



U.S. Department of Justice

Environment and Natural Resources Division

LL:DAJ

90-6-2-63C

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DEC 22 2003

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Department of Water Resources

December 18, 2003

via FedEx Mail

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

Re: SRBA Case No. 39576
Subcase Nos. 63-29070 and 63-29142

Dear Ms. Delaney:

Enclosed for filing are the following original documents in the above mentioned subcases:

1. **MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT**
2. **AFFIDAVIT OF FREDRIC W. PRICE**

The Affidavit of Fredric W. Price is a copy of his original, which he is filing separately; however, the attachments to the affidavit are the original attachments.

Thank you for your time and attention in this matter.

Sincerely,

David A. Jarvis
Paralegal

Enclosures

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DEC 22 2003

Department of Water Resources

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Environment and Natural Resources Division

R. LEE LEININGER
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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

Case No. 39576

) Subcase Nos.: 63-29070, 63-29142
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**MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT**

Descriptive Summary

This is the United States' motion for summary judgment and memorandum in support thereof for the above referenced subcases.

Motion

The United States hereby moves for a ruling pursuant to I.R.C.P. 56(a) that its claims based upon Public Water Reserve No. 107 (PWR 107) to water from springs and waterholes located on the federal public lands are not defeated by an application to enter and homestead the public lands containing the claimed springs or water holes.

Memorandum

I. Background

Claims based upon Presidential Executive Order dated April 17, 1926 and known as Public Water Reserve No. 107 (PWR 107) have been the target of objection and challenge for many years in the SRBA. Initially, the State of Idaho and others challenged the validity of the PWR 107 federal reservation in a matter titled Basin-Wide Issue No. 9. In that contest, presiding SRBA Judge Hurlbutt ruled that PWR 107 only reserved to the United States small parcels of land and not the water from springs and water holes located on the land. *Memorandum Decision and Order, Re: Basin Wide Issue 9*, subcase 91-00009 (Issued Dec. 9, 1996). The Idaho Supreme Court unanimously overturned the Court's decision ruling that "PWR 107 evidences an express intention by Congress that reserves a water right in the United States." *United States v. Idaho*, 131 Idaho 468, 959 P.2d 449, 452 (1999).

After the basin-wide issue was decided, the State filed hundreds of individual objections asserting that the United States' claims to stockwater should not exist. The State argued that the reason the PWR 107 water right should not exist is that certain claimed springs and water holes were tributary to a river or stream. Special Master Haemmerle ruled in favor of the State on this issue. *Order Granting State's Motion for Summary Judgment* (Issued March 5, 1999) at p. 8. Special Master Cushman also examined the State's reasons for why the water right should not exist and, in a second order, ruled that springs on the federal public domain with water that leaves the reservation while on the surface are not reserved by PWR 107. *Second Order on Joint Submission* (Issued October 29, 1999). Judge Burdick disagreed with the Special Masters and ruled that PWR 107

“created an appurtenant implied federal reserved water right in the spring or water hole giving rise to the land irrespective of whether or not water flowing from the spring or water hole is tributary to a perennial running stream.” *Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman Consolidated Subcases 23-10872 et al., Joint Submission Subcases 23-10894 et al.* (hereinafter “Memorandum Decision on Scope of PWR 107”) (Issued December 28, 2001), at 35.^{1/}

While the State’s objections advanced through the Court, the United States continued to present testimony in the form of affidavits at required hearings for its PWR 107 water right claims. *See* I.C. § 42-1411(A). In these affidavits, the BLM affiant swears that he or she has reviewed the claim file and the field investigation report in support of the claim; that the claim is to a spring or water hole containing water sufficient for the watering of livestock; and that the spring or water hole is located on unreserved federal public land. These affidavits have been accepted by the Court for years. In an order dated November 16, 1998, Special Master Haemmerle states that

[u]nder the express provisions of PWR 107, the United States alleges that the *prima facie* elements for a PWR 107 reserve are as follows:

- a. Identification of a spring or waterhole;
- b. Located on land that was unreserved federal public lands in 1926; and
- c. Containing sufficient water for purposes of stock watering.

This court agrees with these *prima facie* elements.

Order Denying Motion for Default Judgment (PWR 107)), subcases 57-02493, *et al.*^{2/} Accordingly,

^{1/} Judge Burdick also concluded that the decision “constitutes a final disposition of the objections raised in this matter” *Id.* at 36. The State’s objections, therefore, are resolved and any further objection at this stage is untimely.

^{2/} The claims for subcases 57-02493 *et al.* were initially denied based upon the Special Master’s determination that the quantity of water claimed was in error. This matter was subsequently settled

the United States has filed affidavits for approximately 2570 subcases attesting to these elements of a PWR 107 water right.

Late last year, Special Master Cushman denied certain United States claims to water rights based on PWR 107 upon the discovery that the lands described in the claims had entry applications pending on the date of the reservation, April 17, 1926. *Special Master's Report and Recommendation*, subcase 25-13635, *et al.* (dated December 18, 2002). The Special Master concluded that the entry applications demonstrate that the lands "were homesteaded" at the time that President Coolidge signed PWR 107 and that the lands or the springs on the lands were appropriated. *Id.* Accordingly, the Special Master ruled that the places of use containing the water were not reserved. The United States filed a motion asking the Special Master to alter or amend his ruling. That motion is pending.

This legal issue was also addressed by Special Master Dolan in a set of subcases in basins 35 and 43. On September 19, 2003, the United States filed for summary judgment on the question of whether a homestead entry application pending at the establishment of Public Water Reserve No. 107 (PWR 107) defeats the federal reservation. The Special Master ruled on the motion on October 28, 2003 stating that "[f]or its PWR 107 federal reserved claims, the BLM is not required to submit evidence of the land entry status of the area surrounding the spring or waterhole source at the time of the reservation," and ruling that "to establish a *prima facie* case in support of its PWR 107 claims, the BLM must: a) identify a spring or waterhole, b) located on land that was reserved federal public land on April 17, 1926, and c) which contains sufficient water for purposes of stock watering."

when the BLM agreed to accept 0.02 cfs or 13,000 gallons per day as the decreed water amount.

Special Master Report, re: subcases 35-12996, *et al.*, at 1.

In subcases 63-29070 and 63-29142, the United States submitted an affidavit establishing that these claims are to springs located on the federal public domain; that the land was unreserved prior to the April 17, 1926 PWR 107 executive order; and, that the springs contain sufficient water for the purpose of stock watering. *See Affidavit of Robert R. Mallis*, re: subcase nos. 51-10499, *et al.*, (hereinafter “*Mallis Affidavit*”), filed July 31, 2003, at ¶ 5. For purposes of this summary judgment motion, the U.S. Bureau of Land Management (“BLM”) also confirmed that these water right claims are located on land parcels where entrypersons had filed for a homestead and the entry applications were pending at the time of the PWR 107 reservation. *See Affidavit of Fredric A. Price*, re: subcases 63-29070 and 63-29142, filed December 19, 2003, at ¶ 7.

However, the homestead entry applications failed and the land has never left federal ownership. *Id.* To determine how these particular applications failed, the BLM retrieved the records of the homestead entries from the National Archives repository in Seattle, Washington. Claim number, 63-29070, was subject to a Homestead Entry filed on June 15, 1920 and subsequently cancelled “for failure to submit proof within the statutory period” on January 10, 1928. *Id.* at Attachment 1, p. 11. Claim number, 63-29142, was subject to a Stock-Raising Homestead Entry filed on December 11, 1922 and subsequently relinquished on March 26, 1928. *Id.* at Attachment 2, p. 18. The facts of the failed entries are more thoroughly presented, *infra*, at p. 12-13.

II. Argument

1. A homestead entry application that is not perfected does not give the entryperson a real interest or a land appropriation.

The State claimed at the November 12, 2003 status conference for these subcases that the

existence of a pending homestead entry application for the tract of public land containing these springs at the time of the enactment of PWR 107 defeats the United States' claim to a reserved water right. Because PWR 107 applies to "vacant, unappropriated, unreserved public land", the State argued, the entry application demonstrates that the land was occupied and appropriated and, therefore, the United States' claims and supporting affidavit fail to establish the *prima facie* elements of the PWR 107 reserved water right.^{3/} This is incorrect as a matter of law and as a matter of fact.

The filing of a homestead entry application grants to the entryperson a vested right good against all other entries. Against the United States, however, the entryperson has only an inchoate interest prior to the issuance of a land patent. *Guerra v. Packard*, 236 Cal.App.2d 272, 291-292 (Cal.App.1965). An inchoate interest is "an interest in real estate which is not a present interest, but which may ripen into a vested estate if not . . . extinguished." *Black's Law Dictionary* 762 (6th ed. 1990).

The inchoate interest of a homesteader became a real interest upon "proving up", i.e., showing that he or she complied with the homesteading laws including payment to the United States and permanent improvements to the entered lands.^{4/} A failure to "prove up" resulted in the

^{3/} PWR 107 provides:

[I]t is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

^{4/} Homesteading in America began with the Homestead Act of 1862, ch. 75, 12 Stat. 392 (not codified), which granted the entryperson title to 160 acres of the public domain by either submitting payment of \$1.25 per acre or by occupying the land for five years and paying a registration fee of 30 dollars.

cancellation or relinquishment of the entry. For the lands containing the springs and waterholes claimed in the SRBA by the United States under PWR 107, all of the homestead entries failed including the entries on the land claimed in subcase numbers 63-29070 and 63-29142 that were pending at the time of the signing of PWR 107. Since these interests were extinguished and did not vest against the United States, the entrypersons had no real interest against the United States, the lands were not “appropriated”, and the mere application for entry has no effect upon the PWR 107 federal reservation.

This situation is markedly different from the circumstances in the *Order Disallowing Uncontested Federal Reserved Water Right Claims* (Mountain Home AFB), subcase numbers 61-11783, 61-11784 and 61-11785 (Issued April 6, 2001), where Judge Burdick ruled that a federal reservation may not exist on land acquired from a non-federal entity. Here, the lands never left federal ownership. Moreover, since the springs and waterholes have always been on federal public lands and continue to serve stockwatering needs on the public lands, the Idaho Supreme Court’s conclusion still holds, “[w]ithout the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes.” *Idaho*, 131 Idaho, 959 P.2d at 453.

Occupancy meant the construction of a house and cultivation of a minimum percentage of acreage. *Id.* Under the Enlarged Homestead Act of 1910, ch. 298, 36 Stat. 531, *repealed by* Federal Land Policy and Management Act, Pub. L. 94-579, § 702, 90 Stat. 2787 (1976), the size of the land parcel a homesteader could claim was raised to 320 acres for dryland farming in arid western states. *Id.* The Stock-Raising Homestead Act of 1916, ch. 9, 39 Stat. 862, *repealed by* Federal Land Policy and Management Act, Pub. L. 94-579, § 702, 90 Stat. 2787 (1976), further raised the maximum size of a land entry parcel to 640 acres for dryland grazing and, instead of cultivation, the entryperson had to make improvements to the land valued at not less than \$1.25 per acre. *Id.*

2. The Congressional authority for PWR 107 demonstrates that where entrypersons failed to comply with the homestead laws their entries do not defeat a withdraw and reservation.

The legislative history of PWR 107 also demonstrates that homestead entries that failed to be perfected and patented could not defeat a withdrawal and reservation. The enabling legislation for PWR 107 begins with the *Pickett Act of 1910* ("Pickett Act"), ch. 421, 36 Stat. 847 (*repealed by* Federal Land Policy and Management Act, Pub. L. 94-579, § 702, 90 Stat. 2787 (1976)), granting the President the power to withdraw and reserve public lands. *See generally, Idaho*, 131 Idaho, 959 P.2d at 451-52. The *Pickett Act* excepted from the executive's withdrawal authority "any lawful homestead" existing on the date of such withdrawal, provided the entryman or settler "continues to comply with the law under which the entry or settlement was made." *See* Pickett Act attached as Exhibit A. In subcases 63-29070 and 63-29142 -- and all other claims made pursuant to PWR 107 -- the entryperson or settler did not continue to comply with the law under which the entry or settlement was made. The homestead entries were relinquished or cancelled prior to patent. As a result, the Pickett Act's homestead exemption to subsequent withdraws and reservations made under its authority, including PWR 107, does not apply.

In *Stockley v. United States*, 260 U.S. 532, 544 (1923), the Supreme Court examined the effect of a similar homestead exclusion provision in a 1908 executive order that withdrew certain oil lands subject to "existing valid [homestead] claims." The purpose of the homestead exception, the Court concluded, was to exempt from the withdrawal order

claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title. The effect of a preliminary homestead entry is to confer upon the entryman an exclusive right of possession, which continues so long as the entryman complies in good faith with the requirements of the homestead law.

Id. at 544. In the subcases at bar, the homestead claims did not ripen into a title. Thus, the unperfected homestead entries were, and remained, inchoate rights that had no force or effect against the PWR 107 reservation.

3. The Congressional authority for PWR 107 did not allow homestead entry onto lands containing bodies of water needed for the public.

The legislative history of PWR 107 also shows that, as a matter of law, an entryperson could not appropriate land containing springs and waterholes needed or used by the public. The PWR 107 executive order was created under the direct authority contained in the *Stock Raising Homestead Act of 1916* (“SRHA”), ch. 9, 39 Stat. 862 (*repealed by* Federal Land Policy and Management Act, Pub. L. 94-579, § 702, 90 Stat. 2787 (1976)), which incorporates by reference the *Pickett Act of 1910*. *See* SRHA attached as Exhibit B; *see generally Idaho*, 131 Idaho, 959 P.2d at 452.⁵⁷ The SRHA allowed qualified persons to make a stock-raising homestead entry for up to 640 acres of unappropriated, unreserved public lands, provided the lands had been designated by the Secretary of the Interior as “stock-raising lands”.⁵⁸ 43 U.S.C. § 291. Designated stock-raising lands, however, excluded lands containing springs or waterholes needed or used by the public. Section 10 of the SRHA, states:

⁵⁷ Although SRHA and the Pickett Act were repealed by the Federal Land Policy Management Act (“FLPMA”), the FLPMA provided that all withdrawals in force on the date of enactment of FLPMA shall remain in force until specifically changed in accordance with FLPMA. *See State of Idaho*, 959 P.2d at 451.

⁵⁸ An entryperson could apply for the designation of a public land parcel as suitable for stock-raising homestead entry provided his or her application was supported by an affidavit showing “prima facie that land applied for is of the character contemplated” by the SRHA. SRHA at § 292. Until the Secretary of the Interior determined that the land was actually of that character, however, the application was suspended. *Id.*

[L]ands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of [the Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

SRHA 39 Stat. at 865 (emphasis added).

Pursuant to these restrictions, the application and affidavit of entrypersons under the SRHA states that the land “does not contain any water hole or other body of water needed or used by the public for watering purposes.” See Attachment 1 to the *Affidavit of Fredric W. Price*, “Stock Raising Homestead Entry - Additional” filed by George A. Pringle, dated December 11, 1922, at pp. 50-51. The restrictive language became even more explicit by 1930 when an entryperson for small stock grazing operations on the public domain had to sign a supplemental affidavit stating:

That there is no spring, water hole, stream or surface supply of water of any kind upon said land needed or used by the public for watering livestock; that there is no known surface supply of water on any of the subdivisions of said land so applied for; that it and the whole thereof is unwatered dry land suitable for grazing purposes only and that save during the snowy season and rainy periods water for livestock grazed thereon will have to be obtained from a well or wells to be sunk or a reservoir or reservoirs to be constructed thereon.

See e.g., *Supplemental Affidavit of Homestead Applicant Charles E. Gaskill*, dated March 14, 1931, attached as Exhibit C; see also *Memorandum Decision on Scope of PWR 107* at 16, n. 13.

Accordingly, stock-raising lands containing a spring or water hole were never legally “appropriated” by entrypersons under the SRHA.⁷ Thus, these lands were available for reservation

⁷ PWR 107 also requires that the land reserved under the executive order be “vacant”. The United States, of course, has no way of definitively proving that the lands subject to a pending entry when

under PWR 107.

3. For subcases involving claims made pursuant to PWR 107, the SRHA affidavits avowing that the entry land does not contain any body of water needed or used by the public for watering purposes are not accurate.

As discussed above, the SRHA affiant had to swear the land he or she was applying to homestead did not contain any water hole or other body of water needed or used by the public for watering purposes. Despite this requirement, many parcels of public lands that were claimed under the SRHA do contain springs and waterholes necessary for use by the public. We can be certain of this because the BLM has visited these sites and conducted field verification of the springs' or waterholes' existence and filed PWR 107 claims for these sources in the SRBA. See e.g., Mallis Affidavit at ¶5. Why, then, would entrypayers have averred that no water sources existed? As the United States has previously argued -- and this Court has previously recognized -- "settlement" on public lands was subject to gross speculation and fraudulent behavior:

[T]hose involved in the livestock industry developed a number of schemes for either controlling or acquiring ownership of lands immediately surrounding key water sources. A number of these schemes were unlawful and fraudulent. . . . Stockmen used "strawmen" for the purpose of making entries under the Homestead Act or other applicable land laws on lands immediately surrounding water sources and then "legitimately" purchased back those same lands.

Memorandum Decision on Scope of PWR 107, at 13. It is likely, therefore, that the entryperson was either not forthcoming in his application or was not sufficiently familiar with his land entry parcel.

PWR 107 was signed were vacant. However, any occupancy made under color of the SRHA on lands containing springs and waterholes was illegal. In addition, these entrypayers failed to "prove up" the five years of residency required under the homestead laws. Therefore, even if a homestead entry application existed, it may be assumed that residency was not established and the land was vacant.

4. The homestead entries for the land containing the water claimed in subcases 63-29070 and 63-29142 were relinquished or cancelled and do not demonstrate that the parcels of land were appropriated.

Finally, the facts surrounding the failed homesteads on the land containing the springs claimed under subcases 63-29142 and 63-29070 confirm that the land was never “appropriated”. Subcase 63-29142 is a claim to a spring located on a tract of land that was subject to an entry application under the Stock Grazing Homestead Act. The archival records reveal that the land was subject to conflicting applications under the SRHA and the Department of the Interior’s Assistant Commissioner of the General Land Office ordered that the parcel containing the spring now claimed in subcase 63-29142 be awarded to George A. Pringle. *See* Attachment 2 to the *Affidavit of Fredric W. Price*, at pp. 53-55. Mr. Pringle filed his SRHA application on December 11, 1922. *Id.* at pp. 50-51. Approximately five years later, on August 26, 1927, Mr. Pringle submitted “Final Proof” of the validity of this homestead claim. *Id.* at pp. 36-38. The General Land Office inspector performed a field inspection of the land under application and submitted his findings in a report dated December 12, 1927. *Id.* at pp. 23-26. The inspector concluded that the “claimant, since filing his application under the stock-raising homestead law, has not placed permanent improvements on the land . . . as required by the law under which entry was made.” *Id.* at p. 26. Shortly thereafter, the entryman, Mr. Pringle, relinquished his SRHA claim. *Id.* at p. 18.

Subcase number 63-29070 is a claim to a spring located on a tract of land that was applied for Homestead Entry by Mr. Fal B. Jenkins on June 15, 1920. *See* Attachment 1 to the *Affidavit of Fredric W. Price*, at pp. 14-15. The General Land Office cancelled his entry on March 7, 1928 for “failure to submit proof within the statutory period.” *Id.* at p. 11. No other documentation exists to

demonstrate occupancy or actual appropriation of the land containing the spring.

Therefore, the record does not support a finding that the parcels of land containing the springs claimed in subcases 63-29070 and 63-29142 were occupied and appropriated. The inchoate interest bestowed upon the entryperson upon filing of an application never ripened into a right of occupancy, an appropriation, or any other cognizable legal interest that defeats the PWR 107 reservation. Accordingly, under the facts of the case, the United States' claim to a PWR 107 water right for subcase numbers 63-29070 and 63-29142 should be decreed.

The United States, however, should not be required to examine the particular entry information for each claim made under PWR 107. The task of investigating the historical use of federal lands that contain PWR 107 spring sites is time consuming. The BLM must examine Master Title Plats, Historical Indices, and Serial Registry pages to determine where, when and what type of entry was attempted. In addition, research in the National Archives is necessary to try to determine why an entry was relinquished or canceled. This burdensome requirement is unnecessary because a PWR 107 water right is not defeated by a homestead entry application existing at the time of the enactment of the executive order. The entryperson had no real interest in the land upon filing an application to homestead and, because all such applications were extinguished prior to vesting, the entryperson never acquired a real interest. Therefore, the land was never appropriated or legally occupied and was available for reservation under PWR 107 on April 17, 1926.

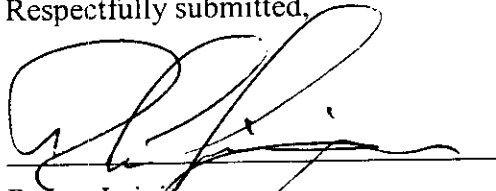
III. Conclusion

For the foregoing reasons, the United States respectfully asks that the Special Master recommend that these subcases be decreed based upon the federal reservation PWR 107 and rule that

the United States is not required to submit evidence on the land entry status of the area surrounding the spring or waterhole sources at the time of the reservation.

DATED this 18th day of December, 2003.

Respectfully submitted,



R. Lee Leininger

Trial Attorney

United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on this 18th day of December, 2003, I served a true and correct copy of foregoing Motion for Summary Judgment and Memorandum in Support upon the following individuals by serving as indicated, postage pre-paid, addressed as follows:

via Federal Express mail:

Diana R. Delaney, Chief Deputy Clerk
(Original)

Snake River Basin Adjudication

DISTRICT COURT

253 Third Ave., North

Twin Falls, ID 83301

David Barber, Esq.

Natural Resources Division

Office of the Attorney General

State of Idaho

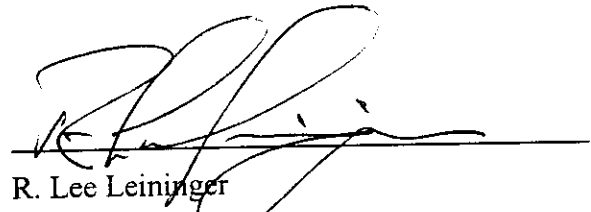
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Boise, ID 83711-4449

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R. Lee Leininger
U.S. Department of Justice

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exclusive. The franchise hereby granted shall not be construed to be exclusive and shall be subject to all general laws now in force or which may hereafter be enacted respecting railway companies.

"SEC. 12. This act shall go into effect and be law from and after the date of its approval by the governor of the Territory of Hawaii, subject, however, to the approval of the Congress of the United States.

"Approved this twenty-sixth day of April, A. D. 1909.

"WALTER F. FREAR,
"Governor of the Territory of Hawaii."

SEC. 2. That Congress may at any time alter, amend, or repeal said Act.

Approved, June 25, 1910.

CHAP. 420.—An Act Granting certain public lands to the State of Colorado for the use of the State Agricultural College, for agriculture, forestry, and other purposes.

June 25, 1910.
[H. R. 24012.]

[Public, No. 302.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and directed to convey to the State of Colorado, for the use and benefit of the State Agricultural College, at Fort Collins, Colorado, for experimental, educational, and kindred uses in forestry, agriculture, horticulture, grazing, stock raising, and such other uses included in the work of experiments and instruction at said college, and the experiment station connected therewith, one thousand six hundred acres of vacant, unoccupied, unentered, and nonmineral land, or so much thereof as the state board of agriculture may select and designate, upon the payment therefor of the sum of one dollar and twenty-five cents per acre.

Public lands.
Granted to Colorado
for State Agricultural
College.

SEC. 2. That said land shall be selected by said state board of agriculture from any vacant, unoccupied, and unentered, nonmineral public land in township seven north, ranges seventy, seventy-one, seventy-two, seventy-three, and seventy-four west, of the sixth principal meridian, in the county of Larimer, State of Colorado, and the tracts so selected shall not contain less than forty nor more than one hundred and sixty acres each.

Selection.

Approved, June 25, 1910.

CHAP. 421.—An Act To authorize the President of the United States to make withdrawals of public lands in certain cases.

June 25, 1910.
[H. R. 24070.]

[Public, No. 303.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Public lands.
Temporary with-
drawals by President
for power sites, irriga-
tion, etc., authorized.

SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this Act shall not be construed as a recognition,

Mining rights con-
tinued.

Exceptions.

Provisos.
Rights of bona fide
oil or gas claimants.

Status of prior
claims.

Homestead, etc., settlements excepted.

Restriction on new forest reserves.

Report of withdrawals to Congress.

abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law: but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

Approved, June 25, 1910.

June 25, 1910.
[H. R. 24149.]

[Public, No. 304.]

Alaska.
Miner's labor lien.
Persons entitled.

Preference of lien.

Proviso.
Prior valid deeds,
etc., not affected.

Notice to be filed.

Form.

CHAP. 422.—An Act To create, establish, and enforce a miner's labor lien in the Territory of Alaska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every miner or other laborer who shall labor in or upon any mine or mining ground for another in the Territory of Alaska in digging, thawing, conveying, hoisting, piling, cleaning up, or any other kind of work in producing any mineral-bearing sands, gravels, earth, or rock, gold or gold dust, or other minerals, or shall aid or assist therein by his labor as cook, engineer, fireman, or in cutting and delivering wood used in said work, or in work in any like capacity in producing the dump, shall, where his labor directly aided in such production, have a lien upon the dump or mass of mineral-bearing sands, gravels, earth, or rocks, and all gold and gold dust, or other minerals therein, and all gold and gold dust extracted therefrom, for the full amount of wages for all the time which he was so employed as such laborer in producing the said dump, within one year next preceding his ceasing to labor thereon; and to the extent of the labor of the said miner or other laborer actually employed or expended thereon, within one year next prior to ceasing to labor thereon, the said lien shall be prior to and preferred over any deed, mortgage, bill of sale, attachment, conveyance, or other claim, whether the same was made or given prior to such labor or not: *Provided*, That this preference shall not apply to any such deed, mortgage, bill of sale, attachment, conveyance, or other claim given in good faith and for value prior to the approval of this Act.

SEC. 2. That every laborer, within ninety days after the completion of the performance of the work or labor mentioned in the foregoing section who shall claim the benefit thereof, must, personally or by some other person for him, file for record in the recording precinct where the labor was performed a claim of lien containing a statement of his demand under oath, substantially in the following form:

NOTICE OF LABORER'S LIEN.

Territory of Alaska, _____ precinct, ss:

_____, claimant, against _____, defendant.

Notice is hereby given that _____, claimant, claims a lien upon (describing the dump or mass of mineral-bearing sands, gravels, earth, or rock, and its location with reasonable certainty) in the _____

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Whereas the projected celebration in said city will include industrial and other exhibitions, pageants, athletic games, tournaments, parades, conventions, and many other interesting features that will attract visitors from all parts of the United States; and

Whereas the citizens' committee, cooperating with the Illinois Centennial Commission, created by the Illinois General Assembly, are widely advertising the approaching events, with the result that a great increase of incoming and outgoing mail matter is anticipated at the Springfield post office; and

Whereas the size and importance of the city of Springfield, Illinois, and the extensive preparations being made by its citizens, cooperating with State organizations created for the purpose of celebrating the one hundredth anniversary of the admission of Illinois into the Federal Union give to said celebration a national character and significance: Therefore be it

Springfield, Ill.
Postal canceling
stamp to commemorate
admission of State, au-
thorized.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Postmaster General of the United States be, and he hereby is, authorized to prepare and deliver to the postmaster of Springfield, Illinois, a special canceling die to be used in the cancellation of mail matter in the post office of that city from December first, nineteen hundred and seventeen, to December third, nineteen hundred and eighteen, said die to be of such design as may be agreed upon by the Postmaster General and the Illinois Centennial Commission.

Approved, December 27, 1916.

December 29, 1916.

[H. R. 407.]

[Public, No. 290.]

CHAP. 9.—An Act To provide for stock-raising homesteads, and for other purposes.

Public lands.
Stock-raising home-
stead entries on, al-
lowed.

Provide.
Lands to be desig-
nated.

Character of lands to
be designated.

Provide.
Applications for un-
designated lands.

Suspension until de-
termination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved public land in reasonably compact form: *Provided, however*, That the land so entered shall theretofore have been designated by the Secretary of the Interior as "stock-raising lands."

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this Act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family: *Provided*, That where any person qualified to make original or additional entry under the provisions of this Act shall make application to enter any unappropriated public land which has not been designated as subject to entry (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this Act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the said land shall be designated under this Act, then such application shall

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be allowed; otherwise it shall be rejected, subject to appeal; but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands.

SEC. 3. That any qualified homestead entryman may make entry under the homestead laws of lands so designated by the Secretary of the Interior, according to legal subdivisions, in areas not exceeding six hundred and forty acres, and in compact form so far as may be subject to the provisions of this Act, and secure title thereto by compliance with the terms of the homestead laws: *Provided*, That a former homestead entry of land of the character described in section two hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this Act, subject to the requirements of law as to residence and improvements, which, together with the former entry, shall not exceed six hundred and forty acres: *Provided further*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land: *Provided further*, That instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than \$1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

SEC. 4. That any homestead entryman of lands of the character herein described, who has not submitted final proof upon his existing entry, shall have the right to enter, subject to the provisions of this Act, such amount of contiguous lands designated for entry under the provisions of this Act as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries, but improvements must be made on the additional entry equal to \$1.25 for each acre thereof.

SEC. 5. That persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired, may, subject to the provisions of this Act, make additional entry for and obtain patent to contiguous lands designated for entry under the provisions of this Act, which, together with the area theretofore acquired under the homestead law, shall not exceed six hundred and forty acres, on proof of the expenditure required by this Act on account of permanent improvements upon the additional entry.

SEC. 6. That any person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, who has entered or acquired under the homestead laws, prior to the passage of this Act, lands of the character described in this Act, the area of which is less than six hundred and forty acres, and who is unable to exercise the right of additional entry herein conferred because no lands subject to entry under this Act adjoin the tract so entered or acquired or lie within the twenty mile limit provided for in this Act, may, upon submitting proof that he resides upon and has not sold the land so entered or acquired and against which land there are no encumbrances, relinquish or reconvey to the United States the land so occupied, entered, or acquired, and in lieu thereof, within the same land-office district, may enter and acquire title to six hundred and forty acres of the land subject to entry under this Act, but must show compliance with all the provisions of this Act respecting the new entry and with all the provisions of existing homestead laws except as modified herein.

No occupancy prior to designation.

Areas of 640 acres allowed.

Previous. Additions to former entries.

Limit. Selection of contiguous lands.

Improvements instead of cultivation required.

Additions to pending homestead entries.

Improvements required.

Homesteaders may enter additional contiguous lands.

Improvements required.

Relinquishment of former homestead to make grazing entry.

Conditions.

No commutation.
R. S., sec. 2301, p. 421.
Vol. 26, p. 1098.
Preferential right to
enter contiguous lands.

Proviso.
Division between
two or more applicants.

Allowance to first ap-
plicant.

Coal and mineral de-
posits reserved.

Disposal under min-
ing laws.

Locating and pros-
pecting allowed.

Surface entries for
mining purposes per-
mitted.

Conditions.

Proviso.
Mining patents sub-
ject to grazing rights,
etc.

SEC. 7. That the commutation provisions of the homestead laws shall not apply to any entries made under this Act.

SEC. 8. That any homestead entrymen or patentees who shall be entitled to additional entry under this Act shall have, for ninety days after the designation of lands subject to entry under the provisions of this Act and contiguous to those entered or owned and occupied by him, the preferential right to make additional entry as provided in this Act: *Provided*, That where such lands contiguous to the lands of two or more entrymen or patentees entitled to additional entries under this section are not sufficient in area to enable such entrymen to secure by additional entry the maximum amounts to which they are entitled, the Secretary of the Interior is authorized to make an equitable division of the lands among the several entrymen or patentees, applying to exercise preferential rights, such division to be in tracts of not less than forty acres, or other legal subdivision, and so made as to equalize as nearly as possible the area which such entrymen and patentees will acquire by adding the tracts embraced in additional entries to the lands originally held or owned by them: *Provided further*, That where but one such tract of vacant land may adjoin the lands of two or more entrymen or patentees entitled to exercise preferential right hereunder, the tract in question may be entered by the person who first submits to the local land office his application to exercise said preferential right.

(SEC. 9. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same.) The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain

homestead laws

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appropriate notations declaring them to be subject to the provisions of this Act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this Act.

SEC. 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the Secretary may, in his discretion (also) withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock to summer and winter ranges or to shipping points, and may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands: *Provided further*, That such driveways shall not be of greater number or width than shall be clearly necessary for the purpose proposed and in no event shall be more than one mile in width for a driveway less than twenty miles in length, not more than two miles in width for driveways over twenty and not more than thirty-five miles in length and not over five miles in width for driveways over thirty-five miles in length: *Provided further*, That all stock so transported over such driveways shall be moved an average of not less than three miles per day for sheep and goats and an average of not less than six miles per day for cattle and horses.

SEC. 11. That the Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this Act for the purpose of carrying the same into effect.

Approved, December 29, 1916.

CHAP. 10.—An Act Providing for the taxation of the lands of the Winnebago Indians and the Omaha Indians in the State of Nebraska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the lands in the State of Nebraska belonging to the members of the tribe of Winnebago Indians held under trust patents of allotments, and upon which the twenty-five-year trust period shall have expired, or shall expire, and which trust period shall have been or shall be extended as provided by law, shall be, and the same are hereby, made subject to appraisalment and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska now in force or to be hereafter enacted.

SEC. 2. That all of the lands in the State of Nebraska belonging to the members of the tribe of Omaha Indians now held under trust patents of allotments issued in eighteen hundred and eighty-five or subsequent thereto, and upon which the twenty-five-year trust period shall have expired, and which trust period shall have been extended, as provided by law, shall be, and the same are hereby, made subject to appraisalment and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska now in force or to be hereafter enacted: *Provided*, That any of the lands described in section one and section two of this Act, so long as the same shall be held under trust patents, shall not be subject to levy and tax sale, as provided under the laws of the State of Nebraska for

Water holes, etc., reserved for public use.

Vol. 36, p. 847.
Date, p. 518.

Proviso.
Withdrawal for access, stock movements, etc.

Regulation of driveways.

Movement of stock.

Regulations, etc.

December 30, 1916.
[S. 6115.]

[Public, No. 291.]

Nebraska.
Winnebago Indian
trust patent lands in,
subject to State, etc.,
taxes.

Omaha Indian trust
patent lands in, subject
to State, etc., taxes.

Proviso.
Not subject to sale,
etc.

SERIAL NO. 9,000 and
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SUPPLEMENTAL AFFIDAVIT OF HOMESTEAD APPLICANT.

3078167

I, Charles F. Gaskill, of Loesch, Montana, applicant to make stock raising original homestead entry for ~~SE 1/4~~ ~~NE 1/4~~ ~~SE 1/4~~ of Section 24, Township 2 S., Range 48 E., within the Billings, Montana land district, having been first duly sworn, depose and say:

- 8.1055- That there is no spring, water hole, stream or surface supply of water of any kind upon said land needed or used by the public for watering livestock; that there is no known surface supply of water on any of the subdivisions of said land so applied for; that it and the whole thereof is unwatered dry land suitable for grazing purposes only and that save during the snowy season and rainy periods water for livestock grazed thereon will have to be obtained from a well or wells to be sunk or a reservoir or reservoirs to be constructed thereon;
- 10.1251- That there is not hot spring, mineral spring, or any known spring of any kind upon said land whose waters have any healing properties; that there is no such spring or springs within one mile from the boundaries of the said lands. That said land and the whole thereof is unwatered grazing land.

Charles W. Wood

We, ~~Sven Swanson~~ and ~~John Gaskill~~, of Loesch, Montana, of lawful age, having been first duly sworn, depose and say: That we are each well acquainted with the above described land and with each legal subdivision thereof; that we have known said land for several years last past, having frequently been over and upon the same; that we have read the foregoing affidavit relative thereto, know the contents thereof and that said statements are true to our best knowledge and belief.

Charles W. Wood

Sven Swanson

I hereby certify that the foregoing affidavit and corroborative statements were read to or by applicant and witnesses in my presence before they affixed their signatures thereto; that affiants are to me well known, and that affiants subscribed and swore to the same before me at my office in Broadus, Powder River County, Montana, within the Billings, Montana land district on this the ~~Sunday of February~~, 1931.
14th day of March, 1931

Notary Public for the State of Montana,
residing at Broadus, Montana.
My commission expires December 22, 1932.