Land-allotments
125909-15
H V C

Indian Occupancy
of State Selection.

Dec. 8, 1915.

The Commissioner

of the General Land Office.

My dear Mr. Tallman:

Receipt is acknowledged of your office letter dated October 22, 1915 (558956 "75" SHC), and the enclosed copy of a report submitted by Mineral Inspector Joseph Jensen, concerning the NE¼ of the NE¼, Sec. 25, T. 30N., R. 58 E., M.D.M., Nevada, which tract was certified to the State on January 17, 1898, under the provisions of the act of June 16, 1880 (21 Stat. L., 287).

The report and the several affidavits submitted therewith have been carefully considered and it is noted that your office is not without doubt of the expediency of recommending an attack upon the certification to the State of the land claimed by the Indian, as recommended by the Mineral Inspector. In this connection your attention is invited to the fact that in an opinion dated November 19, 1915, the Attorney General answered affirmatively that the Interior Department has jurisdiction over lands of similar status after the lapse of the limitation period prescribed in the Act of March 3, 1891 (26 Stat. L., 1099). In the case

presented the lands involved were indemnity school lands selected by the State of Colorado pursuant to the Acts of March 3, 1875 (18 Stats. 474), and February 26, 1891 (26 Stats. 796). The Act of 1875 is the Colorado Enabling Act and Section 15 of this act provides:

> "That all mineral lands shall be excepted from the operation and grants of this act.

The land now under consideration is of similar stat in that it is not of a character granted by the Act of June 16, 1880 (21 Stats. L., 287), and was therefore not subject to certification to the State. (See Section 2449 Revised Statutes). The certification therefore is null and void.

In view of those facts and the showing submitted on behalf of the Indian, this Office is satisfied that there is ample justification for a hearing to determine the rights of the Indian, regardless of the fact that seventeen years have passed since certification.

It is clear from the record that the Indian, Joe Tinoke, was occupying and improving the tract long prior to May 31, 1897, when the land was selected, and January 17, 1898, when the selection was approved. It is also clear that both Ira D. Wines, by whom the land was selected, and his son, Stanley L. Wines, the present holder of title, had knowledge of such Indian occupancy.

In the interests of the Indian, Joe Tinoke,

it is suggested that the recommendation of the Mineral Inspector be followed and that a hearing be held, at which the State of Nevada be called upon to submit evidence to show that the said NE/4 of NE/4 Section 25, T. 30 N., R. 58 E., M.D.M. was vacant and unoccupied land at the time of its selection on May 31, 1897.

Should a hearing be ordered in this case, this Office will appreciate being advised of the time and place of such hearing, with a view of detailing some officer in the Indian Service to be present for the purpose of assisting the Indian, Joe Timoke, in offering testimony in proof of his occupancy of the land prior to the date last mentioned.

Very truly yours,

(Signed) C. F. Hauke

Chief Clerk

12-AM3-2

IN REPLY PLEASE REFER TO OFFICE 558956 "F6" SHC

DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE

WASHINGTON March 24, 1916.

ADDRESS ONLY THE COMMISSIONER OF THE GENERAL LAND OFFICE

Indian occupancy of
State Selection.

To the Commissioner

of Indian Affairs.

My dear Mr. Sells:-

July 18, 1914 and June 9, 1915, J. A. Duval, a resident of Ruby Valley, Nevada, writing for Joe Timoke, an Indian about 65 years old, made complaint that Stanley L. Wines, of Ruby Valley, claimed ownership of the NE¼ NE¼ of Sec. 25, T. 30 N., R. 58 E., M. D. M., in the Elko, Nevada, land district, upon which the Indian, Joe Timoke, and other Indians, were living and had been living for more than 40 years.

By office letter of October 22, 1915, a copy of a report submitted by a mineral inspector of this office under date of October 1, 1915, was transmitted to your office with the request that after consideration

thereof you submit such recommendation in the premises as might be deemed proper. December 8, 1915, your office replied (Land-Allotments 125909-15 H V C) inviting attention to an opinion dated November 19, 1915, in which the Attorney General holds that the Interior Department has jurisdiction over lands which, as in the present case, have been certified to the State of Nevada, after the lapse of the limitation period prescribed in the act of March 3, 1891 (26 Stat.,1099).

This subdivision was selected by the State of Nevada under the act of June 16, 1880 (21 Stat.,287), known as the "two million acre grant," in lieu of the 16th and 36th sections granted to the State of Nevada by the United States in accordance with the act of March 21, 1864 (13 Stat.,30). Said subdivision was a part of list No. 205 filed May 31, 1897 and approved January 17, 1898, under clearlist No. 25, as certified by letter "G" of this office dated January 28, 1898. Prior to 1868, when this land was surveyed, it was occupied for about seven years by L. H. Head, who was a squatter and farmed the same. Head sold his squatter's right to M. P. Freeman and in 1875 these squatters' rights

were purchased by Ira D. Wines. In 1897 Mr. Wines made purchase from the State for this land, embraced in its selection referred to, despite the fact that it was occupied by certain Indians, among them Joe Timoke, and following the approval of the State selection, he permitted them to live on the land. Mr. Wines has turned over his interests to his two sons, and the NE¼ NE¼ of Sec. 25 was deeded to Stanley L. Wines, one of the sons, in 1914. Upon purchasing the land, Stanley L. Wines notified the Indians of his ownership at the time they were cutting hay and he took the hay for his own use. As a result of this action, Joe Timoke requested Mr. Duval to make the complaint above referred to.

The opinion of the Attorney General, referred to in your letter of December 8, 1915, has been carefully considered. On page 7 of the opinion it is stated:

> "If the grant in this case had authorized the selection of indemnity school lands 'subject to approval by the Secretary of the Interior . . .' I should be constrained to hold that the approval of the Secretary passed the title without regard to the Commissioner's certificate and unaffected by Section 2449 of the Revised Statutes."

The Act of June 16, 1880, covering the present case, provides for the certification by the Commissioner of the General Land Office, "approved by the Secretary of

the Interior." Under the Attorney General's opinion, therefore, title has passed from the Government and may be restored, if at all, only by suit in the courts or voluntary reconveyance.

The United States Supreme Court, in Williams vs. United States (138 U.S.,514), a Nevada case, held:

> "It can not be doubted that the certification operated to transfer the legal title to the State,"

citing Fisher and O'Connell (115 U.S.,102), a California case, wherein the same opinion was expressed. The certification to the State of Nevada was set aside by the court, because the lands were not of the character contemplated by the grant.

If, as asserted, there was fraud in the acquisition of title in this case and this office could prove that fraud and that it had no notice of it for a period of six years prior to the bringing of the suit, we could under the theory of the law of March 3, 1891, as adopted by the Government, nevertheless bring suit in this case, notwithstanding the lapse of time. This office doubts, however, that the showing of facts warrants such a procedure, and I have the honor to so advise your office.

Very respectfully,

Commissioner.

5-1100

ADDRESS ONLY THE COMMISSIONER OF INDIAN AFFAIRS

REFER IN REPLY TO THE FOLLOWING:

Land-Allot.
135909-15
33305-16
H V C

DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

WASHINGTON

APR 11 1916

State Selection.

The Honorable,

The Secretary of the Interior.

Sir:

There is submitted herewith the correspondence between this Office and the General Land Office, concerning a selection by the State of Nevada under the Act of June 16, 1880 (21 Stat. L., 287), of the NE/4 of NE/4 of Sec. 25, Twp. 30 N., R. 58 E., M. D. M.

The record shows that the tract in question was certified to the State on January 17, 1898, and that the title is now vested in Stanley L. Wines, of Ruby Valley, Nevada. The record further shows that this tract of land was occupied and improved by Joe Timoke, an Indian, long prior to May 31, 1897, the date said land was selected by the State under the Act of June 16, 1880, supra.

Particular attention is invited to the report of Mineral Inspector Jensen, and the affidavits submitted therewith, which with two exceptions bear out the claim of the Indian as to his occupation and use of the land prior to thefiling of the State selection. The two

exceptions are Ira D. Wines and Stanley Wines, father and son, the latter being the holder of the record title to the land.

In view of the facts presented to this Office by the Commissioner of the General Land Office in his letter of October 22, 1915 (herewith), it was suggested that in the interest of the Indian, Joe Timoke, the recommendation of the Mineral Inspector be followed and that a hearing be held at which the State of Nevada be called upon to submit evidence to show that the tract involved was vacant and unoccupied land at the time of its selection on May 31, 1897. In connection with the case, attention was invited to an opinion of the Attorney General, dated November 19, 1915, holding that the Interior Department has jurisdiction over lands of similar status after the lapse of the limitation period prescribedin the Act of March 3, 1891 (26 Stat. L., 1099). It was suggested that the land involved was not of a character granted by the Act of June 16, 1880, supra, and was therefore not subject to certification to the State.

In his letter of March 24, 1916, the Commissioner of the General Land Office in construing the opinion of

FILED BY M. A. B.

the Attorney General above referred to held that the title to the land had passed from the Government and that it might be restored, if at all, only by suit in the Courts or voluntary reconveyance. He further said:

> "If, as asserted, there was fraud in the acquisition of title in this case and this office could prove that fraud and that it had no notice of it for a period of six years prior to the bringing of the suit, we could under the theory of the law of March 3, 1891, as adopted by the Government, nevertheless bring suit in this case, notwithstanding the lapse of time. This office doubts, however, that the showing of facts warrants such a procedure, and I have the honor to so advise your office."

Contrary to the opinion expressed by the Commissioner of the General Land Office this Office believes that the facts warrant the filing of suit to recover possession of the land regardless of the lapse of time. However, before preparing the case for presentation to the Department of Justice, it is recommended that the facts be laid before the Solicitor for the Interior Department for an opinion as to the wisdom of this course.

Respectfully,

Acting Chief Clerk.

FWH 4-6

APR 11 1916

Referred to the Solicitor for the Interior Department for an opinion on the question of procedure presented by the Indian Office.

Assistant Secretary.

L 33305.

ALEXANDER T. VOGELSANG
SOLICITOR

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

D. 39978. JUN - 1 1916

State selection in conflict with Indian occupancy.

COPY FOR INFORMATION
TO Indian Office

The Secretary of the Interior.

Sir:

My opinion is asked on the question of procedure, submitted by the Indian Office, relative to a selection by the State of Nevada of the NE. ¼ NE. ¼, Sec. 25, T. 30 N., R. 58 E., under the Act of June 16, 1880 (21 Stat., 287), granting two million acres of land in said State in lieu of sections 16 and 36 of land theretofore granted to the State by the United States.

The land was selected May 31, 1897, and certified to the State January 17, 1898. It was subsequently purchased from the State by Ira D. Wines and sold by him to his son, Stanley L. Wines. Report has been made to the Indian Office, accompanied by affidavits, in which it is alleged that long prior to the time the land was certified to the State it was occupied and improved by one, Joe Timoke, an Indian. It is the purpose of that office to present the matter to the Department of Justice for institution of suit to recover possession of the land.

Section 2 of the Act of June 16, 1880, provides:

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The lands herein granted shall be selected by the State authorities of said State from any unappropriated, non-mineral, public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this act the same shall be duly certified to said State by the Commissioner of the General Land Office and approved by the Secretary of the Interior.

This act only authorizes the State to select "unappropriated" public land. If the land is appropriated at date of the State selection, then it is not of the character contemplated by the grant. Lands in use and occupancy of Indians are not "unappropriated" public lands. 6 L. D., 341; 24 L. D., 413; 30 L. D., 125; 33 L. D. 464.

The conveyance of title by certification was authorized by the act of August 5, 1854 (10 Stat., 346; Section 2449 R. S.), which provided that where land had been or should thereafter be granted to any one of the several states and territories, and the law did not convey the fee simple title of such lands, or require patents to be issued therefor, the lists of such lands which had been or might thereafter be certified "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."

It was held in Frasher v. O'Connor (115 U. S., 102), that lists of lands certified to the State convey as complete a title as patents. In Williams v. United States (138 U. S., 514), a Nevada case, construing the act of June 16, 1880, and citing the case of Frasher v. O'Connor, it was held:

It can not be doubted that the certification operated to transfer the legal title to the State.

The same rule has been followed in the Department. 9 L. D., 106; 24 L. D., 106; 29 L. D., 127; 30 L. D., 230.

In Moore v. Robbins (96 U. S., 530), it was held that

A patent for public land, when issued by the Land Department acting within the scope of its authority, and delivered to and accepted by the grantee, passes the legal title to the land.

And the court added:

But when fraud or mistake or misconstruction of the law of the case exists, the United States, or any contesting claimant for the land, may have relief in a court of equity.

In Germania Iron Company v. United States (165 U. S., 379), the court said:

By inadvertence and mistake a patent in this case has been issued, and the effect of such issue is to transfer the legal title and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact.

The act of June 16, 1880, granting lieu lands to the State of Nevada, provides for certification by the General Land Office of the lands selected by the State and "approved by the Secretary of the Interior".

In an opinion by the Attorney General under date of November 19, 1915, it was said:

> If the grant in this case had authorized the selection of indemnity school lands "subject to approval by the Secretary of the Interior," as in a similar grant to California (act of March 3, 1853, sec. 7; 10 Stat., 247), or "with the approval of the Secretary of the Interior," as in the grant to the Dakotas, Montana and Washington (act of February 22, 1889, sec. 10; 25 Stat. 679), I should be constrained to hold that the approval of the Secretary passed the title without regard to the Commissioner's certificate and unaffected by section 2449 of the Revised Statutes. (Mullan v. United States, 118 U. S. 271, 275, 278; Johanson v. Washington, 190 U. S. 179, 184).

From the foregoing it is apparent that as title to the land certified to the State of Nevada has passed from the Government, the only way to recover the same is by suit in the courts or voluntary reconveyance. This being true, the only question really presented by the Indian Office is as to whether the facts as to Indian occupancy prior to the State selection are sufficient to warrant submission of the matter to the Department of Justice for institution of suit. My view is, after examination of the evidence in hand, that a prima facie showing has been made sufficient to justify the procedure contemplated by the Indian Office.

Very respectfully,

Alexander Pitchlynn

Solicitor.