his lands to have assumed his part of such risk not directly resulting from acts of the United States, its officers or employees in connection with the operation and maintenance of the irrigation works.

A careful consideration of all the factors in the matter leads to the conclusion that the rule of *damnum absque injuria* must be applied, which requires that the claim must be and is disallowed.

And in a further decision in the same case, dated July 6, 1933 (A-45268, unpublished), the Comptroller General stated in part:

The suggested interpretation of the act of February 20, 1929, which was quoted in the decision of October 22, 1932, would make the United States an insurer of private property in an irrigation district for any damage even remotely traceable to operations of the United States, its officers or employees, in the survey, construction, operation or maintenance of irrigation works.

Here there was no direct act of omission or commission on the part of any officer or employee of the United States. It may be, as you suggest, that a remote cause of the breaking of the dike was the failure of the United States, if such was its duty, to exterminate the muskrats, but *it is a general rule of law that remote causes do not impose liability. There must be considered the direct cause and the direct cause in this case was the presence of the muskrats in burrowing in the banks of the irrigation ditches and the fact that claimant's land had insufficient drainage. Muskrats are ferae naturae, over which the United States had no direct control, and, of course, the Government was not responsible for the insufficient drainage. In the absence of specific statutory authority to that effect the Government can no more be made liable for the presence of the muskrats in the irrigation ditches than it could be made liable for the presence of grasshoppers, mosquitoes, horseflies and fungi which might be attracted by the*

presence of water flowing through irrigation ditches in an otherwise arid region not favorable to the growth of fungi; insects and animals. *Neither the language of the statute nor the extract from the Committee Report which you have quoted indicates that it was the intention of the Congress to extend the ordinary rule of liability to include liability for remote causes.*

The decision of June 15, 1915, of the former Comptroller of the Treasury, to which reference was made in the decision of October 22, 1932, and in your letter of June 13, 1933, extended to the utmost limit the rule of liability, and that decision may perhaps be supported on the ground that due to the direct acts of the United States there was an unusual amount of water in the stream bed. *Here there were no direct acts of the United States which caused the presence of the muskrats,* and in the absence of statutory authority therefor this office is unable to extend the rule in the decision of June 15, 1915, to approve charges against appropriated moneys for claims of the character of the one in question.

You are advised accordingly. [Italics supplied.]

The facts, and therefore the applicable principles of law, in the present case are nearly identical with those of the *Mast* case. For the reasons therein set forth, it is established that here, as there, no negligence or omission on the part of the Government to act where it was under a duty to act has been proven, that the injury did not result from a direct act on the part of any officer or employee of the United States, and that the rule of *damnum absque injuria* therefore applies. And while it might be contended here, as there, that a remote cause of the breaking of the canal bank was the failure of the United States to exterminate the rodents, such a contention is rendered ineffective by the general rule of law that remote causes do not impose liability, but are such as are the result of accident or an unusual combination of circumstances which could not be reasonably anticipated, and over which the party sought to be charged had no control.

The attitude of the Attorney General on this general subject is reflected in the opinion of this office (M. 30154), approved on June 3, 1940, in the *Joseph Micka, Jr.* case, involving a situation nearly identical with the present case and the *Mast* case, and from which the following is quoted:

The facts upon which the Micka claim is based are found to be that the Government watermaster, in the course of the regular operation of a Bureau of Reclamation irrigation project, released water through an irrigation canal. The water flooded the claimant's land through a break in the side of the canal which had been caused by the burrowing of squirrels.

On April 6, 1940, this case was submitted to the Attorney General with the request for his opinion as to whether the Government should pay the claim under the provisions of the act of May 10, 1939 (Public No. 68, 76th Cong.), [53 Stat. 714] which provides for the payment of damage caused to private property by the operation of the Department's irrigation works. The Attorney General replied on April 18:

"* * * In settling and adjusting claims arising under the latter statutes, the Comptroller General has held that they do not impose liability upon the United States for remote causes, such as the acts of *ferae naturae*, over which the United

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States had no direct control; and that to create liability the damage must arise from direct action on the part of an officer or employee of the United States in the survey, construction, operation or maintenance of irrigation works, and must be due to unavoidable causes in which the element of negligence does not appear, Comp. Gen. Dec. A-47614, April 17 and August 5, 1933 (unpublished), in the Sam Wade case; Comp. Gen. Dec. A-45268, June 30, 1933 (unpublished), in the C. J. Mast case. See also 4 Comp. Gen. 713.

"The rulings of the Comptroller General in this respect appear to have been uniform for a number of years, and under them private rights have been determined without any objection on the part of the Congress. Under the circumstances, the rulings should not be disturbed unless clearly wrong. *United States v. Philbrick*, 120 U. S. 52; *Swendig v. Washington Co.*, 265 U. S. 322; 39 Op. A. G. No. 52; and I find no such reason for disturbing them."

In response to a further communication, dated May 9, from the Acting Secretary of the Interior, in which the Attorney General's opinion was requested specifically on the question "whether the damage to the claimant's land resulted from the 'operation' of irrigation works within the meaning of the provision of the appropriation act (act of May 10, 1939, Public No. 68, 76th Cong.)" [53 Stat. 714] the Attorney General stated on May 13:

"As stated in my letter of April 18, provisions similar to those contained in the act of May 10, 1939, are to be found in annual appropriation acts of the Reclamation Service since 1915, and consistently for a number of years these statutes have been administratively construed as not imposing liability upon the United States for acts of *ferae naturae* over which the United States has no direct control. This interpretation of the statutes is not unreasonable and should not now be disturbed.

"In my opinion the present case is not distinguishable as a matter of law from the *Mast* decision (A. 45268, June 30, 1933), and the other rulings of the Comptroller General mentioned on pages 4 and 5 of my letter of April 18, 1940. The question presented by you is therefore answered in the negative."

It is my opinion that the present case is not distinguishable as a matter of law from either the *Mast* decision, *supra*, or the *Micka* opinion, *supra*, since it clearly appears here, as in those cases, that the rule of *damnum absque injuria* is applicable, the act which caused the damage having been shown to be not a direct act of an officer or employee of the United States, but the direct action of *ferae naturae* over which the Government has no control.

Accordingly, since the damage claimed by Mrs. Barnes is thus shown to have been caused neither by the negligence of a Government officer or employee, as required for recovery under the provisions of the act of 1922, *supra*, nor by the direct act of an officer or employee of the Government in the construction, operation or maintenance of an irrigation work, as required for recovery under the appropriation act, *supra*, the claim should be rejected.

Approved:

E. K. BURLEW,

First Assistant Secretary.

I N D E X

NOTE.—In the front of this volume are the following tables: (1) Cases cited; (2) Overruled and modified cases; (3) Statutes cited; (4) Circulars of the General Land Office; (5) Executive Orders cited; (6) Instructions cited; (7) Orders, Rules, and Regulations cited; (8) Rules of Practice cited; (9) Reported Solicitor's opinions cited; (10) Unreported decisions and Solicitor's opinions cited; (11) Miscellaneous citations.

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2. A person who has notarized an application for a patent under the mining laws is disqualified to act as attorney for the claimant in proceedings before the Department... 24

3. United States Commissioners are disqualified to act as attorneys or agents in any public land matter pending before the Department..... 35

4. Since a conciliation commissioner appointed by a court of bankruptcy pursuant to statutory authority is an officer of the United States within the meaning of section 113 of the act of March 4, 1909 (35 Stat. 1109), and, as such, is prohibited from accepting compensation for services rendered in relation to any proceeding in which the United States is directly or indirectly interested, he can derive no practical benefit from his enrollment as an attorney and it is therefore proper to refuse him admission. He may, however, be admitted to practice before the Department of the Interior in any special instance in which he can make a proper showing that he will receive no compensation for representing any party before the Department and the parties he intends to represent are so notified. He may become eligible for admission to regular practice before the Department upon termination of his connection with his office of conciliation commissioner (*U. S. v. Germaine*, 99 U. S. 508 (1878) followed)..... 78

5. The rules governing proceedings upon special agents' reports expressly provide for appeals by the Division of Investigations from decisions of the Commissioner of the General Land Office (43 CFR 222.13)..... 169

Authority of the Department.

See *Secretary of the Interior, Authority.*

Page | Avulsion and Accretion, Lands Acquired By. Page

See, *Public Lands, subheading, Right of the United States to Maintain Suit to Quiet Title.*

Bituminous Coal Division.**Administrative Review of Price Fixing Decisions.**

1. The allowance of appeals to the Secretary from the orders of the Director by dissatisfied parties is not required by law. It would be proper as a matter of law for the Secretary to review the docket to determine whether the conclusions of the Director conform with the law and general administrative policy. The determination of the relative advantages and disadvantages of review by appeal over other methods of review is an administrative function for the discretion of the Secretary..... 428

Boise Reclamation Project Homesteads.

See *Homestead, subheading, Reclamation.*

Bonds.

See *Puerto Rico.*

Boundaries.

See *Public Lands, subheadings, Right of the United States to Maintain Suit to Quiet Title, Boundaries; Indians and Indian Lands, subheading Boundaries; Taylor Grazing Act, subheading, Districts.*

Broadcasting.

See *Information, Dissemination of.*

Bureau of Mines.**Authority to Publish Report.**

1. The publication of a report of the Bureau of Mines concerning the nature and cause of an individual mine disaster may be made public. Section 3 of the act of February 25, 1913 (37 Stat. 681), which is held to authorize such publication, is not limited by section 4 of that act. Solicitor's opinion of November 18, 1935 (M. 28219), insofar as inconsistent with this opinion, overruled..... 117

Cooperative Agreement; Taxability of non-Government Agency.

2. A non-Government agency engaged in research under a cooperative agreement with the Bureau of Mines is not an instrumentality of the Federal Government, so as to exempt it from nondiscriminatory sales or use taxes imposed by a State. Such taxes are not a direct burden on the Federal Government even though the cost of a purchase is borne by the Government..... 490

Bureau of Mines—Continued. Page

Enforcement Powers of Coal Mine Inspectors.

3. Refusal to admit an inspector of the Bureau of Mines to a coal mine is a violation of the act of May 7, 1941 (55 Stat. 177). If unopposed by physical force, an inspector may enter a coal mine in spite of the opposition of the owner, but the use of force to gain entrance is not justified. Entrance to mines and reports from owners may probably be compelled by injunction.....

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Government Exploration for Coal; Consent by Prospecting Permittee.

4. Since a coal prospecting permittee under the leasing act of February 25, 1920, possesses a valuable right which may be interpreted as exclusive even against the Government, the Government should obtain the consent of the permittee to exploration for coal by the Government in an instrument defining the interests of both parties. A similar agreement should be executed with an applicant for a lease who has made a coal discovery under a prospecting permit and with an applicant for an extension of a prospecting permit who has made substantial improvements or investments for prospecting under his permit. No agreement is required where there has been filed and not yet granted an application for a permit or for an extension of a permit under which no substantial improvements nor investments have been made. The Bureau of Mines should request the General Land Office to deny any such application when the Bureau of Mines intends to explore the area itself. No agreement with a prospecting permittee is necessary where the Bureau of Mines intends to explore for minerals other than those covered by the prospecting permit.....

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Bureau of Reclamation Contracts.

See *Contracts*.

Bureau of Reclamation.

Property Damage; Availability of Appropriations.

See, also, *Damage Claims*.

1. A claim for damage to privately owned property destroyed by fire through the negligence of employees of the Bureau of Reclamation may not be paid directly under an appropriation act provision for the payment of damages to "private property * * * by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since such provisions have been uniformly construed as not extending to claims arising from negligent acts. The claim may be allowed and certified to Congress for payment, however, under the act of December 28, 1922 (42 Stat. 1066).....

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Bureau of Reclamation—Con. Page

Property Damage; Flooding.

2. The Government is not liable in case of damage to privately owned property resulting from flooding caused by a break in its irrigation canal where the cause of the damage is shown to have been the burrowing actions of *ferae naturae*, over which the Government has no control.....

584

California, State of.

See *Oil and Gas Lands; School Land Grants*.

Canadian Indians.

See *Indians*.

Charges for Rights-of-Way.

See *Rights-of-Way*.

Citizenship.

See *Indians and Indian Lands; Philippine Islands; Virgin Islands*.

Civil Service Rules, Puerto Rico.

See *Puerto Rico*.

Claims Against the United States.

See *Attorneys and Agents; Contracts; Damage Claims; Indians*.

Claims by the United States.

See, also, *Contracts; Damage Claims*.

1. Authority for the construction and operation of hospitals by the Alaska Railroad was contained in the act of March 14, 1912 (38 Stat. 305). An Alaska Railroad hospital is a United States institution. An obligation incurred for services rendered by a railroad hospital constitutes a debt due the United States, action for the collection of which is not barred by the statute of limitations of the Territory of Alaska.....

12

Coal Lands.

See, also, *Mineral Lands; Mineral Leasing Act; Oil and Gas Lands*.

Rights of Prospecting Permittee.

1. Since a coal prospecting permittee under the leasing act of February 25, 1920, possesses a valuable right which may be interpreted as exclusive even against the Government, the Government should obtain the consent of the permittee to exploration for coal by the Government in an instrument defining the interests of both parties. It is recommended that such an agreement provide that any discovery made by the Government shall not prevent the granting to the permittee of a lease without competitive bidding covering all coal discovered, provided the permittee has cooperated in the

Coal Lands—Continued.

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Rights of Prospecting Permittee—Con.

exploration by the Government in the manner specified in the agreement, and with the understanding that any such lease shall provide such special terms of rental and royalty and such other requirements with respect to minerals discovered by the Government as the Secretary of the Interior may deem appropriate. A similar agreement should be executed with an applicant for a lease who has made a coal discovery under a prospecting permit and with an applicant for an extension of a prospecting permit who has made substantial improvements or investments for prospecting under his permit. No agreement is required where there has been filed and not yet granted an application for a permit or for an extension of a permit under which no substantial improvements nor investments have been made. The Bureau of Mines should request the General Land Office to deny any such application when the Bureau of Mines intends to explore the area itself. No agreement with a prospecting permittee is necessary where the Bureau of Mines intends to explore for minerals other than those covered by the prospecting permit.....

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Coal Mine Inspectors, Enforcement Powers.

See *Bureau of Mines*.

Condemnation.

1. The act of August 1, 1888 (25 Stat. 357, 40 U. S. C. secs. 257 and 258), provides in general terms that where an officer of the United States is authorized to procure real estate for a public use he is authorized to acquire it by condemnation.....

405

Constitution of Mississippi, Interpretation of.

See *National Parks*.

Constitutional Interpretation.

See *Indians and Indian Lands*, subheading *Taxation*.

Contest, Contestant.

See *Homestead*, subheading *Contest*.

Contracts.

See, also, *Indians*, subheading, *Contracts; Oil and Gas*, subheading *Contracts*.

1. The United States is as much bound by its contracts as are individuals.....

233

Assignment.

2. An assignee is bound by the practical interpretation of the assigned contract concurred in by his assignor.....

500

Contracts—Continued.

Page

Changes in Plans and Specifications.

3. The contracting officer under a contract for the construction of a dam ordered excavation stopped at a point sooner than allegedly anticipated by the contractor in making its bid, and additional compensation is claimed on the ground that the bid thereby was thrown out of balance. *Held*, (1) that the decrease in the amount of excavation by the contracting officer did not constitute a change in the specifications calling for an adjustment under either Article 3 of the contract, which covered actual changes in the plans or specifications, or under Article 4, which covered changes in subsurface conditions encountered or discovered during the course of the work, (2) that the contracting officer acted properly under the contract in terminating excavation when, in his opinion, a suitable foundation had been reached, (3) that the estimate of the amount of excavation was not an actionable representation or guarantee, but was for the purpose of comparing bids only, and that the contractor was charged with the responsibility of confirming estimates by an examination of all available data and material furnished to it by the Government, together with an examination of the locus, and (4) that regardless of increase or decrease in the amount of excavation, payment should be made at the unit bid price.....

539

Claims of Contractors; Offsets.

4. Moneys legally due the Government under a contract and not paid, by reason of a mistake of law, may be set off against a subsequent claim of the contractor.....

500

Damages.

5. The Commissioner of Indian Affairs, authorized by contract to readjust stumpage prices by a given date, and having done so, had exhausted his authority and was not empowered to make a further adjustment a few days later. The profit drawn from such unauthorized action would be properly deductible from any claim against the Government based upon the same contract.....

500

Eight-Hour Law Violations.

6. A requirement of mere business convenience or pecuniary advantage does not constitute an "emergency" relieving a contractor of the penalty for a violation of the eight-hour law. The necessity of repairing a dangerously weak tower, however, does constitute an emergency "caused by * * * danger to life," and no penalty should be imposed for overtime employment in such work.....

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Contracts—Continued.

Page **Contracts—Continued.**

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Estoppel.

7. Where an Indian lumber contract authorized the Commissioner to readjust stumpage prices at three-year intervals on the basis of prices prevailing during such periods, and stumpage price readjustments were made at other times and on other grounds to the benefit of the contractor, the contractor is estopped from objecting to a continuance of the practice when it runs to his disadvantage.....

500

Hire of Animals; Recovery for Loss.

8. Claims for the loss of animals rented to the National Park Service under contracts entered into pursuant to the provisions of the act of May 26, 1930 (46 Stat. 381), are reimbursable from any available funds in the appropriation to which the hire of such equipment would be properly chargeable.....

409

Interpretation.

9. Where an Indian lumber contract provided for readjustment of stumpage prices every three years such readjustments could be fixed at rates varying during the period before the next readjustment. Where a contract has been loosely construed by both parties for many years, the contractor seeking to establish a breach must bear the burden of showing that the interpretation put upon the contract by the Government was unreasonable.....

501

Liquidated Damages; Delay.

10. When there is a delay in furnishing materials beyond the date set by the contract for delivery and the materials could not sooner have been procured in the open market, it is proper to assess the liquidated damages prescribed in the contract, notwithstanding the fact that the total damages thus assessed exceed the purchase price of the materials furnished. Distinguishing 11 Comp. Gen. 384, and 16 Comp. Gen. 344....

412

Liquidated Damages; Delivery Provision.

11. Relief from payment of liquidated damages assessed for delay in delivery may be granted where contract provisions permit finding as excusable thereunder delays caused by required filling of Government national defense orders, and where needed materials cannot be procured in the open market.....

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Liquidated Damages; Substantial Performance.

12. A contract for materials provided for delivery by a certain date and for the assessment of liquidated damages at the rate of \$5 per day for delay in performance. All of the materials except certain bolts, having a value

Liquidated Damages; Substantial Performance—Continued.

of 6 percent of the total contract price and not essential in the use of the remaining materials, were delivered by the date fixed. *Held*, that there was substantial performance of the contract within the time set and that liquidated damages accordingly should not be assessed.....

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Liquidated Damages; Relation to Probable Actual Damages.

13. A contract for the furnishing of brass screws having a value of \$17.26 provided for the assessment of liquidated damages at the rate of \$5 per day for delay in performance. The contracting officer assessed liquidated damages in the amount of \$45 for nine days' delay in making delivery. *Held*, that the liquidated damages stipulated bore no reasonable relation to the probable actual damages and that the damages imposed therefore should be remitted. Citing 16 Comp. Gen. 344.....

531

Liquidated Damages; "Shipment."

14. Liquidated damages are properly assessable for delays occurring between the time of delivery to an intermediate agent for subsequent delivery to a shipper and the time of actual movement from the shipping point, such intermediate action not constituting "shipment".....

535

Modification; "Unknown Conditions of an Unusual Nature."

15. During excavation in a borrow pit the contractor under a contract for the construction of a dam encountered rhyolite, a substance which, after extended examination by the Government engineers, was rejected as unsuitable for the earthfill required by the contract specifications, thereby necessitating the utilization of borrow pits farther removed from the construction site, with resultant increased costs. Geological data available prior to the execution of the contract had indicated with certainty to both the Government and the contractor that the area in question would yield adequate suitable material. *Held*, that the occurrence of rhyolite constituted an "unknown" condition "of an unusual nature materially differing from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," within the meaning of article 4 of the contract, and that the contract therefore should be modified to provide for payment of the increased costs to the contractor.....

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Practical Construction.

16. The practical construction given to a contract by both parties for several years

Contracts—Continued.

Practical Construction—Continued.

may not be repudiated by a party that has profited therefrom even though such construction is incompatible with the literal terms of the contract..... 500

Waiver.

17. Express consent by the contractor to a proposed course of action constitutes a waiver barring any claim grounded on the illegality of such action..... 500

Delegation of Authority.

See *Secretary of the Interior, Authority*, subheading *Delegation*.

Damage Claims.

See, also, *Indians*, subheading *Damage Claims*.

Claims by United States Against Federal Employees.

1. An administrative officer is without authority to require reimbursement, either by withholding compensation or otherwise, from an employee for damage to Government property caused by the employee's negligence, since an officer or employee may not be administratively deprived of his lawful compensation, and is as much entitled to his day in court as any other citizen against whom the United States may assert a claim. The appropriate procedure is to refer such a claim to the Department of Justice for action if a request for payment is unsuccessful.... 334

Hire of Animals; Recovery for Loss.

2. Claims for the loss of animals rented to the National Park Service under contracts entered into pursuant to the provisions of the act of May 26, 1930 (46 Stat. 381), are reimbursable from any available funds in the appropriation to which the hire of such equipment would be properly chargeable... 409

Indebtedness to Government.

3. Where claimant was still indebted to the Government for part of the purchase price of the subject matter of the claim, under a specific reimbursable agreement, the superintendent or other bonded officer of the Indian Service, to be determined by the Secretary of the Interior, to whom payment will be made under the act of February 25, 1933, *supra*, should be governed by the Reimbursable Regulations in order to protect the interests of the Government in the matter of the unpaid account..... 121

Negligence; Imputation to Passenger.

4. Negligence of private driver, which would preclude allowance of any claim sub-

Damage Claims—Continued.

Negligence; Imputation to Passenger—Con.

mitted by him, cannot be imputed to passenger who presents meritorious claim and is shown not to have been engaged in joint enterprise nor involved in directing operation of the private car..... 77

Negligence; Res Ipsa Loquitur.

5. The doctrine of *res ipsa loquitur* may be applied where claimant's horse was killed as result of coming in contact with a fallen high-tension electric line belonging to the Office of Indian Affairs..... 121

Property Damage; Bailee.

6. Private property, in the possession of claimant as bailee, was damaged through the negligence of a Government employee. Since the bailee was responsible to the bailor-owner, who waives in favor of bailee all right of claim against any third party by reason of any collision involving the bailed property, the bailee's interest in the property entitles him to reimbursement under the act of June 28, 1937..... 101

Property Damage; Direct Result.

7. Claims for damage to privately owned property resulting from silt blown from a lowered reservoir may not be paid under an appropriation for the payment of damages caused "by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since the damage was not the direct result of the direct act of Government employees..... 415

Property Damage; Ferae Naturae.

8. The Government is not liable in case of damage to privately owned property resulting from flooding caused by a break in its irrigation canal where the cause of the damage is shown to have been the burrowing actions of *ferae naturae*, over which the the Government has no control, and not the result of a direct nonnegligent act of an employee in the survey, construction, operation, or maintenance of irrigation works, for which recovery may be had under annual appropriation act provisions, or a negligent act, for which recovery may be had under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215)..... 584

Property Damage; Implied Taking.

9. The intermittent and incidental blowing of silt from a lowered reservoir to privately owned property does not constitute such a permanent invasion of the property as to amount to an appropriation of it and hence an implied taking..... 415

Damage Claims—Continued.

Property Damage; Loss of Profits.

10. Recovery for loss of profits alleged to have resulted from negligence cannot be allowed where the anticipated profits are vague and speculative and the business in question has not been operated for a sufficient period of time to give it permanency and recognition..... 493

Property Damage; Measure of Damages.

11. A claimant, whose land was subject to intermittent overflow from irrigation ditch, was obligated to make reasonable efforts to minimize the resulting damage, and since he could have prevented recurrent losses by the improvement of a roadway his recovery is to be measured by the reasonable expense which thereby would have been incurred, rather than by the entire damage sustained..... 492

Property Damage; Negligence.

12. Failure to clean grille in irrigation ditch siphon held to constitute negligence making Government liable for damage resulting from overflow on private property. Claim may not be paid directly under act of February 20, 1929, authorizing the Secretary of the Interior to "pay * * * for damages caused to owners of lands or other private property * * * by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since this provision has been uniformly held to cover only damage resulting from direct, nonnegligent acts of the Government..... 492

13. A claim for damage to privately owned property destroyed by fire through the negligence of employees of the Bureau of Reclamation may not be paid directly under an appropriation act provision for the payment of damages to "private property * * * by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since such provisions have been uniformly construed as not extending to claims arising from negligent acts. The claim may be allowed and certified to Congress for payment, however, under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215), which expressly authorizes such action on claims founded in negligence of the Government..... 537

Restricted Indian; Disposition of Award.

14. Where the claimant, a restricted Indian, has died during the interim between the date of filing claim and the award of damages, payment of the award should be made in accordance with the act of February 25, 1933 (47 Stat. 907)..... 121

Eight-Hour Law Violations.

See *Contracts*.

Extinguishment of Aboriginal Rights.

See *Alaska*.

Extradition of Indian Fugitives.

See *Indians and Indian Lands*, subheading *Extradition; Indian Tribes*, subheading, *Tribal Authority to Extradite Fugitives*.

Federal Employees.

Dual Employment.

1. The prohibition in section 1765, Revised Statutes (5 U. S. C. sec. 70), against dual employment is only against receiving extra or double compensation out of United States funds. In the absence of specific reason to the contrary, there is nothing to prevent an employee of the United States receiving compensation from outside sources and at the same time his salary from the Government. The questions of conflict of duties of dual employments or of diminished efficiency are ones of administration which do not effect the payment of salary so long as employment by the Government exists..... 394

Private Employment.

2. There is no express statutory prohibition against the holding of a Government position simultaneously with a position in private industry. The prohibition in the act of March 3, 1917 (39 Stat. 1106, 5 U. S. C. sec. 66), against the receipt of supplemental salary by a Government employee in connection with his official duties from any source other than the Government of the United States, with certain exceptions as to contributed funds, is applicable only when the salary from the private source is paid for duties which are performed pursuant to Federal employment..... 394

Federal Employees, Claims Against.

See *Damage Claims*.

Federal Range Code.

See *Grazing and Grazing Lands; Taylor Grazing Act and Lands*.

Federal Tax.

See *Indians*, subheading *Taxability*.

Fishing Rights.

See *Alaska*.

Fort Marion National Monument, Florida.

See *National Parks and Monuments*.

Fort Peck Indian Reservation. Page **Grazing and Grazing Lands—Con.** Page

Effect of Rejection of Indian Reorganization Act on Land Allotments.

1. The authority in the Secretary of the Interior to allot lands to children of the Fort Peck Indian Reservation under the act of April 1, 1914 (38 Stat. 593), is a continuing one in view of the rejection by the Fort Peck Indians of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), prohibiting allotments, and in view of the act of June 15, 1935 (49 Stat. 378), providing that laws affecting Indian reservations which exclude themselves from the Indian Reorganization Act shall be deemed to have been continuously effective on such reservations.

2. The authority of the Secretary of the Interior to approve or disapprove allotment selections under the Fort Peck Allotment Act of April 1, 1914, is not broad enough to permit him to decline to approve allotment selections made under the instructions of the Interior Department and in pursuance of a course of allotment established on the reservation because of reasons not related to the merits of the individual selections but of land policy.

3. When beneficial title to lands purchased by the United States through the Resettlement Administration is placed in the Indians, the lands will not be subject to allotment under the Fort Peck Allotment Act of April 1, 1914, as they do not constitute "surplus lands remaining undisposed of," but they may be subject to allotment under the General Allotment Act in the absence of contrary legislation.

4. Undisposed of surplus lands on the Fort Peck Reservation when restored to tribal ownership would be subject to allotment under the Fort Peck Allotment Act of April 1, 1914, in the absence of contrary legislation.

5. Where unapproved allotment selections should have been approved according to the ordinary procedure of the Department but without sufficient justification were not so approved, the selectors are entitled to the rentals from such selections under the principle that equity will treat as done what ought to have been done.

Gila Project, Arizona.

See *Homestead*, subheading *Veterans' Preference; Reclamation*.

Government Contracts.

See *Contracts*.

Government Employees.

See *Federal Employees*.

Grazing and Grazing Lands.

See, also, *Homestead*, subsection *Stock-Raising; Public Lands; Taylor Grazing Act; Withdrawal of Public Lands*.

Licenses.

1. In adjudicating applications for grazing licenses, the base properties of applicants are classified, and the demand for the use of Federal range which is thus created falls in classes 1, 2, and 3, but the Federal range which is used to satisfy such demand is not thus classified. In determining the right of any applicant to the use of certain range, the range that he will be permitted to use depends not on any "classification" of the range, but on the classification of his base property.

2. The class 1 demand of any water which is offered as base property is limited to the greatest number of livestock that were properly grazed from the water during the priority period, and thus would not include the number grazed on a stock driveway created under section 10 of the stock-raising home-
stead act. Where two waters which would otherwise be in class 2 have overlapping service areas, the water developed latest in point of time becomes a class 3 water as to the area of overlap, and the grazing privileges on the area go to the offeror of the earlier developed water. The decision in the case of *Roman C. and Serapio Nunez*, 56 I. D. 363, and certain unreported decisions, are overruled to the extent that they are inconsistent herewith.

3. In construing the requirement of section 2, paragraph (g) of the Federal Range Code, that lands shall have had 3 years or 2 consecutive years' use in connection with the same part of the public domain during the 5-year period prior to June 28, 1934, in order to qualify as dependent by use, the doctrine of reasonableness should apply and the amount of use of the public domain in any 1 year must have been substantial in relation to the extent of the grazing season. A use of the public domain for 1 or 2 days out of a season extending in the average year from July 1 to September 1 is not substantial within that construction.

Hawaii.

Martial Law, Scope of; Authority of Governor.

1. That the action of the Military Governor of Hawaii in closing the civil courts and requiring that all persons accused of crimes be tried by military tribunals is not conclusive of the necessity therefor and in the light of such facts as are of public record does not appear to have been justified. Hence the trials of two civilians by military tribunal are probably illegal.

Homestead.

See, also, *Public Lands*.

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Homestead—Continued.

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Homestead—Continued.

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Community Property.

1. An applicant for an original homestead entry under section 2289, Revised Statutes, as amended by the act of March 3, 1891, who at the date of such application is invested by operation of the community property law with a one-half undivided interest in a tract of land in Arizona of more than 320 acres is a proprietor of more than 160 acres within the meaning of said act and is therefore disqualified from making entry, and that disqualification is not removed by the mere fact that the community is dissolved by the death of applicant's co-owner.....

2. The fact that under the community property law of Arizona the husband is the statutory agent to manage and control the property does not, in the opinion of the Department, affect the character of the interest of the wife as an owner of community property.....

Contest.

3. Where contestant establishes that contestee was disqualified as a homestead entryman by reason of ownership of more than 160 acres of land acquired by devise or from one whose estate has not been partitioned or probated, to impose upon the contestant the burden of further proving that there is no possibility of the proof of debts against the estate to which the land might be subject is an onerous requirement and unnecessary to establish *prima facie* the entryman's disqualifications. The existence of such debts should be peculiarly within the knowledge of the contestee, and if they are such that affect the title and estate of contestee, the burden should be on contestee to allege and prove them. Heirs of *DeWolf v. Moore* (37 L. D. 110) cited and applied.....

4. Contestant alleging intent to acquire title to the land contested under the act of June 28, 1934 (48 Stat. 1269), may be qualified under section 7 of said act, as amended by the act of June 26, 1936 (49 Stat. 1976), to make entry under some applicable public land law. There is no ground, therefore, for dismissing the contest for failure of the contestant to show that he is qualified to acquire title to the land. The question whether contestant may exercise a preference right is not properly before the Department until it is attempted to be exercised.....

Final Proof.

5. Where a homestead entryman's final proof is ambiguous so that it is not clear whether or not he had complied with the homestead law, and where he may have, in fact, fully complied, he will be given an opportunity to make a proper showing as to whether he actually had complied.....

Mortgage.

6. One who takes a mortgage from an entryman who holds but an inceptive title to the entry has a precarious and uncertain security as the entry is subject to forfeiture for noncompliance with the homestead requirements and his lien would not become enforceable unless and until the entryman had made acceptable final proof and obtained equitable title to the land. A subsequent applicant for homestead entry, with notice of the existence of a mortgage on a prior, unperfected entry on the land that had been relinquished, is not charged with the notice of a valid lien on the land for none such exists.....

Qualifications of Entryman.

7. In determining the acreage owned by an owner of an undivided interest in common for the purpose of ascertaining whether he was disqualified to make homestead entry because of his ownership of more than 160 acres in violation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161), he should be credited with the number of acres proportionate to his undivided interest since it will be presumed that upon partition he would be entitled to that number of acres.....

8. Where an entryman makes a second stock-raising entry, his qualifications must be determined, not as of the date when he made his first entry, but as of the date of his second entry, and it is therefore no defense to contest proceedings, instituted on the ground that he was disqualified by ownership of more than 160 acres of land in violation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. Sec. 161), that he was not so disqualified at the time he made his first entry.....

9. Where an entryman, at the time of making a second stock-raising homestead entry, is disqualified by ownership of more than 160 acres of land in violation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161) his disqualification is not removed by later disposal of his land holdings.....

10. Neither the entryman's good faith nor the fact that the Department might have been aware of his other landholdings at the time he made his homestead entry are material on the issue whether he was disqualified by virtue of ownership of more than 160 acres of land in violation of the act of March 3, 1891 (26 Stat. 1095, 1098, Rev. Stat. sec. 2289, 43 U. S. C. sec. 161).....

11. Where a homestead entryman was legally disqualified from acquiring any right under the homestead law, he could not, upon removal of his disqualifications, acquire an interest in lands which had, in the interim,

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Homestead—Continued.

Qualifications of Entryman—Continued.

been withdrawn from entry by a withdrawal order..... 169

12. A person born in the Philippine Islands of Filipino parentage is not a citizen of the United States and, if he has not filed his declaration of intention to become a citizen of the United States in the manner prescribed by the naturalization laws, is not qualified under section 2289, Revised Statutes, 43 U. S. C. secs. 161, 218a, to make an entry under the Enlarged Homestead Act (act of February 18, 1909, 35 Stat. 639, 43 U. S. C. sec. 218)..... 190

Reclamation Project Lands.

13. Notwithstanding a provision in the Interior Department Appropriation Act, 1941 (act of June 18, 1940, 54 Stat. 406, 439), declaring it to be the policy of Congress that, in the opening to entry of newly irrigated public lands, preference should be given to families who have no other means of earning a livelihood, or who have been compelled to abandon, through no fault of their own, other farms in the United States, which provision is not mandatory but merely a suggestion or guide to the Secretary in providing for the entry of newly irrigated public lands, the Secretary has sufficient superintending and supervisory power to warrant his giving first preference in the opening of lands in the Payette Division of the Boise Reclamation Project to former homestead entrymen who relinquished their homesteads in good faith in the expectation of receiving patents from the State of Idaho under the Carey Act..... 288

14. Lands in the Gila Project, Arizona, are not subject to the veterans' preference provision of section 9 of the Boulder Canyon Act of December 21, 1928 (45 Stat. 1057), although that act was adopted by the item of appropriation for the Gila Project in the Interior Department Appropriation Act, 1938 (act of Aug. 9, 1937, 50 Stat. 564, 595)..... 177

Reinstatement.

15. Bean made homestead entry May 1, 1930, and obtained an extension of time to submit final proof until May 1, 1937. Relinquishment of the entry was filed July 7, 1937, together with an application to make homestead entry of the land by the son of Bean. Shelton filed petition for reinstatement of the entry and a protest against the application of Bean's son, alleging that he held a recorded mortgage on the land executed by Bean to secure the payment of her promissory note for \$650 with interest. Shelton alleged that Bean had fully complied with the homestead requirements and the relinquishment and application was for the purpose of defrauding him. Shelton had filed no notice of his encumbrance on the land

Page Homestead—Continued.

Reinstatement—Continued.

as required by Rule 98 of Practice. Bean had filed an affidavit in 1935 admitting that she had never established residence on the land. *Held*, (1) that Shelton, not having filed any notice of his lien, had no basis for his complaint that he had no notice of the relinquishment; (2) that a transferee or mortgagee, prior to patent or prior to submission of final proof acquires no greater right or estate than exists in the homesteader; (3) that had Shelton received notice of the relinquishment he would have been in no better position to oppose the relinquishment than than now, as Bean could not show that she maintained the residence required within the statutory life of the entry and the entry would have to be canceled, and, therefore, there was no basis for its reinstatement..... 203

Residence.

16. The purpose of 43 CFR 166.38, requiring an entryman to file notice at the local land office of the time he departs from and returns to his entry, is to assist the General Land Office in supervising pending homestead entries. Failure to file such notice on taking leave of absence may impose a heavier burden on the entryman in making a convincing showing as to his residence, but it will not, in the ordinary case, forfeit his privilege of taking proper leaves of absence... 185

17. An entryman is under no obligation to establish residence until 6 months after the date his entry is allowed. Hence, where an entryman established residence in August 1932, but his entry was not allowed until May 1933, his residence may properly be counted from the allowance of his entry and he need not be charged with any absences between August 1932 and May 1933..... 186

18. An entryman who has served between 90 days and 7 months in the Federal military forces in connection with World War I is entitled to a residence credit by deducting the period of his Federal service from the third residence year..... 186

19. An entryman must establish and maintain his home on his entry to the exclusion of a home elsewhere in order to comply with the homestead law..... 186

20. Since the homestead law contemplates that the entryman establish his home on the entry, his mere personal presence thereon is not alone sufficient to comply with the homestead law when he maintains a family home elsewhere..... 183

21. An unmarried person, having his aged and infirm parents under his care and maintenance, who established residence on public land and took his parents to live with him, is the head of a family within the meaning of section 2289, Revised Statutes, and his absence for the purpose of maintaining his family is excusable..... 93

Homestead—Continued.

Page Homestead—Continued.

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Stock Raising.

Stock Raising—Continued.

General.

Authority of the Secretary—Continued.

22. The power of the courts to determine possessory rights to public lands is well settled. A writ of assistance directing an ouster from possession is not void as an attempt to adjudicate the title to public lands.-----

340

23. Even if the applications here involved were not rejected in their entirety, they still could not be allowed under the stock-raising homestead law since the lands applied for were not designated under that act prior to the Executive order of withdrawal of November 26, 1934.-----

340

24. The Class 1 demand of any water which is offered as base property is limited to the greatest number of livestock that were properly grazed from the water during the priority period, and thus would not include the number grazed on a stock driveway created under section 10 of the stock-raising homestead act.-----

213

25. A stock-raising homestead application to enter undesignated lands, filed as an amendment of an earlier application and including other lands, is a substitute for, rather than an amendment of the earlier one, and, upon designation, the applicant's rights relate back to the later application and not to the earlier one.-----

283

Abandonment.

26. When settlers who file applications for stockraising homestead entries have previously mortgaged their entire interest in every improvement on the land, together with all feed, range, pasturage, and water rights, have defaulted on the mortgages and suffered foreclosure and rendition of deficiency judgments against them and have permitted the time for redemption to expire, they have stripped themselves of all the essentials of settlement and stockraising so that they have in effect, abandoned their right to make stockraising homestead entries.-----

339

Authority of the Secretary.

27. Since the necessary consequence of granting the applications would be to grant the applicants the power substantially to deprive the mortgagee of the use of property which a court of competent jurisdiction has decreed now belongs to the mortgagee, the Department should exercise its undoubted power to refuse to allow the bounty of the public land laws to be used for inequitable ends. Following *Williams v. United States*, 138 U. S. 514, 524 (1891); *Northern Pacific Ry. Co. v. McComas*, 250 U. S. 387, 393 (1919); *Payne v. U. S. ex rel. Olson*, 289 Fed. 198, 50 App. D. C. 119 (1920).-----

339

28. The issue as to what rights may have been acquired under a tax sale certificate

issued during the existence of the mortgage for taxes due prior to the foreclosure, which certificate was obtained by the son of a mortgagor after foreclosure but prior to the expiration of the period of redemption, is not a question for determination by this Department since the son is not a party to, and a determination of his rights has no place in, a proceeding on an application by the mortgagors for stockraising homestead entries.-----

340.

Improvements.

29. After rejection of his proof for insufficiency of permanent improvements, entryman, alleging financial embarrassment, applied to amend his stock-raising entry to comprise the same tracts in an enlarged homestead entry and an additional stock-raising entry in order to obtain final certificate to all the desired tracts without supplying the deficiency in improvements required for the original entry. *Held*, that the Secretary's supervisory power does not authorize him to abrogate a provision of the stock-raising act for the convenience of an entryman; that this entryman was not entitled to the statutory relief of amendment prescribed by Rev. Stat. sec. 2372, as amended by the act of February 24, 1909, having made no mistake in the designation of the tracts entered; that he was not entitled to the equitable relief permissible under the supervisory authority of the Secretary and the regulations of April 22, 1909, to prevent unmerited loss or hardship arising through ignorance, misinformation or unsound advice as to the lands entered, his debts not constituting any such equitable ground for amendment; and that his deficiency in improvements was greater than had been calculated, a well having water but no equipment to make it available being considered a dry well and therefore not a permanent improvement.-----

449.

Improvements; State Law.

30. The law of New Mexico (N. Mex. Stat. Ann. (1929) secs. 111-107 and 151-156) permits the mortgage of a valid interest in the improvements, water rights and other rights on public lands even though such improvements or rights may be attached or appurtenant to the land. But apart from this, principles of comity and estoppel are persuasive that this Department should not permit to be brought into question before it in this proceeding, a determination by a Federal court which has resolved the validity of the mortgages in favor of the mortgagee, where the mortgagors and the mortgagee were parties to the suit. Section 2296,

Homestead—Continued.

Stock Raising—Continued.

Improvements; State Law—Continued.

Revised Statutes, act of April 28, 1922 (42 Stat. 502, 43 U. S. C. sec. 175), exempting homestead land from liability for the satisfaction of a debt contracted prior to the issuance of a patent therefor, is not applicable to mortgages. Ruddy v. Rossi, 248 U. S. 104 (1918) is not to the contrary. The mortgages here involved did not cover the lands. The question as to whether section 2296, supra, renders invalid the mortgages on the improvements and grazing and water rights has similarly been determined by the decree of the court.....

339

Qualifications.

31. When applicants have been deprived of all the improvements and rights without which the land cannot be put to any use as a home for stockraising purposes before application for entry, it cannot reasonably be said that the applications are "honestly and in good faith made for the purpose of actual settlement, use, and improvement by the applicant, * * * in good faith to obtain a home * * *"

339

32. Where an entryman makes a second stock-raising entry, his qualifications must be determined, not as of the date when he made his first entry, but as of the date of his second entry, and it is therefore no defense to contest proceedings, instituted on the ground that he was disqualified by ownership of more than 160 acres of land in violation of the act of March 3, 1891, that he was not so disqualified at the time he made his first entry.....

169

33. Where an entryman, at the time of making a second stock-raising homestead entry, is disqualified by ownership of more than 160 acres of land in violation of the act of March 3, 1891, his disqualification is not removed by later disposal of his land holdings.....

169

Veterans' Credit.

34. An entryman who has served between 90 days and 7 months in the Federal military forces in connection with World War I is entitled to a residence credit by deducting the period of his Federal service from the third residence year.....

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Veterans' Preference.

35. Lands in the Gila Project, Arizona, are not subject to the veterans' preference provision of section 9 of the Boulder Canyon Act of December 21, 1928 (45 Stat. 1057), although that act was adopted by the item of appropriation for the Gila Project in the Interior Department Appropriation Act, 1938 (act of Aug. 9 1937, 50 Stat. 564, 595).....

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Page Immigration.

See Virgin Islands.

Indian Exchange Applications.

See Public Lands, subheading Contest.

Indian Lands Purchased Without State Consent, Status of.

See Indians and Indian Lands, subheading State Jurisdiction.

Indian Reorganization Act.

See Alaska; Indians; Indians and Indian Lands; Indian Tribes.

Indians.

See, also, Alaska.

Citizenship Status of Foreign-born.

1. A foreign-born Indian, an enrolled member of an American Indian Tribe and the son of an alien father and a citizen mother who obtained her citizenship on June 2, 1924, while he was a minor, is a citizen of the United States, provided he was residing in the United States on June 2, 1924, or established his permanent residence therein prior to attaining majority.....

180

Contracts with Attorneys.

2. A contract by which Indian residents and subjects of the Dominion of Canada propose to employ an attorney to prosecute claims against the United States is not subject to the approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Sections 1, 2, and 81, title 25, United States Code, are confined in scope and operation to Indians who reside in and are subject to the jurisdiction of the United States and have no application to the subjects of a foreign nation.....

24

Damage Claims.

3. Failure of Indian Service employees to clean grille in irrigation ditch siphon held to constitute negligence, making Government liable for damage resulting from overflow on private property. But claim may not be paid directly under act of February 20, 1929, since provision in that act has been uniformly held to cover only damage resulting from direct, nonnegligent acts of the Government. Claimant, however, was obligated to make reasonable efforts to minimize the resulting damage, and his recovery is to be measured by the reasonable expense which thereby would have been incurred, rather than by the entire damage sustained. Recovery for loss of profits alleged to have resulted from negligence cannot be allowed where the anticipated profits are vague and speculative and the business in question.....

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Damage Claims—Continued.

has not been operated for a sufficient period of time to give it permanency and recognition..... 493

4. Where the claimant, a restricted Indian, has died during the interim between the date of filing claim and the award of damages, payment of the award should be made in accordance with the act of February 25, 1933 (47 Stat. 907). Where claimant was still indebted to the Government for part of the purchase price of the subject matter of the claim, under a specific reimbursable agreement, the superintendent or other bonded officer of the Indian Service to be determined by the Secretary of the Interior, to whom payment will be made under the act of February 25, 1933, *supra*, should be governed by the Reimbursable Regulations in order to protect the interests of the Government in the matter of the unpaid account..... 121

Lumber Contracts.

5. The practical construction given to a contract by both parties for several years may not be repudiated by a party that has profited therefrom even though such construction is incompatible with the literal terms of the contract..... 500

6. Where an Indian lumber contract authorized the Commissioner to readjust stumpage prices at 3-year intervals on the basis of prices prevailing during such periods, and stumpage price readjustments were made at other times and on other grounds to the benefit of the contractor, the contractor is estopped from objecting to a continuance of the practice when it runs to his disadvantage..... 500

7. The Commissioner of Indian Affairs, authorized by contract to readjust stumpage prices by a given date, and having done so, had exhausted his authority and was not empowered to make a further adjustment a few days later. The profit drawn from such unauthorized action would be properly deductible from any claim against the Government based upon the same contract..... 500

8. Express consent by the contractor to a proposed course of action constitutes a waiver barring any claim grounded on the illegality of such action. An assignee is bound by the practical interpretation of the assigned contract concurred in by his assignor..... 500

9. Where an Indian lumber contract provided for readjustment of stumpage prices every three years such readjustments could be fixed at rates varying during the period before the next readjustment. Where a contract has been loosely construed by both parties for many years, the contractor seeking to

Indians—Continued.

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Lumber Contracts—Continued.

establish a breach must bear the burden of showing that the interpretation put upon the contract by the Government was unreasonable..... 501

10. Moneys legally due the Government under a contract and not paid, by reason of a mistake of law, may be set off against a subsequent claim of the contractor..... 500

Taxability.

See, also *Indians and Indian Lands, Taxability.*

11. "Indians not taxed" are Indians not subject to taxation. Since all Indians are today subject to Federal taxation, there are no more "Indians not taxed" within the meaning of that phrase as it is used in Article I, section 2, clause 3 of the Constitution and section 2 of the Fourteenth Amendment..... 195

12. Native corporations organized under the Alaska Indian Reorganization Act which undertake to engage in occupations made subject to license tax by Congress, which license taxes appear as sections 259 and 2569 of the 1913 Compiled Laws of Alaska, are subject to such license taxes, but no liability is recognized by this opinion for such additional license taxes as may be imposed by the Territory of Alaska..... 374

13. Federal and State gasoline sales taxes (a) do not apply to sales of gasoline to the Menominee Indian Mills for use in the operations of the mills, but (b) do apply to sales of gasoline to the mills for resale through the commissary of the mills to employees and the general public..... 129

14. The Federal oleomargarine tax must be paid on all oleomargarine purchased by the commissary of the Menominee Indian Mills for resale to individual employees. The Menominee Indian Mills are not subject to the payment of a Federal license fee for retail sale of oleomargarine..... 442

15. The Menominee Indian Mills are not subject to Wisconsin state statutes imposing a license requirement and a sales and use tax on retail sale of oleomargarine..... 442

16. The State tax on the selling of tobacco products does not apply to the selling of such products by the commissary of the Menominee Indian Mills to employees and the general public..... 129

17. Traders on Indian reservations, if they are Indians, or insofar as they trade with Indians, are not subject to the sales tax laws of Arizona, but traders who are non-Indians are subject to such laws insofar as they deal with non-Indians. Traders outside of Indian reservations are subject to the sales

Indians—Continued.**Taxability—Continued.**

tax laws of Arizona whether or not they are Indians or dealing with Indians. Sales to Indians made within Indian reservations are not subject to the sales tax laws of Arizona. Sales to Indians made outside of Indian reservations are not subject to the sales tax laws of Arizona if the purchase is made with restricted funds or if the purchase is part of a specific plan for economic rehabilitation of the Indians approved and supervised by the Federal Government.....

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Indians and Indian Lands.

See, also, *Oil and Gas Leases, Indian Lands; Secretary of the Interior, Authority of.*

Administrative Supervision.

1. Pueblos are subject to administrative supervision with respect to any transfer of an interest in land.....

37

Alaska; Fishing Rights.

2. Aboriginal occupancy of particular areas of water or submerged land creates legal rights which, unless they have been extinguished, the Department is bound to recognize. Such rights were not extinguished by Russian sovereignty or action taken thereunder. Such rights have not been extinguished by the sovereignty of the United States or by any treaty, act of Congress, or administrative action thereunder. With respect to areas which may be shown to have been subject to aboriginal occupancy, regulations permitting control by non-Indians would be unauthorized and illegal....

461

Allotment.

3. The authority in the Secretary of the Interior to allot lands to children of the Fort Peck Indian Reservation under the act of April 1, 1914 (38 Stat. 593), is a continuing one in view of the rejection by the Fort Peck Indians of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), prohibiting allotments, and in view of the act of June 15, 1935 (49 Stat. 378), providing that laws affecting Indian reservations which exclude themselves from the Indian Reorganization Act shall be deemed to have been continuously effective on such reservations.....

16

4. Where unapproved allotment selections should have been approved according to the ordinary procedure of the Department but without sufficient justification were not so approved, the selectors are entitled to the rentals from such selections under the principle that equity will treat as done what ought to have been done.....

16

5. Undisposed of surplus lands on the Fort Peck Reservation when restored to tribal

Indians and Indian Lands—Con. Page.**Allotment—Continued.**

ownership would be subject to allotment under the Fort Peck Allotment Act of April 1, 1914, in the absence of contrary legislation..

16

6. When beneficial title to lands purchased by the United States through the Resettlement Administration is placed in the Indians, the lands will not be subject to allotment under the Fort Peck Allotment Act of April 1, 1914, as they do not constitute "surplus lands remaining undisposed of," but they may be subject to allotment under the General Allotment Act in the absence of contrary legislation.....

16-

7. The authority of the Secretary of the Interior to approve or disapprove allotment selections under the Fort Peck Allotment Act of April 1, 1914, is not broad enough to permit him to decline to approve allotment selections made under the instructions of the Interior Department and in pursuance of a course of allotment established on the reservation because of reasons not related to the merits of the individual selections but of land policy.....

16

8. The inhibition against the making of further allotments on the public domain in San Juan County, Utah, contained in the act of March 1, 1933 (47 Stat. 1418), has no application to Indians whose rights to allotments had become equitably vested prior to the enactment of that legislation. No representative of this Department had authority to make any disposition of these lands in any manner which would defeat the rights of these Indians.....

547

Boundaries; Disposition of Lands.

9. The Secretary of the Interior is without authority to enter into an agreement with owners of land bordering on the Big Wind River, Wyoming, by the terms of which agreement the common boundary lines of lots or parcels of land adjoining the river would be fixed, where the land covered by the proposed agreement would include fee patented lands, allotted and tribal lands of the Shoshone Indians and lands ceded by the Shoshone Indians to the United States. An agreement to fix the boundary lines of the allotted, tribal and ceded lands would change the boundary of the Wind River Indian Reservation contrary to the provisions of the act of Congress approved March 3, 1927 (44 Stat. 1347; 25 U. S. C. sec. 398D). The Secretary of the Interior is prohibited by the act of Congress approved June 12, 1906 (34 Stat. 255, 41 U. S. C. sec. 11), from entering into such an agreement. The Secretary of the Interior may not dispose of Indian tribal lands except by express statutory authority. The Secretary is bound by the limitations imposed by the act of Congress approved March 3, 1905 (33 Stat. 1016), as amended by the act of Congress approved August 21,

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1916 (39 Stat. 519) when disposing of lands ceded by the Shoshone Indians to the United States ----- 219

Chemehuevi Indians.

See *Occupancy Rights*.

Congressional Control.

10. Pueblos are subject to the same degree of control by Congress as are other Indian tribes. They are public corporations which may enter into ordinary legal relations with third parties except in so far as such relations are limited by specific acts of Congress and are endowed with powers of local self-government in all matters save where Congress has limited such powers by express legislation. Indian pueblos are not subject to State jurisdiction except in matters as to which Congress has made State law applicable or in suits in which the pueblo has duly invoked or submitted to the jurisdiction of State courts ----- 37

Constitutional Rights.

11. Pueblos are entitled to the protection of the Federal Constitution and may resort to appropriate legal proceedings to maintain any rights violated by Federal officials. ----- 37

Corporate Status and Powers.

12. Pueblos are public corporations which may enter into ordinary legal relations with third parties except insofar as such relations are limited by specific acts of Congress. Legal title to "grant" lands and equitable title to "executive order reservation" lands, in each pueblo, is vested in the pueblo as a corporation and not in the individual members thereof ----- 37

Extradition of Indian Fugitives.

13. No extradition of Indian fugitives from the jurisdiction of a State may be obtained as States are authorized to extradite fugitives only pursuant to the Constitution and laws of the United States, which do not include the extradition of Indians to Indian reservations. (a) The Interior Department has no authority to extradite Indians from one reservation to another, but Indian tribes have authority to request of each other the return of fugitives and to act on such requests to the extent of removing fugitives from the reservation or of turning over the fugitives to the authorities of the tribes requesting extradition. (b) Neither the Indian police nor the tribal police have recognized authority to hold Indians in custody outside Indian reservations and legislation is necessary to authorize such custody by Federal or tribal officials as agents of the tribe seeking extradition ----- 344

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Irrigation Projects.

See, also, *Indians*, subheading, *Damage Claims*.

14. While there may be some doubt as to whether authority exists under the act of October 16, 1941 (55 Stat. 742), to permit the diversion and appropriation of some of the waters of the San Carlos Irrigation Project for the use of a corporation ordered to produce copper, authority is conferred by the act of June 3, 1916 (39 Stat. 166, 213), as reaffirmed and extended by section 9 of the Selective Training and Service Act of September 16, 1940 (54 Stat. 885, 892). Condemnation is also available as a means of acquiring the needed water supply under 40 U. S. C. secs. 257 and 258 and 50 U. S. C. sec. 171. The desired action may be effected by an order to the company prepared in this Department and signed by the President... 400

Jurisdiction of United States Commissioners.

15. The act of October 9, 1940, "To confer jurisdiction upon certain United States commissioners to try petty offenses committed on Federal reservations" provides an alternative procedure for the trial of petty offenses now within the jurisdiction of the Federal district courts and therefore, while it applies to such Federal offenses upon Indian reservations, the act does not apply to offenses defined by tribal law or the law and order regulations of the Interior Department, since such offenses are not Federal offenses cognizable in the Federal district courts. ----- 335

Occupancy Rights.

See, also, *Alaska, Aboriginal Fishing Rights*.

16. Departmental order of February 2, 1907, withdrawing lands from settlement and entry for the use and benefit of the Chemehuevi Indians, was in confirmation of the Indians' use and occupancy rights therein acquired by long residence, and reclamation withdrawal orders in 1902 and 1903 covering such lands did not extinguish the Indians' rights nor deprive them of their right to compensation for the full value of the lands to be flooded in connection with the Parker Dam. ----- 87

Oil and Gas Leases.

Advance Royalties.

17. An oil and gas lease on restricted Indian lands did not specifically state that advance royalties were payable after production commenced, but the applicable regulations and the administrative interpretation which had been accorded to the lease terms prior to the issuance of the particular lease clearly indicated that advance royalties were payable even after production commenced. *Held*, that subsisting explanatory regulations and

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Oil and Gas Leases—Continued.		Royalties.	
<i>Advance Royalties—Continued.</i>		See <i>Oil and Gas Leases.</i>	
administrative practice support a holding that under the particular lease advance royalties are required after production commences.....	378	State Game Laws.	
<i>Cancellation After Primary Term.</i>		28. Lands purchased by the Federal Government for Indian use and set apart under the superintendence of the Government, whether proclaimed an Indian reservation or not, have the same status as an Indian reservation, and, therefore, the State of Wisconsin cannot enforce its criminal laws, including its fish and game laws, against the Indians on such lands.....	295
18. Where a lease is for a term of 10 years and as much longer thereafter as oil or gas is found in paying quantities, and where the development of only one gas well in paying quantities is sufficient to continue the life of the lease, the lease is not subject to cancellation after the expiration of the primary term if there is a gas well thereon capable of producing gas in such quantities upon which the required royalty of \$300 per annum is paid, even though such well is shut in because of market conditions and gas is not sold therefrom.....	483	29. The State of Florida is without power to enforce Chapter 19860, Laws of Florida, Special Acts, 1939, within the Seminole Indian Reservation in Hendry County, without the authorization of Congress, but in so far as the Florida law is a quarantine measure it may be enforced within the reservation, under the Congressional authorization in the act of February 15, 1929 (45 Stat. 1185), upon such conditions as the Secretary of the Interior may prescribe.....	162
<i>Gas Well Rental.</i>		State Jurisdiction.	
19. Where payment is made by the lessee of \$300 annual royalty on one shut-in gas well, which payment continues the life of the lease, he may pay \$100 annual rental on a second shut-in well under the provision in the lease providing for forfeiture of an unprofitable gas well unless a \$100 annual rental is paid for retaining gas-producing privileges.....	483	30. Lands purchased by the Federal Government for Indian use and set apart under the superintendence of the Government, whether proclaimed an Indian reservation or not, have the same status as an Indian reservation, and, therefore, the State of Wisconsin cannot enforce its criminal laws, including its fish and game laws, against the Indians on such lands.....	295
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20. Indian pueblos are endowed with powers of local self-government in all matters save where Congress has limited such powers by express legislation.....	38	32. Pueblos are not subject to State jurisdiction except in matters as to which Congress has made State law applicable or in suits in which the pueblo has duly invoked or submitted to the jurisdiction of State courts.....	37
21. Legal title to "grant" lands and equitable title to "executive order reservation" lands, in each pueblo, is vested in the pueblo as a corporation and not in the individual members thereof.....	41	Statutory Construction.	
22. The pueblos are subject to the same degree of control by Congress as are other Indian tribes.....	46	33. In view of the clear unambiguous language of section 8 of the act of June 26, 1936 (49 Stat. 1968, 25 U. S. C. sec. 508), all Indians residing in Osage County, Oklahoma, and all lands situated therein must be held to be excluded from the provisions of that act.....	380
23. The pueblos are subject to administrative supervision with respect to any transfer of an interest in land.....	46	Taxability.	
24. The pueblos are entitled to the protection of the Federal Constitution and may resort to appropriate legal proceedings to maintain any rights violated by Federal officials.....	53	See, also, <i>Indians, Taxability.</i>	
25. The pueblos are not subject to State jurisdiction except in matters as to which Congress has made State law applicable or in suits in which the pueblo has duly invoked or submitted to the jurisdiction of State courts.....	54	34. Tracts of taxable Osage allotted land the title to which has passed to an Osage Indian as a result of partition proceedings (a) may not be selected as tax exempt in the	
26. The pueblos are public corporations which may enter into ordinary legal relations with third parties except insofar as such relations are limited by specific acts of Congress.....	57		

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Taxability—Continued.

event the only consideration is the interest of the Indian in other lands involved in the partition proceedings, but, (b) so much of such land as may be acquired in partition proceedings in excess of the interest of the Indian through the investment of trust or restricted funds may be designated as tax exempt.

Fractional interests in tracts of restricted taxable lands purchased with restricted funds may be selected as tax exempt, and each owner of a fractional interest in agricultural and grazing land is entitled to designate as tax exempt his interest in the land in so far as it does not exceed in terms of acreage the maximum acreage prescribed by the act of May 19, 1937.

Where part of the purchase price for the property has been paid from restricted funds, a fractional part of the property representing the restricted funds used in the payment may be designated as tax exempt. Where city property costs in excess of \$5,000 a fractional portion of the property may be selected as tax exempt, such fractional portion being the proportion that \$5,000 bears to the entire cost of the property.

Where an Indian purchases town property at a cost of less than \$5,000 and improvements made with restricted funds are placed thereon bringing the original cost of the property and cost of the improvements to more than \$5,000, the improved property may be selected as tax exempt to the extent of \$5,000, provided the improvements were added prior to the act of May 19, 1937.

The benefit of tax exemption of a homestead designated under the act of May 19, 1937, passes to subsequent Indian owners of the property until further legislation of Congress terminating the tax exemption. 67

Title to Lands.

35. Legal title to "grant" lands and equitable title to "executive order reservation" lands, in each pueblo, is vested in the pueblo as a corporation and not in the individual members thereof. 37

Transfers of Interest in Lands.

36. Pueblos are subject to administrative supervision with respect to any transfer of an interest in land. 37

"Indians Not Taxed."

See *Indians*, subheading *Taxability*.

Indian Tribes.

Authority to Engage in Housing Projects.

1. An Indian tribe is a governmental entity or public body capable of undertaking tribal

Authority to Engage in Housing Projects—Continued.

housing projects, and where a tribe is incorporated under the Indian Reorganization Act it is clearly authorized to engage in the low-rent housing and slum clearance projects contemplated by the National Housing Act, and, therefore, such a tribe comes within the terms of that act as a public housing agency eligible to obtain the assistance and benefits of that act. 145

Authority to Extradite Fugitives.

2. The Interior Department has no authority to extradite Indians from one reservation to another, but Indian tribes have authority to request of each other the return of fugitives and to act on such requests to the extent of removing fugitives from the reservation or of turning over the fugitives to the authorities of the tribes requesting extradition. Neither the Indian police nor the tribal police have recognized authority to hold Indians in custody outside Indian reservations and legislation is necessary to authorize such custody by Federal or tribal officials as agents of the tribe seeking extradition. 345

Petty Tribal Offenses.

See *Indians and Indian Lands*, subheading *Jurisdiction of United States Commissioners*.

Information, Dissemination of.

1. The Department and the Secretary of the Interior have authority to disseminate information generally to the public except that (1) a "publicity expert" may not be employed unless specifically authorized by Congress, and (2) any attempt to stir up private citizens to influence Congressional legislation is prohibited. Except as so limited, any method or means which, as a matter of administrative discretion, is determined to be feasible, desirable, or economical may be used to disseminate information. The Department of the Interior is authorized to disseminate information by means of radio. Enactment of appropriations for functions of which Congress has been made cognizant constitutes legislative approval of such functions. 82

2. The publication of a report of the Bureau of Mines concerning the nature and cause of an individual mine disaster may be made public. Section 3 of the act of February 25, 1913 (37 Stat. 681), which is held to authorize such publication, is not limited by section 4 of that act. Solicitor's opinion of November 18, 1935 (M 28219), insofar as inconsistent, overruled. 117

International Boundaries.

See *Public Lands*, subheading, *Right of the United States to Maintain Suit to Quiet Title*.

Interpretation of Statutes.

See *Statutory Construction*.

Irrigation.

See *Indians and Indian Lands*, subheading *Irrigation, Projects; Reclamation*.

Laches or Mistakes of Government Officials.

See *Public Lands*, subheading *Mistakes or Laches of Government Officials*.

Law and Order Regulations, Offenses Under.

See *Indians and Indian Lands*, subheading, *Jurisdiction of United States Commissioners*.

Leases.

See *Mineral Leasing Act; Oil and Gas Lands; Oil and Gas Leases, Indian Lands; Taylor Grazing Act*.

Lien.**Priority of.**

1. A lien for local taxes assessed merely upon the interest of the property owner and subsequent in point of time to the lien of the United States under a water right application, is inferior to the lien of the United States. A local tax lien which is not given priority by State statute is subordinate to a lien of the United States which is prior in time. Where a local tax lien has, under State statute, priority over all other liens, this Department should, nevertheless, take the position, on the authority of the case of *City of New Brunswick v. United States*, 276 U. S. 547, that a lien of the United States which is prior in time is paramount to such tax lien and that a purchaser at a sale of the property for the nonpayment of such taxes takes subject to the lien of the United States.

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Lieu Selections.

See *Mineral Lands; Public Lands*.

Liquidated Damages.

See *Contracts*.

Martial Law.

See *Hawaii*.

Menominee Indian Mills.

See *Indians*, subheading, *Taxability*.

Mexican Claims to Lands.

See *Public Lands*, subheading, *Right of the United States to Maintain Suit to Quiet Title*.

Page Mineral Lands.

Page

See also, *Coal Lands; Mining Claim; Oil and Gas Lands; School Land Grant*.

Determination of Mineral Character.

1. This Department has jurisdiction to make conclusive determinations respecting the known mineral character of school lands at the effective date of the grant. 349

2. Mere allegations to the effect that the land granted for school purposes was mineral in character and that the title therefore did not pass to the State, unsupported by substantial evidence rebutting the presumption that the title had passed to the State as nonmineral land, will not warrant this Department to entertain proceedings for a determination of the mineral character of the land. School lands which, because of their mineral character, could not pass under the original school grants, nevertheless passed to the State by virtue of the act of January 25, 1927, as amended (44 Stat. 1026, 47 Stat. 140, 43 U. S. C. sec. 870), provided certain circumstances enumerated in that act were not present. Therefore even if there were sufficient evidence offered to rebut the presumption as to the nonmineral character of the land, this Department will not, on an application for an oil and gas lease, determine the mineral character of the land unless the existence could be shown of any of those circumstances. 348

3. While it is true the dismissal of a contest alleging the mineral character of the land is not an award of the land to the contested applicant, and carries no implication that all the determinations essential to the passage of title had been made, and adjudications by the land department concerning public lands are not a bar to its jurisdiction to inquire into any question affecting rights to the land so long as the legal title remains in the Government, the Department has repeatedly held that its decision holding a tract of land to be either mineral or nonmineral will be considered conclusive as to the period covered by the hearing, but will not preclude further consideration of the character of the land based on subsequent explorations and development. *Stinchfield v. Pierce*, 19 L. D. 12; *McCharles v. Roberts*, 20 L. D. 564; *Dargin v. Koch*, 20 L. D. 384; *Mackall v. Goodsell*, 24 L. D. 553; *Leach v. Potter*, 24 L. D. 573; *Town of Aldridge v. Craig*, 25 L. D. 505; *Coleman v. McKenzie*, 28 L. D. 348; *Gorda Gold Mining Company and Wallace Mathers v. Ernest Bauman*, 52 L. D. 519, 520, cited and applied. 252

Exemption of Mineral Entries from Withdrawal.

4. Placer mining locations were made for desert clay within an area subsequently withdrawn for use as a bombing and gunnery range. *Held*, that land containing

Mineral Lands—Continued.

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Exemption of Mineral Entries from Withdrawal—Continued.

clay or silt deposits suitable for use as rotary mud which can be extracted, removed and marketed at a profit is mineral land subject to location and entry under the placer mining laws.....

538

Government Exploration for Coal; Rights of Prospecting Permittee.

5. A coal prospecting permittee possesses a valuable right which may be interpreted as exclusive even against the Government. The Government should obtain the consent of the permittee to explore for coal in an instrument defining the interests of both parties. It is recommended that such an agreement provide that any discovery made by the Government shall not prevent the granting to the permittee of a lease without competitive bidding covering all coal discovered, provided the permittee has cooperated in the exploration by the Government in the manner specified in the agreement, and with the understanding that any such lease shall provide such special terms of rental and royalty and such other requirements with respect to minerals discovered by the Government as the Secretary of the Interior may deem appropriate. No agreement with a prospecting permittee is necessary where the Bureau of Mines intends to explore for minerals other than those covered by the prospecting permit.....

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Indian Exchange Application; Contest.

6. An Indian exchange application upon which no publication has been had is not complete, and the Department is not precluded from entertaining any inquiry as to the mineral character of the land as a present fact. *Wyoming v. United States*, 255 U. S. 489, distinguished. No right of possession is conferred to land by the mere filing of an Indian exchange application; such right would only flow from the acquisition of equitable title to the land, and if before such title vests locations under the mining laws are made on the land based upon a valid discovery of minerals, no reason is seen why the locator upon establishment of the fact may not secure the rejection of the application to the extent of such locations.....

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Mineral Land Laws.

7. As to acts setting aside lands for particular public purposes which do not expressly extend or prohibit the operation of the mineral land laws, there is no sufficient basis for the presumption that the mineral land laws, unless there are express words of exclusion, extend to them: On the contrary in all such cases the intent of Congress in that respect must be gathered from the act itself.....

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Mineral Lands—Continued.

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Mining Claim; Discovery.

8. It is settled law that no lode mining claim can be located and no patent issued without actual discovery of a vein or lode within the limits of the claim located, and that mere indications of, or belief in, the existence of mineral on the claim do not amount to discovery. There is no sound reason for the position that a discovery of mineral upon each of two contiguous claims cannot be recognized as a valid discovery for each claim for the reason that the discoveries are in one shaft on a common boundary between the claims.....

558

Mineral Leasing Act.

See, also, *Alaska; Coal Lands; Oil and Gas Lands; Mineral Lands; Mining Claim; School Land Grant.*

Alaska.

1. Section 17 of the Mineral Leasing Act, as amended, does not apply to Alaska leases insofar as it prohibits waiver, suspension, or reduction of rental payments on oil and gas leases. Rentals on Alaska leases may be waived, in the discretion of the Secretary, under the proviso clause of section 22 of the Mineral Leasing Act of 1920.....

102

Authority of Secretary.

2. The Secretary of the Interior has full discretion to refuse to issue under section 2 (a) of the act of August 21, 1935, exchange leases for lands within one mile of a Naval Petroleum Reserve.....

520

Exploration Agreements.

3. Since a coal prospecting permittee under the leasing act of February 25, 1920, possesses a valuable right which may be interpreted as exclusive even against the Government, the Government should obtain the consent of the permittee to exploration for coal by the Government in an instrument defining the interests of both parties. A similar agreement should be executed with an applicant for a lease who has made a coal discovery under a prospecting permit and with an applicant for an extension of a prospecting permit who has made substantial improvements or investments for prospecting under his permit.....

478

Mining Claim.

4. Section 37 of the act of February 25, 1920 (41 Stat. 437), did not give force or protection to an alleged oil placer mining claim where there had been no discovery of oil or gas and where there was no diligent prosecution of work looking to discovery at the date of said act.....

105

Mining Claim.

See, also, *Mineral Lands; Mineral Leasing Act.*

General.

1. It is improper for a cadastral engineer to assume jurisdiction to disapprove a survey of a mining claim because of his opinion that the claim is invalid.----- 63

2. A grant of rights under mining law in re-vested Oregon and California and reconveyed Coos Bay grant lands is clearly inconsistent with the objects and purposes of the act of August 28, 1937.----- 365

Abandonment.

3. Abandonment is a question of intention and the evidence thereof must be clear. Lapse of time, absence from the ground, failure to work the claim for any definite period in the absence of other circumstances are not evidence of abandonment.----- 244

Abandonment by Cotenant.

4. One cotenant of a mining claim may abandon his own interest therein so as to preclude him from afterwards asserting an interest therein, but he cannot thereby affect the interest of his cotenants. *Contra; Alaska-Dano Mines Company*, 52 L. D. 550, overruled. As the possession of one cotenant is the possession of all, no abandonment can be based on the absence of one of the cotenants, even if he makes a sale of the absent tenant's interest.----- 245

Adverse Possession.

5. The question whether mineral applicants, who are shown by the abstract of title to be cotenants of other persons may be granted a patent under the provisions of section 2332, Revised Statutes, is dependent, in the absence of an adverse claim, upon a sufficient showing that they and their predecessors in title, by working and holding the claim adversely to their cotenants for the period prescribed by the statute of limitations of the State, have acquired a perfect title by such possession to the whole of the claim under the State law.----- 245

Agriculture and Timber Lands.

6. Lands classified under section 3 of the act of August 28, 1937, as more valuable for agriculture than for timber, if in fact more valuable for mineral than for agriculture, and not therefore subject to disposition under section 3, are subject to location, entry and purchase under the mining laws in accordance with section 3 of the act of June 9, 1916.----- 365

Desert Clay; Silt.

7. Placer mining locations were made for desert clay within an area subsequently withdrawn for use as a bombing and gunnery

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Mining Claim—Continued.

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Desert Clay; Silt—Continued.

range: *Held*, that land containing clay or silt deposits suitable for use as rotary mud which can be extracted, removed and marketed at a profit is mineral land subject to location and entry under the placer mining laws.----- 533

Discovery.*

8. (a) It is settled law that no lode mining claim can be located and no patent issued without actual discovery of a vein or lode within the limits of the claim located, and that mere indications of, or belief in, the existence of mineral on the claim do not amount to discovery. (b) Discovery outside the location, no matter what may be its proximity to the lines of the location is not sufficient. (c) The Department has no authority to disregard the above rule of discovery on the ground of national emergency. (d) The fact of discovery is a fact of itself totally disconnected with the idea of a discovery shaft. (e) There is no sound reason for the position that a discovery of mineral upon each of two contiguous claims cannot be recognized as a valid discovery for each claim for the reason that the discoveries are in one shaft on a common boundary between the claims. (f) The Federal law does not require the sinking of a discovery shaft, and where discovery is made in a drill hole on a common boundary to two lode locations, in the absence of any authoritative decision that a discovery in a drill hole does not satisfy the requirements of the law of the State in which the claim lies as to a discovery shaft, the discovery is deemed sufficient to establish the validity of both locations in the absence of any evidence that the drill hole departs from the vertical plane drawn through the side line.----- 558

Evidence.

9. Parol evidence adduced from a party not in privity with the original locator of a mining claim in derogation of such locator's title cannot be considered.----- 244

Lode Intersected by Placer.

10. Where a lode mining claim is intersected by a patented placer *Held*: (1) That upon discovery of mineral on the lode, no condition is imposed on the applicant for patent to the lode to show discovery on other portions of the claim outside the placer, (2) there is no presumption that the lode discovered does not pass through the placer to the other portions of the lode, (3) that the rule that a patent may not be issued for both parts of a lode claim intersected by a mill site has no application to a lode intersected by a placer, (4) that when one has performed all the acts essential to a valid location and shown that the apex exists within the claim

Mining Claim—Continued.

Lode Intersected by Placer—Continued.

to some extent, the locator is entitled to the presumption that the lode extends through the length of his claim. *The Vulcano Lode Mining Claim*, 30 L. D. 483; *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U. S. 220; *Larkin v. Upton*, 144 U. S. 19, 23; *The San Miguel Consolidated Gold Mining Co. et al. v. Bonner*, 33 Colo. 207, 79 Pac. 1027; Par. 41, *Mining Regulations*, 38 L. D. 40, cited and applied; *Paul Jones Lode*, 31 L. D. 359; *Mabel Lode*, 26 L. D. 675, distinguished; *Silver Queen Lode*, 16 L. D. 186, overruled.....

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National Forests.

11. The policy of making mineral lands in national forests subject to the operation of the mining law was continued with certain restrictions and limitations in the act of June 9, 1916, but the act of August 28, 1937, as to timber lands made the objects and purposes of that act paramount, notwithstanding any conflict with any provision of the mineral land laws.....

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Valid Possession.

12. An oil placer mining claim is not valid until there is a discovery of oil or gas within its limits. A qualified person may take possession and hold public land for a reasonable time while prospecting for mineral. Assessment work does not take the place of discovery. It is of no avail on a mere possessory claim. Section 2332, Revised Statutes, has no application to a possessory claim which is not valid through discovery. Section 37 of the act of February 25, 1920 (41 Stat. 437) did not give force or protection to an alleged oil placer mining claim where there had been no discovery of oil or gas and where there was no diligent prosecution of work looking to discovery at the date of said act.....

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Mining Laws, Applicability to O and C Lands.

See *Mineral Land Laws; Mining Claim.*

Natchez Trace Parkway.

See *National Parks.*

National Parks and Monuments.

Conservation of Wildlife.

1. The Secretary of the Interior is required by the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. secs. 1-3), and related statutes, to conserve the wildlife in national parks and monuments. Under his general administrative powers, however, he may permit the taking of animal life for scientific purposes by Federal employees, but is precluded from

National Parks and Monuments—Page Continued.

Conservation of Wildlife—Continued.

granting permits for the taking of animal life to private individuals and institutions. The degree of protection to be afforded animals within the parks and monuments is primarily an administrative question.....

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Exchange of Timber for Privately Owned Lands.

2. Whether the Secretary of the Interior is authorized under section 3 of the Act of August 25, 1916, to exchange timber on park lands within the Olympic National Park for privately owned cut-over lands within the boundaries of said park. *Held*, section 3 of the act of August 25, 1916, authorizes the exchange of timber on park lands for privately owned cut-over lands where the cutting of the timber is found by the Secretary of the Interior to be required for the purposes set forth in said section.....

444

Fee Simple Title, Acquisition of.

3. The acquisition of fee simple title to lands in sixteenth sections in the State of Mississippi is not authorized by its constitution of 1890.....

434

Jurisdiction.

4. Authority of the Secretary of the Interior to prohibit activities of city guides on the grounds of the Fort Marion National Monument, Florida. *Held*, regardless of whether the United States has exclusive or merely proprietary jurisdiction over the Fort Marion National Monument in St. Augustine, Florida, the Secretary of the Interior has the authority to prohibit guides licensed by the city from soliciting on the monument grounds, including that area occupied, used and maintained by the city under a revocable license granted by the Secretary of War for street and sidewalk purposes.....

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5. Cession by the State of Washington by act approved March 8, 1941 (ch. 51, *Laws of Washington*, 1941), of its jurisdiction over lands included in Olympic National Park, reserving only right to serve process and certain rights of taxation, upon acceptance thereof by the United States, terminates the right or duty of State and counties to maintain and police the highways therein and the Government of the United States will assume exclusive maintenance and control under broad powers of the Secretary of the Interior in relation to roads in, and approach roads to, national parks under the acts of April 9, 1924 (43 Stat. 90, 16 U. S. C. sec. 8), and January 31, 1931 (46 Stat. 1053, 16 U. S. C. secs. 8a, 8b), and the encouragement of travel within the United States under the act of July 19, 1940 (54 Stat. 773).....

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National Parks and Monuments—Page

Continued.

Regulations, Authority to Sign.

6. Unless "personal" action by the Secretary or Acting Secretary is specifically required, the Secretary by appropriate order, may prescribe and delegate to the Under Secretary, the First Assistant Secretary and the Assistant Secretary the authority to perform any of his duties. So long as such delegated authority remains unrevoked, any action done pursuant thereto is of as much effect as though done personally by the Secretary or Acting Secretary..... 262

Revocable License.

See *Jurisdiction*.

Rights-of-Way Easements.

7. Rights-of-way easements over sixteenth sections in Mississippi may be acquired by the Government, pursuant to the act of May 18, 1938, (52 Stat. 407), as amended by section 3 of the act of June 8, 1940 (54 Stat. 249)..... 434

National Park Service.

Claims Against.

1. Claims for the loss of animals rented to the National Park Service under contracts entered into pursuant to the provisions of the act of May 26, 1930 (46 Stat. 381), are reimbursable from any available funds in the appropriation to which the hire of such equipment would be properly chargeable.... 409

Naval Petroleum Reserve.

See *Oil and Gas Lands*.

Navigable Waters.

1. The question of the boundary between the land below and above ordinary high water mark in a navigable stream is necessarily a federal question. *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, cited and applied. The laws of the United States alone control the disposition of title to its lands and the States are powerless to place any limitations or restrictions on that control. *United States v. Oregon*, 295 U. S. 1, cited and applied. The line of ordinary high water mark in a navigable stream does not mean the height reached by unusual floods, nor by great annual rises in the stream, but the line which ordinary high water usually reaches. *Cedar Rapids v. Marshall*, 203 N. W. 932; *Welch v. Browning*, 87 N. W. 430, cited and applied. The acceptance of the survey of islands in a navigable stream does not preclude the State or its grantees from showing in an appropriate judicial proceeding that the survey was inaccurate and embraced land which the United States had no power over. *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, cited and applied..... 228

New Mexico and Arizona Pueblos. Page

See *Indians and Indian Lands*, subheading *Pueblos*.

Oil and Gas Lands.

See, also, *Alaska; Mineral Lands; Mineral Leasing Act; Oil and Gas Leases, Indian Lands; Public Lands; School Land Grant*.

Alaska.

1. Section 17 of the Mineral Leasing Act, as amended, does not apply to Alaska leases insofar as it prohibits waiver, suspension, or reduction of rental payments on oil and gas leases. Rentals on Alaska leases may be waived, in the discretion of the Secretary, under the proviso clause of section 22 of the Mineral Leasing Act of 1920..... 102

Approval of Lease Forms by Secretary.

2. The transmittal of a lease form for signature by the applicant does not, upon signature of the lease form by the applicant, immediately operate to prevent the Secretary from exercising his discretion to give final approval or disapproval to the issuance of the lease, irrespective of the preliminary negotiations..... 521

Contracts; Revocation.

3. In the absence of regulations authorizing such action, the departmental approval of contracts for the sale of petroleum produced from Federal lands may not be revoked by the Department in the absence of fraud, misrepresentation or mistake..... 277

Determinative Test.

4. In determining whether or not land is of mineral (oil) character, as contemplated by the public land laws, and, therefore, excepted from a grant of public land, knowledge of actual mineral content need not be shown, it being sufficient if known conditions are shown from which mineral character reasonably can be inferred..... 142

Evidence.

5. While, without more, the drilling of two dry holes on a section of public land would be persuasive evidence of the absence of oil and gas to the depth probed, circumstances showing that such drilling did not produce fair test wells dispel such persuasion. Drilling of two holes by leading oil companies strongly indicates the opinion of experienced oil men as to the value of the section for oil. 142

Exchange Leases; Authority of Secretary.

6. The Secretary of the Interior has full discretion to refuse to issue, under section 2 (a) of the act of August 21, 1935, exchange leases for lands within one mile of a Naval Petroleum Reserve..... 520

- Oil and Gas Lands—Continued.** Page
- Exchange Lease; Cancellation.**
7. Upon failure to comply with the provisions of section 2 (a), as amended, of an oil and gas exchange lease, after 30 days' notice to furnish a rental bond, it may be canceled for such reason as of the end of such period although rent would otherwise thereafter accrue, since the lease was then ripe for cancellation. The demand under section 2 (a), as amended, is only for a bond because that section merely authorizes prepayment of rent as a substitute for furnishing a bond. Since there is no demand for rent as such, the forfeiture, being based on another ground, bars the collection of after accruing rent, in the absence of a lease provision preserving rental liability after forfeiture..... 438
- Lease; Default.**
8. Default in the payment of rent is not, under the provisions of the lease, a surrender or evidence of an intention to surrender the lease. The cancellation of the lease by the Secretary of the Interior after a 30-day period of default in payment of yearly rent following notice to lessee of default, does not excuse the lessee from payment of rent due and payable in advance on the first day of the term... 216
- Lease; Distance from Petroleum Reserve.**
9. The distance of lands covered by lease applications from a Naval Petroleum reserve is computed on the basis of legal subdivisions of land and not on actual distance from the boundary of the Reserve..... 521
- Oil and Gas Leases, Indian Lands.**
- Advance Royalties.**
1. An oil and gas lease on restricted Indian lands did not specifically state that advance royalties were payable after production commenced, but the applicable regulations and the administrative interpretation which had been accorded to the lease terms prior to the issuance of the particular lease clearly indicated that advance royalties were payable even after production commenced. *Held*, that subsisting explanatory regulations and administrative practice support a holding that under the particular lease advance royalties are required after production commences..... 378
- Cancellation After Primary Term.**
2. Where a lease is for a term of 10 years and as much longer thereafter as oil or gas is found in paying quantities, and where the development of only one gas well in paying quantities is sufficient to continue the life of the lease, the lease is not subject to cancellation after the expiration of the primary term if there is a gas well thereon capable
- Oil and Gas Leases, Indian Lands—Page Continued.**
- Cancellation After Primary Term—Con.**
- of producing gas in such quantities upon which the required royalty of \$300 per annum is paid, even though such well is shut in because of market conditions and gas is not sold therefrom..... 483
- Lease Terms.**
3. Statutes and regulations affecting leases issued by the Department must be considered as part of the lease terms irrespective of whether or not they are set forth in the lease. Consequently, where an oil and gas lease does not specifically cover the status of advance royalties after production is obtained, the lease may be interpreted in the light of the applicable regulations and the prior administrative practice prevalent when the lease was issued..... 378
- Rental; Shut-in Gas Well.**
4. Where payment is made by the lessee of \$300 annual royalty on one shut-in gas well, which payment continues the life of the lease, he may pay \$100 annual rental on a second shut-in gas well under the provision in the lease providing for forfeiture of an unprofitable gas well unless a \$100 annual rental is paid for retaining gas producing privileges..... 483
- Oil and Gas Waiver.**
- See *Public Lands*, subheading *Patent*.
- Oil Placer Mining Claim.**
- See *Mining Claim*.
- Oklahoma Welfare Act of June 26, 1936, Interpretation.**
- See *Statutory Construction*.
- Olympic National Park.**
- See *National Parks*.
- Oregon and California Railroad and Reconveyed Coos Bay Grant Lands.**
- See *Mineral Land Laws; Mining Claim*.
- Osage Tribe, Oklahoma.**
- See *Indians and Indian Lands*, subheadings, *Statutory Construction, Taxability*.
- Passport and Visa Requirements, Waiver of.**
- See *Virgin Islands*.
- Patents.**
- See *Public Lands*.

Penalties.

See *Contracts*.

Philippine Islands.**Citizenship of Filipino.**

1. The treaty of December 10, 1898 (30 Stat. 1754), did not make the Philippine Islands an integral part of the United States. Under that treaty the native inhabitants of the Philippine Islands were impliedly denied American citizenship until Congress by further action should signify assent thereto. The Fourteenth Amendment to the Constitution of the United States does not make a Filipino *ipso facto* a citizen of the United States. Nor does it follow from the fact that a Filipino enjoys certain civil rights under the Constitution and owes allegiance to the United States that he is a citizen thereof. A person born in the Philippine Islands of Filipino parentage is not a citizen of the United States and, if he has not filed his declaration of intention to become a citizen of the United States in the manner prescribed by the naturalization laws, is not qualified under section 2289, Revised Statutes, 43 U. S. C. secs. 161, 218a, to make an entry under the Enlarged Homestead Act (act of February 19, 1909, 35 Stat. 639, 43 U. S. C. sec. 218).....

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Excise Taxes, Expenditure of Refunded Proceeds.

2. Section 19 (a) of the Philippine Independence Act (53 Stat. 1232, 48 U. S. C. 1248) provides that the proceeds of excise taxes collected on coconut oil shipped to the United States from the Philippines shall be paid into the treasury of the Philippines, "to be used for the purpose of meeting new or additional expenditures which will be necessary in adjusting Philippine economy to a position independent of trade preferences in the United States and in preparing the Philippines for the assumption of the responsibilities of an independent state." The word "and" is to be construed in the disjunctive and the proceeds therefore may be used to strengthen the Philippine Constabulary and for the construction of an airport upon a determination that such purposes will serve "in preparing the Philippines for the assumption of the responsibilities of an independent state".....

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Pipe Lines.

See *Rights-of-Way*.

Practice and Rules of Practice.

See *Table*, page XXXVI; see also *Attorneys and Agents*.

1. A person who has notarized an application for a patent under the mining laws is

Practice and Rules of Practice—Page Continued.

disqualified to act as an attorney for the claimant in proceedings before the Department.....

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2. United States Commissioners are disqualified to act as attorneys or agents in any public land matter pending before the Department.....

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3. The rules governing proceedings upon special agents' reports expressly provide for appeals by the Division of Investigations from decisions of the Commissioner of the General Land Office (43 CFR 222.13).....

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4. If an entryman in his answer to charges admits all that is essential to show that his entry is invalid and fails to show that the charges are immaterial, there is no issue of fact that requires a hearing.....

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5. Motion for rehearing will not be granted where there is no showing that a new question of vital importance is involved, or that fair minds could not, from the testimony previously adduced, come to the conclusion complained of, or where, without any reason for not then presenting such facts, no facts are alleged in support of the motion that could affect the decision complained of that might not have been presented at the previous hearing.....

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Appeals.

6. The allowance of appeals to the Secretary from the orders of the Director [Bituminous Coal Division] by dissatisfied parties is not required by law. It would be proper as a matter of law for the Secretary to review the docket to determine whether the conclusions of the Director conform with the law and general administrative policy. The determination of the relative advantages and disadvantages of review by appeal over other methods of review is an administrative function for the discretion of Secretary.....

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Res Judicata.

7. Adjudications by the land department concerning public lands are no bar to its jurisdiction to inquire into any question affecting rights to the land so long as the legal title remains in the Government.....

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Practice Before Federal Departments.

See *Attorneys and Agents*.

Preference Right.

See *Homestead*, subheading *Contest*; *Homestead*, subheading *Reclamation*.

President's Authority.

re Aliens, see *Virgin Islands*.
re Withdrawal of Public Lands, see *Withdrawal of Public Lands*.

President's Authority—Con.

re Diverting and Appropriating Waters of Irrigation Project, see *Indians and Indian Lands*, subheading *Irrigation Projects*.

Publication.

See *Information*.

Public Lands.

See, also, *Grazing and Grazing Lands; Indians; Oil and Gas Lands*, subheading, *Contracts; Rights-of-Way; Taylor Grazing Act; Withdrawal of Public Lands*.

General.

1. The power of the courts to determine possessory rights to public lands is well settled. A writ of assistance directing an ouster from possession is not void as an attempt to adjudicate the title to public lands. 340

2. The Department should exercise its undoubted power to refuse to allow the bounty of the public land laws to be used for inequitable ends. 339

3. The law of New Mexico (N. Mex. Stat. Ann. (1929) secs. 111-107 and 151-156) permits the mortgage of a valid interest in the improvements, water rights and other rights on public lands even though such improvements or rights may be attached or appurtenant to the land. 339

Boundaries.

4. The question of the boundary between the land below and above ordinary high water mark in a navigable stream is necessarily a federal question. *Borax, Ltd. v. Los Angeles*, 296 U. S. 10, cited and applied. The line of ordinary high-water mark in a navigable stream does not mean the height reached by unusual floods, nor by great annual rises, but the line which ordinary high-water usually reaches. The acceptance of the survey of islands in a navigable stream does not preclude the State or its grantees from showing in an appropriate judicial proceeding that the survey was inaccurate and embraced land which the United States had no power over. 229

Contest; Indian Exchange Application.

5. An Indian exchange application upon which no publication has been had is not complete, and the Department is not precluded from entertaining any inquiry as to the mineral character of the land as a present fact. *Wyoming v. United States*, 255 U. S. 489, distinguished. No right of possession is conferred to land by the mere filing of an Indian exchange application; such right would only flow from the acquisition of equitable title to the land, and if before such title vests locations under the mining laws are made on the land based upon a valid discovery of minerals, no reason is seen why

Public Lands—Continued.

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Contest; Indian Exchange Application—Continued.

the locator upon establishment of the fact may not secure the rejection of the application to the extent of such locations. 252

Grazing.

6. In construing the requirement of section 2, paragraph (g) of the Federal Range Code, that lands shall have had 3 years or 2 consecutive years' use in connection with the same part of the public domain during the 5-year period prior to June 28, 1934, in order to qualify as dependent by use, the doctrine of reasonableness should apply and the amount of use of the public domain in any 1 year must have been substantial in relation to the extent of the grazing season. A use of the public domain for 1 or 2 days out of a season extending in the average year from July 1 to September 1 is not substantial within that construction. 110

Mistakes or Laches of Government Official.

7. A mistake made by Government officials of approximately 1.5 in computing the acreage and the sale price of a specific tract of land is not of such a material nature as to vitiate the contract and does not except the transaction from the general rule that equitable title passes to the purchaser of public land upon the issuance and delivery to him of the cash certificate. A contract for the sale of a specific tract of land cannot be avoided where it is possible by compensation to the party injured by the mistake to put him in as good a position as if the transaction had been what he supposed it to be, and such compensation is given. The general rule that the Government is not chargeable with the mistakes or laches of its officers cannot be expanded to the point of allowing the Government, after a lapse of 110 years, to alter or avoid a contract for the sale of a specific tract of public land which it could not have altered or avoided if a timely disclosure of the error had been made to the vendees. 232

Patent; Equitable Interest.

8. Requirement of an oil and gas waiver where, due to mistake of 1.5 percent in computing the sale price of land, patent has not issued after 110 years from the date of the issuance of the cash receipt. An entryman who has done everything which is necessary to entitle him to receive a patent for public lands has, even before patent is actually issued by the General Land Office, a complete equitable estate in the land which he can sell and convey, mortgage, or lease. An oil and gas waiver cannot be required where the United States has been divested of its equitable estate in the land. 232

Public Lands—Continued.

Page Public Lands—Continued.

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Right of the United States to Maintain Suit to Quiet Title.

9. The Farmers Banco, comprising 533.4 acres of land, was cut from Mexico by a flood of the Colorado River in 1905. In the next year the Bureau of Reclamation took possession of the banco and commenced improvements. Under the provisions of conventions between the United States and Mexico, the International Boundary Commission on September 18, 1926, decided to make an order for the elimination of the banco to the United States on the ground it was cut from Mexico by avulsion. The order was issued October 26, 1927. Between September 18, 1926, and October 26, 1927, the Mexican government by an instrument dated October 22, 1927 granted the land in the banco to one, Alvarez. There had arisen a difference of opinion between the Department of State and the Attorney General as to whether the Republic of Mexico or the United States was the sovereign proprietor of the land at the time the former made its grant to Alvarez, but it was agreed that the question was one for the determination of the courts. At the instance of the State Department the Congress passed the act of May 6, 1937 (50 Stat. 131). By this act payment was authorized to the Government of Mexico of \$20,000. The Government of Mexico declined to give the assurances provided in the act and furnished evidence that on April 23, 1937, Alvarez had transferred all the rights pertaining to him under his claim against the United States to one, Diaz. Requests were made by certain holders of farm units under the reclamation acts for patent.

Held: (1) That the issuance of a patent would not be justified without a determination by a court of competent jurisdiction that Alvarez had no rights in the land. (2) That the act of May 6, 1937, would not affect the right of the United States to maintain a suit to remove a cloud on its title created by the grant to Alvarez. (3) That a suit by the United States to quiet title was maintainable on two theories, one being, that it acquired sovereignty over the banco when it was cut from Mexico by avulsion in 1905 by virtue of the decision of the International Boundary Commission and the grant to Alvarez was therefore invalid, and the other being, that if the title of Alvarez was good when made, the United States had now a valid title by adverse possession under applicable statutes of limitations.

Survey.

See subheading *Boundaries*.

Taylor Grazing Act.

10. In considering applications for exchanges of privately owned lands for public

Taylor Grazing Act—Continued.

lands under the provisions of section 8 (b) of the Taylor Grazing Act, such exchanges may be consummated when public interests will be benefited thereby, and individual cases of hardship or dissatisfaction on the part of persons who have used the public lands selected by the applicants cannot be allowed to sway the Department in reaching a decision. The hardships resulting in certain instances from the loss by certain livestock operators and ranchers of the use of lands that are now in Federal ownership and that they have long been accustomed to using are outweighed by the benefits to the public interests that are to be derived from the elimination of a "checkerboard" pattern of ownership and the increased facility of control and management of the lands. In considering applications for exchanges under section 8 (b), the Government is in a similar position to that of a private landowner who may have extensive landholdings and who has permitted adjoining landowners to use his lands free for such time as he has had no other use for them. In such case the landowner's right to sell or otherwise dispose of the lands could not be qualified or limited by the fact that there had been such suffered use.

11. The requirement of section 2, paragraph (g) of the Federal Range Code that land having dependency by use shall lose such attribute if the land is not offered as base property in an application for a grazing license or permit filed before June 28, 1938, is not unreasonable and is a regulatory provision that does not constitute an abuse by the Secretary of the Interior of his authority to administer the Taylor Grazing Act.

Title.

12. The laws of the United States alone control the disposition of title to its lands and the States are powerless to place any limitations or restrictions on that control. *United States v. Oregon*, 295 U. S. 1, cited and applied.

Trespass.

13. Establishment and maintenance of a fence enclosing both public and private land and obstructing the use of land withdrawn for a stock driveway is in violation of law against the enclosure of public land and prior use of the public land so enclosed was not by sufferance but in violation of law.

14. The occupancy of the public lands for the construction of a pipe line before approval of the pipe line right-of-way application constitutes a trespass. Rental for the entire right-of-way accrues from date of initial entry and the Secretary may impose appropriate conditions to the granting of the application which will indemnify the U. S.

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Pueblos.

See *Indians and Indian Lands.*

Puerto Rico.

Leave of Insular Employees.

1. Authority for granting leaves of absence to persons employed in the Government of Puerto Rico is contained in Civil Service Rule XXXIX, promulgated by the Puerto Rico Civil Service Commission under the provisions of section 10 (II) of an act passed by the Puerto Rico legislature on May 11, 1931. Since the supreme executive power of Puerto Rico is vested by its Organic Act in the Governor, applications for leave by a former officer of the Government of Puerto Rico should be presented for appropriate consideration by the Governor.....

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2. The granting of vacation leave under Rule XXXIX is discretionary with the officers in whom it is vested. It is not an inherent right of an employee. Such leave may be earned at the rate of two and one-half days (Sundays and legal holidays included) for each month of employment under the Insular Government. An employee may postpone the taking of the leave and allow it to accumulate.....

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Bond Issue; Delinquent Taxes.

3. The proposed issuance of certain bonds under Act No. 22 of the Second Special Session of the Fourteenth Legislature of Puerto Rico, approved June 18, 1939, probably violates the equal protection and uniformity of taxation requirements of the Organic Act of Puerto Rico, since it remits all delinquent property taxes, up to \$400, for the fiscal years preceding 1938-39, but makes no provision for refunding the taxes collected for those years.....

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4. While the invalidity of a portion of a statute will not necessarily invalidate other portions thereof which are separable from the invalid part, such is not true in the case of the present statute; the invalidity of a portion of which has the result of frustrating the cardinal purposes for which the bonds are to be issued.....

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5. Despite the fact that under Act No. 22 the delinquent taxes are declared by the statute to be canceled prior to the time of possible flotation of the bond issue authorized thereby, a liberal view would entail the conclusion that although such action may be illegal it could not have the effect of precluding the issuance of the bonds, but at most would have the effect of continuing the lien of the delinquent taxes until such time as the bond proceeds could be obtained.....

155

6. The Legislature of Puerto Rico in an-acting legislation not only providing for the remission of delinquent taxes up to \$400, but also providing for the contracting of an Insular loan to compensate the municipalities for taxes lost to them because of the contem-

Puerto Rico—Continued.

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Bond Issue; Delinquent Taxes—Con.

plated remission, no doubt acted so as not to imperil the payment of outstanding municipal commitments against revenues appropriated in past municipal budgets. Otherwise, the tax remission features of Act No. 22 would quite probably have violated the prohibition of the Organic Act against impairment of contractual obligations, because of the numerous outstanding and unpaid claims against the general funds of the municipalities existing at the time of the enactment of Act No. 22 and still remaining unpaid.....

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7. Commitments cannot be made beyond amounts appropriated in the budgets, and delinquent taxes and penalties and interest, if collected and not necessary to liquidate commitments of prior years, can only be counted upon as cash surpluses allocable to separate new supplementary budgets to be formed for the special purpose of disposing of such surpluses.....

155

Bond Issue; Deposit of Security by Paying Agents.

8. Banks acting as paying agents for the payment of principal and interest due on bonds issued by municipalities of Puerto Rico are not "depositories of the government of Porto Rico" within the meaning of section 15 of the Organic Act, requiring the deposit of security with the insular treasurer, since other provisions of the Organic Act reflect an intention to distinguish between the fiscal affairs of the insular government and those of municipalities.....

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Radio Broadcasting.

See *Information, Dissemination of.*

Reclamation.

See *Contracts; Damage Claims; Indians and Indian Lands*, subheading, *Irrigation-Projects; Lien; Withdrawal of Public Lands*, subsection, *Reclamation.*

Reclamation Homesteads.

See *Homestead*, subheading *Reclamation.*

Reorganization Plan No. IV.

See *Soil and Moisture Conservation Activities.*

Res Judicata.

See *Practice and Rules of Practice.*

Rights-of-Way.

See, also, *National Parks.*

General.

1. The act of August 21, 1935 (47 Stat. 674), impliedly repealed all preexisting legislation

Rights-of-Way—Continued.**General—Continued.**

which granted, by its terms, rights-of-way over the public lands for the transportation of oil. The granting of such rights-of-way is a matter within the discretion of the Secretary of the Interior.....

79

Easements over Sixteenth Section lands.

2. The acquisition of fee simple title to lands in sixteenth sections in the State of Mississippi is not authorized by its constitution of 1890. Right-of-way easements over sixteenth sections in Mississippi may be acquired by the Government, pursuant to the act of May 18, 1938 (52 Stat. 407), as amended by section 3 of the act of June 8, 1940 (54 Stat. 249, 250).....

434

Pipe Lines; Transmission Lines, charges for.

3. The Secretary may make a reasonable charge (a) for rights-of-way for oil pipe lines over the public land granted pursuant to section 28 of the act of February 25, 1920 (41 Stat. 437, 449), as amended, but not (b) for right-of-way for transmission line under section 5 (d) of the act of December 21, 1928 (45 Stat. 1057).....

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Trespass.

4. The occupancy of the public lands for the construction of a pipe line before approval of the pipe line right-of-way application constitutes a trespass. Rental for the entire right-of-way accrues from date of initial entry and the Secretary may impose appropriate conditions to the granting of the application which will indemnify the United States.....

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Royalty Payments.

See *Oil and Gas Lands; Indians and Indian Lands*, subheading, *Oil and Gas Leases*.

Rules of Practice.

See *Practice*. And see Table, p. XXXVI.

San Carlos Irrigation Project.

See *Indians and Indian Lands*, subheading *Irrigation Projects*.

School Land Grants.

See, also, *Mineral Lands; Oil and Gas Lands*.

Authority to Determine Mineral Character.

1. This Department has jurisdiction to make conclusive determinations respecting the known mineral character of school lands at the effective date of the grant. Such determinations, however, will be made only pursuant to the function conferred on the Secretary of the Interior by the act of June

School Land Grants—Continued. Page**Authority to Determine Mineral Character—Continued.**

21, 1934 (48 Stat. 1185, 43 U. S. C. sec. 871a), or to his functions (a) of determining whether the title to any lands which clearly were excepted from the act of 1927 had passed or failed to pass under the original school grant where sufficient evidence had been shown to rebut the presumption that the title had passed under the original school land grant, or (b) of passing on any dispute as to whether or not any of the circumstances enumerated in the act of 1927 actually existed or were sufficient to prevent the title, which otherwise would pass under that act, from passing thereunder. A request that this Department determine the known mineral character of the land, unrelated to any of the above-enumerated functions of this Department, is merely a request for an advisory opinion which this Department will not usually render. A conclusive determination of the question may be made by this Department either upon application of the State under the act of 1934 or in those other instances above set forth.....

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California, Oil Lands.

2. While, without more, the drilling of two dry holes on a section of public land would be persuasive evidence of the absence of oil and gas to the depth probed, circumstances showing that such drilling did not produce fair test wells dispel such persuasion. Drilling of two holes by leading oil companies strongly indicates the opinion of experienced oil men as to the value of the section for oil.....

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Determination of Mineral Character.

3. Mere allegations to the effect that the land granted for school purposes was mineral in character and that the title therefore did not pass to the State, unsupported by substantial evidence rebutting the presumption that the title had passed to the State as nonmineral land, will not warrant this Department, upon an application for an oil and gas lease, to entertain proceedings for a determination of the mineral character of the land. School lands which, because of their mineral character, could not pass under the original school grants, nevertheless passed to the State by virtue of the act of January 25, 1927, as amended (44 Stat. 1026, 47 Stat. 140, 43 U. S. C. sec. 870), provided certain circumstances enumerated in that act were not present. Therefore, even if there were sufficient evidence offered to rebut the presumption as to the nonmineral character of the land, this Department will not, on an application for an oil and gas lease, determine the mineral character of the land unless the existence could be shown of any of those circumstances.....

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School Land Grants—Continued. Page

Presumption that Title Passed to State.
 4. There is a presumption, which exists until the contrary is clearly shown, that land granted to a State for school purposes was of the character contemplated by the grant insofar as its then mineral or non-mineral character was concerned, and that therefore the title to a school section identified by survey has passed to the State.----- 348

Stock-Raising Homestead.

See *Homestead*, subheading, *Stock Raising*.

Secretary of the Interior, Authority.

See, also, *Alaska, Aboriginal Fishing Rights; Homestead*, subheading, *Stock Raising; School Land Grants*, subheading, *Authority to Determine Mineral Character*.

Administrative Review of Price-Fixing Decisions

1. It would be proper as a matter of law for the Secretary to review the docket [Bituminous Coal Division] to determine whether the conclusions of the Director conform with the law and general administrative policy. The determination of the relative advantages and disadvantages of review by appeal over other methods of review is an administrative function for the discretion of the Secretary.----- 428

Delegation.

2. Unless "personal" action by the Secretary or Acting Secretary is specifically required, the Secretary by appropriate order, may prescribe and delegate to the Under Secretary, the First Assistant Secretary and the Assistant Secretary the authority to perform any of his duties. So long as such delegated authority remains unrevoked, any action done pursuant thereto is of as much effect as though done personally by the Secretary or Acting Secretary.----- 262

Dissemination of Information.

3. The Department and the Secretary of the Interior have authority to disseminate information generally to the public except that (1) a "publicity expert" may not be employed unless specifically authorized by Congress, and (2) any attempt to stir up private citizens to influence Congressional legislation is prohibited. Except as so limited, any method or means which, as a matter of administrative discretion, is determined to be feasible, desirable, or economical may be used to disseminate information.----- 82

Exchange Leases

4. The Secretary of the Interior has full discretion to refuse to issue under section 2(a) of the act of August 21, 1935, exchange

Secretary of the Interior, Authority—Continued. Page

Exchange Leases—Continued.

leases for lands within one mile of a Naval Petroleum Reserve..... 520

Exchange of Timber on Park Lands.

5. Whether the Secretary of the Interior is authorized under section 3 of the act of August 25, 1916, to exchange timber on park lands within the Olympic National Park for privately owned cut-over lands within the boundaries of said park. *Held*, section 3 authorizes the exchange of timber on park lands for privately owned cut-over lands where the cutting of the timber is found by the Secretary to be required for the purposes set forth in said section.----- 444

Indians and Indian Lands.

6. The authority of the Secretary of the Interior to approve or disapprove allotment selections under the Fort Peck Allotment Act of April 1, 1914, is not broad enough to permit him to decline to approve allotment selections made under the instructions of the Interior Department and in pursuance of a course of allotment established on the reservation because of reasons not related to the merits of the individual selections but of land policy.----- 16

7. The authority in the Secretary of the Interior to allot lands to children of the Fort Peck Indian Reservation under the act of April 1, 1914 (38 Stat. 593), is a continuing one in view of the rejection by the Fort Peck Indians of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), prohibiting allotments, and in view of the act of June 15, 1935 (49 Stat. 378), providing that laws affecting Indian reservations which exclude themselves from the Indian Reorganization Act shall be deemed to have been continuously effective on such reservations.----- 16

8. The Secretary of the Interior is without authority to enter into an agreement with owners of land bordering on the Big Wind River, Wyoming, by the terms of which agreement the common boundary lines of lots or parcels of land adjoining the river would be fixed, where the land covered would include fee patented lands, allotted and tribal lands of the Shoshone Indians and lands ceded by the Shoshone Indians to the United States. The Secretary of the Interior may not dispose of Indian tribal lands except by express statutory authority and is bound by the limitations imposed by the act of Congress approved March 3, 1905 (33 Stat. 1016), as amended August 21, 1916 (39 Stat. 519).-----

Issuance of Oil and Gas Lease.

9. The transmittal of a lease form [oil and gas] for signature by the applicant does not,

Secretary of the Interior, Authority—Continued.

Withdrawal of Public Lands—Con.

heads of the Executive Departments of the Government. Since the administration of the public lands is vested in the Secretary of the Interior, the powers of the President relating to the withdrawal of the public lands may be exercised by the Secretary of the Interior.....

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Seminole Indian Reservation.

See *Indians and Indian Lands*.

Shoshone Indians.

See *Indians and Indian Lands*, subheading *Boundaries*.

Soil and Moisture Conservation Activities.

Authority of Secretary of Agriculture.

1. The authority of the Secretary of Agriculture, under the Soil Conservation and Domestic Allotment Act of April 27, 1935 (49 Stat. 163, as amended, 16 U. S. C. ch. 3B), to carry on soil and moisture conservation activities was almost plenary, in that he could carry on such activities on any land regardless of ownership, subject only to the condition that proper safeguards to protect the work and to preserve the beneficial effect of the operations were insured and, in the case of lands owned by the United States, subject to the condition that the activities to be performed thereon should be conducted in cooperation with the agency having jurisdiction thereover. Also, there is nothing in the act which indicates that each project thereunder must be confined entirely either to private lands or public lands, or that any single project must benefit solely either private lands or public lands.....

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Authority of the Secretary of the Interior.

2. In addition to the authority given the Secretary of Agriculture by the Soil Conservation and Domestic Allotment Act, which authority, so far as lands under the jurisdiction of the Secretary of the Interior are concerned, has now been transferred to the latter by Reorganization Plan No. IV, the Secretary of the Interior has similar authority under section 2 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269, as amended, 43 U. S. C. ch. 8A), to carry on soil and moisture conservation activities for the benefit of lands that are subject to the provisions of that act, and broad authority to carry on such activities on other lands under his jurisdiction. Under these several sources of authority the Secretary of the Interior may determine the lands under his jurisdiction that are in need of soil and

Soil and Moisture Conservation Activities—Continued.

Authority of the Secretary of the Interior—Continued.

moisture conservation work, and may initiate and carry on such work, regardless of whether the work is to be done on private or public lands, so long as the work benefits lands under his jurisdiction. Reorganization Plan No. IV does not nullify the authority vested in the Secretary of the Interior by section 601 of the Economy Act of June 30, 1932 (47 Stat. 417, 31 U. S. C. sec. 686), to place orders with the Soil Conservation Service of the Department of Agriculture for the performance of soil and moisture conservation work on a reimbursable basis on lands under the jurisdiction of the Department of the Interior.....

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State Jurisdiction over Indians.

See *Indians and Indian Lands*, subheading *State Jurisdiction*.

State Sales or Use Taxes.

See *Bureau of Mines*, subheading, *Cooperative Agreement*.

State Taxation.

See *Indians*, subheading, *Taxability; Indians and Indian Lands, Taxability*.

Statutory Construction.

See, also, *Indians and Indian Lands, Taxability; Mining Claim*, subheading *National Forests; Virgin Islands, Admission of Aliens as Defense Workers*.

1. The act of August 21, 1935 (47 Stat. 674), impliedly repealed all preexisting legislation which granted, by its terms, rights of way over the public lands for the transportation of oil. The granting of such rights of way is a matter within the discretion of the Secretary of the Interior.....

79

2. An administrative interpretation of a statute, embodied in a long-continued practice by Government agencies, known to and acquiesced in by Congress, has the force and effect of law. Enactment of appropriations for functions of which Congress has been made cognizant constitutes legislative approval of such functions.....

82

3. In view of the clear unambiguous language of section 8 of the act of June 26, 1936 (49 Stat. 1968, 25 U. S. C. sec. 508), all Indians residing in Osage County, Oklahoma, and all lands situated therein must be held to be excluded from the provisions of that act.....

380

4. Banks acting as paying agents for the payment of principal and interest due on bonds issued by municipalities of Puerto Rico are not "depositories of the government

Statutory Construction—Con. Page

of Porto Rico" within the meaning of section 15 of the Organic Act, requiring the deposit of security with the insular treasurer, since other provisions of the Organic Act reflect an intention to distinguish between the fiscal affairs of the insular government and those of municipalities.....

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5. Section 19 (a) of the Philippine Independence Act (53 Stat. 1232, 48 U. S. C. 1248) provides that the proceeds of excise taxes collected on coconut oil shipped to the United States from the Philippines shall be paid into the treasury of the Philippines, "to be used for the purpose of meeting new or additional expenditures which will be necessary in adjusting Philippine economy to a position independent of trade preferences in the United States and in preparing the Philippines for the assumption of the responsibilities of an independent state." The word "and" is to be construed in the disjunctive and the proceeds therefore may be used to strengthen the Philippine Constabulary and for the construction of an airport upon a determination that such purposes will serve "in preparing the Philippines for the assumption of the responsibilities of an independent state".....

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6. While there may be some doubt as to whether authority exists under the act of October 16, 1941 (55 Stat. 742), to permit the diversion and appropriation of some of the waters of the San Carlos Irrigation Project for the use of a corporation ordered to produce copper, authority is conferred by the act of June 3, 1916 (39 Stat. 166, 213), as reaffirmed and extended by section 9 of the Selective Training and Service Act of September 16, 1940 (54 Stat. 885, 892). Condemnation is also available as a means of acquiring the needed water supply under 40 U. S. C. secs. 257 and 258 and 50 U. S. C. sec. 171.....

400

7. While the invalidity of a portion of a statute will not necessarily invalidate other portions thereof which are separable from the invalid part, such is not true in the case of the present statute, the invalidity of a portion of which has the result of frustrating the cardinal purposes for which the bonds are to be issued.....

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Taylor Grazing Act and Lands.

See also *Grazing and Grazing Lands; Homestead, subsection Stock-Raising; Public Lands; Soil and Moisture Conservation Activities; Withdrawal of Public Lands.*

Appeals.

1. The contention by an appellant from an award to the appellee of a grazing lease under section 15 of the amended Taylor Grazing Act that the award is not necessary in order to permit the appellee to make proper use of

Taylor Grazing Act and Lands—Page Continued.

Appeals—Continued.

contiguous land, though true, constitutes no reason to change the award where the appellee would have equal reason for making the same contention against the award to the appellant. In an appeal from the award of a grazing lease under section 15 of the amended Taylor Grazing Act, appellant cannot complain of injury in depriving him of possession of land to which he has no exclusive right of possession.....

30

2. If, upon rejection of an application for a grazing license and an appeal from such ruling, the regional grazier then issues a "temporary license" for the number of livestock and period of time originally applied for, such appeal becomes moot, and the examiner should be advised of this subsequent action in order that he may note the abatement of the appeal.....

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Districts.

3. The determination of the boundaries of grazing districts, and additions to and modifications of such districts, are matters committed wholly to the discretion of the Secretary of the Interior by section 1 of the Taylor Grazing Act, and no appeal will lie from recommendations for such determinations.....

8

4. A grazing license, being purely temporary in its nature, cannot constitute a bar to the authority of the Secretary of the Interior to adjust the boundaries of grazing districts, regardless of the fact that such adjustment may prevent the renewal of a license to one whose livestock unit is pledged as security for a loan.....

8

Exchanges.

5. In considering applications for exchanges of privately owned lands for public lands under the provisions of section 8 (b) of the Taylor Grazing Act, such exchanges may be consummated when public interests will be benefited thereby, and individual cases of hardship or dissatisfaction on the part of persons who have used the public lands selected by the applicants cannot be allowed to sway the Department in reaching a decision. The hardships resulting in certain instances from the loss by certain livestock operators and ranchers of the use of lands that are now in Federal ownership and that they have long been accustomed to using are outweighed by the benefits to the public interests that are to be derived from the elimination of a "checkerboard" pattern of ownership and the increased facility of control and management of the lands. In considering applications for exchanges under section 8 (b), the Government is in a similar position to that of a private landowner who

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Exchanges—Continued.

may have extensive landholdings and who has permitted adjoining landowners to use his lands free for such time as he has had no other use for them. In such case the landowner's right to sell or otherwise dispose of the lands could not be qualified or limited by the fact that there had been such suffered use.....

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Investigations.

6. Reports of special agents involving controversies under the Taylor Grazing Act are confidential and not subject to inspection by claimants, attorneys, or the public.....

8

Leases under Section 15.

7. The contention by an appellant from an award to the appellee of a grazing lease under section 15 of the amended Taylor Grazing Act that the award is not necessary in order to permit the appellee to make proper use of contiguous land, though true, constitutes no reason to change the award where the appellee would have equal reason for making the same contention against the award to the appellant. In an appeal from the award of a grazing lease under section 15 of the amended Taylor Grazing Act, appellant cannot complain of injury in depriving him of possession of land to which he has no exclusive right of possession.....

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Licenses and Permits.

8. The requirement of section 2, paragraph (g) of the Federal Range Code that land having dependency by use shall lose such attribute if the land is not offered as base property in an application for a grazing license or permit filed before June 28, 1938, is not unreasonable and is a regulatory provision that does not constitute an abuse by the Secretary of the Interior of his authority to administer the Taylor Grazing Act. If, upon rejection of an application for a grazing license and an appeal from such ruling, the regional grazer then issues a "temporary license" for the number of livestock and period of time originally applied for, such appeal becomes moot, and the examiner should be advised of this subsequent action in order that he may note the abatement of the appeal.....

113

9. A grazing license, being purely temporary in its nature, cannot constitute a bar to the authority of the Secretary of the Interior to adjust the boundaries of grazing districts, regardless of the fact that such adjustment may prevent the renewal of a license to one whose livestock unit is pledged as security for a loan.....

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Reports.

See *Investigations.*

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Trespass on Public Lands.

10. Establishment and maintenance of a fence enclosing both public and private land and obstructing the use of land withdrawn for a stock driveway is in violation of law against the enclosure of public land and prior use of the public land so enclosed was not by sufferance but in violation of law.....

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Taxes, Federal and State.

See *Bureau of Mines, Taxability of Non-Government Agency; Indians*, subheading, *Taxability; Philippine Islands*, subheading, *Excise Taxes.*

Territories.

See name of Territory concerned.

Title, Suit to Quiet.

See *Public Lands*, subheading, *Right of the United States to Maintain Suit to Quiet Title.*

Tlingit and Haida Indians of Alaska.

See *Alaska, Aboriginal Fishing Rights.*

Transmission Lines.

See *Rights-of-Way.*

Trap Sites.

See *Alaska.*

Veterans' Preference.

See *Homestead*, subheading *Veterans' Preference.*

Virgin Islands.

Admission of Aliens as Defense Workers.

1. The authority conferred upon the Governor of the Virgin Islands by Executive Order No. 8430 of June 5, 1940, to waive passport and visa requirements in cases of emergency for nonimmigrant aliens applying for admission at a port of entry of the Virgin Islands, is applicable to the situation of nonimmigrant aliens coming to the Virgin Islands from other parts of the West Indies to engage in work on defense construction projects.

The applicable provisions of Executive Order No. 8430 are (a) legally valid and (b) currently in force.

The authority of the Governor of the Virgin Islands, under the Executive order cited, extends to (a) cases where the visitor intends to remain for the duration of the necessity, and (b) cases where the visitor has a pending application for an immigration visa and has a conditional intent to secure immigrant status if permitted to do so.....

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Virgin Islands—Continued.

Employment of Aliens by Government.

2. The employment of an alien pilot by the Harbor Department of the Municipality of St. Thomas and St. John does not contravene section 38 of the Organic Act of the Virgin Islands (49 Stat. 1817, 48 U. S. C. sec. 1406j), requiring that "all officials of the Government of the Virgin Islands * * * be citizens of the United States," since a pilot is merely an employee and not an "official," the tenure, duration, duties and salary of the position not being fixed by law.....

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War Powers of President.

See *Indians and Indian Lands*, subheading *Irrigation Projects*.

Water Rights.

See *Indians and Indian Lands*, subheading *Irrigation Projects; Lien*.

Wheeler-Howard Act.

See *Indians; Indians and Indian Lands; Indian Tribes*.

Wind River Reservation, Wyoming.

See *Indians and Indian Lands*, subheading *Boundaries*.

Withdrawal of Public Lands.

See, also, *Homestead; Mineral Lands*.

General.

1. The word "unappropriated" in Executive order of withdrawal (No. 6910) of November 26, 1934, can hardly be applied to land other than that which has not been lawfully appropriated and a homestead entry allowed on misrepresentation of the entryman that he was not the proprietor of more than 160 acres can in no sense be considered a lawful appropriation.....

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2. The exception in the withdrawal of November 26, 1934, of "existing valid rights" cannot reasonably be held to apply to entries void *ab initio*.....

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3. Where a homestead entryman was legally disqualified from acquiring any right under the homestead law, he could not, upon removal of his disqualifications, acquire an interest in lands which had, in the interim, been withdrawn from entry by a withdrawal order.....

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Exercise of President's Power through Heads of Executive Departments.

4. The President is authorized by the act of June 25, 1910 (36 Stat. 847, 43 U. S. C. 141-3), as amended by the act of August 24, 1912 (37 Stat. 497), to withdraw public lands of the United States temporarily in aid of legislation or classification or other public purposes

Withdrawal of Public Lands—Con. Page

Exercise of President's Power through Heads of Executive Departments—Continued.

and has inherent power, apart from these statutes, to make permanent reservations of public lands for Federal uses. The President, with certain exceptions, may exercise his powers through the various heads of the Executive Departments of the Government. Since the administration of the public lands is vested in the Secretary of the Interior, the powers of the President relating to the withdrawal of the public lands may be exercised by the Secretary of the Interior.....

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Reclamation.

5. Departmental order of February 2, 1907, withdrawing lands from settlement and entry for the use and benefit of the Chemehuevi Indians, was in confirmation of the Indians' use and occupancy rights therein acquired by long residence, and reclamation withdrawal orders in 1902 and 1903 covering such lands did not extinguish the Indians' rights nor deprive them of their right to compensation for the full value of the lands to be flooded in connection with Parker Dam.....

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Words and Phrases.

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