Mining Law in Recent Years

Wm. E. Colby
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LAND GRANTS TO STATES (Cont’d.)
SWAMP AND OVERFLOWED LANDS¹

The federal government’s great liberality in its gifts of public lands to the states is further evidenced by its grants to them of Swamp and Overflowed lands. The first grant of this sort was made to Louisiana, March 2, 1849.² The year following, September 28, 1850,³ Congress passed a similar act which, though its opening provisions designate only the State of Arkansas as the beneficiary, was by its final section extended to and its benefits conferred on each of the other states then in existence in which such swamp and overflowed lands were situated.⁴ This Act of 1850 is the basic law on the subject. It was a gratuity to the states to encourage the construction of the necessary levees and drains essential to reclaim such lands and render them

† This is the third of a series of articles intended to supplement the 3rd edition of _Lindley on Mines_ (1914) and bring the subject to date. The first article appeared in September, 1945, in 33 _Calif. L. Rev._ 368-387; the second in September, 1948, in 36 _Calif. L. Rev._ 355-389.

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¹ For some unaccountable reason _Lindley on Mines_ does not deal with this class of land grants to the states. The only explanation this writer can suggest for the omission is that when Judge Lindley wrote his outstanding work on mining law, swamp and overflowed lands were, for the greater part, situated remote from regions of mining activity and no conflict of rights had then occurred or seemed imminent. It is only in recent years that some of these swamp lands have proved to be valuable for petroleum and gold dredging. Because of their complete omission from consideration in _Lindley on Mines_, this article will deal more comprehensively with this class of land than would otherwise be the case. However, since a volume could be devoted to the law on the subject, only the salient features will be presented. Those desiring to pursue the inquiry further are referred to 43 U.S.C. Chaps. 23 and 24 (1946); 50 C.J. 996-1023; 21 Cal. Juris. 681-684; 19 New Cal. Juris. 433-450; Cal. Pub. Resources Code §§ 7501-7609.

² (1849) 9 Stat. 352; Louisiana v. Garfield (1908) 211 U.S. 70, 76 held that this Act of 1849 was not repealed by the Act of 1850 next noted, the provisions of which applied to all states then in existence. See La Terre Co. v. Billiot’s Shell Island (C.C.A. 5th 1939) 103 F. (2d) 53. The reason for Louisiana’s receiving the first grant of this character is probably due to the vast areas of swamp and overflowed lands in that state.


⁴ Rice v. Sioux City R. R. Co. (1884) 110 U.S. 695, 698 decided that the Act of 1850 did not apply to then territories subsequently admitted as states. See also United States v. Minnesota (1926) 270 U.S. 181, 203.
fit for cultivation and use. Swamp lands already sold by the United States at the date of the act were excluded from the grant. Section 2 imposed on the Secretary of the Interior, as soon as practicable, the duty of making lists and plats of such lands and transmitting the same to the governors of the respective states and upon request of such governors to issue patents to the states, whereupon "the fee simple to said lands shall vest in the state," subject to disposal by the state legislature. The proceeds from such disposal were "as far as necessary" to be applied to reclaiming the lands. Section 3 defined swamp and overflowed lands as those legal subdivisions of the public domain the greater part of which were "wet and unfit for cultivation."

Some idea of the importance of this "swamp land" grant may be obtained from the fact that lands of this character amounted to many millions of acres possessing extraordinary fertility due to the recurring deposits of enriching silt. In California alone there were nearly two million acres of swamp land, much of it lying in the delta region of the Sacramento and San Joaquin Rivers, lands which are now immensely productive as truck gardens and fruit orchards, unrivalled the world over.

For the sake of brevity the Act was titled the "Swamp Lands Act," and "swamp and overflowed lands" are commonly referred to by the courts as "swamp lands." Judge Field stated that "swamp lands" as distinguished from "overflowed" lands may be considered as those that require drainage to fit them for cultivation; whereas "overflowed" lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation. This distinction is

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5 Culver v. Uthe (1890) 133 U.S. 655, 659.

6 The Louisiana Act of March 2, 1849, designated the Secretary of the Treasury as the officer to carry out its provisions because the Department of the Interior was not created until the day following. Colby, Mining Law in Recent Years, Part II, (1948) 36 CALE. L. REV. 355, 359.

7 The legal subdivisions mentioned in the Act of 1850 are those made under the authority of Congress, the smallest of which are quarter-quarter sections or 40 acre lots. Robinson v. Forrest (1865) 29 Cal. 317, 325. If, without protection by levees, the greater part of the subdivision is unfit for cultivation in grain or other staple crops by reason of the overflow, it is regarded as swamp and overflowed. It is not enough that a crop of grass may spring up after the overflow subsides. Keeran v. Griffith (1866) 31 Cal. 461, 465.

8 Wright v. Roseberry (1887) 121 U.S. 488, 496. Justice Field gives as a reason for the early reclaiming of these lands not only their extraordinary fertility, but also that they were the source of malarial fevers.

open to criticism because "swamp" lands also require levees and embankments to keep out the water after the land has been drained. The Supreme Court of the United States, in *Heath v. Wallace*,¹⁰ said that whether "swamp and overflowed lands" should be taken as a general term or whether separable and referring to two different qualities of land was immaterial. "Overflowed" has reference to a permanent condition that will remain so without reclamation or drainage. Lands subject to temporary periodical overflow are not "overflowed" within the meaning of the Act. Otherwise, all lands which perchance might be overflowed at times of freshets and high waters but which for the greater portion of the year are dry lands would be included. This was manifestly not the intention of Congress. Lands subject to overflow by tides, the beds of rivers, lakes and other bodies of water are not swamp and overflowed lands.¹¹ The question is one of fact properly determinable by the Land Department, and while a grant is in the process of administration and until the legal title passes from the United States, an inquiry as to equitable rights comes within the cognizance of that department and not of the courts. Errors and mistakes in surveys are subject to correction.¹²

*Time When Grant Took Effect.*

The first important question which arose was as to when the grant took effect. While the granting language of the act, that the lands "shall be and are hereby granted," was unusually specific, nevertheless, the act also provided for issuance of patents by the United States to the respective states and stated that "on that patent the fee simple title to said lands shall vest in the state." The inference was clear, therefore, that, prior to patent to the state, no fee simple title would pass, the title created being inchoate.¹³ The courts have held, however, that the grant was one *in praesenti*, creating an immediate transfer of interest as of the date of the act, September 28, 1850, to each state then in the union,¹⁴ and that these areas thereupon ceased

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¹⁰ (1891) 138 U. S. 573, 584.
¹³ Little v. Williams (1913) 231 U. S. 335, 340.
to be “public lands.” The grant operated on existing things and with reference to an existing state of facts. It was to take effect at once between an existing grantor and several separate and existing grantees.

Therefore, as of the date of the act, the states received an inchoate title or present transfer, which did not depend upon the issuance of a patent by the United States. This beneficial title lacked, however, the identification required to complete the title. When followed by issuance of a federal patent, the equitable title was converted into a legal or fee simple title. This latter title then related back to the date of the act and inured to the benefit of the state and its successors as of that date for all purposes.

**Identification of Lands Granted.**

Identification of these swamp lands became a matter of major importance. The Act of 1850 imposed the duty of making such identification on the Secretary of the Interior. He was instructed, as soon as practicable, to make lists and plats of such swamp lands and upon request to issue patents therefor. The act did not prescribe the manner in which the Secretary should discharge his duty nor the evidence required as to the character of the land. This was left to his discretion.

In administering the grant, the Secretary gave each state a choice between two elections: first, whether it would abide by the showing in the government surveyor's field notes; and, second, whether it would through its own agents make an examination in the field and present claims for lands believed to be swamp in character accompanied by proof of that fact. These elections by the state were generally respected and given effect. Where the election was to abide by the field notes, that, without more, was regarded a continuing selection of all lands shown by the plats and notes to be swamp in character. Where the other course was pursued, the presentation by
the state of its claims with supporting proof was treated as a selection by the state. The system of public land surveys was only being started in many of the western states. Since one of the tests imposed by the act as to whether land was swamp and overflowed was whether the greater part of any legal subdivision was "wet and unfit for cultivation," it was essential that these swamp lands be officially surveyed in order to identify them.

The Secretary's identification of the land as swamp land by making out the required list and official plat was held to be conclusive on collateral attack. But where he neglected or declared his inability to take such action, it was competent for the grantees of the state, in order to prevent their rights from being defeated, to identify the lands in any other appropriate way which would effect that object. This burden of identifying swamp lands in the various states was so prodigious that the Secretary's office was literally "swamped" with applications and demands of the states. His office force was entirely inadequate to meet the emergency. As these lands were not withdrawn from sale until the filing in the local land office of the lists to be prepared by the Secretary of the Interior, they were assumed to be open to entry or location. It was only to be expected that in the interim they would be claimed and appropriated under other federal land laws. Conflicts inevitably arose between such claimants acting under federal laws and the states claiming the same lands as swamp lands. In the Land Department contests were permitted where claimants sought to prove that the lands were not swamp in character. These controversies increased between claimants making filings under United States laws and those claiming the lands as swamp lands, until contests pending before the Land Department were estimated to involve three million acres. The legislatures of the various states affected very generally undertook to have these lands identified, to dispose of them and to authorize the issuance of state patents.

The states and their swamp land grantees urged Congress to remedy this critical situation. On March 2, 1855, an act was passed for

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20 United States v. Minnesota, supra note 4 at 211.
22 Wright v. Roseberry, supra note 8 at 509.
23 Railroad Company v. Fremont County (U.S. 1869) 9 Wall. 89, 91.
24 Tubbs v. Wilhoit, supra note 14 at 137; Emigrant Co. v. County of Wright (1877) 97 U.S. 339, 340.
25 (1855) 10 Stat. 634.
the relief of purchasers of swamp lands which partially removed the embarrassment of the Land Department growing out of these controversies. The act directed the President to issue patents to federal applicants who had made entries of swamp lands in those cases where no patents had previously been issued to the states under the Act of 1850. Where any state had sold or disposed of such land prior to its entry under any of the other federal land laws, the President was not to issue patents to such entrants until a release from the state had been first obtained. Where it was proved that any lands so purchased from the United States were actually swamp lands, the purchase money was either to be paid over to the state, or if the land had been located by scrip, land warrants, etc., the state was authorized to select in lieu an equal quantity of public land subject to entry. This statute was a plain recognition of the prior right of the states to swamp lands, since it provided that a United States patent could not be issued to any swamp land without a release by the state, and in the case of already completed purchases, the states were to be indemnified.28

Another curative act, dated March 3, 1857,27 extended the Act of 1855 in force and extended it to all swamp land entries made since its passage.28 This act confirmed selections which had been reported to the Commissioner of the General Land Office where the land had remained vacant and unappropriated and unclaimed by actual settlement under any federal law. The filing of a list of swamp lands in the General Land Office operated to perfect the title of the state to such lands. This title thereupon became superior to title under a patent issued subsequently by the United States. The approval of such swamp land selections and issue of patents therefore became, by virtue of the Act of 1857, merely ministerial with the Land Department having no discretion in the matter.29

An Act of March 12, 186030 extended the provisions of the swamp land grant to Minnesota and Oregon and recognized the right of states generally to provide for the identification of swamp lands without waiting for action by the Secretary of the Interior. It also placed a time limitation on the selection by the states of swamp lands then

26 Tubbs v. Wilhoit, supra note 14 at 138; Wright v. Roseberry, supra note 8 at 509; Railroad Company v. Fremont Co., supra note 23.

27 (1857) 11 Stat. 251; Martin v. Marks (1877) 97 U.S. 345, 347; Railroad Company v. Fremont County, supra note 23 at 92.

28 Wright v. Roseberry, supra note 8 at 510.

29 Martin v. Marks, supra note 27 at 347.

appearing as such on the public surveys and also on swamp lands thereafter surveyed after notice given by the Secretary of the approval of such surveys.31

These inconveniences and conflicts of title were especially annoying and injurious to California. The great immigration to that state following the discovery of gold created a demand for lands easily reclaimed which possessed such extraordinary fertility.32 Congress, on July 23, 1866, in order to clear up the confusion, enacted special remedial legislation for that state,33 entitled "An Act to Quiet Land Titles in California."34 This act dealt with various types of public land titles in California. Section 4 was devoted to swamp lands. It provided four methods to facilitate the identification of such lands:

1. It directed the Commissioner of the General Land Office, when government survey plats had already been approved, to certify to California as swamp and overflowed all lands represented as such on these official plats.

2. It directed the United States Surveyor General for California to examine the plats and surveys of swamp and overflowed lands made by the state. If he found them to conform to the United States surveys he was to make plats in conformity with such surveys and have them approved by the General Land Office.

3. Where the state and United States surveys were not found to conform and in cases where there were no surveys, then upon an application by the Governor of California, the Surveyor General was within one year directed to make segregation surveys of swamp lands according to the best evidence available.

4. If the state should claim as swamp land any lands not so represented on the United States plats and surveys, then the character of such claimed land as of September 28, 1850, was to be determined by the United States Surveyor General for California upon testimony taken before him, with his decision subject to approval by the General Land Office.

This Act of 1866 was intended to cure uncertainties, principally by recognizing the action already taken by California in identifying its swamp lands. The act superseded all previous rules and methods of identifying swamp lands in California and committed their iden-

31 Wright v. Roseberry, supra note 8 at 511.
32 Robinson v. Forrest, supra note 7 at 319.
33 The act being remedial was to be strictly construed. Heath v. Wallace, supra note 10 at 580.
34 (1866) 14 Stat. 218; Tubbs v. Wilhoit, supra note 14 at 137; Wright v. Roseberry, supra note 8 at 511.
tification and selection to other officers than the Secretary of the Interior, placing the burden of approval on the Commissioner of the General Land Office.\textsuperscript{35}

The State of California early legislated on the subject of swamp lands.\textsuperscript{36} This legislation was designed to facilitate the identification of these lands in cooperation with the federal government and to provide for their disposal. In 1861\textsuperscript{37} the state established a Board of Swamp Land Commissioners and directed the county surveyors to make surveys and plats of such lands and to file these with the State Surveyor General, who was directed to compile and deliver to the Governor a general state map on which would be delineated all swamp lands claimed by California under the Act of 1850.\textsuperscript{38}

The pioneer case decided by the Supreme Court of the United States under the Act of 1850 involved a subsequent railroad grant.\textsuperscript{39} The court held that it was permissible to prove by oral testimony that the land in question was swamp land as described in the Act as of September 28, 1850. Identification by the Secretary of the Interior as required by the act was held not to be essential. Justice Clifford dissented on the ground that since the Swamp Lands Act of 1850 prescribed identification by the Secretary of the Interior, oral testimony could not take the place of his determination. Later decisions have recognized the logic of this dissent and have held that parol evidence was inadmissible to prove that the lands were swamp in character in 1850. This is especially true where the Secretary of the Interior had

\textsuperscript{35} Heath v. Wallace, \textit{supra} note 10 at 579; Tubbs v. Wilhoit, \textit{supra} note 14 at 139; Wright v. Roseberry, \textit{supra} note 8 at 512.

\textsuperscript{36} Cal. Stats. 1855, p. 189; 1858, p. 198; 1859, p. 240. The Act of 1855 placed the state's swamp lands on sale for one dollar per acre. The applicant might take five years to complete the purchase price by paying ten per cent per annum in advance. He was required to reclaim one-half of the land within that period. The act limited each applicant to 320 acres. This was enlarged in 1859 to 640 acres. The applicant was required to have the tract surveyed by the County Surveyor and the plat and field notes were filed with the Surveyor General and the County Recorder. Swamp lands within specified distances of designated large cities and tide lands were excepted from sale.

\textsuperscript{37} Cal. Stats. 1861, p. 355. The California legislation on this general subject is so great that anyone interested is referred to the \textit{CAL. POLITICAL CODE §§ 3440-3493} and \textit{CAL. PUB. RESOURCES CODE §§ 7601-7609}. Also see, \textit{County of Kings v. County of Tulare} (1898) 119 Cal. 509, 51 Pac. 866, where California's policy is considered and legislation noted.

\textsuperscript{38} The case of Foss v. Johnstone, \textit{supra} note 14 at 130 contains a resume of the federal and state legislation and a review of the principal cases (133-136). See also, Wright v. Roseberry, \textit{supra} note 8.

\textsuperscript{39} Hannibal R. R. v. Smith (U.S. 1869) 9 Wall. 95.
decided they were not, and also, where federal patents had been issued, such patents not being subject to collateral attack.  

**Administration of Act by the States.**

The cases herein cited indicate that when the various state legislatures enacted laws to carry into effect the provisions of the federal swamp land grant of 1850, as that act empowered them to do, they usually delegated the details of the administration of the grant to the counties in which the swamp lands were situated. The county surveyors were instructed to survey and prepare plats of the swamp lands in their respective counties for swamp land applicants and make these surveys available to the state and federal officials. The counties, acting through their boards of supervisors, were authorized to sell the swamp lands and enter into contracts of sale with individuals whereby such purchasers were to reclaim the lands and pay for them at prices that ranged from $1.00 to $1.25 per acre, usually spread over a period of years. As might be expected, advantage was taken of a situation which opened the door to great possibilities for graft and imposition. Companies were formed which fraudulently obtained control of large acreages of swamp lands and speculated in their acquisition at grossly inadequate consideration and at the expense of the rights of the public.

It was inevitable that sooner or later the question would be raised as to whether this immense grant of swamp lands, potentially of extraordinary fertility when reclaimed, was being properly administered in the interest of the public by the various states and their grantees. The Act of 1850 stated that the grant was made to enable the states "to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein" and empowered the state legislatures to dispose of the lands; "**Provided, however, that the proceeds of said lands . . . shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.**"

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40 McCormick v. Hayes (1895) 159 U.S. 332, 347 (all the prior cases were reviewed at 338-347); Chandler v. Calumet & Hecla Mining Co. (1893) 149 U.S. 79, 93; French v. Fyan, supra note 14 at 171; Niles v. Cedar Point Club (1899) 175 U.S. 300, 308; Ehrhardt v. Hogaboom (1885) 115 U.S. 67.

41 In Louisiana the selling price ranged from 10 cents to $5.00 per acre. Cross Lake Club v. Louisiana (1912) 224 U.S. 632, 635.

42 Emigrant Company v. County of Wright, supra note 24 at 340. See also Emigrant Co. v. County of Adams (1879) 100 U.S. 61.

43 (1850) 9 Stat. 519.
MINING LAW IN RECENT YEARS

In an early case the Supreme Court had said that the lands "were impressed with an important public trust." However, two years later, the court modified this view by saying that at first it was of the view that an explicit and controlling trust had been created but that on mature reflection had decided otherwise. The security for the application of the proceeds to the object intended rested upon the good faith of each state. It was questionable whether a state could be called to account by the courts for any failure so to do. In the opinion of the court, Congress alone would seem to have the power to enforce the conditions. The court took this view largely because the proceeds derived from the sale of these lands were, by the terms of the act, to be applied to the work of reclamation only "as far as necessary" to attain the object. The court at a later date said that private parties could not question the application of these proceeds to the building of levees and drains. Their disposal rested upon the good faith of the state, and the faithful performance of the duties imposed on the states was a matter between the two sovereign powers. It added that these swamp lands were of little value to the United States; whereas the states were concerned in their settlement and improvement, in the opening up of roads and other public works through them, in the promotion of the public health by systems of drainage and embankment, and were far more deeply interested in their disposal and management than was the United States. Still later the court said it was for the United States and not for the individual to complain of a breach of trust, if there be any, since the appropriation of the proceeds rested solely in the good faith of the state, there being no trust which followed the lands created by the statute.

Recent Decisions.

Under the heading Spanish and Mexican Grants, the case of United States v. O'Donnell was discussed. Conflict between a Mexi-
can grant and a swamp land title was there involved. The Mexican grant had been confirmed under the Mexican Claims Act. The United States had also issued a patent to California under the Swamp Lands Act. The court held that the Swamp Lands Act of 1850 was effective to transfer an interest in swamp lands only so far as they were then a part of the federal public domain and thus subject to the disposal of Congress. The Mexican grant in question antedated the Swamp Lands Act and was, therefore, superior to any rights claimed under the act. Even where the right of the state under the Swamp Lands Act is unqualified, the court said it was more accurate to say that the United States is no more than a donor granting without warranty those lands falling within the description and purview of the statute. The United States assumes no duty or obligations and gives no warranty of title to any grantee, thereby subjecting itself to any claims of equitable duty. Even if the lands in question had been sold to others, the United States was not accountable as a trustee, in spite of the issuance by it of the swamp land patent. The court decided that the evidence established that the Mexican grant description of Mare Island included the swamp land described in the United States patent to the state and hence, because of priority of right, the Mexican grant title was superior.

A companion case, also involving Mare Island where the government's great naval base is situated, was decided some four years later. It presented the same basic issues, involving the same Mexican grant of Mare Island and three other swamp land patents issued by the United States to the State of California. The United States contended that the description of Mare Island contained in the Mexican grant was broad enough to include the large acreage of swamp land adjoining the main island upland on the northwest and asserted that the O'Donnell case had virtually determined these issues in its favor. The swamp land owners did not contest the legal principles announced in that case, but their defense was factual, namely, that their swamp lands were not included in the description of the Mexican grant. The Supreme Court, reversing the Circuit Court of Appeals, sustained the trial court in its findings that the old maps, the facts surrounding the making of the grant and the subsequent history all ordered...
proved that these swamp lands were never recognized as a part of Mare Island or “La Yegua”, as it was named in the Mexican Grant.53

Swamp Lands Containing Minerals.

We have already noted53 that when Judge Lindley wrote swamp and overflowed lands were not known to contain minerals, and that this afforded the most plausible explanation for his not having dealt with swamp lands. However, in more recent years, modern progress and discovery have brought to light valuable mineral occurrences in some of these areas. Low lying lands, bordering on streams which have their sources in gold bearing regions, have been proven valuable for gold dredging because of the fine particles of gold which have been carried down in suspension in the currents and deposited in these lands in value quantities. Also, great areas of marsh land have been found to contain natural gas and petroleum.54

The Land Department, following the passage of the Swamp Land Acts of 1849 and 1850, did not for many years have presented the question whether lands valuable for mineral were excepted from the swamp grants. It was not until phosphate was found in valuable quantities in swamp lands in Florida and immensely valuable deposits of petroleum were discovered in the swamp lands of Louisiana that the Department gave serious consideration to this problem. In the early part of this century, the federal government had been emphasizing the policy of conservation of natural resources. The executive branch had withdrawn lands of the public domain from entry which were deemed potentially valuable for the coal, oil, phosphate, potash, etc., which they contained. Congress had enacted legislation fortifying this executive action. The Supreme Court of the United States had decided that the withdrawals were constitutional.55 It was but nat-

53 Stewart v. United States, supra note 51 at 356. The government had contended that there was a continuous unbroken neck of upland connecting Mare Island with the marsh land and that, therefore, the marsh land constituted a peninsula which could not be divorced from the island proper. The Supreme Court held that even if this were the fact, it would not affect the result for, “It is common knowledge that lands not in fact surrounded by water are sometimes called islands.” Note, p. 362.

54 Natural gas has been held to be a mineral within the meaning of the mining laws. Colby, The Law of Oil and Gas (1942) 30 Calif. L. Rev. 245, 250. Much of the natural gas which now supplies San Francisco comes from lands bordering the lower reaches of the two great rivers of Central California and some of this gas producing land is “swamp and overflowed.” Immensely valuable deposits of petroleum have in recent years been developed in the swamp lands of Louisiana.

55 Colby, op. cit. supra note 54 at 254.
ural that the Land Department, the custodian of these lands, would carry this policy into effect to the best of its ability. It had already been successful in recovering for the United States title to oil lands in California and Wyoming of fabulous value. When it was called on to decide whether mineral lands were excepted from the swamp land grants, it issued “Instructions”,66 dated May 25, 1918, in answer to an inquiry from Louisiana. These “Instructions” reviewed at length the authorities and legislation on the subject and concluded that it had been the uniform policy of the government to reserve mineral lands from all classes of grants. Consequently, mineral lands were not included within the scope of the swamp land grants and could not lawfully be patented thereunder.

This ruling by the Land Department was repudiated by the leading case on this subject, involving swamp lands containing valuable petroleum deposits in Louisiana.57 These lands had been included in a Petroleum Withdrawal made by Presidential order58 and had been impressed with a prima facie mineral character by that withdrawal. The state was given an opportunity to show that the lands were not mineral bearing. When it failed to do so, the Land Department rejected the state’s claim that the swamp land title was paramount.59 The Supreme Court of the United States stated that neither the Swamp Land Act of 1849, which affected Louisiana exclusively, nor the general Act of 1850 contained any exception or reservation

67 Work v. Louisiana, supra note 14. This case was considered in the second article of this series but its importance merits a reconsideration in this connection. Fall v. Louisiana (1923) 53 App. D.C. 22, 287 Fed. 999 was modified and affirmed by the Supreme Court. This suit was brought in behalf of the federal government, Work being then and Fall before him Secretaries of the Interior.
68 For a discussion of these withdrawals and their validity, see Colby, op. cit. supra note 54 at 254.
69 State of Louisiana (1921) 48 Land Dec. 201, 203. On petition for rehearing, the department held that since mineral lands were not expressly included within the terms of the swamp land grants of 1849 and 1850, they did not inure to the state and that until the Secretary’s approval under the Act of 1849 or date of issuance of patent under the Act of 1850, the mineral or non-mineral character of land claimed as swamp was open for investigation and adjudication. The Land Department in (1920) 47 Land Dec. 366 had already decided that these same lands if mineral in character were not included in the swamp land grant. Still earlier in State of Florida (1919) 47 Land Dec. 92, it had held that until patented the Land Department had jurisdiction to investigate and determine both the swamp and overflowed character and the mineral character of any land claimed under the swamp act. In the Florida case, swamp land valuable for phosphate was involved. Following the adverse decision of the Supreme Court, the Land Department reconsidered and overruled its earlier decisions above noted in both the Louisiana and Florida cases. State of Louisiana (1925) 51 Land Dec. 291, 292.
of mineral lands. In 1849 and 1850 there was no settled policy on the part of the United States of withholding mineral lands from disposal, save under laws specially excluding them. The court noted that the day before Congress had approved the Swamp Land Act of 1850, it had provided for the disposal of public lands in the Territory of Oregon to settlers and expressly excepted “mineral lands.” It concluded, however, that this was insufficient to establish a settled public policy in reference to the reservation of mineral lands. Congress having had before it the day preceding the subject of excluding mineral lands from other grants, it followed that, since it did not specifically except them from the grant of swamp lands to the several states, that fact “indicates that no reservation of such lands was intended.” The court went on to say that, since there was at that time no settled policy of reserving mineral lands, there was no substantial ground for reading such a reservation into the broad and unrestricted grants of swamp and overflowed lands to the states. Such lands were not then generally known to contain valuable minerals, but were thought valuable, only after reclamation, for agricultural use, which was the purpose of the swamp land grants. Especially was this true where the discovery of oil and gas in the lands in question had been made at a much later date. The court differentiated its later decisions relating to school lands where it had held that the Act of 1853 granting school lands to California was not intended to cover mineral lands, by noting that,

“the discovery in 1849 that California was rich in precious metals, bringing its mineral lands to the attention of Congress, had led to the adoption in reference to that State of a local policy, plainly manifested in other provisions of the Act, making specific exceptions of mineral lands, by which, unlike the ordinary laws for disposing of public lands in agricultural States, the mineral lands of that State were uniformly reserved from sale, preemption and grants for public purposes.”

The court noted that it was not until 1917 that the Land Department had departed from its earlier construction of these swamp land grants, and had first held that mineral lands were to be excepted. It concluded that the Swamp Land Acts granted to the states the swamp

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60 Act of September 27, 1850; 9 Stat. 496.
62 Work v. Louisiana, supra note 14 at 258.
and overflowed lands without reference to their mineral character. This decision is unique in the fact that it is the outstanding exception to an almost uniform line of cases involving railroad grants, state school grants, and placer locations made under the general mining laws where the federal government's right to retain valuable petroleum lands has been upheld.

While the language above quoted could be used as an argument that, as to California, known in 1849 to be "rich in precious metals," a different conclusion might have been reached, especially in view of the later remark of the court, that this had "led to the adoption in reference to that state of a local policy... by which... the mineral lands of that state were uniformly reserved from sale, preemption and grants for public purposes." Nevertheless, the unrestricted conclusion of the court, "that the swamp land acts granted to the states the swamp and overflowed lands... without reference to their mineral character," is broad enough to include California and all the states which were in 1850 qualified to receive these swamp lands.

The Land Department was later on called on to decide whether swamp land selections made by Oregon, which had possibilities of mineral value, were patentable as swamp land. Oregon and Minnesota occupied a different status with respect to their swamp lands. It was not until March 12, 1860, that Congress extended the provisions of the Swamp Lands Act of 1850 to those states. The Land Department in its decision issued in the form of Instructions noted that the Oregon so-called donation act of, September 27, 1850, excepted mineral lands from its grant and also that the Supreme Court of Oregon had decided that the Oregon Swamp Land Act of 1860 was a limited and conditional grant only of such lands as the federal government had not already reserved, sold or disposed of prior to confirmation of title and concluded. As a consequence, mineral lands in Oregon were effectively reserved, so that the swamp grant could not be applied to

63 Ibid. at 259.
67 This is the view taken by the Land Department in its comment on the effect of the Work v. Louisiana decision by the Supreme Court, (1925) 51 Land Dec. 292, 317.
68 (1860) 12 Stat. 3.
69 (January 15, 1926) 51 Land Dec. 316.
70 (1850) 9 Stat. 496.
71 Morrow v. Warner Valley Stock Co. (1909) 56 Ore. 312, 101 Pac. 171.
them. In Minnesota this question would not be material, because the mining laws are not applicable to that state.\textsuperscript{72}

**Grants to Railroads.\textsuperscript{73}** The Policy of Congress in Making These Grants and Their Extent

Beginning with 1850 Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. These grants totalled upwards of 150,000,000 acres. Some 100,000,000 acres of this total was in the “precious metal” or “mining” states of the West,\textsuperscript{74} the latter being mainly grants to proposed transcontinental railroads and their branches. The largest of these involved an estimated 40,000,000 acres,\textsuperscript{75} which Justice Field described as an “immense territory” 2,000 miles in length and 40 miles in width, making an area nearly equal in extent to that of Ohio and New York combined and covering 80,000 square miles.\textsuperscript{76}

By 1870 this liberal policy had met with great public disfavor, so much so, that in 1872 the House of Representatives adopted a resolution condemning these subsidies, advocating their discontinuance and stating that the public lands should be reserved for actual settlers and to foster educational purposes.\textsuperscript{77} After 1871 such grants were discontinued. Much has been written in criticism of the congressional policy in making these grants,\textsuperscript{78} but there is much to be said for as well as against. Justice Van Devanter, commenting on the grant to the Northern Pacific Railway Company\textsuperscript{79} to bring about the construction and operation of a 2,000 mile transcontinental line extending from Lake Superior to Puget Sound and Portland, called attention to the fact that at the date of the grant this intervening area,

\[
\ldots \text{consisted of great stretches of homeless prairies, trackless forests and unexplored mountains,}
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and that the purpose of the grant was,

\[
\ldots \text{to facilitate the development of that region, promote commerce, and establish a convenient highway for the transportation of mails,}
\]

\textsuperscript{72} Supra note 69 at 317.

\textsuperscript{73} This subject is treated in Lindley, Mines §§ 149-162. See also 43 U. S. C. §§ 981-94 (1946).

\textsuperscript{74} Lindley, op. cit. supra note 73 at § 149.

\textsuperscript{75} Great Northern Ry. v. U. S. (1942) 315 U. S. 262, 273.


\textsuperscript{77} Great Northern Ry. v. U. S., supra note 75 at 273.

\textsuperscript{78} See Land Grants, 9 Encyc. of Social Sciences 35 (1933); Land Grants to Railways, 3 Dictionary of American History 237 (1940).

\textsuperscript{79} United States v. Northern Pac. Ry. (1921) 256 U. S. 51, 63.
troops, munitions and public stores to and from the Pacific coast, with all the resultant advantages to the Government and the public.

Justice McKenna in an earlier case\(^8^0\) said,

They were given as aids to enterprises of great magnitude and uncertain success and which might not have succeeded under a restricted and qualified aid.

Referring specifically to the grant there in question, he added,

We shall be led into error if we conclude that because the railroad is attained it was from the beginning an assured success . . . the aid to the company was part of the national purpose, which this court has said induced the grants to the transcontinental railroads. . . . And we may say that the policy was justified by success. Empire was given a path westward and prosperous commonwealths took the place of a wilderness.

When one takes into consideration the enormous expense of building these transcontinental railroads, the then seemingly insurmountable problems of engineering to overcome, the difficulties of financing what were at that time considered extremely hazardous ventures, and also recalls that in some instances receiverships and reorganizations of the grantee railroads ensued,\(^8^1\) he will realize that Congress, looking at the picture as it appeared when the earlier grants were made, was justified in its liberality. These grants were "the product of a period" in our national history. Later on when fortune had favored some of these risky undertakings and the tremendous development of the lands which the roads had opened up had taken place the scene changed. Some of the railroads eventually prospered beyond all anticipation, and hence, the revulsion of feeling.

In the early days, from 1850 to 1862, the railroad grants were made directly to the states, largely in the Middle West, which acted as trustees for the benefit of the companies constructing the railroads, and the responsibility of administering the grants was placed on these states. Beginning with July 1, 1862, when the Pacific railroad grant was made,\(^8^2\) this policy was altered, because the transcontinental railroads then projected were to pass through many states and territory remote from state control, and state control would have been confusing and conflicting. Thereafter the grants were made directly to the respective railroad companies.

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\(^8^0\) Oregon and Cal. R. R. v. United States (1915) 238 U.S. 393, 416, reversing (1911) 186 Fed. 861.


\(^8^2\) (1862) 12 Stats. 489.
The customary grants were of the odd numbered sections of public land existing within ten mile strips on both sides of the line of the road. These were called "primary limits" and the lands granted "place lands." Lands in these odd numbered sections which were already reserved, granted, appropriated, preempted, homesteaded or subject to other claims and rights at the date of definite location of the road were excepted and were termed "lands lost to the grant." In order to compensate the companies for these losses, they were given the right to select in lieu thereof odd numbered sections not more than 10 miles beyond the "place lands" on each side of the right of way in two additional strips referred to as "first indemnity belts" or "first indemnity limits." In some cases where the lands in these belts had already been largely claimed by settlers and others, these first indemnity limits were extended out 10 miles still further to form "second indemnity limits." Mineral lands were, as a recognized policy of Congress, specifically excluded from these railroad grants, and in lieu thereof, in some instances, the selection of agricultural lands within 50 miles on each side of the right of way in what were known as "mineral indemnity belts" was authorized. In exceptional instances the railroads were aided by bonds issued by the United States.

These railroad grants were not gifts. Although they granted rights they also imposed obligations. Instead of giving a gratuitous reward for something already done, these grants were a proposal to the grantees to the effect that if the latter would locate, construct and put into operation designated lines of railroads, patents would be issued to the companies confirming to them title to the public lands granted. The proposal could be accepted or rejected. If accepted, the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. By constructing the roads at enormous cost and putting them into operation, the companies performed their part of the contract and became entitled to perform-

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84 United States v. Northern Pac. Ry., supra note 81 at 328.

85 Barden v. Northern Pac. R. R., supra note 76 at 333.


87 Oregon and California R. R. v. United States, supra note 80 at 435.
ance by the Government. They thereby earned the right to the lands specified.\textsuperscript{88}

In construing these grants all ambiguities are resolved in favor of the sovereign grantor.\textsuperscript{89}

Congress had two major purposes in view in making these grants. The primary purpose was to provide the sinews of finance and thus aid the railroads in raising the funds essential for such costly construction; and the secondary purpose, which was inaugurated after the early grants had been made, was "to people the country" by encouraging settlers to acquire and establish homes on the public domain through which the railroads extended.\textsuperscript{90} Consequently, these acts or the amendments thereto usually specifically provided that the odd-numbered sections granted to the railroads should be sold to actual settlers only, in quantities not exceeding 160 acres to one purchaser and for a price not exceeding $2.50 per acre.\textsuperscript{91}

As the country developed, these railroad lands increased so greatly in value that the grantee railroads were charged with perverting the "bounty of Congress" by ignoring the actual settler and enriching "a few financial adventurers"; that these

lands granted for national purposes were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies.\textsuperscript{92}

In consequence of a memorial presented to it, Congress on April 30, 1908, adopted a joint resolution authorizing the Attorney General to bring suit to enforce the provisions of certain grants for the construction of a railroad from California to Portland, Oregon.\textsuperscript{93} Suit was brought, and the proof established the fact that the company had made sales of thousands of acres in single blocks to individuals who were not actual settlers and for prices ranging from $5.00 to $40.00 an acre and subsequently had even withdrawn from sale altogether all of its remaining unsold lands, asserting that they were mainly timberlands and unfit for settlement. However, it was also proved that

\begin{footnotesize}
\textsuperscript{88} Burke v. Southern Pacific R. R., \textit{supra} note 86 at 680; United States v. Northern Pacific Ry., \textit{supra} note 79 at 64.
\textsuperscript{89} Great Northern Ry. v. United States, \textit{supra} note 75 at 272; Burke v. Southern Pac., \textit{supra} note 86 at 680.
\textsuperscript{91} Oregon and Cal. R. R. v. U. S., \textit{supra} note 80 at 396, 413, 434.
\textsuperscript{92} \textit{Id.} at 408, 436. \textit{See} Southern Oregon Co. v. U. S., \textit{supra} note 90.
\textsuperscript{93} Oregon and Cal. R. R. v. U. S., \textit{supra} note 80 at 409, 438.
\end{footnotesize}
several thousand persons had made application to purchase some of the lands for settlement purposes and been refused. In answer to the company's contention that the unsold lands were timberlands and unfit for settlement, the court said that whatever the difficulties of performance, relief might have been secured through an appeal to Congress.

Over 3,000,000 acres of land had inured to the Oregon and California Railroad Company under the original grants. By reason of its violation of the covenants to sell to actual settlers at the price fixed by the granting acts, it was held to have forfeited its right to over 2,300,000 acres which were still unsold, having a value in excess of $30,000,000. Congress having initiated this litigation, the court left it "for Congress to provide by legislation for their disposition in accordance with such policy as it may deem fitting." Congress by Act of June 9, 1916, declared revested in the United States all railroad lands which had not been sold prior to July 1, 1913. The act also provided that an accounting should be had and the railroad company credited with $2.50 per acre for the entire acreage originally granted, and from this total sum should be deducted the amounts received by the company from its sales of lands.

Where a railroad grant conflicted with an Indian Reservation, it was held that even though an erroneous survey made by the Land Department had shown the lands to be outside the reservation and the railroad had sold such lands to purchasers in good faith, nevertheless, they were not bona fide purchasers under the public land laws and the Indian rights were superior. Lands in actual occupancy of Indians were held excluded from railroad grants even though patented to the railroad. The patents were cancelled to the extent of such occupancy. The policy of the government from the beginning has been to respect the Indians' right of occupancy, individual as well as tribal. It is not necessary that it be recognized by statute or other formal govern-

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95 U.S. v. Oregon and Cal. R.R. (D. Ore. 1925) 8 F. (2d) 645, 661. The total amount due the railroad company from the government under the accounting was found to be nearly one and three quarter million dollars, but the unsold lands forfeited by the company to the United States amounted to over 2,000,000 acres valued at $30,000,000, most of which became a part of the National Forests in Oregon. Also see, Southern Oregon Co. v. United States, supra note 18, which applied the same principles to the grant there under consideration.
96 Northern Pac. Ry. v. United States (1913) 227 U. S. 355, 367, affording (C. C. A. 9th 1911) 191 Fed. 947:
mental action. It flows from a settled governmental policy. Occupancy necessary to establish aboriginal possession is a question of fact.

**Time When the Grants Take Effect.**

Practically all of these several railroad grants have been held to be grants *in praesenti*, as far as "place lands" are concerned. This is in the sense that title to the granted land, when identified, relates back to the date of the granting act. We have seen that land grants to the states for educational purposes and swamp land grants, where the lands granted have already been surveyed, are grants *in praesenti*. There is one distinction, however, for in the case of both swamp and school land grants, the lands already surveyed are at that time definitely ascertainable and identifiable; whereas, in the case of railroads, the lands granted are called "floats" because they are unidentifiable and indeterminate in position until the line of the railroad has been definitely located and established. Once the line has been definitely located and the map of definite location filed, the odd-numbered sections to which the railroad is entitled are identifiable and all that remains is to determine whether excepted rights have attached or whether these sections are known mineral lands. Naturally the title to indemnity land does not attach until the indemnity selection has been made. Until then the right continues to be a "float." There is also one other material distinction in the case of railroad grants. This arises from the explicit exception "of mineral lands" from those grants. We shall see when we discuss this phase of the subject that the courts have held that this question of mineral character may be inquired into up to the date of the patent to the railroad. The doctrine of relation may not be invoked to carry the railroad title back to the date of the grant and defeat subsequently initiated mineral rights.

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100 Burke v. Southern Pac. Co., *supra* note 86 at 685.
103 The Land Department may inquire into and determine the character of the land at any time prior to patent. Northern Pac. Ry. (1937) 56 Land Dec. 201, 203.
Grants of Rights of Way.

In addition to the grants of odd-numbered sections and as a further incentive "to encourage development of the Western vastnesses," Congress, of necessity, had to grant rights to lay track across the public domain. Such rights could not be secured against the sovereign by eminent domain proceedings or adverse user. For a time special acts were passed granting to the designated railroads "the right of way" through the public lands. However, the burden of enacting this special legislation for each railroad moved Congress to adopt a general right of way statute, Act of March 3, 1875. Judge Lindley has pointed out the fact that under the terms of this act the railroad acquired only a "limited fee" to the right of way granted. The railroad could not alienate the right of way lands or use them except for railroad operation and acquired no title to the underlying minerals. His conclusions are confirmed by the recent case of Great Northern Ry. v. United States. That case presented the question as to whether the railroad company had any right to the oil and minerals underlying its right of way acquired under the general right of way statute of 1875. Congress had passed the Act of May 21, 1930, providing for the leasing of the right to extract oil from railroad rights of way. No lease under the act had been issued to the railroad company. The suit was brought by the federal government to enjoin the railroad company from drilling for oil and gas.

The court first considered the nature of the right granted by the right of way Act of 1875 and concluded that it "clearly grants only an easement, and not a fee." The right granted is one of "use and occupancy only, rather than the land itself." The court distinguished certain of its earlier decisions, where the right of way granted was described as "a limited fee," by noting that this conclusion and description of the nature of the right granted was based on cases arising under specific land grant acts passed prior to 1871, where rights of way were included with the grants of the odd-numbered sections, and

105 Sometimes also referred to as a "base" or "qualified" fee.
106 LINDLEY, MINES § 153.
107 Supra note 75. Also see Opinion of Land Department, (1937) 56 Land Dec. 206.
that Congress' change of policy after 1871 was not brought to the court's attention in these earlier cases. The decision reviews exhaustively the Congressional history and the contemporaneous administrative interpretation of the Act of 1875. The court concluded that since the railroad's right of way was but an easement, it had no right to the underlying oil and minerals. However, the court said that this result did not "freeze the oil and minerals in place," for the railroad company would be free to develop them under a lease executed pursuant to the Act of 1930, above noted.110

Where a forest reserve (now called a National Forest) had been created, a railroad company could not acquire a right of way through the reserve under the Act of 1875, which expressly excepts lands specially reserved from sale from its operation, even though before the reserve was created, but after its temporary withdrawal, the railroad had taken steps preliminary to construction. Railroad rights of way through forest reserves can only be secured through application to the Land Department when, in the judgment of the Secretary of the Interior, concurred in by the Secretary of Agriculture, the public interests will not be injuriously affected.111

Indian reservations, unless there is specific legislation to the contrary, are generally treated as public lands subject to railroad right of way. These right of way grants are not regarded as bestowing a bounty on the railroads, but stand upon a somewhat different footing from private grants and receive a liberal construction favorable to the purposes in view.112

Since the railroad rights of way are only easements, no prescriptive rights are obtainable by third parties of any portions of such right of way strips.113 It is suggested, however, that such a prescriptive right might be acquired if there is an abandonment of the right of way, but this is dependent upon the intention.114

110 Great Northern Ry. v. U.S., supra note 75 at 279; MacDonald v. United States (C.C.A. 9th 1941) 119 F. (2d) 821 was affirmed with modification.
Grants of Indemnity Lands.\textsuperscript{115}

It was obvious from the outset that in innumerable instances the odd-numbered sections within the place or primary limits of the various railroad grants would, at the time of filing the map of definite location of the railroad, have become subject to other valid claims. Many of these sections might also be mineral in character. Since the railroad grant acts expressly excepted mineral lands and prior valid non-ninumber claims from their operation, it was recognized that great losses of these odd-numbered sections within 10 miles of the line would be sustained by the grantee railroads unless some form of compensation were provided to make up for these deficiencies.\textsuperscript{116} Congress anticipated this situation and, as we have noted, provided "indemnity limits" or strips extending parallel to and on each side of the right of way, usually for another 10 miles in width beyond the place limits and in some cases this distance was doubled to create "second indemnity limits." Within these additional areas the railroads were authorized to select an equal acreage of "agricultural" land to make up for their "place land" losses.\textsuperscript{117} The place lands became fixed and indentifiable and were no longer "floats" as soon as the railroad right of way had been surveyed and the map of definite location filed. Title to the odd-numbered sections in the place limits, that were not excepted for one reason or another, then vested in the railroad and related back to the date of the granting act. The titles to the indemnity lands, however, only became fixed and were no longer "floats," as of the date of each indemnity selection by the railroad. When it could be established that any place or base lands were not available because of a prior claim or because of their mineral character, and the company had made a selection of an equal area of land within the indemnity limits in lieu of its loss of place lands, its title to such indemnity selections attached. The Land Department thereafter could only check and see that the legal requirements existed. It could not, nor could Congress, suspend or defeat the title once attached.\textsuperscript{118}

A suit of unusual interest, called the Forest Reserve Case,\textsuperscript{119} was

\textsuperscript{115} Lindley, Mines § 157.
\textsuperscript{116} These excepted lands were called "losses" or "bases for indemnity," Southern Pacific R. R. v. Fall (1922) 257 U.S. 460, 461.
\textsuperscript{117} These were called "indemnity lands" or "lieu selections."
brought by the United States to cancel patents allegedly erroneously issued to the Northern Pacific Railway Company for indemnity lands. The losses of place lands sustained by the company had amounted to over 4,000,000 acres. It was claimed that the lands available for indemnity were insufficient to supply the losses. A temporary executive withdrawal of these lands for forest reservation purposes had been made prior to their selection by the company, but in issuing the patents the Land Department had overlooked this fact. The question was, when the losses exceeded the land available for indemnity, whether there was any need for selection by the company under such circumstances and whether the United States could reserve or appropriate to its own use lands in the indemnity limits required to supply losses in the place limits. The court decided that such reservation by the United States could not lawfully be made under such circumstances. The indemnity provision in the granting act confers a “substantial right” on the railroad which “cannot be thus cut down or extinguished.” The court added that if the government could take part of the lands required for indemnity purposes, it could take all and thereby entirely defeat the provision for indemnity.\footnote{United States v. Northern Pacific Ry., \textit{supra} note 79 at 67.} The case was remanded to have the question of asserted deficiency determined by the Land Department as of the date of the temporary withdrawal.

The Forester of the Department of Agriculture, which had charge of the forest reserves, could not agree with the Department of the Interior’s Land Department and raised objections to a proposed adjustment. As a result, Congress passed a Joint Resolution on June 5, 1924,\footnote{(1924) 43 Stat. 461.} directing the Secretary of the Interior to withhold action in the matter until the situation had been investigated by Congress. The result was an investigation followed by the Act of June 25, 1929,\footnote{(1929) 46 Stat. 41; 43 U. S. C. 921 (1946).} which declared forfeited certain of the railroad company’s rights and directed that a suit be brought to adjust the grant but provided that the company should be compensated for any lands to which the courts might find the company entitled. As a result of the suit, the trial court found the company entitled to patents for certain lands and awarded compensation for 1,453,061 acres of land situated within the newly created forest reserves. March 22, 1936,\footnote{(1936) 49 Stat. 1369.} Congress, in order to expedite the final determination of the case, authorized a direct appeal
to the Supreme Court of the United States. On this appeal, the government urged various breaches of covenant by the company (335-342, 369-370). The justices were equally divided on this question of forfeiture. No decision was reached because their rulings on other issues disposed of the controversy.

One of the main issues was as to the meaning of the phrase "agricultural lands." There were nearly two million acres of losses by reason of the fact that the base or place lands had been returned as mineral in character. In considering this question, the court held that the words "mineral" and "agricultural" as used in the Railroad Act were not to be read strictly as defined by the dictionary. Mineral lands embrace deposits valuable for marble, slate, petroleum, asphaltum, and even guano, which are not so defined in lexicons. Likewise, filings on "agricultural" lands mentioned in acts of Congress have been allowed on forest and grazing land and, in fact, all types of land which in good faith were sought for a home, provided the settler could make them habitable. This has been true, in spite of the fact that the applicable acts of Congress require "cultivation" as a prerequisite to acquisition of title. While lands containing timber have been taken up for homes, a certain portion of the lands had to be cleared for cultivation. Lands valuable for timber or stone or other use, which could not be cultivated or farmed when cleared, could not be so taken up. By the use of the word "agricultural" and the right to select lieu lands anywhere along the line, Congress intended to give the company the privilege of selecting more valuable lands than the wild forest non-mineral lands contiguous to the mineral lands within the place limits in the mountain regions, which non-mineral lands were of little or no value and practically unusable. By the use of the word "agricultural", the company was precluded from selecting other mineral lands in lieu of mineral lands lost in the place limits. The court considered that the word "agricultural" was not intended to be synonymous with "non-mineral", but as synonymous with "land subject to be taken up

\textsuperscript{124} U. S. v. Northern Pacific Ry., \textit{supra} note 81.

\textsuperscript{125} Some of these rulings were that, while as to unsurveyed lands within the withdrawn forest reserve area, no odd-numbered sections could exist, unsurveyed lands not being public lands (344), nevertheless, the company had the privilege of selection when they were surveyed, notwithstanding the withdrawals (347); that conflicting Indian reservations did not operate to defeat the right of indemnity selection (349); that the company did not, as charged by the government, adopt a more circuitous route for its line in order to obtain additional lands (352); that as to certain lands alleged to have been fraudulently classified as mineral, thus giving the company additional indemnity selection, the case was to go back for a trial of the fraud issue (358).
The court concluded that land in the forest reserves valuable solely for timber and other uses which did not justify pre-emption or homestead settlement was not selectable by the company as indemnity. Such selections must be confined to land that was susceptible of clearing and subsequent cultivation or for grazing or of similar homestead character (364). The court further held that, if the government's act of withdrawal of lands for forest reservation purposes from the indemnity limits left insufficient vacant land available for selection, the company had the right to select from the withdrawn lands (365). Even the subsequent restoration to the public domain of the withdrawn lands in amount sufficient to make up the deficiency created by the original withdrawal would not defeat the company's right to compensation under the Act of Congress, for the withdrawals were unauthorized as far as the company was concerned (366). The company was not called on in making the money settlement by way of compensation for land "losses", to account for moneys received by it for certain of the lands sold by it for higher prices, as was required in the Oregon and California Railroad case, because the Congressional requirement that the lands be opened to settlement in the latter case did not apply to the lands here in question (368).1

The creation of various other federal land reserves also created some serious problems for the railroads. An indemnity railroad selection had been filed and completed in all respects. It was cancelled because of a subsequent temporary executive withdrawal for a water power site. Suit was brought to enjoin the Secretary.127 The court held that the filing of a railroad indemnity selection was not an initial step but rather the concluding step of one who by full compliance with the law has earned the right to receive title. The ultimate obligation of the government with respect to indemnity lands was similar to that respecting lands in place. The only difference was in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by filing selections in lieu of losses in the place limits. The Secretary had no discretion to en-

126 It was also decided that the company was not entitled to indemnity for two different overlapping grants to it, one being for a branch line. Had the overlap resulted from an earlier grant to another railroad, indemnity could have been claimed. Many minor issues were decided, the decision below partially reversed and the case remanded to the lower court for further proceedings as indicated in the opinion (376).

large or curtail the rights of the railroad. Upon its full compliance with the selection requisites, it became the equitable owner of the land in question (236-239).

The question whether lands are swamp lands or previously occupied and appropriated so as not to be properly subject to railroad indemnity selection is expressly committed to the Land Department.\textsuperscript{128}

Congress did not intend that coal lands should be acquired as indemnity lands. It has been the uniform practice of the Land Department to confine railroad lieu selections to lands not known to contain coal, iron, or other minerals.\textsuperscript{129} However, where the granting act expressly provided that lands "of equal quality" might be selected, the railroad had the right to select coal lands in lieu of coal lands. It was held that the Secretary of the Interior must determine the equality in value as provided by the act according to the conditions existing at the time the selection was made and could not take into consideration subsequently discovered facts as to value.\textsuperscript{130}

Indemnity selections must be for units of legal subdivisions. Forty acres is the smallest recognized unit, except where fractional. It is not necessary that losses and selections be exactly matched in quantity. They should correspond as nearly as legal subdivisions will permit and a reasonable approximation is sufficient.\textsuperscript{131}

The Supreme Court has said\textsuperscript{132} regarding a forest lieu selection that:

\begin{quote}
In principle it is plain that the validity of the selection should be determined as of the time when it was made, that is, according to the conditions then existing.
\end{quote}

The only exception to the general rule before stated respecting the time as of which the character of the land—whether mineral or non-mineral—is to be determined is one which in principle and practice is confined to railroad land grants.

\textsuperscript{128}Northern Pac. Ry. v. McComas (1919) 250 U.S. 387, 392.


\textsuperscript{130}Santa Fe Pac. R. R. v. Fall (1922) 259 U.S. 197, 200. But see (1923) 49 Land Dec. 522, 524 where these selections were cancelled.

\textsuperscript{131}Southern Pacific Co. v. Fall (1922) 257 U.S. 460, 462, 464; \textit{affirming} (App. D.C. 1920) 263 Fed. 637. The rule of approximation is applicable to indemnity selections. (1918) 46 Land Dec. 279, 281.

\textsuperscript{132}Wyoming v. United States (1921) 255 U.S. 489, 496.
The grants to railroads which crossed the mining states invariably specifically excepted "all mineral lands" from their operation. This was but a reflection of the times. The miners, who had pioneered in the rugged wilderness of the West and who had endured heartbreaking hardships in their search for gold and other metals, considered themselves primarily responsible for the development and growth of this new land. They were jealous of any interference with their mining activities, so much so, that, through their influence, the extension of the public land surveys into the region of their operations was in many cases postponed for years. Mining claims under their own rules and customs could also be located on unsurveyed public domain, but filings under other public land laws had to await survey. Naturally, they viewed with apprehension the proposed enormous grants of odd-numbered sections on each side of the transcontinental lines, which necessarily would for great distances traverse the scenes of their activities. In order to protect the mining industry, the railroad grants were expressly confined to non-mineral lands. Justice Field reflected this feeling when he said in the case of Barden v. Northern Pacific Railroad that if the railroad's contention in that case were to prevail and it was awarded the vast mineral wealth embraced in some 80,000 square miles of public domain to which it was entitled under its grant, "It would render the plaintiff corporation imperial.

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135 Lindley, Mines §§158-162.
134 Lands valuable for coal and iron were expressly included in the railroad grants because those minerals were essential to railroad construction and operation. But chromite, though it contains iron, may not be acquired by a railroad under its grant. Only where the iron value predominates is it iron bearing land within the meaning of the act. (1918) 46 Land Dec. 476, 478. A deposit of shale valuable only for the manufacture of cement is not mineral land. (1914) 43 Land Dec. 325; but a bed of diatomaceous earth is, (1916) 45 Land Dec. 223. It is not necessary that mineral be actually discovered on the land to justify the determination that it is mineral if indications give it mineral character in a broad sense. (1916) 45 Land Dec. 25; also see (1916) 45 Land Dec. 327.
133 So that there would be no misunderstanding on this score, Congress, January 30, 1865, adopted a joint resolution (13 Stat. 567) restating its policy of reserving mineral lands from railroad grants. See U.S. v. Sweet (1918) 245 U.S. 563, 568.
136 Justice Stephen J. Field was eminently qualified to write the opinion in this case, for, prior to his elevation to the Supreme Court bench, he had for many years practiced law in the mining regions of the Sierra and later was on the Supreme Court in California. He brought to the Supreme Court of the United States a first hand knowledge of mining and land problems of the West.
137 (1894) 154 U.S. 288, 331. While Judge Lindley has discussed this case at length (§154), its importance merits a brief restatement here to serve as a background to what follows.
in its resources—one that would far outshine 'the wealth of Ormus and Ind.'” In spite of the expressed will of Congress to except mineral lands from the railroad grants, the uncertainties which were bound to arise resulted in serious conflicts and claims of ownership which persist to this day. We have discussed the time when the title to lands acquired under these railroad grants would take effect and have seen that, like the grants of school and swamp lands, the railroad title would, when acquired, ordinarily relate back to the date of the granting act. This doctrine was urged by the railroads as applicable to their land grants. Some of the early trial court decisions\(^1\) held that the railroad grant mineral exception only applied to lands known to be mineral at the date of the railroad granting act. Such a ruling, if sustained, would have worked incalculable hardship on countless miners who had taken up mining claims in the vast areas penetrated by the transcontinental lines. The Barden case raised the issue squarely. The place land there involved was claimed by the railroad under a grant of 1864. Its line had become definitely located in that vicinity in 1882. Quartz mining claims were located on the land in 1888. Two federal judges sat at the trial. Their views were in conflict on this question of relation of title back to the date of the grant.

Justice Field in the Supreme Court's opinion stated that Congress made it "as plain as language can make it" that its intention "was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral." The belt of territory included in the grant was known to embrace great quantities of minerals. The policy of Congress to exclude mineral lands and reserve them for special disposition was reflected in all its grants of public lands in aid of railroads \((317-318)\). This rugged region was largely unexplored. It was inconceivable that the United States would "give away to a corporation of their own creation not only an imperial domain in land but the boundless wealth that might lie buried in the mineral regions covered by 80,000 square miles." \((318-319)\) It was recognized, however, that it would not be wise to leave the question of mineral or non-mineral character of the land open indefinitely. It was for the best interests of the country that titles to lands and minerals should eventually be settled. Accordingly, since provision was made for patenting these railroad lands and for determining their character at that time, the court concluded that this question was to be decided and foreclosed as of the date of the patent.

\(^1\) Lindley, Mines § 154.
Prior to that date the question of mineral character remained open for determination (326-332).\textsuperscript{139}

When Judge Lindley published his third edition the critical case of \textit{Burke v. Southern Pacific Railroad Company} was pending before the Supreme Court of the United States, having been certified there by the Circuit Court of Appeals (Ninth) for instruction upon designated questions of law.\textsuperscript{140} He called attention to the fact that the discovery of oil in the San Joaquin Valley through which railroad lines extended, where the odd-numbered sections claimed as railroad lands checkerboarded a considerable portion of the valley floor, gave rise to acute controversies as to ownership of what proved to be immensely valuable oil lands.\textsuperscript{141} In the \textit{Burke} case, suit was brought against the railroad company to establish title to five sections of land which had been located in 1909 under the placer mining laws.\textsuperscript{142} Fourteen years earlier, on July 10, 1894, patent had been issued to the railroad company for this same land. The Supreme Court\textsuperscript{143} first decided that oil is a mineral within the meaning of the mining laws.\textsuperscript{144} The court then followed the reasoning of the \textit{Barden} case that, though mineral lands were excepted from the railroad grants, it became practically imperative "that an authoritative identification of the lands passing under the grant and of those excluded" be made, otherwise there would

\textsuperscript{139} Justice Brewer wrote a vigorous and satiric dissenting opinion, concurred in by two other justices, contending that the mineral or non-mineral character of the land granted should be determined as of the date of the definite location of the road when the odd-numbered sections were first identifiable. The later case of \textit{Northern Pacific R. R. v. Sanders} (1897) 166 U.S. 620, decided similar issues and the court adhered to its ruling in the \textit{Barden} case without any dissent. Justice Brewer was still on the bench, but evidently recognized that the ruling in that case had become "the law of the land." The Sanders case is also of interest because it reiterated the ruling, already well established, that the miners' rules and customs were recognized as a part of the public land law long before Congress saw fit to legislate on the subject (634-635). In a still later case, \textit{Shaw v. Kellogg} (1898) 170 U.S. 312, 339, the court comments on the division of opinion in the \textit{Barden} case, but says that the only difference was as to the exact time when the legal title would pass free from the contingency of future discovery of minerals. The dissenters claimed that this occurred at the time of the filing of the map of definite location of the road and the prevailing opinion that it was the date of patent.

\textsuperscript{140} Because of the importance of the case, Judge Lindley devoted several pages to its consideration. \textit{Lindley, Mines} § 161.

\textsuperscript{141} The writer has already briefly discussed this situation. Colby, \textit{The Law of Oil and Gas} (1942) 30 \textit{CALIF. L. REV.} 245, 258.

\textsuperscript{142} At that time public lands valuable for oil and gas could be located under the placer mining laws. Subsequently, Congress, by the \textit{Leasing Act of 1920}, made such lands subject only to lease from the government. Colby, \textit{op. cit. supra} note 141 at 262.


\textsuperscript{144} \textit{Id.} at 676. Colby, \textit{op. cit. supra} note 141 at 247.
follow uncertainty of title, conflicting claims and inevitable litigation. The Land Department was the branch of the government to which was confided the identification of these lands and the issuance of patents. The purpose of the patents was to identify the lands granted. Their issuance was a confirmation of the company’s right and title (683-687). The court noted the Barden case as holding that the question of mineral or non-mineral character of the land “remained an open one until the issue of a patent,” and that this same rule prevailed in the homestead, desert land, timber and stone and other public land laws. The settled rule in all of them has been that the mineral or non-mineral character of the land is a question for determination by the Land Department. Once patent issues, it is to be taken, on collateral attack, as conclusive evidence of the non-mineral character of the land (687-691). The court noted that in 1892, or two years prior to issuance of patent, the same lands had been located by others, but there was no privity between them and complainants for these earlier claims had been abandoned (693). The fact that the patent itself, with the express consent of the patentee, recited that the mineral lands were excepted from its operation was held to be an invalid insertion by the Land Department, which had no power to extend the exception of the statute (693-705). The fact that the patent might have been issued by the Land Department without any investigation as to the character of the land did not, in the opinion of the court, alter the situation. A patent under such circumstances is irregularly issued, but “it is not void and therefore passes title.” The government might attack such a patent in a direct suit for its annulment if the land was known to be mineral when the patent issued (710).145

Acting on this last suggestion, the United States, itself, brought suit to set aside some of these railroad patents.146 Patents had been issued in 1904, at which time it was claimed by the government that the lands were known to be mineral and that this fact had been concealed from the Land Department. The Supreme Court reviewed the conflicting testimony and concluded that at and prior to the date of

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145 The Burke case was followed in People’s Development Co. v. Southern Pac. Co. (C. C. A. 9th 1922) 277 Fed. 794.

146 United States v. Southern Pac. Co. (1919) 251 U. S. 1, reversing (C. C. A. 9th 1918) 249 Fed. 785. See also (S. D. Cal. 1915) 225 Fed. 197; (N. D. Cal. 1919) 269 Fed. 511, where cancellation of railroad patents issued in 1894 to oil property worth a quarter of a billion dollars was refused on the ground that it was not then known to be mineral land.
the patent the known conditions were such as reasonably to engender
the belief that the lands contained oil of such quality and in such
quantity as would render its extraction profitable and justify expendi-
tures to that end (13-14) and ordered cancellation of the patents.\footnote{147}

Work done and discoveries of mineral subsequent to the date of
the railroad patent are incompetent and immaterial, for the condition
as of that date cannot be proven by the most fallible of criteria, sub-
sequent events. However, the subsequent discoveries are of account
in their influence upon witnesses and in weighing their testimony.\footnote{148}

Another government suit to set aside a railroad patent, issued in
1905 and which contained a deposit of limestone, was successful in
part only, because all of the odd-numbered section was not proved
valuable for mineral and known to be at the date of the patent.\footnote{149}

A railroad patent was ordered issued for one-half of a 40 acre
tract that was proven to be non-mineral, the other half being mineral.
The court said that the Land Department regulations cannot destroy
rights vested under a railroad grant even though tracts containing
40 acres are the minimum legal subdivisions recognized under the
government surveys. The court said, if the non-mineral portion can-
not be patented to the railroad, how can it be patented to any one
else?\footnote{150}

The United States has a right to maintain a suit to vacate a rail-
road patent issued through error or mistake where at the time of
issuance the question of mineral character was still pending before
the Land Department.\footnote{151}

\textbf{Railroad Lands and the Extralateral Right.}

With all the countless thousands of railroad patents issued in the
mining regions of the West, it is remarkable that only comparatively
recently has a reported case\footnote{152} arisen definitely deciding the right of
the owner of a mining claim to exercise an extralateral right by fol-

\footnote{147} The federal statute of limitations barring suits to set aside patents would have
barred this action, were it not for the fraud charged and proved. (1891) 26 Stats. 1093;
\footnote{151} United States v. Northern Pac. Co. (S. D. Cal. 1930) 43 F. (2d) 591, 592.
\footnote{152} Ames v. Empire Star Mines Co. (1941) 17 Cal. (2d) 213, 110 P. (2d) 13, \textit{cert. denied,} (1941) 314 U. S. 651; the decision of the District Court of Appeals, 93 P. (2d)
635, was affirmed but on different grounds. This case will receive more detailed considera-
tion in a subsequent article, dealing with the subject of Extralateral Rights.
lowing the vein apexing in his mining claim down on its dip as it penetrates beneath railroad patented land. The paucity of cases involving the right of vein apex owners to penetrate extralaterally beneath agricultural lands generally, is also noteworthy. In the *Ames v. Empire* case, the evidence established the fact that the Pennsylvania and Jefferson lode mining claims were located and worked in accordance with the miners’ rules and customs of the Browns Valley mining district in Yuba County as early as 1863. The railroad land underneath the surface of which the Pennsylvania-Jefferson vein apexing in those claims extended on its dip or descent into the earth, was patented June 14, 1880, pursuant to the Railroad Grant Act of July 25, 1866. The owners of the railroad title contended that since the first mining act of Congress expressly recognizing the rights of the miners (who previously had gone on the public domain without specific statutory authority) was enacted July 26, 1866, the day following the enactment of the Railroad Act, the railroad title by the doctrine of relation took precedence over the mining title. The court held that since the Mining Act of 1866 was a confirmation and recognition of previously existing mining claims initiated in 1863 under the miners’ rules and customs (218) and since the Railroad Act of 1866 expressly excepted mineral lands (219), the mining title had priority in time over the railroad title. The court also held that the mineral exception

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153 Judge Lindley in § 597, 1426, comments on a case, Wedekind v. Bell (1902) 26 Nev. 395, tried in Nevada, where the trial court upheld the right of the apex proprietor to follow the vein extralaterally beneath railroad patented land, but the Nevada Supreme Court dismissed the appeal on technical grounds without deciding the case on its merits.

154 We have two outstanding cases. East Cent. E. M. Co. v. Central Eureka Co. (1907) 204 U. S. 266, 272, affirming (1905) 146 Cal. 147, where the right of the mining claimant to follow the vein extralaterally beneath a later agricultural patent was upheld. The same ruling was made in Penn. Consol. Min. Co. v. Grass Valley Expl. Co. (N. D. Cal. 1902) 117 Fed. 509, 516. The principle of these cases is indistinguishable from the similar situation involving railroad land patents. The reason that there are so few such cases is probably due to the fact that fewer agricultural patents were obtained in the mining regions.

155 It is of historical interest to note that cases involving these claims are reported in Kent v. Snyder (1866) 30 Cal. 666; Pralus v. Jefferson M. Co. (1868) 34 Cal. 558; and Pralus v. Pac. G. & S. M. Co. (1868) 35 Cal. 50.

156 (1866) 14 Stat. 239.

157 (1866) 14 Stat. 251. Congress had previously many times recognized that the miners were working on the public domain. Colby, *Mining Law in Recent Years, Part I* (1945) 33 CAL. L. REV. 366, 371, note 13.

158 This opinion was written by Judge Traynor, a former member of the faculty at Boalt Hall of Law.
in the railroad patent must be determined as of the date of issuance of that patent and could not by the doctrine of relation be referred back to the date of the Railroad Act (221). The court concluded that the extralateral rights of the mining claims took precedence over the railroad title and that the railroad patent conveyed only the surface of the railroad land and also the subsurface that was not already subject to existing extralateral rights.\[160\] The Pennsylvania claim had been patented August 18, 1880, but this fact was immaterial, because it is elementary mining law that a mining location held under a possessory right, "for all practical purposes of ownership, is as good as though secured by patent."\[160\]

The Jefferson claim was never patented but was abandoned and subsequently relocated in 1891. The California Supreme Court stated, with reference to the railroad land, that both "the Pennsylvania and Jefferson mines received full extralateral rights "and could mine thereunder by virtue of the Mining Act of July 26, 1866." (219). The decision also pointed out that the owners of the railroad land were estopped from contesting the extralateral right of the Jefferson claim by virtue of a reservation to that effect in a deed made by one of their predecessors (223), so that two grounds are given for sustaining the extralateral right of the Jefferson claim.\[161\]

A case decided more recently (1946) in El Dorado County\[162\] involved a situation similar to that presented by the Jefferson lode mining claim in the preceding case. There was evidence to show that the ground included in the patented Penobscot lode mining claims was located as early as 1864 and that it had been claimed as a mining claim continuously since then. Adjoining ground, beneath which the vein apexing in the claim extended extralaterally on its dip, had been patented in 1905 as railroad land. At the date of the railroad patent there was a valid mining location in existence embracing the area, later patented as the "Penobscot," which included this apex. Subsequent to 1905, this mining claim was "jumped" and located adversely as the "Penobscot." The trial court held that the right to the vein extra-

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159 LINDLEY, MINES § 613 was cited on this point.
161 Judge Carter dissented from the prevailing opinion which was concurred in by five other judges, (1941) 17 Cal. (2d) 213, 226, 110 P. (2d) 13.
162 Middle Fork Gold Min. Co. v. Green. An appeal was dismissed on technical grounds (1947) 79 Cal. App. (2d) 350, 197 P. (2d) 363, so there is no reported opinion on the merits.
laterally beneath the surface of the railroad patented land had auto-
matically been carved out of and reserved from that land by reason
of the existence at the date of the railroad patent of the mining loca-
tion including the apex of the vein. The subsequent relocation of the
mining claim carried with it the extralateral right to the vein which
had already been permanently carved out of and reserved by opera-
tion of law from the overlying railroad patented surface. This hold-
ing is in consonance with Judge Lindley's expressed views and also
those of the other textwriters on the subject. 163

163 Lindley, Mines § 612; Costigan, Mining Law § 118m (1908); Morrison,
Mining Rights, 210 (16th ed. 1936); Ricketts, American Mining Law §§ 172, 945;
(1931); Snyder on Mines §§ 760, 865 (1902); Martin, Mining Law § 323 (1908);
Kenny, The Law of the Apex, 210 (1914). The vein on its dip "constitutes no part"
of the adjoining land beneath the surface of which the vein extends. Tyler M. Co. v.
Last Chance M. Co. (1898) 90 Fed. 15, 21. It cannot be recaptured by adverse posses-
sion of the surface. Lindley, Mines § 812.