FORM SA-1B

MEMORANDUM State of Alaska

TO: Wendell P. Miller
Airport Engineer

DATE : March 16, 1970

FROM: Margery McCormick
Land Acquisition Officer

SUBJECT: Sections 16, 33 and 36 - Lands

Eva Fallon raised a question as to the status of Sections 16 and 36 in Alaska in relationship to the possibility of our needing to acquire for the proposed Galbraith Airport, part or all of unsurveyed Sections 16 and 36, Township 11 South, Range 11 East, Umiat Meridian.

The Lands Acquisition Officer discussed this with Alfred Steger, Adjudicator, BLM and with Kenneth Hallback, Chief of Lands Section, and John Frieberg, Land Selection Officer, State Division of Lands.

The Act of March 4, 1915, (38 Stat. 1214, 48 U.S.C.A. 353) provided that when the public lands of the Territory of Alaska were surveyed under direction of the Government of the United States, Sections numbered 16 and 36 in each township in said territory were reserved from sale or settlement for the support of common schools in the Territory of Alaska; and Section 33 in each township in the Tanana Valley between parallels sixty-four and sixty-five north latitude and between the one hundred and forty-fifth and the one hundred and fifty-second degrees of west longitude (meridian of Greenwich) were reserved from sale or settlement for the support of a Territorial Agricultural College and School of Mines established by the Legislature of Alaska. The Territory of Alaska administered the surveyed Sections 16 and 36 and the above designated Section 33's. These sections were held in trust during territorial days for the future State of Alaska.

At the time of Statehood, the State applied for all surveyed Sections 16 and 36. Practically all of these were patented to the State. There are some exceptions that involved prior claims, which either were not patented to the State, or where such patent is pending.

If we should need to acquire an interest in a surveyed Section 16, 33 or 36 patented to the State of Alaska, we could obtain an ILMT by paying a fair market rental or we could secure title by paying a fair market value for the land. In order to secure title, the area desired must be surveyed according to ADL standards. Due to previous court decisions, the Division of Lands policy is that they must obtain revenue for use of or sale of these lands.

We are thus able to secure any unappropriated areas that would be within Sections 16, 33 or 36, provided they were not surveyed at the time of Statehood.

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quarter section of land, in each of the counties or parishes, in trust for such counties or parishes, respectively, for the establishment of seats of justice therein; but the proceeds of the sale of each of such quarter section shall be appropriated for the purpose of erecting public buildings in the county or parish for which it is located, after deducting therefrom the amount originally paid for the same. And the seat of justice for such counties or parishes, respectively, shall be fixed previously to a sale of the adjoining lands within the county or parish for which the same is located.

(R.S. § 2286.)

Historical Note

Codification. R.S. 2286 derived from Act May 26, 1824, c. 169, § 1, 4 Stat. 50.

Cross References

Reservations for county seats in Oklahoma, see section 1099 of this title.

Library References

Public Lands ⇐64.
C.J.S. Public Lands §§ 67 to 71.

Notes of Decisions

1. Application

This section was never in force in Oregon.
Whitlow v. Reese, 1873, 4 Or. 335.

§ 859. Fee simple to pass in all grants

Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Secretary of the Interior or such officer as he may designate, under the seal of his office, either as originals or copies of the originals or records shall be regarded as conveying the fee-simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress, and intended to be granted thereby, but where lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

(R.S. § 2449; 1946 Reorg.Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

Historical Note

Codification. R.S. derived from Acts Aug. 3, 1854, c. 201, 10 Stat. 346; Mar. 3, 1875, c. 139, § 8, 18 Stat. 475.

Transfer of Functions. For transfer of functions of the other officers, employees, and agencies of the Department of the Interior, with certain exceptions, to the Secretary of the Interior, with power to delegate, see Reorg.Plan No. 3 of 1950, §§ 1, 2, eff. May

§ 851. Deficiencies in grants to State by reason of settlements, etc., on designated sections generally

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

(R.S. § 2275; Feb. 28, 1891, c. 384, 26 Stat. 796; Aug. 27, 1958, Pub.L. 85–771, § 1, 72 Stat. 928; June 24, 1966, Pub.L. 89–470, § 1, 80 Stat. 220.)

Historical Note

Codification. R.S. 2275 derived from Acts Feb. 26, 1859, c. 58, 11 Stat. 385; June 22, 1874, c. 422, 18 Stat. 202.

1966 Amendment. Pub.L. 89–470 deleted "or Territory" following "State" in eight instances and substituted "before title could pass to the State" for "prior to survey" in two instances.

1958 Amendment. Pub.L. 85–771 inserted "in accordance with the provisions of section 852 of this title" and "prior to survey", wher-

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The Department's rules of practice, 43 CFR 221.98 (b), provide that an appeal to the Secretary will be subject to summary dismissal for failure to serve the notice of appeal within the time required. Inasmuch as the appellant has failed to show compliance with the requirements of the regulation, 43 CFR 221.34, even though given additional time within which to show compliance, the appeal will be summarily dismissed.[1]

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the appeal is dismissed.

EDMUND T. FRITZ,
Deputy Solicitor.

SCHOOL SECTIONS RESERVED FOR THE TERRITORY OF ALASKA BY THE ACT OF MARCH 4, 1915 (38 STAT. 1214), AS AMENDED (48 U. S. C. SEC. 353), AND LIEU SELECTIONS MADE UNDER THAT ACT

Alaska: School Lands

The act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. sec. 353), does not authorize the Territory of Alaska to lease to the Department of the Army, or an agency thereof, a school section reserved for the Territory by the act. Absent an act of Congress authorizing the Department of the Army, or an agency thereof, to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States, neither is a qualified beneficiary under the act of June 14, 1926 (44 Stat. 741), as amended by the act of June 4, 1954 (43 U. S. C. sec. 869).

Alaska: School Lands—Withdrawals and Reservations: Generally

If a school section reserved for the Territory by the act of March 4, 1915 (38 Stat. 1214), is later withdrawn or reserved for governmental or other purposes, under the lieu selection provision of the act, the Territory may select land in lieu of that withdrawn or reserved, provided that the withdrawal or reservation was made under authority of the act of June 25, 1910 (36 Stat. 847), as amended (43 U. S. C. sec. 142), or other statutory authority. It is immaterial whether the withdrawal or reservation is permanent or temporary.

[1] *Marion F. Jensen et al.*, 63 I. D. 71 (1956); *Garth L. Wilhelm et al.*, 62 I. D. 27 (1955); *Carl V. Giem et al.*, A-27299 (May 31, 1956); *Lee R. Ormiston*, A-27355 (May 14, 1956); *Everta P. Ericson*, A-27264 (March 12, 1956). These cases involved similar provisions of the Department's rules of practice prior to their revision effective May 1, 1956.

Alaska: School Lands—School Lands: Indemnity Selections

The lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), does not authorize the selection of land known to be of mineral character. A reservation of a school section by the act of March 4, 1915, *supra*, bars mining locations on the section so long as the reservation is in effect. Such a reservation, short of an act of Congress, can be extinguished only by an approved selection in lieu of the land reserved.

School Lands: Indemnity Selections

The act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), is not applicable to Alaska.

Words and Phrases

"Federal instrumentality" as used in the act of June 14, 1926, as amended (43 U. S. C. sec. 869), means only such a Federal instrumentality as is authorized by law to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States. "Otherwise appropriated" as used in the lieu selection provision of the act of March 4, 1915 (38 Stat. 1214), includes governmental withdrawals or reservations.

M–36229 FEBRUARY 4, 1957.

TO THE DIRECTOR, OFFICE OF TERRITORIES.

This is in response to your memorandum of April 6, 1956, and attachments, raising the following questions:

(*1*) May the Department of the Interior issue leases for reserved Alaska school sections or portions thereof to agencies of the Department of Defense and, if so, whether payments received for the use of such lands may be paid to the Territory under the terms of the act of 1915?

(*2*) If reserved school lands are subsequently withdrawn for permanent military installations, is the Territory entitled to lieu or indemnity selections?

(*3*) In the case of such permanent withdrawals, what steps can or should be taken to extinguish the Territory's rights to reserved school lands which may be included in the withdrawals?

It appears from a letter dated August 16, 1955, from the Land Commissioner for the Territory of Alaska, addressed to the Bureau of Land Management's Area Administrator for Area 4, Alaska, and the other correspondence, that since June 11, 1941, the Department of the Army has had structures on sec. 16, T. 14 N., R. 2 W., S.M., Alaska; that under leases issued by the Territory rental was being paid by the Department of the Army to the Territory for portions of certain school sections reserved for the Territory by the act of March 4, 1915 (38

Stat. 1214), as amended (48 U. S. C. sec. 353); and that after the Solicitor's opinion of February 8, 1955 (62 I. D. 22), was rendered, the Department of the Army stopped paying rentals and filed application Anchorage 027871 for a withdrawal of the sec. 16 described above for use by that Department for military purposes. The Territorial Land Commissioner has protested the application and taken steps toward terminating the various leases and to have that Department vacate the reserved school sections now being used by it.

The plat of survey of the portion of T. 14 N., R. 2 W., S.M., containing the sec. 16 was approved July 18, 1917, on which date the reservation made by the act of 1915 attached.[1]

I

Concerning Question (1):

As held in the Solicitor's opinion of February 8, 1955 (62 I. D. 22), the leasing provision of the act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. sec. 353) does not authorize the Territory to lease to the Federal Government a school section reserved for the Territory by that act. Consequently, the Territory has no authority to lease such a section to the Department of the Army or to an agency thereof. There is no statute authorizing the Secretary of the Interior generally to enter into leases for public lands and in the absence of such authority, the Secretary has no power to issue leases.[2] Therefore, it is now necessary to consider the question whether under the act of June 14, 1926 (44 Stat. 741), as amended by the act of June 4, 1954 (43 U. S. C. sec. 869), the Secretary may lease or sell to the Department of the Army, or to an agency thereof, a school section reserved for the Territory by the act of March 4, 1915, *supra*. This raises the question whether that Department or an agency thereof is a "Federal instrumentality" within the meaning of that term as used in the amended act of 1926. No departmental or court decision as to the meaning of that term as so used has been found. An examination of the legislative history of the act discloses nothing helpful concerning the meaning of the term, as used in the act.

The word "instrumentality" has been defined as a "condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end,"[3] or as "anything used as a means or an

[1] Solicitor's opinion of February 8, 1955 (62 I. D. 22), footnote 1.

[2] See Solicitor's opinions of July 25, 1955 (62 I. D. 284), and October 22, 1954 (59 I. D. 313); Acting Solicitor's opinion of December 28, 1954 (61 I. D. 459). Departmental ruling of February 24, 1916 (44 L. D. 568).

[3] *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35 (1941).

agency; that which is instrumental; the quality or condition of being instrumental." [4] The term "Federal instrumentality" has been defined as "a means or agency used by the Federal Government," and in the law books the terms "federal agency" and "federal instrumentality" are used interchangeably.[5] One court has said that "The Federal Government is one of delegated powers, in exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental instrumentality," and that "Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the Government for the convenient prosecution of its governmental functions, existing at the will of its creator, is an instrumentality of government." [6]

There are many decisions of the United States Supreme Court, each concerning the question whether a particular governmental organization created by or under a certain act of Congress was immune from State taxation because of being an instrument or agency of the Federal Government.[7] But these decisions are all in the somewhat narrow field of the authority of a State to tax the Federal Government and the word "instrumentality" is construed in its commonly accepted sense. It does not follow as of course that it was so used in the 1926 act. In fact, it has heretofore been concluded that the words "Federal instrumentality" were here used in the sense of a special body to which Congress has seen fit to give rather broad autonomous powers.[8] And that conclusion is further supported by the fact that the same section of the act, which refers to a "Federal instrumentality" as a possible land purchaser or lessee, does not use the same term in referring to withdrawals made for public uses. There the words "Federal department or agency" are used instead. However, whatever the meaning that Congress intended be given "Federal instrumentality," clearly there is no intent to authorize the issuance of patents or leases in the name of the United States, to a Federal agency not authorized to acquire and hold title to public lands, or to lease it, in its own name

[4] 32 C. J. 947.

[5] *Capitol Building & Loan Ass'n.* v. *Kansas Comm. of L. & I.*, 83 P. 2d 106 (1938).

[6] *Unemployment Comp. Comm.* v. *Wachovia Bank & T. Co.*, 2 S. E. 2d 592 (1939).

[7] *Cleveland* v. *United States*, 323 U. S. 329 (1945); *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95 (1941); *Colorado National Bank of Denver* v. *Bedford*, 310 U. S. 41 (1940); *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477 (1939); *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209 (1936); *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149 (1937); *Shaw* v. *Oil Corp.*, 276 U. S. 575 (1928); *Federal Compress Co.* v. *McLean*, 291 U. S. 17 (1934). Many others can be cited.

[8] Opinion of Associate Solicitor for Public Lands, dated July 16, 1956, M-36357; memorandum opinion of Acting Assistant Solicitor for Branch of Land Management, dated August 30, 1955, to Lands Staff Officer, Bureau of Land Management.

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rather than in the name of the United States. Otherwise, the United States would be in the position of issuing to itself, patents or leases for public lands—a result certainly not contemplated by Congress. An examination of various statutes fails to disclose any authority for the Department of the Army or any of its agencies to take leases of land in its own name and I am informed that the Corps of Engineers only leases land in the name of the United States. Therefore, neither that Department, nor an agency thereof, is a qualified beneficiary under the act.

I have no alternative but to answer question (1) in the negative.

II

Concerning Question (2):

The lieu selection provision of the act of March 4, 1915, *supra*, after referring to school sections reserved by the act, reads in part as follows:

> * * * where the same may have been sold or otherwise appropriated by or under the authority of any Act of Congress * * * other lands may be designated and reserved in lieu thereof in the manner provided by sections 851 and 852 of Title 43 * * *.

In my opinion the words "otherwise appropriated" include withdrawals or reservations of public lands for governmental or other purposes. The word "appropriated" as applied to public lands frequently has been held to include a withdrawal or reservation of public lands.[9] My answer to question (2) is that under the lieu selection provision of the act of 1915 the Territory may select land in lieu of school sections reserved by the act and which subsequently have been withdrawn or reserved for governmental or other purposes "by or under the authority of any Act of Congress." However, many withdrawals or reservations[10] of public lands are not made under any statutory authority but are made by the President or his delegate, through the exercise by the President of his non-statutory power to make withdrawals or reservations which the United States Supreme Court has held that he possesses.[11] The use of the words "Act of Congress" limits the classes of appropriation to those authorized by law enacted by

[9] "Appropriated" or "appropriation" as applied to public lands has been defined as "setting apart of things for some particular use." *Wilcox* v. *Jackson*, 13 Pet. 498, 38 U. S. 266 (1839). See *McSorley* v. *Hill*, 27 Pac. 552, 556 (1891); *J. C. Aldrich*, 59 I. D. 176 (1946); *Harkrader et al.* v. *Goldstein*, 31 L. D. 87 (1901); *Mather et al.* v. *Hackley's Heirs*, 19 L. D. 48 (1894); *Wilson Davis*, 5 L. D. 376 (1887).

[10] The words "withdrawal" and "reservation" often are used interchangeably where public lands are concerned. See Departmental Instructions of April 9, 1920 (47 L. D. 361) and the case of *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 476 (1915).

[11] *United States* v. *Midwest Oil Company*, 236 U. S. 459 (1915); also see Attorney General's Opinion of June 4, 1941 (40 Op. Atty. Gen. 20).

Congress. The authority must stem from an act which confers it; not from one which recognizes and confirms it as made under some authority other than that of Congress. Although it has been held that such recognition of the power to make withdrawals is "equivalent to a grant" the case so holding recognized that Congress had not conferred the power by any act.[12] As to a withdrawal or reservation made by the President under his non-statutory power, in view of the words "by or under the authority of any Act of Congress" in the act of 1915, I am unable to hold that a withdrawal or reservation of a reserved school section made under that power of the President creates any rights in the Territory to make lieu selections under the act. Those words are clear and unambiguous, leaving me no choice in the matter.[13]

A "Spot check" of withdrawals of public lands in Alaska for military purposes discloses that most of them have been made under the non-statutory power of the President, rather than under the act of June 25, 1910 (36 Stat. 847), as amended (43 U. S. C. sec. 142), or other statutory authority. Presumably, the authority conferred by that act was not used because withdrawals made thereunder do not bar metalliferous mining locations,[14] while one made under the non-statutory power of the President may bar mining locations, metalliferous or nonmetalliferous, if the words of the withdrawal order show that intent. However, for the reasons set forth in the following paragraph, I am of the opinion that reservations of school sections made by the act of 1915, standing alone, now are sufficient to bar mining locations on such sections in those cases where the Territory elects to await the extinguishment of the withdrawal or reservation made by the President. Consequently, withdrawals of reserved school sections may be made under the act of 1910, as amended, with the only risk being that metalliferous mining locations may be made on the sections if and when lieu selections under the act of 1915 are made by the Territory and approved, upon which event the reservation made by the act would be extinguished.

[12] See footnote 11 above.

[13] Section 7 of the act of March 3, 1875 (18 Stat. 474), provides for lieu selections by the State of Colorado where school sections "have been sold or otherwise disposed of *by any act of Congress.*" [Italics added.] The Secretary ruled on November 20, 1890 (12 L. D. 70) that selections might be made in lieu of school sections withdrawn under the non-statutory power of the President. However, the ruling contains little to support it and I am unable to agree with it. No other such ruling has been found. Soon afterwards the act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), was passed, thus removing the need for further consideration of the question where that act applies.

[14] Section 2 of the act of 1910, as amended (43 U. S. C. sec. 142), provides that lands withdrawn under the act "shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to metalliferous minerals."

The original act of 1915 (38 Stat. 1214) contained a provision that the reservations made by the act should not be effective as to school sections known on the date of acceptance of the survey to be of mineral character. The act of August 7, 1939 (53 Stat. 1243), amended that act so as to make the reserved school sections and the minerals therein subject to disposition under the United States mining and mineral leasing laws, the proceeds to be set apart as permanent funds in the territorial treasury. The act of March 5, 1952 (66 Stat. 14), repealed the act of 1939 and also amended the act of 1915 by eliminating the portion which confined reservations made by the act to school sections not known on the date of the acceptance of the survey to be of mineral character. The act of August 5, 1953 (67 Stat. 364), further amended the act of 1915 so as to provide for the leasing of those minerals in reserved school sections coming within the scope of the mineral leasing laws of the United States but it included no provision for the disposition of minerals under the United States mining laws. The failure to include such a provision, the broadening of the scope of the reservation provision of the act of 1915 to include the mineral school sections and the repeal of the act of 1939 which had opened the reserved school sections to mining locations, clearly evidence the intent of Congress that after the act of March 5, 1952, *supra*, school sections reserved by the act of 1915 no longer should be open to mining locations. Although a mining location is not a sale unless and until the owner thereof applies for a patent, when he must pay for the land, the words "reserved from sale or settlement" in the act of 1915 bar mining locations. This is apparent from the lieu selection provision of the act which authorizes selections to be made by the Territory in lieu of those portions of school sections which have been "otherwise appropriated." [15] This is further apparent from the fact that Congress found it necessary to pass the act of 1939 to open the reserved school sections to mining location, which would not have been necessary if "reserved from sale or settlement" did not bar such locations.

Application 027871 invokes no act under which the Department of the Army wishes the withdrawal to be made. However, presumably that Department wishes it made under the non-statutory power of the President, as that Department requests a withdrawal from all

[15] In a decision concerning the words "settlement and entry, or other form of appropriation" in an executive order withdrawing lands, the United States Supreme Court held that "appropriation" included appropriation by mining location. *Mason* v. *United States*, 260 U. S. 545, 554 (1923).

forms of appropriation under the public land laws, including the United States mining and mineral leasing laws. The withdrawal might be made under the act of June 25, 1910, *supra*, which could be done without risk of valid metalliferous mining locations being made on the school section involved, until such time as the Territory might give up its rights to the section by making a lieu selection and obtaining departmental approval thereof.

The section here in question, even if it should be withdrawn for a public purpose, would still be subject to the overhanging or continuing reservation made by the act of 1915. That Congress intended the reservation to be a continuing one effective immediately upon the removal of any legal bar to its attachment, is indicated by the provision in the act as amended by the act of March 5, 1952, *supra*, that the reservation should not affect any lands within "an existing reservation of or by the United States, or lands subject to or included in any valid application, claim, or right" unless and until "the reservation, application, claim, or right is extinguished, relinquished, or cancelled." A reservation of the land for the use of the United States takes precedence over but does not completely annul the reservation for the Territory so as to prevent the latter from applying once the Federal reservation is vacated. On the other hand, there is no reason why the Territory, if it so desires, may not in lieu of awaiting termination of the withdrawal, apply for other land in lieu of that withdrawn.

Section 1 of the act of June 25, 1910 (36 Stat. 847; 43 U. S. C. sec. 141), authorizes the President to withdraw public lands "temporarily" but the section provides further that such withdrawals "shall remain in force until revoked by him or by an act of Congress." Therefore, at the will of the President or of the Congress, a withdrawal made under the act could exist indefinitely and in practical effect be permanent. However, as far as lieu selection rights of the Territory under the act of 1915 are concerned, it is immaterial whether a withdrawal of a school section is a temporary or a permanent one.[16]

My answer to question (2) is that the Territory is entitled to exercise lieu selection rights under the act of 1915 where a reserved school

[16] Either a temporary or permanent withdrawal of school section lands entitles a State to make lieu selections under the general act of February 28, 1891 (43 U. S. C. secs. 851, 852). See Departmental Instructions of April 9, 1920 (47 L. D. 361); Departmental Decision of April 18, 1931 (53 I. D. 365); *United States* v. *Morrison*, 240 U. S. 192 (1916). I think the same rule applies to lieu selection rights under the act of 1915.

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section is later withdrawn for governmental purposes "by or under the authority of any Act of Congress." Further, it is immaterial whether the withdrawal is permanent or temporary.

III

Concerning Question (3):

I think that it is clear from the provision in the act of 1915, authorizing selections by the Territory "in lieu" of reserved school sections, and from the provisions of 43 CFR 76.2 and 43 CFR 270.4, that upon secretarial approval of a lieu selection made under the act, the Territory's claim to such portions of a reserved school section as are assigned as a basis for the selection is extinguished. Aside from such approval, I know of no means of extinguishing the Territory's claim to a school section reserved by the act, short of an act of Congress.

IV

The following questions have been asked, which I will designate questions (4) and (5), and which I will now answer:

(4) Does the lieu selection provision of the act of 1915 authorize the Territory to select public lands which on the date of selection are known to be mineral in character, in lieu of a withdrawn school section, mineral or non-mineral, reserved by the act?

(5) Is the general school land indemnity act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), applicable to Alaska?

Concerning Question (4):

In view of the amendment to the act of 1915, made by the act of March 5, 1952, *supra*, the reservation made by the act of 1915 is no longer restricted to school sections not known on the date of acceptance of the survey to be of mineral character and now it may include mineral school sections. But neither the act of 1952 nor any other act amending the act of 1915 made any change in the lieu selection provision of the act, and it remains as it was in the original act of 1915. That provision is silent as to the character of the lands that may be selected.

It has been the settled policy of Congress to dispose of mineral lands only under laws including them.[17] Therefore, the silence of the lieu selection provision of the act of 1915 as to the character of the land that may be selected by the Territory cannot be construed as impliedly

[17] *United States* v. *Sweet, Administrator of Sweet*, 245 U. S. 563 (1918).

authorizing the selection of lands known to be of mineral character. Moreover, had Congress intended that the act of March 4, 1952, *supra*, making mineral school sections subject to reservation by the act of 1915, as amended, should also make mineral lands subject to lieu selection, in all probability provision therefor would have been incorporated in the act of 1952. Such a change cannot be held to have been implied by the act of 1952. There is a presumption against the implied amendment of any existing statutory provision.[18] An amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied.[19] Therefore, I answer question (4) in the negative.

V

Concerning Question (5):

Section 8 of the act of May 17, 1884 (23 Stat. 24), provides that the laws of the United States relating to mining claims and the rights incident thereto shall be in full force and effect in Alaska but provides further that nothing in the act shall be construed as putting into force in Alaska the "general land laws of the United States." Section 27 of the act of June 6, 1900 (31 Stat. 330; 48 U. S. C. sec. 356), contains a similar provision with respect to the general land laws of the United States.

The general school land indemnity act of February 28, 1891 (26 Stat. 796; 43 U. S. C. secs. 851, 852), authorizes the selection by a State or Territory of "unappropriated, surveyed public lands, not mineral in character, within the State or Territory" in lieu of sections 16 and 36 where those sections are "reserved to any Territory" and also are within "a military, Indian or other reservation, or are otherwise disposed of by the United States."

Section 3 of the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. sec. 23), provides in part that "The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." By virtue of this provision, the general right-of-way acts of March 3, 1891 (26 Stat. 1095; 43 U. S. C. secs. 893, 946), February 15, 1901 (31 Stat. 790; 43 U. S. C. sec. 959), and March 4, 1911 (36 Stat. 1253; 43 U. S. C. sec. 961), and the general Indian Allotment Act of February 8, 1887 (24 Stat. 388; 25 U. S. C. sec. 331), have been held to have been extended to Alaska.[20] Hence, the question

[18] Section 1930, page 414, *Sutherland on Statutory Construction*, 3d Edition.

[19] See footnote 18 above.

[20] 30 Op. Atty. Gen. 387; 43 CFR Part 51, 74.25. *Nagle* v. *United States*, 191 Fed. 141 (9th Cir. 1911). See Secretary's opinion of February 25, 1932 (53 I. D. 593).

arises whether the general act of February 28, 1891, *supra*, has been similarly extended to the Territory.

Possibly the act of February 28, 1891, *supra*, might be held to be "locally inapplicable" to Alaska within the meaning of the act of 1912 because the act of 1891 could not operate in the Territory when the act of August 24, 1912, *supra*, was passed.[21] Until the passage of the act of March 4, 1915 (38 Stat. 1214), there existed no general act either reserving or granting to the Territory any sections 16 and 36 for the benefit of its common schools. Hence, prior to March 4, 1915, there could be no loss to the Territory of lands in those sections, which would have entitled the Territory to lieu selections, even if the act of 1891 were applicable to Alaska. However, whether or not the act of 1891 was "locally inapplicable" because it could not operate when the act of 1912 was passed need not be decided, as I am convinced from a thorough consideration of the legislative history of the various bills, one of which became the act of March 4, 1915, *supra*, soon after the act of 1912 was passed, that Congress neither considered the act of 1891 extended to Alaska by the act of 1912 nor intended the act of 1915 to have that effect.

During the second session of the 63d Congress, two bills were introduced in the House,[22] each of which provided for reserving and granting to the Territory of Alaska, upon survey, sections 16 and 36. Each bill provided for the Territory to make lieu selections and expressly provided that "the provisions of" the act of February 28, 1891 (26 Stat. 791) "are hereby made applicable thereto." In the third session of the same Congress, identical bills were introduced in the House and Senate,[23] respectively, providing for the reservation of school sections for the Territory and for the lieu selections to be made "in the manner" provided by the act of 1891, instead of expressly making the provisions of that act applicable to lieu selections. One of those bills, S. 7515, was enacted as the act of March 4, 1915, *supra*, without change in the lieu selection provision of the bill. A thorough examination of the legislative history of the bills fails to disclose the reason for the change in wording of the lieu selection provisions in the bills as introduced in the second session, to that contained in the two bills introduced in the third session. Apparently, the change was made because

[21] An act similar to the act of August 24, 1912 (48 U. S. C. sec. 23), was held not to have extended certain general acts, applicable only to surveyed lands, to the Territory of Oregon because no surveys therein had been authorized by the Federal Government. *Stark* v. *Starrs*, 73 U. S. 402 (1867).

[22] H. R. 15870 and H. R. 17262.

[23] H. R. 20851 and S. 7515.

Congress decided merely to adopt the methods and procedures authorized by the act of 1891 and the regulations thereunder, rather than make the lieu selections of that act applicable to lieu selections made under the act of 1915. This conclusion is supported by the meaning of "manner" as generally construed, namely, that it means the method of doing a thing, or method of procedure or execution.[24] I find nothing in the act of 1915 indicating that Congress intended "manner" in that act to have a meaning different than that ordinarily given it. At any rate, it is a well established rule that changes made in a bill during its consideration if later reflected in the law are made with a purpose and the change here under consideration can only mean that rather than extend the 1891 act, Congress decided to extend the procedural parts of it only. No other reason for the change is disclosed in the history of the legislation. Therefore, my answer to question (5) is in the negative.

J. REUEL ARMSTRONG,
Solicitor.

APPEAL OF TRI-STATE CONSTRUCTION CO.

IBCA–63 *Decided February 26, 1957*

Contracts: Unforeseeable Causes—Contracts: Delays of Contractor—Contracts: Damages: Unliquidated Damages

A strike precipitated by the decision of a contractor to discontinue paying its employees for travel time when such employees were affiliated with the union that called the strike, and it was customary for employers in the area to pay their employees for travel time, is not an unforeseeable cause of delay beyond the control and without the fault and negligence of the contractor within the meaning of the "delays—damages" clause of the standard form of Government construction contract, and does not entitle the contractor to an extension of time for the performance of the contract so as to avoid the assessment of liquidated damages. The question whether the strike was unforeseeable and beyond the control of the contractor does not necessarily depend on a determination of the legality of the conduct of the contractor or of the union that called the strike. While it is more readily to be expected that the illegal conduct of an employer will lead to a strike, the converse of this proposition is not necessarily true, and there are many circumstances in which an employer can readily foresee that the exercise of his legal rights will lead to a strike and delay the progress of the work.

[24] See *Melsheimer* v. *McKnight*, 46 So. 827 (1908); *United States* v. *Watashe et al.*, 117 F. 2d 947 (10th Cir. 1941); *People* v. *English*, 29 N. E. 678 (1892); *Cover et al. v. Connolly et al.*, 121 P. 2d 55; 55 C. J. S. 663.

C.O

42055

M-36528

State Grants Selections

September 24, 1958

GRANT OF RESERVED SCHOOL SECTIONS IN ALASKA
MADE BY SECTION 6(k) OF THE STATEHOOD ACT
OF JULY 7, 1958 (72 STAT. 339, 343)

Alaska: School Lands

Such portions of the school sections reserved for the Territory of Alaska by section 1 of the act of March 4, 1915 (38 Stat. 1214; 48 U. S. C. 353) as are being used and occupied by a Federal agency and contain Federal improvements when the State is admitted into the Union, are impliedly excepted from the grant made by section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339).

Extra cy in Dec. file

BUREAU OF LAND MANAGEMENT
RECEIVED
NOV 28 1958
OPERATIONS SUPERVISOR, ALASKA

BUREAU OF LAND MANAGEMENT
RECEIVED
NOV 28 1958
LAND OFFICE
FAIRBANKS, ALASKA

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36528 September 24, 1958

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Grant of reserved school sections in Alaska made by section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339, 343)

This is in response to your memorandum of July 16 (5.04e; G; Fairbanks 014601), inquiring whether title to 1,693 acres of school sections reserved for the Territory of Alaska by section 1 of the act of March 4, 1915 (38 Stat. 1214; 48 U. S. C. 353) will pass to the State when it is admitted into the Union, if the lands are then withdrawn for the use of the Air Force. It appears that the Air Force is using the 1,693 acres for the Ladd Air Force Base and has requested that those lands be withdrawn for such use.

The reservation made by the section 1 of the act of 1915 attaches to sections 16 and 36 in every township and to certain sections 33 in an area specified in the act, only if the particular section has been surveyed and the plat of survey has been approved or accepted by the Bureau of Land Management.1/ In other words, lands, which if surveyed, would fall in the sections 16, 36 or 33 are not reserved by the section 1.

Section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339) repeals the section 1 of the act of 1915, effective upon admission of the State into the Union and then grants the reserved school sections to the State. The section 6(k) contains nothing indicating that the grant is subject to any exceptions. Neither does the section 6(k) contain any provision authorizing the State to select lands in lieu of such reserved school sections as may be withdrawn or otherwise appropriated on the date the grant would otherwise become effective. Each of the enabling acts for the other States after granting certain school sections to the State contains such a lieu selection provision thus implying that some lands in the school sections were excepted from the grant, though not expressly excepted. The absence of such a lieu selection provision in the section 6(k), or elsewhere in the Statehood Act, coupled with the grant of specific sections, namely those reserved by section 1 of the act of 1915, might indicate the intention of Congress that upon admission of the

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1/ Acting Solicitor's Opinion M-36243 (62 I. D. 22).

State it would take title to every legal subdivision of a section reserved by the section 1, notwithstanding any then existing withdrawal of the legal subdivision, its occupancy by a Federal agency and the appropriation of Federal funds for improvements thereon. But there is a familiar rule of law that a granting act impliedly excepts therefrom such land as prior to the act has been set apart for the use of the United States, unless the granting act specially discloses an intention to include it.2/ We think that rule is applicable here. The withdrawal of certain legal subdivisions of the reserved school sections, and their occupation and use by a Federal agency and the appropriation of Federal funds for improvements thereon constitute such a setting apart or appropriation of those lands as would impliedly except them from the grant made by the section 6(k) if and when it becomes effective. As held by the United States Supreme Court land grants are construed favorably to the Government and nothing passes except what is conveyed in clear language, and if there are doubts they are resolved for the Government; not against it.3/ Here, there is no language in the section 6(k) or elsewhere in the act, indicating the intention of Congress that the State should obtain title to land set apart for the use of a Federal agency and on which Federal improvements exist.

There is no need to decide whether a bare withdrawal of any of the reserved school sections, that is, a withdrawal not followed by use and occupation by a Federal agency, would prevent the grant made by section 6(k) from attaching when the State is admitted into the Union. We gather from your memorandum that the 1,693 acres of the reserved school sections now are actually being used and occupied by the Air Force as an air base. We assume that there are Federal improvements on the land being so used and occupied. The use and occupancy should be supplemented by a public land order withdrawing the 1,693 acres and describing them in terms of the public land surveys so that there will be no uncertainty as to which lands are granted to the State and those which are excepted if and when the State is admitted into the Union.

(Sgd) Edmund T. Fritz
Acting Solicitor

2/ Wilcox v. Jackson, 13 Pet. 266, 272; Leavenworth, etc. R. R. Co. v. United States, 92 U. S. 733, 741, 745; Scott v. Carew, 196 U. S. 100, 109; United States v. Minnesota, 270 U. S. 181, 206; and United States v. O'Donnell, 303 U. S. 501, 510.

3/ United States v. Union Pac. R. Co., 353 U. S. 112, 116.

Interior—Duplicating Section, Washington, D. C.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

IN REPLY REFER TO:

G-60-2131.10a

AUG 16 1960

Memorandum

TO: Regional Solicitor, Anchorage

From: The Solicitor

Subject: Withdrawal made for the Ladd Air Force Base.
Solicitor's opinion M-36528, dated September 4, 1958.

There is enclosed a copy of our memorandum of even date to the Director of the Bureau of Land Management. The copy is self-explanatory.

With respect to the Ladd Air Force Base, which was the subject of the Solicitor's opinion M-36528 dated September 24, 1958, the lands occupied by the Base were impliedly excepted from the grant made by the section 6(k) because when the Statehood act was passed there were Federal improvements on the lands constructed with Federal funds. The opinion suggested that a public land order be issued withdrawing and identifying the lands so occupied. Such an order was issued November 21, 1958, (No. 1760, 23 F.R. 9182), before the State was admitted into the Union and hence before the grant of school sections made by section 6(k) became effective. As school sections were reserved for the Territory - not granted the Territory - by the act of 1915, we think that the opening words of section 6(k) reading "Grants previously made to the Territory" do not include school sections.

GEORGE W. ABBOTT
The Solicitor

By: C. R. Bradshaw
C. R. Bradshaw
Associate Solicitor
Division of Public Lands

Attachment

Historical Note

Change of name. References to "receivers" were changed to "registers" by Act Oct. 9, 1942, cited to text. See note under former section 366 of this title.

Transfer of Functions. All functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department were, with two exceptions, transferred to the Secretary of the Interior, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by 1950 Reorg.Plan No. 3, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in note under section 481 of Title 5, Executive Departments and Government Officers and Employees.

Functions of Supervisor of Surveys and registers were transferred to the Secretary of the Interior or such officers as he may designate by 1946 Reorg. Plan No. 3, cited to text. See note under section 1 of Title 43, Public Lands.

Act Mar. 3, 1925, cited to text, abolished the office of surveyor general and transferred the administration of all activities in charge of surveyors general to the Field Surveying Service under the jurisdiction of United States Supervisor of Surveys.

§ 353. Reservation of lands for educational purposes; proceeds or income set aside; lands excluded

When the public lands of the Territory of Alaska are surveyed, under direction of the Government of the United States, sections numbered 16 and 36 in each township in said Territory shall be reserved from sale or settlement for the support of common schools in the Territory of Alaska; and section 33 in each township in the Tanana Valley between parallels sixty-four and sixty-five north latitude and between the one hundred and forty-fifth and the one hundred and fifty-second degrees of west longitude (meridian of Greenwich) shall be reserved from sale or settlement for the support of a Territorial agricultural college and school of mines established by the Legislature of Alaska upon the tract granted in section 354 of this title: *Provided*, That where settlement with a view to homestead entry has been made upon any part of the sections reserved hereby before the survey thereof in the field, or where the same may have been sold or otherwise appropriated by or under the authority of any Act of Congress, or are wanting or fractional in quantity, other lands may be designated and reserved in lieu thereof in the manner provided by sections 851 and 852 of Title 43: *Provided further*, That the Territory may, by general law, provide for leasing said land in area not to exceed one section to any one person, association, or corporation for not longer than ten years at any one time: *And provided further*, That the entire proceeds or income derived from said reserved lands, are appropriated and set apart as separate and permanent funds in the Territorial treasury, to be invested and the income from which shall be expended only for the exclusive use and benefit of the public schools of Alaska or of the agricultural college and school of mines, respectively, in such manner as the Leg-

dated or held under any laws of the U
such reservation, application, claim, or
quished, or canceled. Mar. 4, 1915, c.
5, 1952, c. 80, §§ 1–3, 66 Stat. 14.

Historical No

1952 Amendment. Act Mar. 5, 1952, amended section generally by repealing Act Aug. 7, 1939, c. 516, 53 Stat. 1243, amending this section, to prevent the location of mining claims on lands reserved for the benefit of Territorial schools, to eliminate the exception which excluded from the reserve lands of known mineral character, and to exclude from the grant lands subject to other reservations or valid existing rights.

Validation of settlement claims on certain reserved land. Act Mar. 9, 1942, c. 175, 56 Stat. 150, provided "That where settlement claims with a view to making homestead entry have been established on lands in sections 16 and 36, reserved for the support of schools in the Territory of Alaska by the Act of March 4, 1915 (38 Stat. 1214) [sections 353 and 354 of this title], within the area withdrawn by Executive Order Numbered 6557, dated February 4, 1935, as modified by Executive order of May 20, 1935, which temporarily withdrew from disposal under the public-land laws certain lands within the Matanuska Valley in Alaska reserved them for classification a aid of legislation, such claims be, they are hereby, validated, subje compliance with the applicable p sions of the homestead laws; and er lands in lieu thereof may be d nated by the Territory of Alaska, t reserved for the support of schoo said Territory, in the manner pro by the Act of Congress approved Fe ary 28, 1891 (26 Stat. 796) [sections and 852 of Title 43]."

Lease or sale of certain public l in Alaska. Act Oct. 17, 1940, c. 88 Stat. 1191, provided:

"That the sections numbered 16 an in townships 17 and 18 north, ra 1 and 2 east, Seward meridian, Ala are hereby released from the reserva

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islature of Alaska may by law direct. Nothing in this section and section 354 of this title shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or right initiated or held under any laws of the United States unless and until such reservation, application, claim, or right is extinguished, relinquished, or canceled. Mar. 4, 1915, c. 181, § 1, 38 Stat. 1214; Mar. 5, 1952, c. 80, §§ 1–3, 66 Stat. 14.

Historical Note

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Lease or sale of certain public lands in Alaska. Act Oct. 17, 1940, c. 889, 54 Stat. 1191, provided:

"That the sections numbered 16 and 36 in townships 17 and 18 north, ranges 1 and 2 east, Seward meridian, Alaska, are hereby released from the reservation thereof made by the Act of March 4, 1915 (38 Stat. 1214) [sections 353 and 354 of this title], for the support of the common schools in the Territory of Alaska, and in lieu of the lands so released an equal area of vacant, nonmineral, surveyed, unreserved, public lands in the Territory of Alaska may be designated and reserved for the support of the common schools in the Territory of Alaska in the manner provided by the Act of February 28, 1891 (26 Stat. 796) [sections 851 and 852 of Title 43].

"Sec. 2. The Secretary of the Interior is hereby authorized, in his discretion, to lease, or to sell at not less than $1.25 per acre, under such rules and regulations and upon such terms and conditions as he may prescribe, the lands released from reservation by section 1 of this Act and the public lands in townships 17 and 18 north, ranges 1 and 2 east; sections 25, 26, 27, 31, 32, 33, 34, and 35, township 17 north, range 1 west; sections 3, 4, 5, 6, and 7, township 16 north, range 1 west; sections 1, 2, 11, and 12, township 16 north, range 2 west, Seward meridian, Alaska: Provided, however, That all patents and leases issued under the provisions of this Act shall contain a reservation to the United States of the oil, gas, and other mineral deposits, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary of the Interior may prescribe. The provisions of this section are subject to valid existing rights."

Appropriation repeal. Effective July 1, 1935, the appropriation provided for in the last proviso of this section was affected by Act June 26, 1934, c. 756, § 3, 48 Stat. 1226. See section 725b (b) of Title 31, Money and Finance.

Omitted

the Commission to carry out its functions.

§ 341. Transferred

HISTORICAL AND STATUTORY NOTES

Codifications

Section, Act Mar. 30, 1948, c. 162, 62 Stat. 100, which made provision for the occupancy and use of national-forest lands under permit and dealt with the period of such permits, size of area allotted, prohibitions, and the termination of permits, was transferred to section 497a of Title 16, Conservation.

§§ 351, 352. Transferred

HISTORICAL AND STATUTORY NOTES

Codifications

Section 351, Act Mar. 3, 1889, c. 424, § 1, 30 Stat. 1098, which extended to the Territory the system of public land surveys, was transferred to section 751a of Title 43, Public Lands.

Section 352, Acts Mar. 2, 1907, c. 2537, § 4, 34 Stat. 1232; Mar. 3, 1925, c. 462, 43 Stat. 1144; Oct. 9, 1942, c. 584, § 2, 56 Stat. 779, which provided for the making of land surveys in the Nome and Fairbanks districts, was transferred to section 751b of Title 43.

§ 353. Repealed. Pub. L. 85–508, § 6(k), July 7, 1958, 72 Stat. 343

HISTORICAL AND STATUTORY NOTES

Section, Acts Mar. 4, 1915, c. 181, § 1, 38 Stat. 1214; Mar. 5, 1952, c. 80, §§ 1 to 3, 66 Stat. 14; Aug. 5, 1953, c. 323, 67 Stat. 364; Aug. 2, 1956, c. 892, 70 Stat. 954; Aug. 27, 1958, Pub.L. 85–771, § 3, 72 Stat. 929, made reservation of certain lands for educational purposes, covered disposition of proceeds or income derived from reserved lands, and set out the exclusion of certain lands.

§§ 353a to 362. Transferred

HISTORICAL AND STATUTORY NOTES

Codifications

Section 353a, Act May 31, 1938, c. 304, 52 Stat. 593, which authorized the Secretary of the Interior to reserve tracts in Alaska for school, hospitals, etc. for the Indians, Eskimos, and Aleuts of Alaska, was transferred to section 497 of Title 25, Indians, and was subsequently repealed by Pub.L. 94–579, Title VII, § 704(a), Oct. 21, 1976, 90 Stat. 2792.

Section 354, Act Mar. 4, 1915, c. 181, § 2, 38 Stat. 1215, which set aside a site for an agricultural college and school of mines, is set out as a note under section 852 of Title 43, Public Lands.

Section 354a, Acts Jan. 21, 1929, c. 92, §§ 1 to 7, 45 Stat. 1091–1093; July 12, 1960, Pub.L. 86–620, §§ 1, 2, 74 Stat. 408; Sept. 19, 1966, Pub.L. 89–588, 80 Stat. 811, made additional grants for an agricultural college and school of mines and imposed certain conditions and limitations, is set out as a note under section 852 of Title 43.

Section 355, Act Mar. 3, 1891, c. 561, § 11, 26 Stat. 1099, which permitted

lands to be entered for
poses and set out the req
the proper execution of th
thereby, was transferred t
of Title 43, and was sub
pealed by Pub.L. 94–57
§ 703(a), Oct. 21, 1976, 9

Section 355a, Act May 25,
§ 1, 44 Stat. 629, which aut
site trustee to issue a deed
lands on survey of town si
or Eskimo lands, was trans
tion 733 of Title 43, and wa
ly repealed by Pub.L. 94–5
§ 703(a), Oct. 21, 1976, 9

Section 355b, Act May 25,
§ 2, 44 Stat. 630, which a
extension of streets and alle
dian or Eskimo lands, was t
section 734 of Title 43, an
quently repealed by Pub.L.
VII, § 703(a), Oct. 21, 19
2789.

Section 355c, Act May 25,
§ 3, 44 Stat. 630, which au
Secretary of the Interior t
mineral lands surveyed in
blocks, was transferred to se
Title 43, and was subsequer
by Pub.L. 94–579, Title V
Oct. 21, 1976, 90 Stat. 2789.

Section 355d, Act May 25,
§ 4, 44 Stat. 630, which au
Secretary to prescribe appr
lations for the administratio
355a to 355c of this title, wa
to section 736 of Title 43, an
quently repealed by Pub.L.
VII, § 703(a), Oct. 21, 19
2789.

Section 355e, Act Feb. 26,
62 Stat. 35, which permitted
of town-site lands under
deeds by Alaska natives un
conditions, was transferred
737 of Title 43.

Section 356, Act June 6, 1
§ 27, 31 Stat. 330, which pr
disturbing of the occupancy
ing occupied by Indians or ot
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of this section which migh
place in force in the Territor
al land laws of the United
transferred to section 280a
Indians.

[CHAPTER 516]

AN ACT

To amend an Act entitled "An Act to reserve lands to the Territory of Alaska for educational uses, and for other purposes", approved March 4, 1915 (38 Stat. 1214–1215).

August 7, 1939
[H. R. 3025]
[Public, No. 314]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved March 4, 1915 (38 Stat. L. 1214–1215), being an Act to reserve lands of the Territory of Alaska for educational uses, and for other purposes, be, and the same is hereby, amended by adding to the first section of the Act the following: "Timber on the reserved lands may be sold by the Secretary of the Interior under the provisions of section 11 of the Act of Congress approved May 14, 1898 (30 Stat. 409–414), and such lands and the minerals therein shall be subject to disposition under the mining and mineral leasing laws of the United States, upon conditions providing for compensation to any Territorial lessee for any resulting damages to crops or improvements on such lands, but the entire proceeds or income derived by the United States from such sale of timber and disposition of the lands or the minerals therein are hereby appropriated and set apart as permanent funds in the Territorial treasury, to be invested and the income expended for the same purposes and in the manner hereinbefore provided for. Any leases issued by the Territory after a valid appropriation of such reserved lands under the mining laws or the mineral leasing laws of the United States shall be with due regard to the rights of the mineral claimant.

Alaska, reserve lands for educational uses.
38 Stat. 1214.
48 U. S. C. § 353.

Sale of timber.

30 Stat. 414.
48 U. S. C. §§ 421, 423; Supp. IV, § 423.
Disposition of lands and minerals therein.

Use of proceeds, etc.

Rights of mineral claimants regarded in issuance of leases.

"The Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this Act for the purpose of carrying the same into effect."

Rules and regulations.

Approved, August 7, 1939.

[CHAPTER 517]

AN ACT

To amend the Act of March 2, 1929 (45 Stat. 536).

August 7, 1939
[H. R. 3215]
[Public, No. 315]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 (a) (1) of the Act of March 2, 1929, entitled "An Act to supplement the naturalization laws, and for other purposes" (45 Stat., ch. 536, p. 1512), which now reads "(1) Entered the United States prior to June 3, 1921", is hereby amended, effective as of the date this Act is enacted, so as to read as follows: "(1) Entered the United States prior to July 1, 1924".

Naturalization.
Aliens having no record of admission for permanent residence.
Entry prior to July 1, 1924, registration.
45 Stat. 1513.
8 U. S. C. § 106a; Supp. IV, § 106a.

Approved, August 7, 1939.

[CHAPTER 518]

AN ACT

To authorize M. H. Gildow to construct a free, movable, pontoon footbridge across Muskingum River Canal at or near Beverly, Ohio.

August 7, 1939
[H. R. 3375]
[Public, No. 316]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That M. H. Gildow, his heirs, or legal representatives, is hereby authorized to construct, maintain, and operate a free, movable, pontoon footbridge and approaches thereto across the Muskingum River Canal at or near Island Park, in Beverly, Ohio, at a point suitable to the interests of navigation, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters", approved March 23, 1906, and subject to conditions and limitations contained in this Act.

Muskingum River Canal.
Pontoon footbridge authorized across, at Beverly, Ohio.

34 Stat. 84.
33 U. S. C. §§ 491–498.

10914

M-36229

February 4, 1957

SCHOOL SECTIONS RESERVED FOR THE TERRITORY OF ALASKA BY THE ACT OF MARCH 4, 1915 (38 STAT. 1214), AS AMENDED (48 U. S. C. 353) AND LIEU SELECTIONS MADE UNDER THAT ACT

Alaska: School Lands

The act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. 353), does not authorize the Territory of Alaska to lease to the Department of the Army or an agency thereof, a school section reserved for the Territory by the act. Absent an act of Congress authorizing the Department of the Army or an agency thereof, to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States, neither is a qualified beneficiary under the act of June 14, 1926 (44 Stat. 741); as amended by the act of June 4, 1954 (43 U. S. C. 869).

Alaska: School Lands--Withdrawals and Reservations: Generally

If a school section reserved for the Territory by the act of March 4, 1915, supra, is later withdrawn or reserved for governmental or other purposes, under the lieu selection provision of the act the Territory may select land in lieu of that withdrawn or reserved, provided that the withdrawal or reservation was made under authority of the act of June 25, 1910 (36 Stat. 847), as amended (43 U. S. C. 142), or other statutory authority. It is immaterial whether the withdrawal or reservation is permanent or temporary.

Alaska: School Lands--School Lands: Indemnity Selections

The lieu selection provision of the act of March 4, 1915, supra, does not authorize the selection of land known to be of mineral character. A reservation of a school section by the act of March 4, 1915, supra, bars mining locations on the section so long as the reservation is in effect. Such a reservation, short of an act of Congress, can be extinguished only by an approved selection in lieu of the land reserved.

Rec't conflict with Act. of June 25, 1910.

School Lands: Indemnity Selections

The act of February 28, 1891 (26 Stat. 796; 43 U. S. C. 851, 852), is not applicable to Alaska.

Words and Phrases

Rec. + P.P. act

"Federal instrumentality" as used in the act of June 14, 1926, as amended (43 U. S. C. 869), means only such a Federal instrumentality as is authorized by law to acquire and hold title to public land, or to lease it, in its own name rather than in the name of the United States. "Otherwise appropriated" as used in the lieu selection provision of the act of March 4, 1915, supra, includes governmental withdrawals or reservations. → now do I know.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36229 February 4, 1957

Memorandum

To: Director, Office of Territories

From: Solicitor

Subject: School sections reserved for the Territory of Alaska by the act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. 353), and lieu selections made under that act

This is in response to your memorandum of April 6, 1956, and attachments, raising the following questions:

(1) May the Department of the Interior issue leases for reserved Alaska school sections or portions thereof to agencies of the Department of Defense and, if so, whether payments received for the use of such lands may be paid to the Territory under the terms of the act of 1915?

(2) If reserved school lands are subsequently withdrawn for permanent military installations, is the Territory entitled to lieu or indemnity selections?

(3) In the case of such permanent withdrawals, what steps can or should be taken to extinguish the Territory's rights to reserved school lands which may be included in the withdrawals?

It appears from a letter dated August 16, 1955, from the Land Commissioner for the Territory of Alaska, addressed to the Bureau of Land Management's Area Administrator for Area 4, Alaska, and the other correspondence, that since June 11, 1941, the Department of the Army has had structures on section 16, T. 14 N., R. 2 W., S.M., Alaska; that under leases issued by the Territory rental was being paid by the Department of the Army to the Territory for portions of certain school

sections reserved for the Territory by the act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. 353); and that after the Solicitor's opinion of February 8, 1955 (62 I. D. 22), was rendered, the Department of the Army stopped paying rentals and filed application Anchorage 027871 for a withdrawal of the section 16 described above for use by that Department for military purposes. The Territorial Land Commissioner has protested the application and taken steps toward terminating the various leases and to have that Department vacate the reserved school sections now being used by it.

The plat of survey of the portion of T. 14 N., R. 2 W., S.M., containing the section 16 was approved July 18, 1917, on which date the reservation made by the act of 1915 attached.1/

I

Concerning Question (1):

As held in the Solicitor's Opinion of February 8, 1955 (62 I. D. 22), the leasing provision of the act of March 4, 1915 (38 Stat. 1214), as amended (48 U. S. C. 353) does not authorize the Territory to lease to the Federal Government a school section reserved for the Territory by that act. Consequently, the Territory has no authority to lease such a section to the Department of the Army or to an agency thereof. There is no statute authorizing the Secretary of the Interior generally to enter into leases for public lands and in the absence of such authority, the Secretary has no power to issue leases.2/ Therefore, it is now necessary

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1/ Solicitor's Opinion of February 8, 1955 (62 I. D. 22), footnote 1.

2/ See Solicitor's opinions of July 25, 1955, (62 I. D. 284) and October 22, 1954 (59 I. D. 313); Acting Solicitor's Opinion of December 28, 1954 (61 I. D. 459).

to consider the question whether under the act of June 14, 1926 (44 Stat. 741), as amended by the act of June 4, 1954 (43 U. S. C. 869), the Secretary may lease or sell to the Department of the Army, or to an agency thereof, a school section reserved for the Territory by the act of March 4, 1915, supra. This raises the question whether that Department or an agency thereof is a "Federal instrumentality" within the meaning of that term as used in the amended act of 1926. No departmental or court decision as to the meaning of that term as so used has been found. An examination of the legislative history of the act discloses nothing helpful concerning the meaning of the term, as used in the act.

The word "instrumentality" has been defined as a "condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end,"3/ or as "anything used as a means or an agency; that which is instrumental; the quality or condition of being instrumental."4/ The term "Federal instrumentality" has been defined as "a means or agency used by the Federal Government," and in the law books the terms "federal agency" and "federal instrumentality" are used interchangeably.5/ One court has said that "The Federal Government is one of delegated powers, in exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental instrumentality," and that "Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the Government for the

3/ Falls City Brewing Co. v. Reeves, 40 F. Supp. 35.

4/ 32 C. J. 947.

5/ Capital Building & Loan Ass'n. v. Kansas Comm. of L. & I., 83 P. 2d 106.

convenient prosecution of its governmental functions, existing at the will of its creator, is an instrumentality of government."6/

There are many decisions of the United States Supreme Court, each concerning the question whether a particular governmental organization created by or under a certain act of Congress was immune from State taxation because of being an instrument or agency of the Federal Government.7/ But these decisions are all in the somewhat narrow field of the authority of a State to tax the Federal Government and the word "instrumentality" is construed in its commonly accepted sense. It does not follow as of course that it was so used in the 1926 act. In fact, it has heretofore been concluded that the words "Federal instrumentality" were here used in the sense of a special body to which Congress has seen fit to give rather broad autonomous powers.8/ And that conclusion is further supported by the fact that the same section of the act, which refers to a "Federal instrumentality" as a possible land purchaser or lessee, does not use the same term in referring to withdrawals made for public uses. There the words "Federal department or agency" are used instead. However, whatever the meaning that Congress intended be given

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6/ Unemployment Comp. Comm. v. Wachovia Bank & T. Co., 2 S. E. 2d 592.

7/ Cleveland v. United States, 323 U. S. 329; Federal Land Bank v. Bismarck Co., 314 U. S. 95; Colorado National Bank of Denver v. Bedford, 310 U. S. 41; Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466, 477; Baltimore National Bank v. Tax Commission, 297 U. S. 209; James v. Dravo Contracting Co., 302 U. S. 134, 149; Shaw v. Oil Corp., 276 U. S. 575; Federal Compress Co. v. McLean, 291 U. S. 17. Many others can be cited.

8/ Opinion of Associate Solicitor for Public Lands, dated July 16, 1956, M-36357; memorandum opinion of Acting Assistant Solicitor for Branch of Land Management, dated August 30, 1955, to Lands Staff Officer, Bureau of Land Management.

"Federal instrumentality," clearly there is no intent to authorize the issuance of patents or leases in the name of the United States, to a Federal agency not authorized to acquire and hold title to public lands, or to lease it, in its own name rather than in the name of the United States. Otherwise, the United States would be in the position of issuing to itself, patents or leases for public lands - a result certainly not contemplated by Congress. An examination of various statutes fails to disclose any authority for the Department of the Army or any of its agencies to take leases of land in its own name and I am informed that the Corps of Engineers only leases land in the name of the United States. Therefore, neither that Department, nor an agency thereof, is a qualified beneficiary under the act.

I have no alternative but to answer question (1) in the negative.

II

Concerning Question (2):

The lieu selection provision of the act of March 4, 1915, supra, after referring to school sections reserved by the act, reads in part as follows:

> "Where the same may have been sold or otherwise appropriated by or under the authority of any Act of Congress * * * other lands may be designated and reserved in lieu thereof in the manner provided by sections 851 and 852 of Title 43."

In my opinion the words "otherwise appropriated" include withdrawals or reservations of public lands for governmental or other purposes. The word "appropriated" as applied to public lands frequently has been held to include a withdrawal or reservation of public

lands.[9] My answer to question (2) is that under the lieu selection provision of the act of 1915 the Territory may select land in lieu of school sections reserved by the act and which subsequently have been withdrawn or reserved for governmental or other purposes "by or under the authority of any Act of Congress." However, many withdrawals or reservations[10] of public lands are not made under any statutory authority but are made by the President or his delegate, through the exercise by the President of his non-statutory power to make withdrawals or reservations which the United States Supreme Court has held that he possesses.[11] The use of the words "Act of Congress" limits the classes of appropriation to those authorized by law enacted by Congress. The authority must stem from an act which confers it; not from one which recognizes and confirms it as made under some authority other than that of Congress. Although it has been held that such recognition of the power to make withdrawals is "equivalent to a grant" the case so holding recognized that Congress had not conferred the power by any act.[12] As to a withdrawal or reservation

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9/ "Appropriated" or "appropriation" as applied to public lands, has been defined as "setting apart of things for some particular use;" Wilcox v. Jackson, 38 U. S. 266. See McSorley v. Hill, 27 Pac. 552, 556; J. C. Aldrich, 59 I. D. 176; Harkrader, et al. v. Goldstein, 31 L. D. 87; Mather, et al. v. Hackley's Heirs, 19 L. D. 48; Wilson Davis, 5 L. D. 376.

10/ The words "withdrawal" and "reservation" often are used interchangeably where public lands are concerned. See Departmental Instructions of April 9, 1920 (47 L. D. 361) and the case of United States v. Midwest Oil Co., 236 U. S. 459, 476.

11/ United States v. Midwest Oil Company, 236 U. S. 459; also see Attorney General's Opinion of June 4, 1941 (40 Att. Gen. 20).

12/ See footnote 11 above.

made by the President under his non-statutory power, in view of the words "by or under the authority of any Act of Congress" in the act of 1915, I am unable to hold that a withdrawal or reservation of a reserved school section made under that power of the President creates any rights in the Territory to make lieu selections under the act. Those words are clear and unambiguous, leaving me no choice in the matter.13/

A "Spot check" of withdrawals of public lands in Alaska for military purposes, discloses that most of them have been made under the non-statutory power of the President, rather than under the act of June 25, 1910 (36 Stat. 847), as amended (43 U. S. C. 142) or other statutory authority. Presumably, the authority conferred by that act was not used because withdrawals made thereunder do not bar metalliferous mining locations,14/ while one made under the non-statutory power of the President may bar mining locations, metalliferous or non-metalliferous, if the words of the withdrawal order show that intent.

13/ Section 7 of the act of March 3, 1875 (18 Stat. 474) provides for lieu selections by the State of Colorado where school sections "have been sold or otherwise disposed of by any act of Congress." (Emphasis added.) The Secretary ruled on November 20, 1890 (12 L. D. 70) that selections might be made in lieu of school sections withdrawn under the non-statutory power of the President. However, the ruling contains little to support it and I am unable to agree with it. No other such ruling has been found. Soon afterwards the act of February 28, 1891 (26 Stat. 796; 43 U. S. C. 851, 852) was passed thus removing the need for further consideration of the question where that act applies.

14/ Section 2 of the act of 1910, as amended (43 U. S. C. 142) provides that lands withdrawn under the act "shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to metalliferous minerals."

However, for the reasons set forth in the following paragraph, I am of the opinion that reservations of school sections made by the act of 1915, standing alone, now are sufficient to bar mining locations on such sections in those cases where the Territory elects to await the extinguishment of the withdrawal or reservation made by the President. Consequently, withdrawals of reserved school sections may be made under the act of 1910, as amended, with the only risk being that metalliferous mining locations may be made on the sections if and when lieu selections under the act of 1915 are made by the Territory and approved, upon which event the reservation made by the act would be extinguished.

The original act of 1915 (38 Stat. 1214) contained a provision that the reservations made by the act should not be effective as to school sections known on the date of acceptance of the survey to be of mineral character. The act of August 7, 1939 (53 Stat. 1243) amended that act so as to make the reserved school sections and the minerals therein subject to disposition under the United States mining and mineral leasing laws, the proceeds to be set apart as permanent funds in the territorial treasury. The act of March 5, 1952 (66 Stat. 14) repealed the act of 1939 and also amended the act of 1915 by eliminating the portion which confined reservations made by the act to school sections not known on the date of the acceptance of the survey to be of mineral character. The act of August 5, 1953 (67 Stat. 364) further amended the act of 1915 so as to provide for the leasing of those minerals in reserved school sections coming within the scope of the mineral leasing laws of the United States but it included no provision for the disposition of minerals under the United States mining laws.

The failure to include such a provision, the broadening of the scope of the reservation provision of the act of 1915 to include the mineral school sections and the repeal of the act of 1939 which had opened the reserved school sections to mining locations, clearly evidence the intent of Congress that after the act of March 5, 1952, supra, school sections reserved by the act of 1915 no longer should be open to mining locations. Although a mining location is not a sale unless and until the owner thereof applies for a patent, when he must pay for the land, the words "reserved from sale or settlement" in the act of 1915 bar mining locations. This is apparent from the lieu selection provision of the act which authorizes selections to be made by the Territory in lieu of those portions of school sections which have been "otherwise appropriated."15/ This is further apparent from the fact that Congress found it necessary to pass the act of 1939 to open the reserved school sections to mining location, which would not have been necessary if "reserved from sale or settlement" did not bar such locations.

Application 027871 invokes no act under which the Department of the Army wishes the withdrawal to be made. However, presumably that Department wishes it made under the non-statutory power of the President, as that Department requests a withdrawal from all forms of appropriation under the public land laws, including the United States mining and mineral leasing laws. The withdrawal might be made under the act of June 25, 1910, supra, which could be done without risk of

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15/ In a decision concerning the words "settlement and entry, or other form of appropriation" in an executive order withdrawing lands, the United States Supreme Court held that "appropriation" included appropriation by mining location. Mason v. United States, 260 U. S. 545, 554.

valid metalliferous mining locations being made on the school section involved, until such time as the Territory might give up its rights to the section by making a lieu selection and obtaining departmental approval thereof.

The section here in question, even if it should be withdrawn for a public purpose, would still be subject to the overhanging or continuing reservation made by the act of 1915. That Congress intended the reservation to be a continuing one effective immediately upon the removal of any legal bar to its attachment, is indicated by the provision in the act as amended by the act of March 5, 1952, supra, that the reservation should not affect any lands within "an existing reservation of or by the United States, or lands subject to or included in any valid application, claim, or right" unless and until "the reservation, application, claim, or right is extinguished, relinquished, or cancelled." A reservation of the land for the use of the United States takes precedence over but does not completly annul the reservation for the Territory so as to prevent the latter from applying once the Federal reservation is vacated. On the other hand, there is no reason why the Territory, if it so desires, may not in lieu of awaiting termination of the withdrawal, apply for other land in lieu of that withdrawn.

Section 1 of the act of June 25, 1910 (36 Stat. 847; 43 U. S. C. 141), authorizes the President to withdraw public lands "temporarily" but the section provides further that such withdrawals "shall remain in force until revoked by him or by an act of Congress."

Therefore, at the will of the President or of the Congress, a withdrawal made under the act could exist indefinitely and in practical effect be permanent. However, as far as lieu selection rights of the Territory under the act of 1915 are concerned, it is immaterial whether a withdrawal of a school section is a temporary or a permanent one.16/

My answer to question (2) is that the Territory is entitled to exercise lieu selection rights under the act of 1915 where a reserved school section is later withdrawn for governmental purposes "by or under the authority of any Act of Congress." Further, it is immaterial whether the withdrawal is permanent or temporary.

III

Concerning Question (3):

I think that it is clear from the provision in the act of 1915, authorizing selections by the Territory "in lieu" of reserved school sections, and from the provisions of 43 CFR 76.2 and 43 CFR 270.4, that upon secretarial approval of a lieu selection made under the act, the Territory's claim to such portions of a reserved school section as are assigned as a basis for the selection, is extinguished. Aside, from such approval, I know of no means of extinguishing the Territory's claim to a school section reserved by the act, short of an act of Congress.

16/ Either a temporary or permanent withdrawal of school section lands entitles a State to make lieu selections under the general act of February 28, 1891 (43 U. S. C. 851, 852). See Departmental Instructions of April 9, 1920 (47 L. D. 361); Departmental Decision of April 18, 1931 (53 I. D. 365); United States v. Morrison, 240 U. S. 192. I think the same rule applies to lieu selection rights under the act of 1915.

IV

The following questions have been asked, which I will designate questions (4) and (5), and which I will now answer:

> (4) Does the lieu selection provision of the act of 1915 authorize the Territory to select public lands which on the date of selection are known to be mineral in character, in lieu of a withdrawn school section, mineral or non-mineral, reserved by the act?
>
> (5) Is the general school land indemnity act of February 28, 1891 (26 Stat. 796; 43 U. S. C. 851, 852) applicable to Alaska?

Concerning Question (4):

In view of the amendment to the act of 1915, made by the act of March 5, 1952, supra, the reservation made by the act of 1915 is no longer restricted to school sections not known on the date of acceptance of the survey to be of mineral character and now it may include mineral school sections. But neither the act of 1952 nor any other act amending the act of 1915 made any change in the lieu selection provision of the act and it remains as it was in the original act of 1915. That provision is silent as to the character of the lands that may be selected.

It has been the settled policy of Congress to dispose of mineral lands only under laws including them.[17/] Therefore, the silence of the lieu selection provision of the act of 1915 as to the character of the land that may be selected by the Territory, cannot be construed as impliedly authorizing the selection of lands known to

17/ United States v. Sweet, Administrator of Sweet, 245 U. S. 563.

be of mineral character. Moreover, had Congress intended that the act of March 4, 1952, supra, making mineral school sections subject to reservation by the act of 1915, as amended, should also make mineral lands subject to lieu selection, in all probability provision therefor would have been incorporated in the act of 1952. Such a change cannot be held to have been implied by the act of 1952. There is a presumption against the implied amendment of any existing statutory provision.18/ An amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied.19/ Therefore, I answer question (4) in the negative.

V

Concerning Question (5):

Section 8 of the act of May 17, 1884 (23 Stat. 24), provides that the laws of the United States relating to mining claims and the rights incident thereto shall be in full force and effect in Alaska but provides further that nothing in the act shall be construed as putting into force in Alaska the "general land laws of the United States." Section 27 of the act of June 6, 1900 (31 Stat. 330; 48 U. S. C. 356), contains a similar provision with respect to the general land laws of the United States.

The general school land indemnity act of February 28, 1891 (26 Stat. 796; 43 U. S. C. 851, 852), authorizes the selection by a State or Territory of "unappropriated, surveyed public lands, not

18/ Section 1930, page 414, Sutherland on Statutory Construction, 3d Edition.

19/ See footnote 18 above.

mineral in character, within the State or Territory" in lieu of sections 16 and 36 where those sections are "reserved to any Territory" and also are within "a military, Indian or other reservation, or are otherwise disposed of by the United States."

Section 3 of the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. 23), provides in part that "The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." By virtue of this provision, the general right-of-way acts of March 3, 1891 (26 Stat. 1095; 43 U. S. C. 893, 946), February 15, 1901 (31 Stat. 790; 43 U. S. C. 959), and March 4, 1911 (36 Stat. 1253; 43 U. S. C. 961), and the general Indian Allotment Act of February 8, 1887 (24 Stat. 388; 25 U. S. C. 331), have been held to have been extended to Alaska.[20/] Hence, the question arises whether the general act of February 28, 1891, supra, has been similarly extended to the Territory.

Possibly the act of February 28, 1891, supra, might be held to be "locally inapplicable" to Alaska within the meaning of the act of 1912 because the act of 1891 could not operate in the Territory when the act of August 24, 1912, supra, was passed.[21/] Until the passage of the act of March 4, 1915 (38 Stat. 1214), there existed no

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20/ 30 Op. Atty. Gen. 387; 43 CFR 74.25. Nagle v. United States, 191 Fed. 141. See Secretary's opinion of February 25, 1932 (53 I. D. 593).

21/ An act similar to the act of August 24, 1912 (48 U. S. C. 23), was held not to have extended certain general acts, applicable only to surveyed lands, to the Territory of Oregon because no surveys therein had been authorized by the Federal Government. Stark v. Starrs, 73 U. S. 402.

general act either reserving or granting to the Territory any sections 16 and 36 for the benefit of its common schools. Hence, prior to March 4, 1915, there could be no loss to the Territory of lands in those sections, which would have entitled the Territory to lieu selections, even if the act of 1891 were applicable to Alaska. However, whether or not the act of 1891 was "locally inapplicable" because it could not operate when the act of 1912 was passed need not be decided, as I am convinced from a thorough consideration of the legislative history of the various bills, one of which became the act of March 4, 1915, supra, soon after the act of 1912 was passed, that Congress neither considered the act of 1891 extended to Alaska by the act of 1912 nor intended the act of 1915 to have that effect.

During the second session of the 63d Congress two bills were introduced in the House,[22] each of which provided for reserving and granting to the Territory of Alaska, upon survey, sections 16 and 36. Each bill provided for the Territory to make lieu selections and expressly provided that "the provisions of" the act of February 28, 1891 (26 Stat. 791) "are hereby made applicable thereto." In the third session of the same Congress, identical bills were introduced in the House and Senate,[23] respectively, providing for the reservation of school sections for the Territory and for the lieu selections to be made "in the manner" provided by the act of 1891, instead of expressly making the provisions of that act applicable to lieu selections. One

22/ H. R. 15870 and H. R. 17262.

23/ H. R. 20851 and S. 7515.

of those bills, S. 7515, was enacted as the act of March 4, 1915, supra, without change in the lieu selection provision of the bill. A thorough examination of the legislative history of the bills fails to disclose the reason for the change in wording of the lieu selection provisions in the bills as introduced in the second session, to that contained in the two bills introduced in the third session. Apparently, the change was made because Congress decided merely to adopt the methods and procedures authorized by the act of 1891 and the regulations thereunder, rather than make the lieu selections of that act applicable to lieu selections made under the act of 1915. This conclusion is supported by the meaning of "manner" as generally construed, namely, that it means the method of doing a thing, or method of procedure or execution.24/ I find nothing in the act of 1915 indicating that Congress intended "manner" in that act to have a meaning different than that ordinarily given it. At any rate, it is a well established rule that changes made in a bill during its consideration if later reflected in the law are made with a purpose and the change here under consideration can only mean that rather than extend the 1891 act, Congress decided to extend the procedural parts of it only. No other reason for the change is disclosed in the history of the legislation. Therefore, my answer to question (5) is in the negative.

(Sgd) J. Reuel Armstrong
Solicitor

24/ See Malsheimer v. McKnight, 46 So. 827; United States Watashe, et al., 117 F. 2d 947; People v. English, 29 N. E. 678; Cover et al. v. Connolly, et al., 121 P. 2d 55; 55 C. J. S. 663.

Interior--Duplicating Section, Washington, D. C.

Fairbanks L.O.

75646

M-36243 February 8, 1955

SCHOOL SECTIONS RESERVED BY THE ACT OF MARCH 4, 1915
(38 Stat. 1214; 48 U.S.C. 353) FOR THE TERRITORY OF ALASKA

Alaska: School Lands

Subject to the Territory's consent, the Bureau of Land Management may issue permits under the Act of July 31, 1947 (43 U.S.C. 1185) to the Alaska Road Commission authorizing it to remove roadbuilding material from school sections reserved for the Territory by the Act of March 4, 1915 (48 U.S.C. 353). The consent may be conditioned upon reasonable payment to the Territory. The Territory has no authority under the Act of 1915 to lease the reserved school sections to the Federal Government. Land reserved by the Act of 1915 may be withdrawn by public land order for the use of the Department of the Army. Applicability of the Act of June 14, 1926 (44 Stat. 741) as amended (43 U.S.C. 869) to school sections reserved by the Act of 1915 considered.

Materials Act

The Bureau of Land Management may issue permits to the Alaska Road Commission under the Materials Act authorizing the Commission to remove roadbuilding material from sections reserved for the Territory of Alaska by the Act of March 4, 1915 (48 U.S.C. 353), providing consent of the Territory is first obtained.

M-36243

Accounts: Payments

Proceeds from leases for school sections reserved by the Act of March 4, 1915 (48 U.S.C. 353) issued under the Act of June 14, 1926, as amended (43 U.S.C. 869) should be deposited in the United States Treasury for payment annually to the Territory of Alaska.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

February 8, 1955

M-36243

Memorandum

To: Director, Office of Territories

From: Acting Solicitor

Subject: School sections reserved by the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353), for the Territory of Alaska

Reference is made to your memorandum of September 23 and attached correspondence raising the following questions:

1. May the Territory charge the Alaska Road Commission, a Federal agency under the jurisdiction of this Department, for road-building material removed by that Commission from school sections reserved for the Territory by the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353), the material to be used for the construction and maintenance of roads outside of those sections? The record shows that such material is being removed by that Commission under permits issued by the Bureau of Land Management, authorized by the Act of July 31, 1947 (61 Stat. 681; 43 U.S.C. 1185).

2. May the Territory, under authority of section 1 of the act of March 4, 1915, supra, lease lands in reserved school sections to the Federal Government for buildings and structures used for defense purposes and collect rental for such use? It appears that the Territory

has leased such lands to an agency of the Department of the Army for those purposes.

I

With respect to question 1:

With certain exceptions not pertinent here, section 1 of the Act of March 4, 1915, supra, provides that when public lands in the Territory are surveyed, sections 16 and 36 of every township shall be reserved from sale or settlement, for the support of common schools of the Territory and sections 33 in every township within a certain area shall be reserved for the support of the Territorial agricultural college and school of mines. The reservation made by the act does not attach to a school section until it has been surveyed and the plat of survey approved or accepted by the Bureau of Land Management.1/ The reservations made by the act are not grants and title to the reserved sections remains in the United States, subject to the full control and disposition

1/ Section 1 of the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353). See John J. Corey, A-25892 (August 11, 1950); departmental decision of April 14, 1920 (D-38804) (796175); Cf. United States v. Morrison, 240 U.S. 192 (1916); State of New Mexico, 52 L.D. 679 (1929); State of Colorado, 49 L.D. 341 (1922); State of Montana, 38 L.D. 247, 250 (1909); F. A. Hyde & Co., 37 L.D. 164, 165 (1898); and Solicitor's Opinion M-36143 (July 22, 1952).

of Congress until the contemplated grant is effected.2/ Hence, the Territory cannot charge for the material by virtue of any ownership of such a section or of the material therein. However, section 1 of the act of July 31, 1947, supra, after authorizing the Secretary of the Interior to permit any Federal, State, or Territorial agency, unit or subdivision, including municipalities, without charge, to remove material from public lands, provides in part:

> "When the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under said sections only with the consent of such Federal department or agency or of such State, Territory, or local governmental units."

The act clearly applies to Alaska, as section 3 thereof provides for the disposal of proceeds from the reserved school sections in Alaska.

One of the functions of the Territorial government is the establishment and maintenance of public schools in the Territory3/ and as the proceeds from the reserved school sections obviously would aid in the performance of that function, it is clear that the Territory comes within the scope of the above-quoted provision of section 1

2/ See departmental ruling of July 16, 1946 (59 I.D. 280, 283) and footnotes 5 and 6; New Mexico v. Altman, 54 I.D. 8 (July 18, 1932); Byers v. State of Arizona, 52 L.D. 488 (September 10, 1928).

3/ Act of January 27, 1905 (33 Stat. 616), as amended (48 U.S.C. 41, 161, 169).

of the act of 1947. Consequently, roadbuilding or other materials in the reserved school sections may not be removed and disposed of under the Act of 1947 without first obtaining the consent of the proper agency of the Territory. As the Territory may refuse or give consent, it follows that it may attach reasonable conditions to the consent, if given.4/ In view of the purpose for which the surveyed school sections have been reserved, its consent may be conditioned upon the Federal agency entering into a separate agreement with the Territory which requires a reasonable payment to the Territory. However, in our opinion after the Territory has once given its consent to the issuance of a permit and the permit has been issued, the Territory may not attach other conditions so long as the permit remains in effect.

II

With respect to question 2:

A provision of the Act of March 4, 1915, supra, reads as follows:

> "Provided further, that the Territory may, by general law, provide for leasing said land in area not to exceed one section to any one person, association, or corporation, for not longer than ten years at any one time."

We find nothing in the act or in its legislative history to justify the conclusion that by the words "person, association, or

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4/ See Solicitor's Opinion M-36071 of May 16, 1951 (60 I.D. 477); Cf. Solicitor's Opinion of July 8, 1939 (57 I.D. 31, 33), wherein he held that power to grant or refuse a right of way permit, implied the authority to condition the permit upon payment of rental.

corporation" Congress intended to include the Federal Government. It is hardly conceivable that by those words Congress intended that lands to which the United States still holds legal title may be leased by the Territory to the United States and that the Federal Government be restricted to leasing not to exceed one section. Therefore, we conclude that the Territory has no authority under the provision quoted to lease to the Federal Government. It may be that under the language the Territory could issue a lease to a governmental corporation. That specific question will be considered when and if it arises.

III

We have also been asked whether the Secretary by the issuance of a public land order may withdraw such legal subdivisions of a section reserved to the Territory by the Act of March 4, 1915, supra, as might be needed by the Department of the Army. In our opinion, he may do so. As above stated, the reservation made by the Act of 1915 is not a grant but is merely a reservation in contemplation of a future grant and the legal title to the reserved school section remains in the United States. Hence the reservation is no legal obstacle to such a withdrawal 5/ particularly as the reservation is only "from sale or settlement". 6/

5/ See Byers v. State of Arizona, 52 L.D. 488 (September 10, 1928); departmental ruling of July 10, 1946 (59 I.D. 280, 283); Assistant Attorney General's Opinion of October 19, 1905 (34 L.D. 186), which concerned lands withdrawn March 9, 1903, under the reclamation laws. The Federal Government still retains control and dominion over the reserved sections - see United States v. Elliott, 41 P. 720 (1895); Berkley v. United States, 19 P. 36 (1888; Washington); United States v. Bisel, 19 P. 251 (1888; Montana).

6/ Section 1 of Act of March 4, 1915 (48 U.S.C. 353).

IV

In closing, attention is called to the Act of June 14, 1926 (44 Stat. 741), as amended by the Act of June 4, 1954 (43 U.S.C. 869) which authorizes the Secretary of the Interior to sell or lease public lands for public purposes to Federal instrumentalities. The judicial interpretation of the term "public lands" as used in other acts has varied with the context and purpose of the statute in which it occurs and although those words ordinarily are used to designate such lands as are subject to sale or disposal under the general land laws, they are sometimes used in a larger and different sense.7/ We think that might be true here, since the section 1(c) of the Act specifically excepts from the applicability of the Act, lands covered by certain enumerated kinds of withdrawals and provides for the disposal of other lands withdrawn in aid of a function of a Federal or Territorial agency with the consent of that agency.

The pertinent portion of the section 1(c) provides that:

> "Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal department or agency, or of such State, Territory, or local governmental unit."

7/ See Kindred v. Union Pac. Ry. Co., 225 U.S. 582 (1912); Newhall v. Sanger, 92 U.S. 761 (1875); Union Pac. Ry. Co. v. Karges, 169 F. 459 (1909); United States v. Blendauer, 128 F. 910 (1904); State of Utah, 53 I.D. 365, 368 (1931).

In view of the consent requirement, before a lease may be issued for a reserved school section, it would be necessary that the consent of the proper agency of the Territory to the issuance be obtained. As the Territory may refuse or grant its consent, the consent, if given, may be conditioned upon the Territory being assured of receiving the amount of the rental.8/ The section 2(b) of the Act authorizes the Secretary to charge a "reasonable annual rental" and the regulations (43 CFR 254.8d) provide for such rental. The rental received by the Secretary under such a lease would be deposited in the United States Treasury for payment annually to the Territory pursuant to section 1 of the Act of March 4, 1915 (48 U.S.C. 353). When any specific questions arise over the applicability and effect of the Act of June 4, 1954, we shall be glad to consider them.

Of course, a permit, lease, or withdrawal order cannot be issued for a reserved school section to the detriment of a lease issued by the Territory under the second provision of section 1 of the Act of March 4, 1915, supra.

/sgd/ J. Reuel Armstrong
Acting Solicitor

8/ See footnote No. 4.

Interior--Duplicating Section, Washington, D. C.

Withdrawal

Anchorage District Office
RECEIVED
JUL 28 1965
Bureau of Land Management
Anchorage, Alaska

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Anchorage Region
P. O. Box 166
Anchorage, Alaska 99501

IN REPLY REFER TO:
Lands Br. [illegible]
Adj. Sect. [illegible]
Compl. Sect. .....
Minerals Br. .....
R & P Sv. Br. .....
Records Sect. .....
Docket Sect. .....
Pub. Sv. Sect. .....
Res. Mgmt. Br. .....
FO Sect. .....
Field Sect. .....
..... Action
..... Reply F.D. .....
..... Comments
..... Note & Return
..... Info:
..... See Dist. Mgr.
..... Other .....
File .....

July 22, 1965

Memorandum

To: Manager, Anchorage District & Land Office

From: Regional Solicitor, Anchorage

Subject: Status of Sections 16 and 36 Restored From Reservation or Withdrawal After Statehood

In your memorandum of February 3, 1964, which should have been answered long ago, you inquire concerning the status of land Sections 16 and 36 in Alaska reserved for the support of common schools by the Act of March 4, 1915 (38 Stat. 1214.)

Your first question relates to a situation in which one of those sections, namely, Section 36, T 16 N. R 1 W, S.M., after its reservation by the 1915 Act, was by Secretarial Order of October 19, 1936, temporarily withdrawn from further disposition for the use and benefit of the Eklutna Industrial School. A plat of the survey of this section was not filed until March 8, 1958. Shortly thereafter, on July 7, 1958, the Alaska Statehood Act was passed. Section 6(k) of this Act repealed the Act of March 4, 1915, but provided that all lands reserved thereunder should upon admission of Alaska into the Union, "be granted to said State for the purposes for which they were reserved...."

On January 3, 1959, by Presidential Proclamation, Alaska was declared admitted to Statehood. Then on April 27, 1960, the State of Alaska filed application for a patent to Section 36 as a school section in place. On July 5, 1961, Public Land Order 2427 revoked the Secretarial Order of October 19, 1936, and thereby released Section 36, among other lands, from withdrawal and provided that until January 3, 1962, the State of Alaska should have a preferred right to select said Section 36 as provided for in the Mental Health Act of July 28, 1956 (70 Stat. 709) or in Section 6(g) of the Alaska Statehood Act.

On August 22, 1961, the State filed an application for the Section 36 in question, along with certain other lands, under the general purpose grant of the Statehood Act, giving notice, however, that it was not relinquishing its prior application

of April 27, 1960, for patent. The 1960 application for patent was denied on October 22, 1962, for the reason that the lands were in a withdrawal status at the time patent had been applied for. The State has not taken an appeal.

Basing your question upon the foregoing factual situation, you ask whether you may include that, even though the Secretarial Order of October 30, 1936, was of a temporary nature, pending vote of the natives, the reservation under the Act of March 4, 1915 never attached because the lands were restored after the Act of March 4, 1915 was repealed. It is our opinion that the reservation under the Act of March 4, 1915 did attach when the lands were surveyed in March of 1958, even though the lands were not released from the withdrawal order of 1936 until after the Act of March 4, 1915 was repealed.

The pertinent provision of the Act of March 4, 1915 (38 Stat. 1214) reads as follows:

> When the public lands of the Territory of Alaska are surveyed... sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved from sale or settlement for the support of common schools in the Territory of Alaska...Provided, That where settlement with a view to homestead entry has been made upon any part of the sections reserved hereby before the survey thereof in the field, or where the same have been sold or otherwise appropriated by or under the authority of any Act of Congress, or are wanting or fractional in quantity, other lands may be designated in lieu thereof....

The Act under consideration was several times amended by additions thereto, one of such amendments being contained in Section 3 of the Act of March 5, 1952 (66 Stat. 14) which provided as follows:

> Nothing in this Act shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or right initiated or held under any laws of the United States unless and until such reservation, application, claim, or right is extinguished, relinquished, or cancelled.

In reference to a school section reserved for the Territory of Alaska by the Act of March 4, 1915, which the Department of the Army later applied to have withdrawn for its use for military purposes, the Solicitor had this to say:

> The section here in question, even if it should be withdrawn for a public purpose, would still be subject to the overhanging or continuing reservation made by the Act of 1915. That Congress intended the reservation to be a continuing one effective immediately upon the removal of any legal bar to its attachment, is indicated by the provision in the act as amended by the Act of March 5, 1952, supra, that the reservation should not affect any lands within "an existing reservation of or by the United States, or lands subject to or included in any valid application, claim, or right" unless and until "the reservation, application, claim, or right is extinguished, relinquished, or cancelled." A reservation of the land for the use of the United States takes precedence over but does not completely annul the reservation for the Territory so as to prevent the latter from applying once the Federal reservation is vacated. On the other hand, there is no reason why the Territory, if it so desires, may not in lieu of waiting termination of the withdrawal, apply for other land in lieu of that withdrawn.[1]

The foregoing pronouncement of the Solicitor is in keeping with earlier decisions emanating from the Department of the Interior. For instance, in 1909 the Acting Secretary ruled that, while the grant of sections sixteen and thirty-six for school purposes is a grant in praesenti, the grant does not attach to any particular tract of land until identified by survey; and, where prior to such identification Congress or some officer of the Government acting under the authority of Congress should make other disposition of the land, the right or title of the state to that specific tract does not attach so long as the reservation continues, but the state is entitled to indemnity.[2]

In a somewhat similar vein the Acting Solicitor gave it as his opinion in 1955[3] that land reserved by the Act of March 4, 1915, may be withdrawn by the Secretary by public land order for the use of the Department of the Army, because the reservation of public lands for school purposes made by said Act is not a grant but is merely a

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1) 64 I.D. 27,34 (1957)

2) 38 L.D. 247,251 (1909)

3) 52 I.D. 22 (1955)

a reservation in contemplation of a future grant and the legal title to the reserved school section remains in the United States. In this same opinion he stated: "The reservation made by the Act /of March 4, 1915 7 does not attach to a school section until it has been surveyed and the plat of survey approved or accepted by the Bureau of Land Management."[4]

It is to be noted from the foregoing rulings that there is a distinction made between the attachment of the reservation and the attachment of the title. The reservation attaches when the school lands are surveyed. The right or title of the State to a specific tract which has been withdrawn for some other purpose does not attach until the lands are released from the order of withdrawal.

It cannot be denied that section 6(k) of the Alaska Statehood Act repealed the Act of March 4, 1915, but it did not repeal the reservation made in the 1915 Act of Sections 16 and 36 for school purposes. In fact section 6(k) of the Statehood Act specifically provides that all lands reserved under the provisions of the 1915 Act "as of the date of this /Statehood 7 Act shall, upon the admission of said State into the Union, be granted to said State for the purposes for which they were reserved."

As of the date of the Statehood Act the particular Section 36, with which we are here concerned, had been surveyed and, therefore, its reservation for school purposes had attached. Later, when the President issued his Proclamation of Statehood for Alaska on January 3, 1959, title to the Section would have passed to the State, except for the fact that in this instance the Section had been temporarily withdrawn for the use and benefit of the Eklutna Industrial School. In order for the transfer of title to the State of Alaska to take place it remained only for the Secretary to release the Section from withdrawal. This he did on July 5, 1961.

While the State's application on April 27, 1960, for a patent to section thirty-six as a school section in place was premature and, therefore, properly denied, there seems to be no apparent reason why the State may not now renew its application for patent to the land as a school section. If it sees fit to do so, the patent should issue in the absence of any other impediment. Of course, the State would have to relinquish its application for the land under the general purpose grant of the Statehood Act.

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4) Id at 23

What we have said above is aside from the preferred right granted to the State of Alaska in Public Land Order 2427 (which released Section 36 from withdrawal) to select said Section under the Mental Health Act of July 28, 1956, or under the general purpose grant of section 6(g) of the Alaska Statehood Act. Since some might argue that by granting this preference right to the State to select Section 36 under the general purpose grant, the Secretary must have felt that the right of the State to take the land as a school section was extinguished by the provisions of Section 6(k) of the Statehood Act, it is recommended that you submit this memorandum to the Director in Washington before taking any local action thereon.

Your other inquiry relates to another Section 36 in a different township, namely in T 14.N.R1W, S.M. With respect to this tract of land, you state that it was likewise reserved by the 1915 Act for the support of the common schools in Alaska. The plat of the survey was filed on August 21, 1918; and on September 3, 1952, the Section, along with others, was withdrawn by Public Land Order 861 for the use of the Army as an impact area and safety zone for antiaircraft artillery firing. By Public Land Order 2340, dated April 19, 1961, all of the withdrawn lands were restored to preferred selection by the State of Alaska until July 19, 1961, under the Mental Health Act of July 28, 1956 or section 6(g) of the Alaska Statehood Act. Thereafter said lands including Section 36, will not be subject to disposition under the public land laws until so ordered by BLM.

You state further that the State of Alaska, on April 27, 1960, filed an application for a patent to this Section 36 as a school section in place. The State has also selected all of the lands restored by Public Land Order 2340, except Section 36.

We gather from your memorandum that you propose to reject the State's application for patent to Section 36 as a school section in place, on the ground that the application was made at a time when the land was withdrawn for the use of the Army. In this connection you ask whether you should advise the State of the status of Section 36 and whether the Section has lost or retained its identity as a school section. We shall answer the last part of the question first.

It is our opinion that the Section 36 under consideration here has retained its identification as a school section for the same reasons which we gave when we were discussing earlier the other Section 36 about which you had inquired. That is to say, the reservation of the land as a school section attached when the plat of the survey was filed and the right or title of the State to the land attached when the order of withdrawal of the land for the use of the Army was revoked. We have an even stronger case here, because the withdrawal order occurred after the land was surveyed.

It is our further opinion that the State should be notified as to what you regard the present status of this particular Section 36 to be. Unless it desires, for some reason of its own, to withdraw its application of April 27, 1960, for a patent to the land as a school section, the State should be informed that you will act upon its application as though it had been filed after the entry of the Public Land Order 2340. You may prefer to deny the original application and request the State to file a new application.

Here again it is suggested that this memorandum be sent to Washingfor for consideration there before you proceed to act upon it. ✓

If we can be of any further assistance in this matter, please advise.

Harry O. Arend

Harry O. Arend
Regional Solicitor

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Juneau Region
Anchorage Field Office
P.O. Box 166
Anchorage, Alaska

December 16, 1958

Memorandum

To: Area Administrator, Bureau of Land Management, Juneau

From: Field Solicitor, Anchorage

Subject: Transfer of BLM activities on lands granted to the State of Alaska

This responds to your memorandum of November 19, subject as above, in which you solicit the opinions of this office regarding the disposition, upon the proclamation of Alaskan Statehood, of special land-use permits, free use permits, and contracts outstanding on school lands, tidelands and inland navigable waters situated within Alaskan borders.

1. Special Land-Use Permits.

As you are aware, the authority for issuing special land-use permits is contained in section 2 of Title 43, United States Code, and is to be implemented by the provisions of 43 CFR Part 258. There is no specific provision for revoking such a permit where the land to which the permit applies is conveyed to a new or existing State. Section 258.7 of 43 CFR does provide that "[the permit] also will be revocable in the discretion of the authorized officer, at any time, upon notice, if in his judgment the lands should be devoted to another use." It is not clear what is meant by "another use"; presumably the term could embrace a conveyance of the land to which the permit applies.

In any event, a special land-use permit constitutes only a license and does not create in the permittee any right, title, interest, or estate in the land covered by the permit. See Footnote 1, Director's decision Eric J. Fribrock, Johnny Anton Hintzen, Anchorage 020926, 026624, April 16, 1958.

In the case of DeHaro v. United States, 72 U.S. 599(1866), at page 627, the United States Supreme Court discusses licenses as follows:

> "There is a clear distinction between the effect of a license to enter land . . . . and a grant. A grant passes some estate of greater or less degree, must be in writing,

and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. . . . A sale of the lands by the owner instantly works its revocation. . . ." (Emphasis ours).

Since a license (or permit) is merely a personal privilege revocable at will, to lawfully enter and use, in this case, land, and since the licensee (or permittee) is not vested with any legal right, there would appear to be no requirement imposed by law to issue notification of revocation by way of decision with right of appeal. In our opinion, it is necessary only to inform the permittee by letter that effective with the date of the President's proclaiming Alaska to be a State the jurisdiction to the lands becomes that of the State of Alaska and that, consequently, the permit is revoked. It is suggested that the permittee be advised that he might wish to apply to the appropriate State agency for a new permit. It is further suggested that the appropriate State agency be informed of your actions regarding revocation of the permits.

With reference to the revocation of those permits issued on tidelands which are the subject of the Inner Harbor Act, we are in agreement with the procedure you are following.

2. Free Use Permits.

The authority for issuing free use permits on lands below high water mark of navigable waters (as implemented by 43 CFR Part 259) is now found in sections 601-604 of Title 30, United States Code. Section 604 reads as follows:

"Subject to the provisions of this subchapter, the Secretary may dispose of sand, stone, gravel, and vegetative materials located below highwater mark of navigable waters of the Territory of Alaska. Any contract, unexecuted in whole or in part, for the disposal under this subchapter of materials from land, title to which is transferred to a future State upon its admission to the Union, and which is situated within its boundaries, may be terminated or adopted by such State." (Emphasis ours).

The above quoted section makes it quite clear that when jurisdiction to the lands in question passes to the State upon the President's proclamation of Statehood the authority to terminate or adopt contracts (in our opinion a free use permit is a contract within the purview of the above section) will rest with the State of Alaska in its discretion. It is not necessary that notification of your intentions be given the permittees in the form of a decision; a simple letter would be satisfactory. As you suggest, a copy of the notification and permit could be sent to the Alaska Department of Lands for their consideration.

3. Contracts.

With reference to those contracts for the sale of materials on school lands, section 353 of Title 48, United States Code, reads in part as follows:

> "Upon the transfer to any future State erected out of the Territory of Alaska of title to any of the reserved lands, the provisions of this section shall cease to apply to the reserved lands title to which is so transferred. Any lease, permit, or contract made pursuant to this section which is in effect at the time of any such transfer of title to the lands covered by the lease, permit, or contract shall not be terminated or otherwise affected by such transfer of title; but all right, title, and interest of the United States under such lease, permit, or contract, including any authority to modify its terms and conditions that may have been retained by the United States, shall vest in the State to which title to the lands covered by the lease, permit, or contract is transferred." (Emphasis ours).

Under the provisions of section 6(k) of the act of July 7, 1958 (Statehood Act), the grants of school lands previously made to the Territory are transferred to the State of Alaska. Under the provisions of the above quoted section, all right, title, and interest of the United States under the subject contracts pertaining to said lands will vest, upon the Statehood proclamation, in the State. Therefore, upon the issuance of the Statehood proclamation, these contracts should be forwarded to the appropriate State agency for their administration. There appears to be no legal requirement for notification by decision and, thus, a simple letter of notification is all that is necessary.

With reference to those contracts for the sale of materials on tidelands and inland navigable waters, the procedure outlined with reference to free use permits may be followed since the provisions of 48 U.S.C., sect. 604, apply.

If there are further questions, or if we can be of further assistance, please advise.

For the Regional Solicitor

Eugene F. Wiles, Field Solicitor
Juneau Region

Solicitor's Opinion, Memorandum Dated February 13, 1978

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D C 20240

FEB 13 1978

MEMORANDUM

To: Director, Bureau of Land Management (322)

Through: Assistant Secretary--Land & Water Resources

From: Associate Solicitor--Energy & Resources

Subject: Issuance of title evidence for granted school sections

This is in reply to your memorandum of December 9, 1977, in which you asked our advice on whether it is still possible to issue title evidence for granted school sections.

As you correctly pointed out in your memorandum, the Act of June 21, 1934 (43 U.S.C. §871a) was expressly repealed by Section 705(a) of FLPMA. It is clear from the legislative history of FLPMA that the original intent of Congress in repealing the 1934 Act was to transfer its authority to FLPMA; however, Section 208 of FLPMA as finally enacted does not contain such authority. Section 208 was derived from Section 211 of S. 507, 94th Cong. 1st Sess., which provided: "Consistent with his authority to dispose of national resource lands, the Secretary is authorized to issue deeds, patents, and other indicia of title ...." This provision could have been construed to retain the authority previously contained in the 1934 Act. Section 208 of FLPMA, however, does not allow such a construction. It states: "The Secretary shall issue all patents or other documents of conveyance after any disposal authorized by this Act. The Secretary shall insert in any such patent or other document of conveyance he issues ... such terms, covenants, conditions, and reservations as he deems necessary to insure proper land use and protection of the public interest ...." The numbered school section grants to States are not disposals authorized by FLPMA, and the Secretary should not insert in confirmatory patents the types of terms and conditions required by Section 208.

Although the 1934 Act has been repealed and there is no new patent authority in FLPMA to replace it, 43 U.S.C. §870(d)(4) still requires that the Secretary "shall, upon application by a State, issue patents to the State" for mineral lands in place granted to a State for support of schools. Even though 43 U.S.C. §871a has now been repealed, it would still be proper for any such patent for mineral lands to include the information previously required by Section 871a.

Where the lands in place granted to the State are found to be nonmineral in character, there is now no express authority to issue as evidence of title a document in the form of a "patent", and therefore it appears that this type of document should not be issued as evidence of title. However, there is nothing to prevent BLM from issuing a document to the State, in the form of a letter or otherwise, which is not designated a "patent" but which provides the information necessary to determine the date on which title vested in the State. See 43 C.F.R. §2623.1. The fact that such information is provided in a document which does not purport to be a "patent" will, by itself, show that the Department has determined that the lands are nonmineral in character. It does not appear necessary or desirable to issue such a document under authority of Section 315(a) of FLPMA or entitle it a "recordable disclaimer of interest in land." It does not appear that Section 315 was designed to cover this type of situation, and Section 315 contains certain procedural requirements.

In your memorandum you asked us to consider four specific options for furnishing to States evidence of title to granted school sections. Our responses follow in the same order as the options were listed.

1. It would be proper to request amendatory legislation to reinstate 43 U.S.C. §871a in view of the fact that new authority to replace it was not provided for in FLPMA and 43 U.S.C. §870(d)(4) still refers to issuance of patents in accordance with §871a. (But see 4, below.)

2. It appears that it would be awkward to try to amend Section 208 of FLPMA to provide the repealed authority, because Section 208 contains requirements concerning imposition of terms and conditions and compliance with State and local land use plans which do not appear applicable to State school grants.

3. Grants of school sections to the States are made by the applicable statutes, and do not require any conveyancing instrument to vest title. A patent issued in accordance with 43 U.S.C. §871a did not grant title, it only gave evidence of title already vested. Navajo Tribe v. Utah, 80 I.D. 441 (1973). As explained above, any document issued as evidence of title for nonmineral school grants need not be issued under Section 315 of FLPMA.

4. In the absence of an amendment to FLPMA restoring 43 U.S.C. §871a, the procedures explained above should handle the problem.

John D. Leshy

2624 (931)
A-067672

State Office
555 Cordova Street
Anchorage, Alaska 99501

JAN 10 1972

State of Alaska
Division of Lands
323 E. Fourth Avenue
Anchorage, Alaska 99501

Gentlemen:

In your letter of December 8, 1971, you requested a clarification of the status of various school sections in place. These sections, upon survey, were reserved by section 1 of the act of May 4, 1915 (38 Stat. 1214) but were in a withdrawn status when the Statehood Act confirmed the grant and transferred the available school sections to the State.

The Solicitor's Opinion, M-36228, dated February 4, 1957 states that aside from Secretarial approval of an indemnity selection, he knows of "no means of extinguishing the territory's claim to a school section reserved by the act, short of an act of Congress." The Statehood Act mentioned no exclusions or extinguishment, nor did the revocation of the 1915 act disturb any reservation established when the plat of survey of a school section was accepted.

The Secretary held in the State of Montana, 38 L.D. 247 (September 30, 1909) that "the State's title does not attach until the reservation is extinguished and the lands restored to the public domain." In State of New Mexico, 50 I.D. 402 (February 12, 1947), he held that title to such a school section does not necessarily pass to the State by operation of law, because the withdrawal delays the vesting of State's title until the lands are removed from the withdrawal and restored.

Your pending application A-067672 will be adjudicated in line with the position expressed above. You asked if the State may submit a new application in place of A-051238, closed in 1961. A request for a confirming patent for section 36, T. 13 N., R. 3 W., Seward Meridian will be accepted if and when revocation and restoration application AA-6139 results in revocation of Public Land Order 5. A new application may be filed requesting patent to the N½N½ section 36, T. 12 N., R. 3 W., Seward Meridian, which will be issued without a reservation under section 24 of the Federal Power Act. These lands were rejected from A-051278.

ADP-2-1 1/23/75 see ANCAB VLS 77-11 motion summary judgment 2-1-78

The SW¼NW¼SE¼NW¼ section 36, T. 12 N., R. 3 W., Seward Meridian was properly rejected from the application A-051278, however, and is not available. Together with the lands in the reserved sections in T. 15 N., R. 3 W., Seward Meridian (A-051788) and in T. 14 N., R. 3 W., Seward Meridian (A-051784), these lands are withdrawn by Public Land Order 2993 for the protection and segregation of lands improved and used by the United States. When, and if, at some time in the future, the withdrawal affecting these, or other surveyed and reserved school sections, is canceled and the lands restored to the public domain, the State may thereupon apply for a patent confirming that title to the lands vested in the State on the day the lands were released from the segregative effect of the withdrawal.

Sincerely yours,

/s/J. A. Hagans
Chief Adjudicator

cc:
A-051278

WMShore:ses 12/29/71

42055

M-36528

September 24, 1958

GRANT OF RESERVED SCHOOL SECTIONS IN ALASKA
MADE BY SECTION 6(k) OF THE STATEHOOD ACT
OF JULY 7, 1958 (72 STAT. 339, 343)

Alaska: School Lands

Such portions of the school sections reserved for the Territory of Alaska by section 1 of the act of March 4, 1915 (38 Stat. 1214; 48 U. S. C. 353) as are being used and occupied by a Federal agency and contain Federal improvements when the State is admitted into the Union, are impliedly excepted from the grant made by section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339).

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36528 September 24, 1958

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Grant of reserved school sections in Alaska made by section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339, 343)

This is in response to your memorandum of July 16 (5.04e; G; Fairbanks 014601), inquiring whether title to 1,693 acres of school sections reserved for the Territory of Alaska by section 1 of the act of March 4, 1915 (38 Stat. 1214; 48 U. S. C. 353) will pass to the State when it is admitted into the Union, if the lands are then withdrawn for the use of the Air Force. It appears that the Air Force is using the 1,693 acres for the Ladd Air Force Base and has requested that those lands be withdrawn for such use.

The reservation made by the section 1 of the act of 1915 attaches to sections 16 and 36 in every township and to certain sections 33 in an area specified in the act, only if the particular section has been surveyed and the plat of survey has been approved or accepted by the Bureau of Land Management.1/ In other words, lands, which if surveyed, would fall in the sections 16, 36 or 33 are not reserved by the section 1.

Section 6(k) of the Statehood Act of July 7, 1958 (72 Stat. 339) repeals the section 1 of the act of 1915, effective upon admission of the State into the Union and then grants the reserved school sections to the State. The section 6(k) contains nothing indicating that the grant is subject to any exceptions. Neither does the section 6(k) contain any provision authorizing the State to select lands in lieu of such reserved school sections as may be withdrawn or otherwise appropriated on the date the grant would otherwise become effective. Each of the enabling acts for the other States after granting certain school sections to the State contains such a lieu selection provision thus implying that some lands in the school sections were excepted from the grant, though not expressly excepted. The absence of such a lieu selection provision in the section 6(k), or elsewhere in the Statehood Act, coupled with the grant of specific sections, namely those reserved by section 1 of the act of 1915, might indicate the intention of Congress that upon admission of the

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1/ Acting Solicitor's Opinion M-36243 (62 I. D. 22).

State it would take title to every legal subdivision of a section reserved by the section 1, notwithstanding any then existing withdrawal of the legal subdivision, its occupancy by a Federal agency and the appropriation of Federal funds for improvements thereon. But there is a familiar rule of law that a granting act impliedly excepts therefrom such land as prior to the act has been set apart for the use of the United States, unless the granting act specially discloses an intention to include it.2/ We think that rule is applicable here. The withdrawal of certain legal subdivisions of the reserved school sections, and their occupation and use by a Federal agency and the appropriation of Federal funds for improvements thereon constitute such a setting apart or appropriation of those lands as would impliedly except them from the grant made by the section 6(k) if and when it becomes effective. As held by the United States Supreme Court land grants are construed favorably to the Government and nothing passes except what is conveyed in clear language, and if there are doubts they are resolved for the Government; not against it.3/ Here, there is no language in the section 6(k) or elsewhere in the act, indicating the intention of Congress that the State should obtain title to land set apart for the use of a Federal agency and on which Federal improvements exist.

There is no need to decide whether a bare withdrawal of any of the reserved school sections, that is, a withdrawal not followed by use and occupation by a Federal agency, would prevent the grant made by section 6(k) from attaching when the State is admitted into the Union. We gather from your memorandum that the 1,693 acres of the reserved school sections now are actually being used and occupied by the Air Force as an air base. We assume that there are Federal improvements on the land being so used and occupied. The use and occupancy should be supplemented by a public land order withdrawing the 1,693 acres and describing them in terms of the public land surveys so that there will be no uncertainty as to which lands are granted to the State and those which are excepted if and when the State is admitted into the Union.

(Sgd) Edmund T. Fritz
Acting Solicitor

2/ Wilcox v. Jackson, 13 Pet. 266, 272; Leavenworth, etc. R. R. Co. v. United States, 92 U. S. 733, 741, 745; Scott v. Carew, 196 U. S. 100, 109; United States v. Minnesota, 270 U. S. 181, 206; and United States v. O'Donnell, 303 U. S. 501, 510.

3/ United States v. Union Pac. R. Co., 353 U. S. 112, 116.

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Steese/White Mountains District Office
1150 University Avenue
Fairbanks, Alaska 99709-3844

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:

2620 (080)

1/23/90

Memorandum

To: Deputy State Director (930)

From: District Manager (080)

Subject: Third Party Use of Reserved School Lands

We have a number of cases where school lands were withdrawn prior to statehood and remain withdrawn to date. These areas are noted on the MTP as State Grants Act of 1915. Often BLM has management authority over third party uses.

Once such area is the unpatented portion of Section 16, T. 1 S., R. 1 E., F.M., withdrawn by PLO 1760 on 11/21/58. Since the parcel was surveyed in 1913 and was vacant, the parcel was reserved as school lands at the time of passage of the 1915 Act. While the Statehood Act was passed on 7/7/58, it was not effective until 1/3/59. The land was withdrawn during the intervening period.

Because of the withdrawal, title did not vest at the time of Statehood. Therefore, the plat notation is a misnomer. The land remains reserved as school lands but has never matured to grant status. Under Section 906(b) of ANILCA, Congress provided a quantity grant to satisfy all "in lieu" selection rights wherein the State, upon exercise of these selection rights is deemed to have relinquished all right, title, or interest in the un-vested outstanding school lands.

Since GVEA has approached us with an inquiry concerning the filing of powerline right-of-way on this parcel, we need clarification of some grey areas:

1) Since 906(b) relinquishment of rights is predicated upon the exercise of selection rights, has the State filed any selections under the 906(b) grant?

2) Since third party use requires the State's consent under the 1915 Act and since the school lands were reserved as a source of revenue for the schools, can we charge GVEA rental on the right-of-way even though the 43 CFR 2800 regulations do not provide for right-of-way rental for REAS (in the event that the State conditions their consent with a rental requirement). (See Solicitor's Opinion of 2/8/55.)

3) Is there a procedure established wherein the State Grant notations will be removed from the MTPs at the time the State exercises it's selection rights under 906(b)?

4) As a separate issue from the above cited parcel, attached are both State and BLM MTPs for T. 1 S., R. 2 W., F.M., which reflect a patented portion of Section 33 (University land), and Section 36 (School land), both of which are located in the Blair Lakes Bombing and Gunnery Range.

The Range was withdrawn in 1941 by EEO 8847. EO 9526 subsequently amended EO 8847 to provide a specific termination date. The withdrawal was terminated on 10/28/52, but the land was not restored to public domain status. The Air Force continued to use the Range under a letter of authorization from the Secretary of the Interior until 5/4/62, when PLO 2676 revoked the termination clause set out in EO 9526 which, in effect, extended the EO 8847 withdrawal to the present.

Of concern are:

a) Was the confirmatory patent properly issued in light of the withdrawal?

b) The State plat reflects State ownership which does not appear to exist. The likelihood of State authorized third party use is very high, placing us in the position of pursuing a trespass action. The magnitude of this type of problem is unknown but needs to be resolved before trespass occurs.

/S/ Roger Bolstad,
DM

5 Attachments
1 - MTP, HI, Survey Plat for T. 1 S., R. 1 E., F.M.
2 - MTP (BLM and State) T. 1 S., R. 2 W., F.M.
3 - PLO 1760
4 - Solicitor's Opinion 2/8/55
5 - Briefing Paper, COE Agreement, Solicitor's Opinion of 10/28/71

1754
PLO 1760
11-21-58

[Public Land Order 1760]

ALASKA

WITHDRAWING LANDS FOR USE OF THE DEPARTMENT OF THE AIR FORCE FOR MILITARY PURPOSES

By virtue of the authority vested in the President, and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

1. Subject to valid existing rights, the following-described public lands in Alaska are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral leasing laws and the act of July 31, 1947 (61 Stat. 681; 30 U. S. C. 601–604) as amended, and reserved for use of the Department of the Air Force for military purposes:

[Fairbanks 014601]

FAIRBANKS MERIDIAN

T. 1 N., R. 1 W.,
Sec. 16.
The area described contains 640 acres.

[Fairbanks 014602]

FAIRBANKS MERIDIAN

T. 1 S., R. 1 E.,
Sec. 16, lots 1, 2, 3, 7, 8, SE¼NE¼, E½SW¼ and SE¼.
The areas described aggregate 412.54 acres.

[Fairbanks 014603]

FAIRBANKS MERIDIAN

T. 1 N., R. 1 E.,
Sec. 33.
The area described contains 640 acres.

The total area withdrawn by this order is 1,692.54 acres.

2. The Department of the Interior retains jurisdiction over the management of the surface and subsurface resources, including mineral resources, of the lands. No disposal of such resources will be made except under applicable public-land laws with the concurrence of the Department of the Air Force and, where necessary, only after appropriate modification of the provisions of this order.

ROGER ERNST,
Assistant Secretary of the Interior.

NOVEMBER 21, 1958.

[F. R. Doc. 58-9868; Filed, Nov. 26, 1958; 8:54 a. m.]

59 I.D. 402

history is there any indication that a preference-right applicant shall be entitled to any more than is given him by the quoted language, namely, a right over others to receive a lease *if* a lease is issued. The Department has consistently held that the act confers upon him no vested right to the issuance of a lease. *Harry J. Lane, Admr. of the Estate of Mary A. Lane*, A. 24028, April 30, 1945 (unreported); *Charles S. Hill et al.*, 59 I. D. 215 (1946). Appellants' attempt to distinguish their rights from those of a section 17 applicant must therefore fail.

In answer to the Commissioner's statement that they had shown no equities which would justify a modification of the withdrawal to permit the issuance of leases, appellants make the bare statement that Robinson *et al.* drilled a test well on their lease at considerable expense. No details are given as to the time of drilling or the amount of expenses, or any other facts showing any substantial equities in the lessees. Appellants also assert that through Morgan's cooperation, a well was drilled on *adjoining* land which resulted in a discovery of potash and occasioned the withdrawal in question. How this gives Morgan any equities in the issuance of a new lease is not at all evident.

It is clear that the Commissioner's decisions were correct.[4] They are therefore affirmed.

C. GIRARD DAVIDSON,
Assistant Secretary.

STATE OF NEW MEXICO

A-24400 *Decided February 12, 1947*

School Sections Within National Forests—Title of the State.

Title to school sections within national forests does not vest in the State of New Mexico until the lands are removed from the national forest (sec. 6 of the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, 562).

School Sections—Title of the Territory—Title of the State.

The fact that title to school sections, previously surveyed, vested in the Territory at the time of the granting act of 1898 (30 Stat. 484) does not have the result that title necessarily passed to the State by operation of law, since section 6 of the New Mexico Enabling Act of June 20, 1910 (36 Stat. 557, 562), delayed the vesting of the State's title until the lands are removed from the national forest; also in cases where the lands had been included in the forest after having been surveyed.

[4] There is one error in the Commissioner's decision on Hogan's application. After reciting that the application covered lands in secs. 21, 22, and 28, T. 22 S., R. 19 E., S. L. M., the Commissioner said that all the land, except that in sec. 28, was withdrawn by Order No. 256. Since sec. 21 is also not included in the withdrawal, the application should not have been rejected as to the land in that section. The affirmance of this decision is on the understanding that this error will be rectified.

February 12, 1947

APPEAL FROM THE GENERAL LAND OFFICE[1]

The State of New Mexico, by its Commissioner of Public Lands, has appealed from the ruling of the General Land Office dated June 18, 1946, which held that title to sections 16 and 36, T. 19 S., R. 12 E., N. M. P. M., had not vested in the State.

The plat of survey for the above sections was approved on March 18, 1886. By proclamation of April 24, 1907 (35 Stat. 2127), the sections were included in the Sacramento National Forest and have never been eliminated therefrom. Relying upon the second proviso of section 6 of the New Mexico Enabling Act of June 20, 1910 (36 Stat. 557, 562), the Land Office answered in the negative the State Commissioner's inquiry whether the title to the above sections had vested in the State.

In support of its conclusion that title to the sections vested in fee simple, the State contends on appeal that the school-section grant to the Territory of New Mexico in the act of June 21, 1898 (30 Stat. 484), was a grant *in praesenti*, and that the fee simple title, acquired by the Territory, "came to the *State* of New Mexico along with the territorial Capitol and other property, by operation of law." The State argues that the creation of the Sacramento National Forest could not legally interfere with the vested title of the Territory, and that it would not be reasonable to construe the land provisions of the New Mexico Enabling Act, *supra*, as divesting the State of the title. Indemnity selections for the sections here in question, the State contends, would not serve its purposes since the entire township 19, with small exceptions, is owned by the State, so that the land pattern in the area would be greatly disturbed by the exclusion of sections 16 and 36.

The present controversy is determined by the express provision of section 6 of the New Mexico Enabling Act of June 20, 1910, *supra*. The portion of that section which is here relevant reads as follows:

> * * * That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, ***shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain;*** but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situate within said forest reserves, whether surveyed or unsurveyed, and for which

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

no indemnity has been selected, may bear to the total area of all the national forests within said State, the area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated. [Italics supplied.]

The italicized language makes it clear that title to the sections in question does not vest in the State until the lands are removed from the national forest. In order to overcome the express provision of the statute, the State has cited numerous authorities designed to support its argument that fee simple title was acquired by the State and that such title was disturbed neither by the creation of the national forest nor by the New Mexico Enabling Act. None of the authorities serves to refute the result reached by the Land Office.

Thus, *United States* v. *King and Coxe*, 3 How. (44 U. S.) 773 (1845); *Wilcox* v. *Jackson*, 13 Pet. (38 U. S.) 498 (1839); and *Cooper* v. *Roberts*, 18 How. (59 U. S.) 173 (1855), are cited for the proposition that the grant of the sections by the 1898 act was a grant *in praesenti* so that, the lands having previously been surveyed, title vested in the Territory when the act was passed. But the issue here presented is not whether title passed to the *Territory*. In fact the Land Office, referring to the precedent of *Tillian et al.* v. *Keepers*, 44 L. D. 460 (1915), stated specifically that title to sections 16 and 36, surveyed prior to the act of June 21, 1898, did pass to the Territory at the date of that act unless the lands at that time were reserved or otherwise disposed of or were known to be mineral in character. *Cf. United States ex rel. State of New Mexico* v. *Ickes*, 72 F. (2d) 71 (1934), *cert. denied* 293 U. S. 596. Rather, the issue is whether title vested in the *State*.

Arguing from the acquisition of title by the Territory, the State quotes from Article 22, section 6, of the New Mexico constitution, and from the opinion in the case of *Brown* v. *Grant*, 116 U. S. 207 (1886), in order to sustain its contention that title passed to the State by operation of law. But the very quotation from the Supreme Court opinion, supplied in the brief of the State—"*Unless otherwise declared by Congress*, the title to every species of property owned by a Territory passes to the State upon its admission into the Union" (116 U. S. at p. 212; italics supplied)—shows that in the present case title did *not* pass to the State, for the above-quoted portion of section 6 of the New Mexico Enabling Act, *in haec verbis*, contains such a congressional declaration "to the contrary." And, of course, the provision of the New Mexico constitution that "All property, real and personal * * * belonging to the Territory of New Mexico, shall become the property of this state" (Art. 22, sec. 6), was not intended to, and in

any event could not, prevail over the express terms of the New Mexico Enabling Act.[2] The Presidential proclamation of January 6, 1912 (37 Stat. 1723), providing for the admission of the State of New Mexico, stated specifically that such proclamation was "in accordance with the provisions" of the New Mexico Enabling Act.

The State, citing *Wilcox* v. *Jackson*, 13 Pet. (38 U. S.) 498 (1839), and *Hibberd* v. *Slack*, 84 Fed. 571 (1897), contends that the vested title, acquired upon the survey of the land, could not be disturbed by the creation of the Sacramento National Forest and that therefore the reasonable meaning of the above-quoted proviso of section 6 of the Enabling Act could only be that sections 16 and 36 should not vest in the State if they had been included in a reservation *prior* to the identification by survey. It need not here be determined whether the inclusion within the forest had any effect on the title of the *Territory*,[3] for in any event section 6 of the Enabling Act should not be interpreted in the narrow manner suggested by the State. Section 6, in general language, delays the vesting of the State's title to lands "within national forests now existing or proclaimed." The statute specifically includes in this provision lands within said forest reserves, "whether surveyed or unsurveyed," and there is no indication whatever that that rule was to be limited to land surveyed *after* its inclusion in a forest reservation. Section 6, it should be noted, does not preclude the acquisition of title by the State, but merely delays it until restoration of the lands to the public domain. Moreover, it provides that the State be granted, as compensation for such delay, a proportionate share of the gross proceeds from all the national forests within the State. Special consideration was thus given to the interests of the State in the New Mexico Enabling Act, and this constitutes an additional reason why the provision should not be limited unjustifiably, in violation of the clear terms of the statute.

Finally, the State contends that the interpretation of the Enabling Act here adopted would "divest vested rights." But any rights which

[2] It may be noted that in the case of Brown v. Grant, *supra*, involving the identical provision of the Colorado constitution, the Supreme Court, after setting forth the above-quoted language, continued as follows: "The provision in the State constitution to that effect was only declaratory of what was the law," i. e., declaratory of the rule that title passes to the State, "unless otherwise declared by Congress."

[3] The case of Hibberd v. Slack, *supra*, held only that school lands title to which had vested in a *State* could not be made part of a forest reservation. Similarly, the dictum in Wilcox v. Jackson, *supra*, at p. 513, quoted by the State, that "whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and * * * no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it," does not resolve the above-stated issue, namely the effect of a reservation upon the title of a *Territory*. *Cf.*, generally, memorandum opinion, July 16, 1946 (M–33540), 59 I. D. 280, entitled, "Reclamation Withdrawal of Surveyed Arizona School Lands," which, citing authorities, explained that despite severance from the public domain by a forest reserve, lands remain subject to a reclamation withdrawal.

the *State* of New Mexico might have to the lands could only have been created by the Enabling Act. There cannot be any vested rights of a State prior to its admission to the Union.

The conclusion here reached is in accord with an earlier ruling of the Department. In a letter of January 15, 1929, to the State Commissioner of Public Lands, the Secretary took the same view concerning sections 16 and 36, T. 16 S., R. 13 E., N. M. P. M. The view also was sustained by a decision of the District Court of the United States for the District of New Mexico. In the unreported case of *United States* v. *Nelson A. Field* (decided August 8, 1921, No. 760, Equity), District Judge Neblett determined the status of certain school sections (section 16, T. 17 S., R. 12 E., portions of section 36, T. 17 S., R. 11 E., N. M. P. M., etc.) which, like the sections here involved, had been surveyed prior to inclusion in a forest reserve. He ruled that the State of New Mexico had no title to the lands.

The decision of the General Land Office is affirmed.

C. GIRARD DAVIDSON,
Assistant Secretary.

HORACE CRISP v. OMAR LeROY MAINE

A-24311 *Decided February 14, 1947*

Homestead Entry—Establishment of Residence—Residence Required for Final Proof—Contest Proceedings.

A charge of failure to establish residence is not sustained by evidence to the effect that the residence maintained was not of the character contemplated by the requirements of final proof.

Homestead Entry—Establishment of Residence—Good Faith of Entryman—Elements of Residence Required for Final Proof.

The good faith of the entryman is the basic essential in determining whether residence has been established (*Slette* v. *Hill*, 47 L. D. 108), and the rule laid down in that case is in no way dependent upon the establishment of the elements of residence required for final proof, such as a habitable house. *Cf.* 43 CFR 166.26.

Homestead Entry—Good Faith of Entryman—Establishment of Residence.

The determination whether an entryman has acted in good faith must be made in the light of all the circumstances of each particular case; and in this connection the amount of work done by the entryman on the homestead and his efforts to secure a well and to build a house are important.

Homestead Entry—Good Faith of Entryman in Establishing Residence—Primitive Conditions on Homestead—Possession of Shack Somewhere Else.

The fact that the entryman had a shack on some other place; that as compensation for his work there he was to obtain a certain portion of that

Not only is there nothing in this act, which is manifestly a remedial statute, beyond the use of the word "person" to indicate that Congress intended to limit the provisions of the act to natural persons, but, on the contrary, by including "selections" as well as "entries" and "locations," it is apparent that the act was not intended to be limited to "persons" as distinguished from a State or any other corporation. The term "selection," as used in the land department, generally represents the filing or presentation of a claim by a State or a railroad company and is seldom used to indicate the claim of an individual, which is usually known as an "entry" or a "location," as the case may be.

In view of the foregoing, and inasmuch as it appears from the statute of the State of Utah above cited, that the Board of Land Commissioners has the direction, management, and control of the lands granted to the State by the government, and as said board has elected to accept patents for the surface rights of these lands, the list of selections has been approved, subject to the reservation contained in the act, and the same is returned herewith.

SCHOOL LANDS—SURVEY—NATIONAL FOREST—JURISDICTION OF LAND DEPARTMENT.

STATE OF MONTANA.

The grant of sections 16 and 36 made to the State of Montana by the act of February 22, 1889, for school purposes, is a grant *in præsenti*, but the right of the State thereunder does not attach to any particular tract of land until identified by survey; and where prior to such identification any section 16 or 36 is embraced in a national forest, the right of the State to that specific tract does not attach so long as the reservation continues, but the State is entitled to select indemnity therefor.

Acting Secretary Pierce to the Attorney-General of Montana, September 30, 1909.

(F. W. C.) (S. W. W.)

I have received your letter of the 7th instant relative to a controversy which has arisen between officials of the State and officials of the United States Forest Service over a portion of section 36, township 32 north, range 19 west, at or near the station of Belton on the Great Northern Railway, in Flathead County, Montana.

It appears that this land was surveyed in the field between August 20 and 25, 1902, and the township plat, which was approved March 10, 1904, was filed in the local office October 17 of that year. Subsequently to the survey, but prior to the approval of the plat, the said land was by proclamation of June 9, 1903, made a part of the Lewis and Clarke National Forest.

It seems that on or about July 7, 1909, application was made to the State Board of Land Commissioners for the purchase of the south half of the northwest quarter of section 36, whereupon that tract, together with other lands in the same district, was offered for sale after due publication of notice; that on the day of the sale a representative of the Forest Service served written notice upon the assistant State land agent and others that the United States did not recognize the claim of the State of Montana to any portion of said section 36, and that no purchaser from the State would be allowed to take possession thereof; that notwithstanding such notice the land was sold on August 5, 1909, to L. C. Gilman, the highest bidder, who paid $75.50 per acre therefor, and the sale was thereafter confirmed by the officers of the State; and that agents and employes of the Forest Service of the United States have taken possession of the land, proceeded to fence the same with a substantial fence, have ordered all persons off, and claimed the right and title thereto for the United States as against the State and all persons whomsoever.

You maintain that the title to this land is in the State under and by virtue of sections ten and eleven of the act of February 22, 1889 (25 Stat., 676), by which the State of Montana was admitted into the Union and which granted to the State sections numbered sixteen and thirty-six in every township for the support of common schools. It is submitted that the act admitting the State into the Union constituted a contract prescribing the conditions of admission, which were duly accepted by the State; that it also constituted a grant of lands *in præsenti* which can not be subsequently changed or modified by legislation on the part of the government of the United States alone so as to deprive the State of vested rights.

You have submitted the matter to this Department under the belief that the Department has jurisdiction over the same and you desire that action be taken to vindicate the rights of the State, to the end that an appeal to the courts may be avoided.

In reply I have the honor to advise you that respecting the subject-matter of the controversy this Department is without jurisdiction and without authority to interfere in any manner whatever. If, as maintained by you, the land is not part of the national forest, within the limits of which it is included, it is because title has vested in the State. If, on the other hand, title has not vested in the State and the land was properly included in the national forest, it is no longer within the jurisdiction of this Department but is under the control of the Forest Service. Inasmuch, however, as you seem to desire the views of this Department upon the subject, and as the Department has heretofore in its adjudication of similar questions found it necessary to construe the laws involved, I shall inform you as to

the construction placed upon such laws together with a statement of the reasons therefor.

In making the grant of land to the State of Montana for the support of common schools, the act of February 22, 1889, *supra*, provided, in section ten thereof, that—

> Upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of an act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to, and become a part of, the public domain.

The foregoing section making the grant of school lands to the State is similar in many respects to previous legislation by Congress making school grants to other States, but the act in question contains a somewhat unusual provision in that section eleven declares:

> And such lands shall not be subject to preemption, homestead, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for school purposes only.

It seems that the State relies upon the provision contained in section eleven, above quoted, under which it is claimed Congress plainly intended to reserve the particular sections named in the act to the State for the purpose specified, and that in view of that provision of the granting act Congress can not without the consent of the State make any other disposition of the land.

By the act of February 28, 1891 (26 Stat., 796), Congress amended sections 2275 and 2276 of the Revised Statutes, which relate to the school grants to the States generally, and provided the method of selecting indemnity therefor. As thus amended these sections clearly provide that if, prior to survey, settlement is made under the preemption or homestead laws, upon land afterwards found to fall within section 16 or 36, such settlement shall be protected and the State is relegated to taking indemnity therefor. In construing the act making the grant to the State and the act of 1891 amending sections 2275 and 2276, this Department has repeatedly and uniformly held that a State admitted into the Union under the said act of 1889 acquires no rights to lands in sections 16 and 36 prior to the survey, and that the provisions of the act of 1889 where they conflict with sections 2275 and 2276, Revised Statutes, as amended, are superseded by the provisions of the amended sections and that the grant of school lands

provided for in the act of 1889 must be administered and adjusted in accordance with the later legislation. See State of Washington *v.* Kuhn (24 L. D., 12); Todd *v.* State of Washington (24 L. D., 106); South Dakota *v.* Riley (34 L. D., 657); South Dakota *v.* Thomas (35 L. D., 171).

It will be observed that the cases cited involve conflicts between settlers prior to survey and the claim of the State under the school grant, and the Department held that in view of the plain language of the amendatory act of 1891 the claims of the States must yield to those of the settlers.

The State maintains that Congress had no authority to thus modify the granting act of 1889 without first procuring the State's consent, and while that argument, whatever be its force, might have been properly presented in the cases cited it has little or no bearing upon the question now under consideration, because it will be observed that the inhibition contained in section eleven of the granting act was specifically against the making of any settlement upon or entry of the lands embraced in sections 16 and 36, "whether surveyed or unsurveyed," under the preemption, homestead, or other land laws of the United States. Congress did not declare that by making the grant to the State the power of the United States to make any other disposition was thereby lost; on the contrary, that such was not the intent of Congress is manifested from the fact that in the granting act special provision was made whereby the State might be indemnified in the event the lands found to fall within the limits of the school sections granted should be embraced in "Indian, military, or other reservations of any character."

This Department and the courts also have uniformly held that the grant of sections 16 and 36 to the State does not vest until the lands are identified by survey, and the date of the survey is not fixed by the time the work is done in the field but by the approval of the township plat by the proper authority. (5 L. D., 415; 24 L. D., 54.)

In the case of Cooper *v.* Roberts (18 How., 173), the Supreme Court said:

> We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and depending for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title.

The same court in the comparatively recent case of Minnesota *v.* Hitchcock (185 U. S., 393), after quoting from the decision in the case of Cooper *v.* Roberts, *supra*, used the following language:

> But while this is true, it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all

burdens which may rest upon lands belonging to the government within the state, or to transform all from their existing status to that of public lands, strictly so-called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the State shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that within the limits of an Indian reservation or unceded Indian country—that is, within a tract which is not strictly public lands—certain lands should be set apart for a public park, or as a reservation for military purposes, or for any other public uses, it has the power notwithstanding the provisions of the school grant section.

So, in construing the grant of school lands made to the State of Nevada by the act approved March 21, 1864 (13 Stat., 30), the Supreme Court, after stating that the grant was a grant *in præsenti*, held that—

until the status of the lands was fixed by a survey and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a sixteenth or thirty-sixth section had been disposed of the State was to be compensated by other lands equal in quantity. [Heydenfeldt *v.* Daney Gold and Silver Mining Company, 93 U. S., 634, 640.]

It will thus be seen that the grant to the State of Montana, like school grants made to other States, while a grant *in præsenti* did not attach to any particular tract of land until it was surveyed; that if prior to such survey, that is, prior to the date when that survey is officially approved, Congress, or some officer of the government acting under the authority of Congress, should make other disposition of the land, the right of the State to that particular section is thereby defeated; otherwise it would have been useless for Congress to make any provision whatever for the taking of indemnity.

This Department has recently had occasion to consider similar questions in connection with a case arising in South Dakota, and you are respectfully referred to the decision rendered in that case which is published in the thirty-seventh volume of Land Decisions, at page 469, *et seq.*

In view of these considerations this Department is of the opinion that the land involved herein was legally included in the forest reserve prior to its survey, and that the State's title does not attach until the reservation is extinguished and the land restored to the public domain. However, under the terms of the act of February 28, 1891, *supra*, the State, without awaiting the extinguishment of the reservation, may immediately avail itself of the privilege of taking indemnity for the lands so reserved.

Upon careful consideration it is believed that you will perceive that the act of 1891 was manifestly passed in the interests of the States, and that notwithstanding the somewhat unusual language of the eleventh section of the act of 1889 the States admitted into the Union thereunder—Montana being one of them—have derived material benefits from the act of 1891. By the granting act lands in Indian, military, or other reservations of any kind are declared to be not subject to the grants or to the indemnity provisions of the act until the reservation shall have been extinguished; the States are confined in taking indemnity to tracts contiguous to those in lieu of which the indemnity is taken; and there is no provision for the taking of indemnity in lieu of unsurveyed lands in any reservation; while by the act of 1891 the indemnity may be taken anywhere in the State; the States need not await the extinguishment of the reservation before taking indemnity for the school sections situated therein; and the quantity of indemnity to which the States may be entitled may be ascertained without awaiting the extension of the public surveys over the reservations involved.

Moreover, by modifying the terms of section eleven of the granting act, Congress, by the act of 1891, evidently had the welfare of the States in view, because, if no protection had been afforded settlers who prior to survey might locate upon lands afterwards found to be within the sixteenth or thirty-sixth section, it is absolutely certain that the development of the States would have been so retarded as to result in incalculable damage. Under the law as it now stands, however, settlers who located prior to survey are protected, and it is believed that it will not be seriously questioned that this fact alone has largely contributed to the rapid development of the States admitted under the act of 1889.

In this connection it is believed that an opinion recently rendered by the Attorney-General on a question somewhat similar may have some bearing upon this case. The question involved in that case was the construction of the act of August 18, 1894 (28 Stat., 394), granting the preference right of selection to certain States and Territories, and the Attorney-General, to whom the matter was referred for an opinion, held September 15, 1907, that notwithstanding the lands might have been withdrawn for the State upon its application for a survey, until the State's right was actually fixed to some specific tract by proper selection, the government had authority to make other disposition of the land and thus defeat entirely the State's right to make the selection. [See 38 L. D., 224.]