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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos.: 35-12996, 43-10957, 43-10997, 43-11005,
	)	43-11052, 43-11054, 43-11056, 43-11058, 43-11069,
	)	43-11071, 43-11158, 43-11160, 43-11166, 43-11172,
Case No. 39576	)	43-11268, 43-11272
	)	
	)	STATE OF IDAHO'S MOTION TO WITHDRAW
	)	ITS OBJECTIONS
	)	
	)	
	)	
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	)	

The State of Idaho hereby moves for an order granting its motion to withdraw its objections in this matter. The grounds for this motion are as follows:

1. The AFFIDAVIT OF FREDRIC W. PRICE establishes that only two of the sixteen subcases were ever subject to entry under the public land disposal statutes. Thus, the

State of Idaho has no basis for continuation of its objections for those fourteen subcases.

2. On December 13, 1920, a Mr. William Hart Udy filed an application for entry under the Stock Raising Homestead Act for land within the place of use of subcase no. 43-11160. This application was relinquished on May 12, 1921. AFFIDAVIT OF FREDRIC W. PRICE, at 6, Attachment 1. Thus, this application was not pending on the date of April 17, 1926, and the State of Idaho has no basis for continuing its objection for subcase no. 43-11160.

3. On July 22, 1921, a Mr. Robert G. Hall filed an application for entry under the Enlarged Homestead Act of June 17, 1910, ch. 298, 35 Stat. 531, for land within the place of use of subcase no. 43-11268. A contest to this entry was filed, and the contestant alleged that Mr. Hall "has never established residence, never lived on this land, never having built a house, or made any other improvements, excepting inclosing said land with a fence." Mr. Hall failed to respond to the contest; the facts alleged in the contest were deemed true; and the entry was cancelled on September 22, 1926. AFFIDAVIT OF FREDRIC W. PRICE, at 6, Attachment 2. Thus, this application was pending on the date of April 17, 1926. However, for federal land to be classified as not "unappropriated," the entry must be of such a character as to constitute a "bona fide settlement." *California v. Turner*, 26 Pub. Lands Dec. 669 (1898). A copy is attached as Attachment I. Here, the mere enclosure of the premises in a fence is insufficient to constitute a "bona fide settlement." Thus, the land was unappropriated on April 17, 1926, and the State of Idaho has no basis for continuing its objection for subcase no. 43-11268.

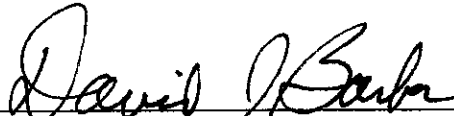
4. Counsel for the State of Idaho has attempted to contact the United States on September 25, 2003, and was unsuccessful.

5. The State of Idaho is prepared to execute Standard Form 5s for each of the sixteen subcases.

RESPECTFULLY Submitted this 25th day of September 2003.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO



DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 25th day of September 2003, I caused to be served the original and true and correct copies of the **STATE OF IDAHO'S MOTION TO WITHDRAW ITS OBJECTION** on the following parties by the methods indicated below:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 27007
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. One Copy to the claimant of the water right:

R. Lee Leininger
Trial Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources
Div.
550 West Fort Street, MSC 033
Boise, ID 83724

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (303) 312-7379
- ☐ Statehouse Mail

3. Copies to

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

STATEHOUSE MAIL

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

(not applicable)

United States Department of Justice
Environment and Natural Resource Division
550 W. Fort Street, MSC 033
Boise, ID 83724

U.S. MAIL



DAVID J. BARBER
Deputy Attorney General

SCHOOL INDEMNITY SELECTION—SETTLEMENT RIGHT.

STATE OF CALIFORNIA *v.* TURNER.

The right to select school indemnity extends only to "unappropriated" lands, and hence can not be recognized where at the date of selection the land applied for is embraced within a *bona fide* settlement claim of a qualified homesteader who has improved the land, and is residing thereon.

Secretary Bliss to the Commissioner of the General Land Office, May 16,
(W. V. D.) 1898. (P. J. C.)

The plat of survey of Tp. 11 N. R. 11 W., M. D. M., San Francisco, California, land district, was filed in the local office August 14, 1894, and on August 16 following the State of California filed application No. 11740 to select as school indemnity land the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Sec. 33 thereunder. September 13, following Wellington H. Turner made homestead entry of this tract, with others, alleging in his application settlement September 5, 1887, which was before the land was surveyed.

Turner gave notice of his intention to make final proof on July 25, 1895. Notice of this was served on the State, and on the day set all parties appeared. The final proof was submitted, the witnesses cross-examined by the State and testimony in behalf of the State introduced. The local officers found that Turner had not established and maintained a residence a sufficient length of time prior to the hearing to entitle him to the land under the homestead laws. They recommended that the proof be rejected.

On appeal your office not only affirmed the action of the local officers, but in addition held the entire entry for cancellation; whereupon Turner prosecutes this appeal. The appellant accepts the decision of your office "in so far as it refuses to allow said Turner to make final entry under his presented proofs," but alleges that it is error to deny his request "to withdraw his application for a patent, and to be permitted to reside upon and cultivate the land for such time as the homestead act requires in the securing of a homestead thereunder and in holding said Turner's entry for cancellation."

In view of the questions raised by the appeal, it is not deemed necessary to discuss at any length Turner's connection with the land prior to the year 1894. Whatever may be said about his residence before the date of the selection by the State, it is clear from the evidence that at that time, and for several months prior thereto, he was residing on the land and cultivating it. It is also shown that he was a qualified entryman, and, within the statutory period, he made his homestead entry.

By the act of Congress of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, the right of the

State to select lands in lieu of those lost in the sixteenth and thirty-sixth sections is restricted to "unappropriated" lands.

It is believed that the testimony in this case is sufficient to show that the tract in controversy was, in contemplation of the statute, appropriated by Turner, and that his settlement, residence and improvements were sufficient to defeat the right of the State to make selection thereof.

That part of your office judgment holding his entry for cancellation is therefore reversed; the State's application to select will be rejected, and Turner's homestead entry will remain intact subject to future compliance with law.

TIMBER CULTURE CONTEST—ACT OF MARCH 3, 1893.

PETTY v. RICHARDS.

A contest against a timber culture entry, initiated after the passage of the act of March 3, 1893, in which the charge is non-compliance with law, presents no cause of action, in the absence of an allegation of default on the part of the entryman occurring during the first eight years of the entry.

Secretary Bliss to the Commissioner of the General Land Office, May 17, 1898. (W. V. D.) (G. C. R.)

On July 11, 1885, Owen R. Richards made timber culture entry for the NE. $\frac{1}{4}$ of Sec. 3, T. 8 S., R. 36 W., Colby, Kansas.

On January 29, 1896, Purley Petty filed his affidavit of contest against the entry, alleging that Richards

has wholly failed to plow, plant, or cultivate, or to cause to be cultivated any portion of said tract to trees, seeds, or cuttings at any time since about July 1, 1893, and up to this date, viz., January 29, 1896; but has wholly abandoned said tract; that said tract is in an uncultivated condition and overgrown by grass and weeds, and barren of trees.

Notice was given by publication, and on the day of hearing (March 5, 1896,) the defendant demurred to the complaint, stating that the same does not state facts sufficient to constitute a cause of action or sufficient, if true, to warrant cancellation of the entry. The register and receiver sustained the demurrer and dismissed the contest. On appeal, your office, by decision dated June 24, 1896, sustained that action, and a further appeal brings the case here.

It is insisted in the appeal that the timber culture laws contemplate that the entryman must:

1. Make proof on his claim within a reasonable time after his right to make proof accrues; or
2. Failing to make such proof, he must continue the planting and cultivation of the land, or suffer the penalty of cancellation.

It is stated in argument that, if it be held that upon compliance with the timber culture law for eight years, the entryman has met the full requirements of the law, and may thereafter postpone making final