individual the establishment of his claim at a hearing. The evident purpose of the act of 1898 was to aid a speedy adjustment of conflicts between individuals and the railway company and to put an end to the expense and delay incident to the ordinary contests. The company can not therefore appear as a contestant in this matter. On the other hand, the Department should not knowingly permit itself to be imposed upon nor should it require of the company a relinquishment of land to which there was in fact no real claim on January 1, 1898. Notwithstanding the approval of the list the Department has the right to inquire whether the showing on which the tract was listed represented the true condition or status of the tract involved. The showing filed by the railway company in the case under consideration tends to discredit the showing filed by Dalglish and upon which this tract was listed for relinquishment, and in the opinion of this Department the railway company should be advised that if it will serve the same upon Dalglish the matter will be taken up by your office for consideration, after the usual length of time to be allowed Dalglish to make response thereto, when, if upon the entire record as made in this way your office believes the showing filed in opposition sufficient to discredit the showing filed by Dalglish, you will, by hearing or otherwise, investigate the matter in order to arrive at the true condition of the land on January 1, 1898, the nature of the claim then being asserted to the land by Dalglish, and whether his subsequent actions with relation thereto tend to show that he has since maintained the claim or abandoned the same.

ARID LAND—WITHDRAWAL—SETTLERS—ACT OF JUNE 17, 1902.

OPINION.

The power conferred upon the Secretary of the Interior by the act of June 17, 1902, to make the necessary withdrawals to carry into effect the provisions of the act, and to acquire rights and property for the purpose contemplated, implies the right to appropriate for irrigation purposes public lands to which the United States has the full legal and equitable title, but the inchoate rights acquired by a *bona fide* settlement made in pursuance of and in strict compliance with the public land laws should not be arbitrarily taken without compensation. In determining the compensation it should be considered with reference to the loss sustained by the settler in depriving him of his inchoate right by the arbitrary taking of lands which he had cultivated, improved and resided upon under authority of law with a view to the acquisition of the title.

The Secretary of the Interior has no authority under the provisions of the seventh section of the act of June 17, 1902, to compensate settlers upon lands within the limits of a withdrawal made in connection with an irrigation project unless they have in good faith acquired an inchoate right to the land by complying with the requirements of law up to the date of the withdrawal and have such a claim as ought to be respected by the United States.

Assistant Attorney-General Campbell to the Secretary of the Interior, October 12, 1905. (E. F. B.)

I am in receipt by reference of a letter from the Director of the Geological Survey requesting to be advised whether persons occupying and improving public lands but who have not taken any steps to acquire title to the same under the public land laws have claims of such character as are properly subject to acquisition by purchase or condemnation under the terms of the Reclamation Act (32 Stat., 388). The letter has been referred to me for opinion upon the question submitted.

Reference is made in the letter to two particular claims: First, the claim of one Pemberton, who has occupied and cultivated a tract of land within the proposed reservoir line for fifteen years, having placed thereon substantial improvements, but who has taken no steps to acquire title to the same under any of the general land laws. The other claim is that of Sulton Bros. who purchased through an intermediate grantor the improvements of Yancy Moffatt, a settler, who improved a tract of land within the proposed area of the reservoir, and filed a preemption declaratory statement for the tract July 11, 1885, but who has taken no further steps to complete his filing, as required by the provisions of the preemption act.

It is presumed that the inquiry of the Director was prompted by the following expression in the letter of the Department of January 20, 1905, relative to lands in the Truckee-Carson project:

> As the legal and equitable title is in the United States to all public lands to which a mere inchoate right has attached, there is no outstanding legal or equitable title in such lands to purchase, but, the improvements of the settlers made upon such lands under authority of the public land laws is a property right that can not be taken without compensation, which probably may include the enhanced value of the land by reason of the settler's cultivation and improvement.

That expression was made with reference to the authority conferred by the 7th section of the act of June 17, 1902, upon the Secretary of the Interior to acquire rights or property by purchase or by condemnation under judicial process and to pay for the same from the Reclamation Fund.

A mere entry of public lands by a qualified settler with a view to acquiring title under the general land laws confers only an inchoate right which, although it may be asserted against every one who has not a prior right, is no bar to the appropriation of such land by the United States. Ordinarily such appropriation can only be exercised by Congress acting directly, but the power conferred upon the Secretary of the Interior by the act of June 17, 1902, to make the necessary withdrawals to carry into effect the provisions of the act

and to acquire rights and property for the purpose contemplated, necessarily implies the right to appropriate for irrigation purposes public lands to which the United States has the full legal and equitable title.

It follows from this that a mere withdrawal of lands, for use in the construction and operation of an irrigation project, under the provisions of that act, is of itself an appropriation of all lands within the limits of such withdrawal except lands to which a vested right or interest had attached at the date of the withdrawal so as to deprive Congress of the power of disposition and control over the same. (Instructions, 32 L. D., 387. Board of Control *v.* Torrence, Ib. 472.)

So that the United States may exercise ownership and control over all lands covered by such withdrawal, irrespective of the occupancy and improvement of such lands by settlers who have not acquired a vested right thereto, although they may have made filings and entries and may have complied in all respects with the laws under which their settlements were made. In such cases there would be no property or right necessary to be acquired by the United States, as a condition to its right to appropriate the land, but it does not follow that a settler who had in all respects complied with the law up to the date of the withdrawal should be arbitrarily deprived of the fruits of his labor without just compensation.

It is more than probable that the United States may not have any use for the improvements of the settler in the construction and operation of any project, and would therefore have no object in acquiring them. Hence the compensation to the settler should not be measured by that alone but should be considered with reference to the loss sustained by the settler in depriving him of his inchoate right by the arbitrary taking of lands which he had cultivated, improved and resided upon under authority of law with a view to the acquisition of the title.

The power conferred upon the Secretary of the Interior by the 7th section of the act to acquire "rights" or property, and to pay from the reclamation fund the sum that may be required for that purpose evidently contemplated that the inchoate right acquired by a *bona fide* settler upon public lands made in pursuance of and maintained in strict compliance with the law should not be destroyed and arbitrarily taken without compensation. It is not a purchase of the land that is required, because the settler has no title to sell, nor of his improvements, because the United States may have no object in acquiring them, but it is the acquisition of the right that a *bona fide* settler had earned by complying with the law.

In the cases referred to the parties will be deprived of no valid rights under the general land laws. In Pemberton's case, he is a mere squatter who had forfeited whatever right he acquired and had

not by any act indicated a purpose to acquire title to the land for a home. He had not in any respect complied with the law and the taking of the land by the United States would deprive him of no right either legal or equitable acquired under the general land laws. Whatever improvements he has may be removed if it can be done without impairing the right of the United States.

In the case of Sulton Bros., the sale of the improvements by the settler was of itself an abandonment of the filing independently of his failure to perfect the same within the period prescribed by the statute. The statutory life of his filing had long since expired and whatever rights he acquired thereunder were by the express terms of the statute forfeited. While a settler may be permitted to complete his filing and acquire title to the land after the time for submitting proof and making payments fixed by statute, it is merely by grace of the government and not from any right that can be asserted by the settler in virtue of the inchoate right conferred by the statute.

My opinion is that the Secretary of the Interior has no authority under the 7th section of the act of June 17, 1902, to compensate settlers upon lands within the limits of the withdrawal except such settlers who have in good faith acquired an inchoate right by complying with the law up to the date of the withdrawal and have such a claim as ought to be respected by the United States. It is the right that the settler has been deprived of by the government, that is to be compensated for and not merely the intrinsic value of his improvements. A settler who has not complied with the law has no such right, and as to such settlers the improvements may be removed if in doing so it will not impair the property of the United States.

Approved:

E. A. HITCHCOCK, *Secretary.*

ARID LAND—WITHDRAWALS—ACT OF JUNE 17, 1902.

INSTRUCTIONS.

Withdrawals under the provisions of the act of June 17, 1902, in connection with irrigation projects, will be made as follows:

1. When a site has been selected with a view to making an examination and survey for the purpose of determining whether the construction of an irrigation project upon such site is practicable and advisable, a withdrawal will immediately be made of all lands believed to be susceptible of irrigation from such contemplated works, in accordance with the second form of withdrawal provided for by the third section of the act of June 17, 1902, and at the same time a preliminary withdrawal will be made of lands that may be needed for use in the construction and operation of the works, which will reserve such lands from entry of every character but will not affect entries previously made.