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## II. Mining Law in Recent Years<sup>†</sup>

Wm. E. Colby\*

*The Federal Public Land System.*<sup>1</sup> With the acquisition by the federal government of the vast territory lying to the west of the original colonies, by cession from these colonies, some sort of a national land system became imperative.

There had been two distinct systems of public land disposal in operation in the original colonies and the states which succeeded them. The New England colonies early in the eighteenth century had laid out rectangular townships, whereby common or surplus land, particularly in the vicinity of towns, was divided into surveyed tracts prior to sale and settlement. Townships six miles square were favored, but some were eight and others ten miles square. Another system had arisen in the southern colonies, where settlers and purchasers were granted a varying acreage of land which they were authorized to select out of unappropriated domain and to have identified by survey. This

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<sup>†</sup>This is the second of a contemplated 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. LINDLEY ON MINES might well have been entitled LINDLEY ON MINES AND THE PUBLIC DOMAIN, for his outstanding text on mines also deals extensively with the laws applicable to non-mineral public lands. This was essential, for many of the legal problems involving mineral lands can only be correctly understood when treated in conjunction with a background knowledge of the non-mineral land laws upon which the mining laws impinge. Consequently, this second article, dealing as it does with the origin and growth of the federal public land system and bringing down to date that portion of LINDLEY ON MINES devoted to this phase of the general subject, might well be entitled *The Law of the Public Domain in Recent Years*.

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<sup>1</sup>This supplementary article contains much historical information regarding our federal public land system which does not appear in LINDLEY ON MINES and which is deemed of sufficient importance and interest to present here. Much of this additional information is found in TREAT, *THE NATIONAL LAND SYSTEM* (1910) and in DONALDSON, *THE PUBLIC DOMAIN* (1884), and the writer expresses his indebtedness to these excellent sources of material.

latter system resulted in carving up the available land into irregular parcels or "indiscriminate locations" without any coordinated surveys.

In the spring of 1784 the Continental Congress appointed a committee, with Thomas Jefferson as chairman, to recommend a plan for the disposition of the federal public domain. This committee reported unanimously in favor of the distinctly New England system of methodical rectangular surveys, although three of its five members were from southern states where the other system of "indiscriminate locations" was in force. It recommended that, prior to sale, the public domain be divided into "hundreds" by laying out townships ten geographical miles square, with interior lots one geographical mile (6086.4 ft.) square, each containing 850.4 acres. This report was in Jefferson's handwriting, though he did not "invent" the system which already had its New England prototypes. The Continental Congress, however, did not adopt the plan. George Washington,<sup>2</sup> a land surveyor by training and profession, that same summer made a journey into this wild, Indian-inhabited region lying to the west and gathered much information regarding it, which he communicated to Congress with his recommendations as to its control and disposition.

In March, 1785 the Continental Congress again appointed a committee, which also recommended dividing the federally owned lands into rectangular townships, reducing the size to seven miles square and substituting statute for geographical miles. The land when surveyed was to be sold at auction with a minimum price of \$1.00 per acre. On May 20, 1785 the Continental Congress passed a "Land Ordinance," which provided that the federal public domain should be surveyed and divided into townships six miles square. These townships were to be offered for sale, some as a whole and each alternate township in lots<sup>3</sup> of one square mile each. This ordinance provided for the sale of these lands on specified terms, and certain lots (sections) in each township were reserved for future disposition, as was also "one-third part of all gold, silver, lead, and copper mines."<sup>4</sup> The sixteenth

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<sup>2</sup> George Washington was a member of the Continental Congress, representing Virginia.

<sup>3</sup> The word "section," though used in the debates, was not used in the ordinance as passed, and it first appears in the later Act of 1796. Thereafter it replaced the word "lot" and for nearly 150 years bears the name applied to one surveyed square mile of the public domain.

<sup>4</sup> This reservation of a fractional portion of the metal mines named was a relic of the Royal Charters under authority of which the original colonies were established. These charters contained similar reservations. There is no record that this provision was ever put to practical use.

lot (section) in each township was reserved for the maintenance of public schools. One-seventh of the entire area was made subject to the claims of the Continental soldiers, and a minimum price of a dollar per acre was established. This land ordinance constitutes the foundation of our federal land system, and, with minor changes, it is the method of subdividing public land which has since been followed consistently for more than a century and a half. The surveys of public lands were to be made by surveyors chosen by the Congress, one from each state and all acting under the direction of the "Geographer of the United States." Some surveys were completed under this system but hostile Indians were a serious menace, not only to the surveyors, but to the settlers who occupied the surveyed lands.

The Constitution of the United States, drafted by the Federal Convention of 1787, was ratified and became effective September 13, 1788, and the first Congress authorized by the Constitution was elected and then assembled in March, 1789. The Constitution provided:

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States . . . . (Article IV, Section 3.)

This provision gives Congress plenary power over the federally owned public lands, and its constitutional power in this respect "is without limitation. Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of National power."<sup>5</sup>

The adoption of the Constitution had the effect of nullifying the action previously taken by the Continental Congress. It was urgent, therefore, that the new Congress early declare itself on land policy in order that the sale and settlement of public lands, which had been authorized in a small way in the growing West, should continue on a much larger scale. Alexander Hamilton, then Secretary of the Treasury, was requested by Congress to prepare a uniform plan of public land disposal. His report ignored the Land Ordinance of 1785 of the Continental Congress, with its provision for prior survey of townships, and recommended instead a modified system of "indiscriminate locations."<sup>6</sup> Bitter debates ensued on the respective merits of

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<sup>5</sup> *United States v. California* (1947) 332 U. S. 19, 27; *Sinclair v. United States* (1929) 279 U. S. 263, 294.

<sup>6</sup> The Secretary of the Treasury had been authorized by Congress "to execute such services relative to the sale of the lands belonging to the United States, as may be by law

the two irreconcilable systems. In spite of the need for revenue and the urgency resulting from the unlawful "squatting" of pioneer settlers on the public domain, Congress only debated and delayed positive action.<sup>7</sup> Tremendous pressure on Congress was exerted by speculators who offered to purchase large tracts of land in single units embracing millions of acres. The scandal which developed from these offers further added to the delay. There was serious conflict between congressmen who favored such sales of large areas to moneyed purchasers, with its immediate returns for the federal treasury, and those who wished the land to be taken up in small tracts by actual settlers, which meant delay in realizing funds. Finally a bill was passed and approved by President Washington on May 18, 1796.<sup>8</sup> The plan originally adopted by the Land Ordinance of 1785 of dividing the lands by prior survey into six mile square townships, one-half of which were to be further subdivided into sections of one square mile each, and the auction system of sale, were continued. The minimum price per acre was raised to two dollars and a "Receiver" provided to take the payments. The improved condition of the nation's credit had rendered this increased price possible. The appointment of a "Surveyor-General" to supervise the making of surveys was also authorized. It was his "duty to engage a sufficient number of skillful surveyors as deputies" to carry on the public surveys.

An Act of May 10, 1800<sup>9</sup> supplemented the Land Act of 1796, and contained detailed provisions which made the earlier act more workable. Certain land offices were established so that the lands could be purchased more easily locally, and a Register was authorized to enter the applications and perform other clerical duties in cooperation with the Receiver, already provided for under the earlier act. On April 25, 1812<sup>10</sup> a General Land Office was also established and a commissioner provided to take over the executive land duties which had up to that time devolved on the Secretary of the Treasury. The commissioner became the custodian of the books, survey plats, and other public land records at Washington. The General Land Office

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required of him . . ." (1789) 1 STAT. 65, and Hamilton, as Treasurer, doubtless saw more immediate money coming into the Federal Treasury as the result of the adoption of such a plan.

<sup>7</sup> Congress had already authorized the sale of certain public lands which had been surveyed into townships under the Land Ordinance of 1785.

<sup>8</sup> (1796) 1 STAT. 464.

<sup>9</sup> (1800) 2 STAT. 73.

<sup>10</sup> (1812) 2 STAT. 716.

remained a bureau of the Treasury Department until March 3, 1849, when it was transferred to the newly created Department of the Interior.<sup>11</sup> The surveying of public lands became an administrative act confided to the supervision of the Commissioner of the General Land Office.<sup>12</sup> The importance of this federal public land system is emphasized by the fact that, under its wise provisions, there has been transferred into private ownership the larger part of a great belt of the most fertile and productive land in the entire world, excelling in agricultural crops and manufacturing opportunities as well as in richness and variety of mineral resources. Extending across the temperate zone of a continent and facing on two great oceans, this favored region has, in the comparatively short period of its existence, produced greater wealth and become the home of a people enjoying a higher standard of living than any other region in the history of the human race.

*Federal Land Department Now the "Bureau of Land Management."* As has been noted, a Receiver to accept the monies received by the United States for sales of the public lands was authorized in 1785, a Surveyor-General was appointed in 1796, and a Register, to perform the clerical duties of the office, in 1800. The General Land Office with its commissioner in charge in Washington, D.C., was provided in 1812. In 1849 the functions of the land department and the various land officials were transferred from the Treasury Department to the Department of the Interior, and the Secretary of the Interior thereupon assumed control. A Register and a Receiver were appointed for each of the numerous district United States land offices scattered throughout the public land states, and a Surveyor-General was placed in charge of the public land surveys in each state and territory of the growing West. This remained the setup of the land department for over one hundred years until 1921 when the President was authorized to consolidate the offices of Register and Receiver and abolish the office of Receiver.<sup>13</sup> The office of Surveyor-General was abolished in 1925, and the field surveying service was placed under the United States Supervisor of Surveys.<sup>14</sup> District Cadastral Engineers took charge of the maps and records formerly in the custody of the Surveyors-General.

The most radical change of all has recently taken place. Congress

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<sup>11</sup> (1849) 9 STAT. 395.

<sup>12</sup> REV. STAT. § 453 (1875); *United States v. Morrison* (1916) 240 U. S. 192, 210.

<sup>13</sup> (1921) 42 STAT. 208.

<sup>14</sup> (1925) 43 STAT. 1144, 43 U. S. C. § 51 (1940).

passed the "Reorganization Act of 1945,"<sup>15</sup> authorizing the President to make recommendations to it for the reorganization of various departments of the government under his control. These "Reorganization Plans" were approved by Congress December 20, 1945.<sup>16</sup> Among other changes, the functions of the General Land Office and the Grazing Service in the Department of the Interior were consolidated to form a new agency to be known as the "Bureau of Land Management," headed by a Director with an Associate Director and Assistant Directors. The General Land Office, Grazing Service, Commissioner of the General Land Office, all Registers of the district land offices, and the Supervisor of Surveys, together with the Field Surveying Service, then known as the Cadastral Engineering Service, were abolished. The Secretary of the Interior was given full authority to administer, direct, and control the "Bureau of Land Management" and to designate officers and agencies to assist him. All records, property, and personnel were transferred for such purposes. As a result, the General Land Office has become the Bureau of Land Management, the Commissioner of the General Land Office is now the Director of the Bureau of Land Management, and the Registers are known as Acting Managers of the District Land Offices.<sup>17</sup> The Grazing Service has become the Division of Grazing, a branch of Range Management. There is also a Regional Cadastral Engineer who has charge of the survey records, and survey of public lands is now done by the Division of Engineering and Construction.

The duties of the Bureau of Land Management are to maintain general supervision, through survey, management, and disposition of the public lands of the United States and their natural resources, in accordance with national conservation laws and policies.<sup>18</sup>

*The Public Land Surveys.* The preceding historical account of the

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<sup>15</sup> (1945) 59 STAT. 613, 5 U. S. C. § 133y (Supp. 1946).

<sup>16</sup> (1946) 60 STAT. 1100, 5 U. S. C. A. § 133y-16 (Supp. 1947).

<sup>17</sup> Presumably they will eventually be called "managers," but since they had been appointed as "registers" for a definite term of office it was decided that they could not properly be designated as managers. Therefore, for the present they are referred to as "acting managers."

When the writer started the practice of the law, some 50 years ago, there were ten or more district land offices in California. Now there are only two, one in Sacramento and the other in Los Angeles. This is a reflection of the great decrease in the sales of and dealings in public lands. Most of the important and desirable public land has either passed into private ownership or been included in federal reservations.

<sup>18</sup> This statement is substantially the one that appears in a government issued pamphlet containing information on the new setup.

origin and early beginnings of our public land system is of more than passing interest. This system of public surveys, originating with some of the New England colonies as early as 1730, was, as we have seen, carried forward and embodied in the federal land system and continued down with little change to the present day. Under this system most of the great empire of federal public domain extending to the Pacific Ocean, which the United States acquired by cession from the original states, by purchase from foreign countries, and by treaty and by conquest from Mexico, has been disposed of to settlers and private buyers. This system has certain outstanding advantages. By requiring a public survey of these lands prior to the passage of title to grantees an orderly development of the public domain has resulted. The conflicts of title which inevitably accompany overlapping areas has been largely avoided. The keeping of the official survey notes and plats as public records has facilitated the identification of land boundaries. The method of projecting rectangular surveys has resulted in great simplicity and brevity of land description. The reports required of the public land surveyors, as to the quality of the land surveyed and the existence of known mines, salt springs, timber, bodies of water and water courses, mountains, etc., have brought into these public records a great fund of valuable information:

Public-land surveys made by the General Land Office result in the official township maps which are the basis of all land titles and to which, therefore, all data on land classification must finally be adjusted. The system now in use was adopted in essentially its present form in 1785. Under this system a certain initial point is first selected through which a north-south line, called a principal meridian, and an east-west line, called a base line, are run. At successive intervals, usually 24 miles, north and south of the base line standard parallels or correction lines are established parallel to the base, and similarly at intervals east and west of the principal meridian guide meridians are established. Because of the convergence of meridians toward the poles these guide meridians are not parallel to the principal meridian but approach it toward the north. In order to correct this narrowing the guide meridians are offset at each standard parallel and started anew northward at their original distance apart. The quadrilateral thus defined is subdivided into townships, each approximately 6 miles square, and each township in turn is divided into 36 sections 1 mile square. Each section is further subdivided into quarters, and each of these is held to contain four 40-acre tracts, or quarter-quarters, the smallest commonly recognized legal subdivision of the public-land system. Appropriately marked monuments are set at all township



and section corners and at the middle points of the side lines of sections, thus indicating the limits of the quarter sections.<sup>19</sup>

The townships extending in the same line north and south are called ranges, and these ranges are numbered consecutively, both to the east and to the west, beginning with number one immediately on each side of the basic reference point. The tiers of townships extending contiguously east and west are also numbered consecutively, both to the north and to the south, commencing with the same basic reference point. While, as originally adopted, the system of public land surveys contemplated leaving each alternate township without further subdivision, the division of all townships into sections of one square mile each was soon authorized. Section 1 is the extreme upper right hand or northeasterly square mile of the township. The sections are numbered consecutively 1, 2, 3, 4, 5, 6, reading to the left or west and extending in a row along the north side of the township, and then dropping down one tier they are numbered 7, 8, 9, 10, 11 and 12, extending to the right or east. This system of numbering alternates as above indicated is continued until the bottom row of sections in the township is reached; section 36 becomes the last or most southeasterly section of the township.<sup>20</sup> A section is treated as being divided into four equal parts of 160 acres each. These quarter sections are still further divided, theoretically, into 40 acre square tracts for the purposes of agricultural disposition, and for the making of placer mining locations the sections may be divided into still smaller square tracts of ten acres each.<sup>21</sup>

*Public Surveys and Resurveys.* No system is perfect, and this method of checkerboarding the vast areas of federally owned land had its inevitable shortcomings. The establishment of basic reference points, most of which were natural features such as mountain tops,<sup>22</sup> from which to start the township surveys in any particular region necessarily resulted in the creation of tiers of fractional townships along the zones of meeting of surveys extending out toward each other

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<sup>19</sup> THE CLASSIFICATION OF THE PUBLIC LANDS, BULL. 537, U. S. GEOLOGICAL SURVEY 61.

<sup>20</sup> (1796) 1 STAT. 464.

<sup>21</sup> (1891) 26 STAT. 1097, 30 U. S. C. § 36 (1940); 2 LINDLEY, MINES § 448 (3rd ed. 1914).

<sup>22</sup> In California the Mt. Diablo Meridian governs public land surveys of all central and northern California and the entire state of Nevada; the San Bernardino Meridian governs surveys in southern California and the Humboldt Meridian, surveys in north-west California west of the Coast Range. DONALDSON, *op. cit. supra* note 1 at 181.

from the nearest basic reference points. Since these were usually arbitrarily selected natural features, it was inevitable that surveys emanating from each would not harmonize where they met. Errors in measurement due to incompetent surveyors or faulty instruments also resulted in serious discrepancies, and much litigation to straighten out conflicting surveys and claims has resulted. Worst of all, gross survey frauds were perpetrated on the government. In many instances little if any survey work was actually done in the field; perhaps only a few of the more accessible and prominent corners were established, and those inaccurately. "Paper" field notes were written up in an office with mere guesses as to topography, stream crossings, and character of land. Public scandals arose and criminal proceedings resulted.<sup>23</sup> Wherever these conditions have been found to exist the government has usually ordered actual surveys or resurveys made to remedy these deficiencies. In making such "corrective" surveys of public lands, the federal government may not interfere with already vested rights to any of the lands involved:

Although the power to correct surveys of the public land belongs to the political department of the Government and the Land Department has jurisdiction to decide as to such matters while the land is subject to its supervision and before it takes final action, *Cragin v. Powell*, 128 U. S. 691, 698; *Knight v. Land Association*, 142 U. S. 161, 177; *Kirwan v. Murphy*, 189 U. S. 35, 54, this power of supervision and correction by the Department is 'subject to the necessary and decided limitation' that when it has once made and approved a governmental survey of public lands, and has disposed of them, the courts may protect the private rights acquired against interference by corrective surveys subsequently made by the Department. *Cragin v. Powell, supra*, p. 699. A resurvey by the United States after the issuance of a patent does not affect the rights of the patentee; the Government, after conveyance of the lands, having 'no jurisdiction to intermeddle with them in the form of a second survey.' *Kean v. Canal Co.*, 190 U. S. 452, 461. And although the United States, so long as it has not conveyed its land, may survey and resurvey what it owns, and establish and reestablish boundaries, what it thus does is 'for its own information' and 'cannot affect the rights of owners on the other side of the line already existing.' *Lane v. Darlington*, 249 U. S. 331, 333.<sup>24</sup>

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<sup>23</sup> The so-called "Benson cases" arising in California are an outstanding example. *United States v. Perrin* (1889) 131 U. S. 55; *United States v. Hall* (1889) 131 U. S. 50; *United States v. Benson* (C. C. A. 9th 1895) 70 Fed. 591. The government has abandoned this system of letting out the surveying of public lands on a contract basis and the work is now done by government surveyors in the Division of Engineering and Construction.

<sup>24</sup> *United States v. State Investment Co.* (1924) 264 U. S. 206, 212.

A prior purchaser may assert whatever title he has acquired under the original survey as against anyone claiming under the resurvey,<sup>25</sup> and the original survey may not be collaterally attacked.<sup>26</sup>

It has been held, however, that an Act of Congress authorizing a resurvey of public lands is a legislative declaration that the lands are to be regarded as unsurveyed and that the *future* disposition of the lands is to be regulated by the new survey.<sup>27</sup> The making and correction of public land surveys belong to the political department of the government, and it may make a resurvey of lands where the boundaries are in dispute even after first refusing to do so.<sup>28</sup>

*The Classification of Public Lands as to Character.* Judge Lindley has stated that there had been "no general systematic classification of the public lands, according to their mineral or nonmineral character, for purposes of sale or disposal . . ." <sup>29</sup> However, he qualified this by adding "at least until a very recent period." As a matter of fact, at the time that his comment was written, the United States Geological Survey, under instructions from the Department of the Interior, had entered upon an active and far-reaching program of land classification. This had been brought about by the government's awakened interest in conservation of its natural resources, which had received much impetus during the Theodore Roosevelt administration after the turn of the century.

While Judge Lindley's comment was true as to any extensive mineral and nonmineral classification of lands of the public domain as of that time, there had been a rather careful examination and classification of railroad lands, which were odd numbered sections embraced within the railroad grants which Congress had made to encourage the building of railroads into the vast, then largely uninhabited public domain. These grants invariably excepted mineral lands from their operation and in many instances, especially where railroads penetrated the fabulously rich mineral bearing lands of the West, it became necessary to classify these grants with respect to their mineral or nonmineral character. The same has been true of certain lands set aside as Indian Reservations.<sup>30</sup> Another outstanding example of clas-

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<sup>25</sup> *Greene v. United States* (C. C. A. 5th 1921) 274 Fed. 145.

<sup>26</sup> *Phelps v. Pacific Gas and Electric Co.* (1948) 84 A. C. A. 284, 287, 190 P. (2d) 209, 212. In this case the original survey was held to be inaccurate, but not fraudulent. *Id.* at 289, 190 P. (2d) at 213.

<sup>27</sup> *Cox v. Hart* (C. C. A. 9th 1921) 270 Fed. 51.

<sup>28</sup> *United States v. Redondo Development Co.* (C. C. A. 8th 1918) 254 Fed. 656.

<sup>29</sup> 1 LINDLEY, MINES § 102.

sification of public lands was of their forested areas, which were withdrawn from private entry and created into permanently segregated areas, at first called "Forest Reserves," now known as "National Forests."<sup>31</sup> Vast areas of public domain were also classified as coal, oil, and gas bearing lands and withdrawn under presidential order,<sup>32</sup> which action received subsequent confirmation from Congress.<sup>33</sup>

Public lands valuable for phosphates, potash, and other strategic minerals have from time to time been classified and withdrawn from private entry.<sup>34</sup> Recently lands containing deposits of uranium bearing ores have been withdrawn from entry because of the public interest in atomic energy.<sup>35</sup>

*United States Geological Survey.* The United States Geological Survey,<sup>36</sup> acting under the Department of the Interior, now has charge of land classification,<sup>37</sup> and issues topographic maps, geological bulletins, and monographs descriptive of mines and mineral resources. This valuable work is not confined to the public domain but extends to all of the mineral bearing regions of the United States, whether in private ownership or not.<sup>38</sup>

Classification of public lands has usually preceded and been directed at eventual withdrawal from private acquisition, with a view to reservation in the public interest. Since metalliferous lands are not, as a general rule, subject to withdrawal, their classification has had other objects in view.<sup>39</sup> There have also been attempts at various times to induce Congress to withdraw metalliferous lands from outright

<sup>30</sup> BULL. 537, *supra* note 19 at 143.

<sup>31</sup> This was done by presidential proclamation pursuant to various Acts of Congress. *E.g.*, (1891) 26 STAT. 1095.

<sup>32</sup> The validity of such withdrawals without prior congressional authorization was upheld in *United States v. Midwest Oil Co.* (1915) 236 U. S. 459; Colby, *The Law of Oil and Gas* (1942) 30 CALIF. L. REV. 245, 255.

<sup>33</sup> (1910) 36 STAT. 847, 43 U. S. C. § 142 (1940); (1911) 36 STAT. 1015, 30 U. S. C. § 103 (1940); (1912) 37 STAT. 497, 43 U. S. C. § 142 (1940).

<sup>34</sup> Colby, *Mining Law in Recent Years* (1945) 33 CALIF. L. REV. 368, 376.

<sup>35</sup> See Atomic Energy Act of 1946, 60 STAT. 755, 42 U. S. C. A. § 1801 (Supp. 1946). The Atomic Energy Commission has offered bonuses in cash for the discovery of uranium ores and fixes the price at which these ores are purchased by the government.

<sup>36</sup> Created March 3, 1879, 20 STAT. 394, 43 U. S. C. § 31 (1940).

<sup>37</sup> At one time land classification was conducted by special commissioners, but the United States Geological Survey has more recently been given charge of this work.

<sup>38</sup> THE CLASSIFICATION OF THE PUBLIC LANDS, *supra* note 19, issued by the United States Geological Survey, is an excellent and comprehensive treatment of this subject. It details the methods of land classification adopted by the Survey and the various types of lands that have been or are being classified.

<sup>39</sup> *Id.* at 143.

disposition and place them in a state of permanent reservation, subject only to leasing from the federal government. However, the practice initiated by the pioneer miners "in the roaring days of '49," long prior to any Congressional confirmation of their self-asserted "miners' customs, rules and regulations,"<sup>40</sup> of free mining on the public domain has become so strongly entrenched that it would be difficult now, after successful operation for a full century, to overturn this system created by the miners themselves to fit their own needs.<sup>41</sup>

*State Geological Surveys.* Not only does the federal government make these valuable geological surveys of the federal public lands and also of important mining districts, including mines in private ownership, but most of the western or mining states have geological surveys of their own which cooperate with the federal agency. Outstanding in this respect is California.<sup>42</sup> The California mineral surveys and publications are the work of the Division of Mines in the Department of Natural Resources.<sup>43</sup>

*Spanish and Mexican Grants.*<sup>44</sup> The oldest grants of land that af-

<sup>40</sup> The earliest direct and positive confirmation is found in (1866) 14 STAT. 251; see Colby, *supra* note 34 at 370-374.

<sup>41</sup> The Mining Act of 1872, 17 STAT. 91, 30 U. S. C. § 22 (1940), has remained the basic law of mines to this day as far as metalliferous deposits of the public domain are concerned. One potent underlying reason for retaining this self-initiated system is because the search for and discovery of metalliferous ore deposits have been largely accomplished by the pioneer prospector. Unless he is appropriately rewarded by being able to acquire exclusive title to the object of his search, usually made in rugged mountainous and arid desert regions, the chief incentive for his expenditure of effort would be gone. Because some such incentive has seemed essential, in all parts of the world throughout the ages special inducements have been given prospectors and miners so that they may profit by their discoveries. 2 LINDLEY, MINES § 335.

<sup>42</sup> California as early as 1860 appointed Josiah Dwight Whitney State Geologist to make a geological survey of the state, including its minerals. (1860) CAL. STAT. 225. Professor Whitney and his corps of able assistants did some fine geological work, the results of which were published in a volume entitled GEOLOGY (1865).

<sup>43</sup> The writer is indebted to Mr. Olaf P. Jenkins, Chief of the Division of Mines, Ferry Building, San Francisco, for the following information on this subject. The Chief of the Division is known as the State Mineralogist, and the general policies of the Division are determined by a State Mining Board consisting of five members. The Division carries on cooperative work with the United States Geological Survey in the detailed mapping of mineral areas, the results of which are published by the Division, which also issues a *California Journal of Mines and Geology* and monthly circulars containing valuable mineral information of general interest. The Division has an extensive mining library and mineral collection at its headquarters in San Francisco and cooperates most effectively and efficiently with the mineral industry of California. For further information as to the work and activities of the Division of Mines, see CAL. PUB. RESOURCES CODE §§ 2200-2210.

<sup>44</sup> This subject has been discussed in 1 LINDLEY, MINES §§ 113-128.

ect the public domain are grants to private individuals within the large public land areas which the United States acquired from Spain, France, and Mexico by purchase, cession and conquest. These prior grants made by these predecessor sovereign governments have given rise to many complex legal questions of a most interesting nature.<sup>45</sup> The law of nations, to which the United States has given full sanction, provides that all such legitimate private claims shall be recognized by any nation succeeding to sovereignty over such newly acquired areas. The duty of providing a mode for securing and establishing French, British, Spanish, and Mexican<sup>46</sup> land titles and fulfilling treaty obligations devolved upon the political branch of the government. The obligations are political in character, to be discharged in such manner and upon such terms as the United States deems expedient to conform to treaty requirements.<sup>47</sup> Congress could either discharge that duty itself, delegate it to the courts, with the inevitable delays and confusion affecting land titles in a vast annexed area,<sup>48</sup> or create special administrative tribunals from whose determinations appeals to the regularly constituted courts might be had.<sup>49</sup> Some grants were confirmed by direct action of Congress, and the legality of such grants is not subject to review by the courts.<sup>50</sup> Where Congress has confirmed these private claims by special enactment, no issuance of a formal patent is required as evidence of the grant,<sup>51</sup> and

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<sup>45</sup> TREAT, *op. cit.* *supra* note 1, c. IX.

<sup>46</sup> Some of these land claims and the circumstances surrounding their initiation were of a highly romantic character, and much in our literature has been written on the subject of haciendas, ranchos, pueblos and missions. Many of these private claims involved areas that were principalities in size and value. As might be expected, because of the large financial inducements there were numerous applications for confirmation of title based on forged and fraudulent documents.

<sup>47</sup> See *United States v. O'Donnell* (1938) 303 U. S. 501, 504, 510-511; *Borax, Ltd. v. Los Angeles* (1935) 296 U. S. 10, 15, 19.

<sup>48</sup> *United States v. O'Donnell*, *supra* note 47 at 511, 515; *Borax, Ltd. v. Los Angeles*, *supra* note 47 at 19-21; *Knight v. United States Land Assn.* (1891) 142 U. S. 161, 216.

<sup>49</sup> *United States v. O'Donnell*, *supra* note 47 at 512, 524.

<sup>50</sup> *Yeast v. Pru* (D. N. M. 1923) 292 Fed. 598, 605. In this case the congressional confirmation of grants of land to towns was held to be to the towns as communities and not to the individual claimants. *Id.* at 604. A case where the grant was held to be a private grant as distinguished from a community grant is *Chadwick v. Campbell* (C. C. A. 10th 1940) 115 F. (2d) 401. See also *Reilly v. Shipman* (C. C. A. 8th 1920) 266 Fed. 852, 858; *Laurel Hill Cemetery Assn. v. All Persons* (1945) 69 Cal. App. (2d) 190, 192-193, 158 P. (2d) 759, 760 (involving title to a portion of the Pueblo of San Francisco, the pueblo title having been confirmed by direct act of Congress (1866) 14 STAT. 4); 1 LINDLEY, MINES § 126. Pueblo rights are considered in *Lane v. Pueblo of Santa Rosa* (1919) 249 U. S. 110; *Pueblo of Santa Rosa v. Fall* (App. D. C. 1926) 12 F. (2d) 332.

<sup>51</sup> *Reilly v. Shipman*, *supra* note 50.

a tribunal subsequently created by Congress is without power to determine conflicting rights to such lands.<sup>52</sup>

Congress created special tribunals and boards of commissioners empowered to take evidence and determine the extent and validity of certain classes of grants and to authorize issuance of patents therefor. These patents and the final decrees on which they are based are conclusive between the United States and the claimants but do not affect the interests of third persons.<sup>53</sup> The Statute of Limitations of 1891 bars the United States from bringing suit to set aside land grant patents of this character.<sup>54</sup>

After the tribunal or commission has adjudicated a claim and authorized issuance of a patent it is too late for another party to assert adverse title.<sup>55</sup> These titles, though required to be confirmed by a United States tribunal, are titles originating from and relating back to the date of the original grant.<sup>56</sup>

Many of these grants by foreign sovereigns were far from "complete and perfect," but, on the contrary, were vague and indefinite in description and irregular in outline. In such cases, particularly when "floats" were involved, surveys were necessary to locate the grants definitely on the ground.<sup>57</sup> Where, because of indefinite description, it became necessary to survey a grant, the title relates back to the date of the survey, even though the United States did not issue a confirmatory patent until many years later.<sup>58</sup>

Where the grants are inherently defective or difficult of determination they constitute an "imperfect obligation" and affect "only the conscience of the new sovereign," from which on confirmation they receive "a vitality and efficacy which they did not before possess." Their validity results "wholly from the act of confirmation and not from any French or Spanish element which entered into their previous

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<sup>52</sup> *La Joya Grant v. Belen Land Grant* (1916) 242 U.S. 595, 598.

<sup>53</sup> *United States v. O'Donnell*, *supra* note 47 at 512-513; *United States v. Coronado Beach Co.* (S. D. Cal. 1919) 274 Fed. 230; *Watts v. Ely Real Estate Inv. Co.* (D. Ariz. 1919) 254 Fed. 862. These specially constituted tribunals had jurisdiction of Mission lands also. *Hogan v. United States* (C. C. A. 9th 1934) 72 F. (2d) 799.

<sup>54</sup> *Hogan v. United States*, *supra* note 53.

<sup>55</sup> *Romero v. Janss Inv. Corp.* (C. C. A. 9th 1936) 84 F. (2d) 832.

<sup>56</sup> *United States v. O'Donnell*, *supra* note 47 at 513-514; *United States v. Coronado Beach Co.* (1921) 255 U.S. 472, 488; *Commodores Point Terminal Co. v. Hudnall* (S. D. Fla. 1925) 3 F. (2d) 841, 843.

<sup>57</sup> *Jones v. St. Louis Land Co.* (1914) 232 U.S. 355, 363; *United States v. Redondo Development Co.*, *supra* note 28.

<sup>58</sup> *Sanchez v. Deering* (C. C. A. 5th 1924) 298 Fed. 286, *aff'd* (1926) 270 U.S. 227; see also *Wilson Cypress Co. v. Del Pozo* (1915) 236 U.S. 635, 651.

existence." Hence, the usual doctrine of relation back to the foreign grant does not apply.<sup>59</sup>

A United States patent issued upon a confirmed Mexican grant is regarded as a quitclaim deed from the United States, relating back to the time when the petition for confirmation was filed with the tribunal created to adjudicate the claim, and as a record of the federal government showing its judgment with respect to the title of the patentee at the date of the cession.<sup>60</sup>

The owner of a Mexican grant perfected before the cession under the Gadsden purchase was permitted, but not required, by Act of Congress to assert his claim. A failure to do so in no way affects the validity of his title.<sup>61</sup>

Congress, in many instances, has provided by special enactment for the determination of certain Mexican grants which were in the nature of "floats," giving the grantee the right to select a specified area of land from the main body of public land. Usually such legislation provided that the lands selected should be nonmineral, but this has been interpreted to prohibit merely the selection of "lands then known to contain mineral" and not to render the grant nugatory by reason of any future discoveries of minerals.<sup>62</sup>

Water boundaries create situations which are in many instances difficult of solution where title to upland is involved. Foreign land grants bordering on bodies of water are no exception in this respect. While, as a general rule, upon the acquisition of the territory from Mexico the United States acquired the title to tide lands<sup>63</sup> with the

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<sup>59</sup> Jones v. St. Louis Land Co., *supra* note 57 at 362.

<sup>60</sup> Ely Real Estate & Investment Co. v. Watts (C. C. A. 9th 1920) 262 Fed. 721, 722, 726.

<sup>61</sup> *Id.* at 726.

<sup>62</sup> See Lane v. Watts (1914) 234 U. S. 525, 527, 539, *rel'g. denied* (1914) 235 U. S. 17. The latter citation discusses conflicts of Mexican grants with each other, as does also La Joya Grant v. Belen Land Grant (1916) 242 U. S. 595. Lane v. Watts also holds that title to a floating grant vested by survey of its location and that approval could not subsequently be divested by the Land Department. The action of the commissioner of the General Land Office in making such approval could not be revoked by his successor in office. Lane v. Watts, *supra* at 540. See also Ballinger v. Frost (1910) 216 U. S. 240 and Dahl v. Raunheim (1889) 132 U. S. 260.

<sup>63</sup> The great legal battle over the tide lands which has resulted in a decision declaring the United States to be their owner (United States v. California (1947) 332 U. S. 19) is in the minds of everyone. Two justices dissented, and one did not participate. This decision apparently has reversed a great body of authority *contra*, which had been built up largely by the Supreme Court itself. It is worth noting that as careful a student and exponent of the law as Judge Lindley, who had specialized on the law of waters as well as of mines, had concluded: "There is no principle involved in the consideration of the



title to upland, but held the tide lands in trust for the future states that might be erected out of that territory, there is an established qualification that this principle is not applicable to tide lands which had previously been granted by Mexico to private parties under a different method of disposition. The rights of such grantees were dependent upon Mexican laws, and as owner of the tide lands as well as the uplands, Mexico had power to place the boundaries wherever she thought proper.<sup>64</sup> In some instances these Mexican grants described the lands as including the tide lands and extending to the deep water line or "anchorage for ships," the usual boundary limit in this country.<sup>65</sup>

A case which is outstanding because it was contested so bitterly and because the government had such a vital interest in the outcome, is *United States v. O'Donnell*,<sup>66</sup> involving tide and marsh land contiguous to the great naval yard at Mare Island, Solano County, California. In 1841 Alvarado, Mexican Governor of California, granted to Castro the Island, La Yegua (Mare Island), and the United States succeeded to this Mexican title by purchase under authorization of Congress.<sup>67</sup> Opposing parties claimed under a patent issued by California in 1857 which purported to convey the area in question as swamp and overflowed lands under the Swamp Lands Act of Sept. 28, 1850.<sup>68</sup> The Court held that, even though the Secretary of the Interior had found the lands to be swamp lands within the meaning of the Swamp Lands Act and had certified them as such as the result of a mandamus proceeding<sup>69</sup> compelling him to do so, this did not bind the United States and preclude a subsequent determination of the

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public land system better settled or more clearly enunciated than that lands under tidal waters, and below the line of ordinary high tide are not 'public lands.' When a state bordering upon these waters is admitted to the union it becomes, by virtue of its sovereignty, the owner of all lands extending seaward . . . to the distance of three miles, or a marine league." 2 LINDLEY, MINES § 429.

The reaction resulting from this decision of the Supreme Court upsetting the rule which Judge Lindley had considered so positively settled has been so profound that there is a bill pending before Congress intended to remedy this radical upset and to confirm in the states the title to tide lands which it had previously been generally assumed they owned. This subject will be more fully treated hereafter under its appropriate heading.

<sup>64</sup> *Borax, Ltd. v. Los Angeles* (1935) 296 U. S. 10, 15, 20. See also *City of Los Angeles v. Borax Consolidated Ltd.* (C. C. A. 9th 1935) 74 F. (2d) 901, 903, and *United States v. Coronado Beach Co.*, *supra* note 53.

<sup>65</sup> *United States v. Coronado Beach Co.*, *supra* note 56 at 487-488.

<sup>66</sup> *Supra* note 47.

<sup>67</sup> (1852) 10 STAT. 100, 104.

<sup>68</sup> (1850) 9 STAT. 519.

<sup>69</sup> *Work v. United States* (App. D. C. 1927) 23 F. (2d) 136.

respective rights of the rival claimants. The Court decided that the Mexican grant title included the area in controversy and that it was superior to the swamp land title emanating from the State of California.<sup>70</sup> The Supreme Court reasoned that, at the date the Swamp Lands Act of 1850 became effective, this swamp land was not a part of the public domain because it had already been disposed of under a title that the United States had assumed a political obligation to recognize and respect. The fact that the Swamp Lands Act antedated the Mexican Claims Act, and the confirmation of claims under it, was held to be immaterial, for the Swamp Lands Act was subject to the treaty obligations of the United States. The description in the Mexican grant was also held to be inclusive enough to embrace the adjacent marsh land as well as the Mare Island upland.

An unusually complicated case arose because of the physical agency known as "avulsion," where land boundaries are suddenly changed by the action of water (as opposed to accretion, which is an imperceptible building up and adding to land areas, or to reliction or erosion, which is the gradual retreat of a land boundary). The course of the Rio Grande had changed suddenly, resulting in large land areas known as "bancos" being cut from Mexico and added to the Texas side of the river. The opposing litigants had titles granted by their respective governments.<sup>71</sup> The Texas title prevailed, largely as the result of the provisions of treaties between the United States and Mexico settling questions of jurisdiction and sovereignty over such "banco" lands as had been affected by avulsive changes.<sup>72</sup>

Mines within the foreign grants were invariably held to be a part of the areas granted and not subject to special disposition as mineral

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<sup>70</sup> The swamp land claimants had originally applied to the Land Department for issuance of a patent confirming their swamp land title from the state, and the Secretary of the Interior found the land to be of that character. Suit was brought to compel him to certify to this fact, and the Supreme Court of the District of Columbia issued its peremptory writ of mandamus. This action was sustained on appeal. *Work v. United States*, *supra* note 69. The United States brought suit in the local federal district court in California for cancellation of the swamp land patents, and the trial court sustained the United States. On appeal this decision was reversed in *O'Donnell v. United States* (C. C. A. 9th 1936) 91 F. (2d) 14, with one judge dissenting. The Supreme Court granted certiorari and sustained the trial court, *U. S. v. O'Donnell*, *supra* note 47. Other cases which involved these same titles are *Sawyer v. Osterhaus* (N. D. Cal. 1914) 212 Fed. 765; *Bouldin v. Phelps* (C. C. N. D. Cal. 1887) 30 Fed. 547; *San Francisco Sav. Union v. Irwin* (C. C. D. Cal. 1886) 28 Fed. 703, *aff'd*, (1890) 136 U. S. 578.

<sup>71</sup> Texas and not the United States had issued the patent to the Texas claimant, because Texas joined the Union as a sovereign and independent state, and, consequently, Texas and not the United States owned all the public land within its borders.

<sup>72</sup> *Willis v. First Real Estate & Inv. Co.* (C. C. A. 5th 1934) 68 F. (2d) 671.

lands. The outstanding case of this character in California involved the "Mariposa Grant," originally made to Alvarado in 1844 and confirmed to his grantee, the colorful General Fremont, for "ten square leagues" of land in what is now Mariposa County, an area containing many valuable gold mines.<sup>73</sup>

Another historic case which arose in California involved title to the famous New Almaden quicksilver mine, situated in Santa Clara County and discovered in 1845 while Mexico still had jurisdiction. This case was bitterly contested because of the great value and unique character of the mine.<sup>74</sup> A divided court held that the mining claimant did not have a valid title under the mining laws of Mexico because no officials to accept mine filings, required by the Spanish-Mexican mining law, had ever been appointed in California. The United States was the contesting party and attacked Castillero's claim to the mine on the theory that under the law of Mexico the sovereign had, under the doctrine of regalian rights, automatically reserved the mining title out of the large grant of agricultural land which included the mine. If Castillero's title to the mine failed, it was contended the mine would belong to the new sovereign, the United States. However, Judge Field, speaking for the Supreme Court of California, later held<sup>75</sup> that the doctrine of regalian rights to mines was foreign to the land laws of the United States. The Supreme Court of California had much earlier erroneously held that<sup>76</sup> the state had succeeded to Mexico's regalian rights to mines.

The settlement of title to these Spanish and Mexican grants in California was brought about only after protracted litigation during the first fifty years of California's statehood. It proved a boon to the lawyers of those days, who collected some of the largest fees in money or percentage of the land involved ever received for legal services.

These grant surveys have naturally complicated the rectangular system which was being extended throughout the public domain as

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<sup>73</sup> *Fremont v. United States* (U.S. 1854) 17 How. 541. While Judge Lindley had dealt fully with this and the following case here discussed (1 LINDLEY, MINES § 125), they are deemed of sufficient importance and interest to note briefly here. It will interest some of the readers of this review to note that this case was successfully argued for Fremont in Washington, D.C., by Mr. William Carey Jones, father of the Dean, of the same name, who organized the Law School at the University of California.

<sup>74</sup> *United States v. Andres Castillero* (U.S. 1862) 2 Black 17. Over 350 pages of that Report is devoted to it. Some of the most eminent lawyers of the time, including Hall McAllister, were counsel.

<sup>75</sup> *Fremont v. Flower* (1861) 17 Cal. 199.

<sup>76</sup> *Hicks v. Bell* (1853) 3 Cal. 219.

rapidly as circumstances would warrant and which had to be fitted into these usually irregular grant boundaries. This has resulted in the creation of fractional subdivisions of public land wherever the rectangular public land surveys have abutted on the exterior boundaries of such irregular shaped prior grants and gives some suggestion of the confusion which would have existed had Congress adopted the system of irregular surveys and "indiscriminate locations."

*Land Grants to States.*<sup>77</sup> From the very outset, the federal government has evinced a policy of liberality in its grants of public lands to the states. These grants have been mainly for school and educational purposes. The Land Ordinance of May 20, 1785, enacted by the Continental Congress, provided that "lot" (later named "section") number 16 of each township should be reserved for the maintenance of public schools within the township.<sup>78</sup> Congress, in 1848, added section 36 of each township to grants to newly erected states<sup>79</sup> and later, in certain instances, added other sections.<sup>80</sup> These grants were, with few exceptions, for educational aid. Where private rights had already attached to any portions of the designated "school" sections or they

<sup>77</sup> This subject is found treated in 1 LINDLEY, MINES §§ 132-145.

<sup>78</sup> Commenting on this policy the Supreme Court of the United States has said: "The practice of setting apart section No. 16 of every township of public lands, for the maintenance of public schools, is traceable to the ordinance of 1785, being the first enactment for the disposal by sale of the public lands in the Western territory. The appropriation of public lands for that object became a fundamental principle, by the ordinance of 1787, which settled terms of compact between the people and States of the northwestern territory, and the original States, unalterable except by consent. One of the articles affirmed that 'religion, morality, and knowledge, being necessary for good government and the happiness of mankind'; and ordained that 'schools, and the means of education, should be forever encouraged.' This principle was extended, first, by congressional enactment, (1 Stats. at Large, 550, § 6,) and afterwards, in 1802, by compact between the United States and Georgia to the southwestern territory . . . .

" . . . the constancy with which the United States have adhered to the policy in the various compacts with the people of the newly-formed States, and the care which congress has manifested to prevent the accumulation of prior obligations which might interrupt it, fully display their estimate of its value and importance. There is, obviously, a definite purpose declared to consecrate the same central section of every township of every State which might be added to the federal system, to the promotion 'of good government and the happiness of mankind,' by the spread of 'religion, morality, and knowledge,' and thus, by a uniformity of local association, to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast, and magnanimous statesmanship of those who framed the institutions for these new States, before the constitution for the old had yet been modelled." *Cooper v. Roberts* (U. S. 1855) 18 How. 173, 177-178.

<sup>79</sup> TREAT, *op. cit. supra* note 1 at 277-278.

<sup>80</sup> Sections 2 and 32 in addition to 16 and 36 were granted in a number of instances.

were proven to be mineral in character at the date the grant would take effect, or the federal government had already reserved the land for other purposes, the right to select an equivalent area of public land as indemnity or lieu land to compensate for such loss was provided for by Congress. Congress has also, on various occasions, made additional grants of large acreages of unidentified public lands to be thereafter selected, the proceeds to be devoted in some cases to internal improvements and in others to the support of agricultural colleges. The total of these state land grants constitutes one of the largest dispositions of federal public lands for a single objective. This "legislation of Congress designed to aid the common schools of the States is to be construed liberally rather than restrictively."<sup>81</sup>

The case of *United States v. Sweet*<sup>82</sup> considered the question as to whether Congress intended that mineral lands should be excepted from the grants of school lands to the western or mining states. The reasoning of this case may be summarized as follows: In its legislation concerning the public lands, Congress has, on various occasions, made a distinction between mineral lands and other lands, dealing with them along different lines and withholding mineral lands from disposal save under special laws. This policy was given particular emphasis following the discovery of gold in California in 1848, as evidenced by the mineral reservations contained in the Homestead Act, the railroad grants, and other land grants of that period. These declarations and reservations were the expression of the will of Congress that all public land grants should reserve and exclude mineral lands, in the absence of an otherwise expressed intention.<sup>83</sup>

By Act of March 3, 1853<sup>84</sup> Congress granted to the State of California sections 16 and 36 in each township for school purposes and a large acreage of public land for other purposes. Mineral lands were not specifically referred to in the grant of school sections, but were expressly excepted from the other grant. In spite of this failure to specifically except mineral lands in the grant of school sections, the Court concluded "that Congress did not intend to depart from its uniform policy in this respect . . ."<sup>85</sup>

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<sup>81</sup> *Wyoming v. United States* (1921) 255 U. S. 489, 508.

<sup>82</sup> (1918) 245 U. S. 563, *reversing* *Sweet v. United States* (C. C. A. 8th 1915) 228 Fed. 421.

<sup>83</sup> This policy is codified in REV. STAT. §§ 2318, 2346 (1875), 30 U. S. C. §§ 21, 50 (1940).

<sup>84</sup> (1853) 10 STAT. 244.

<sup>85</sup> *Mullan v. United States* (1886) 118 U. S. 271; *Mining Co. v. Consolidated Mining Co.* (1880) 102 U. S. 167.

Subsequently, from 1864 to 1873, Congress passed a series of acts dealing with all phases of the acquisition of mineral lands.<sup>86</sup> Thus, the policy of disposing of mineral lands only under laws specifically including them became even more firmly established. It was still further evidenced by the Act of February 28, 1891,<sup>87</sup> which provided that, where sections 16 and 36 were mineral land, the state might select other public lands of equal acreage in lieu thereof. The court in the *Sweet* case concluded that the school grant to Utah of sections 2, 16, 32 and 36 of each township should be similarly construed and that mineral lands in those sections had by implication been excluded from the grant, even though Congress had made no explicit exception of mineral land in the granting act.<sup>88</sup>

Another case of importance, *Work v. Louisiana*,<sup>89</sup> which discussed a somewhat similar situation, involved land claimed under a grant of swamp and overflowed lands to the State of Louisiana by the federal Acts of 1849 and 1850. The claim of title by the state under this grant was contested by the Secretary of the Interior, acting in behalf of the United States, on the theory that the lands were mineral in character and hence title could not pass to the state because the lands were automatically excepted from the grant. The court, however, distinguished this case from *United States v. Sweet*, principally on the ground that "there was no settled public policy in reference to the reservation of mineral lands prior to these granting acts of 1849 and 1850," and hence there was no substantial reason for reading a mineral reservation into these broad and unrestricted grants of swamp and overflowed lands to the state.<sup>90</sup>

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<sup>86</sup> (1864) 13 STAT. 343; (1865) 13 STAT. 529; (1866) 14 STAT. 251; (1870) 16 STAT. 217; (1872) 17 STAT. 91; (1873) 17 STAT. 607. These and subsequent acts have been codified in 30 U. S. C. (1940), MINERAL LANDS AND MINING.

<sup>87</sup> (1891) 26 STAT. 796, 43 U. S. C. § 851 (1940).

<sup>88</sup> *Supra* note 82 at 572-573. See also *State of Utah v. Work* (App. D. C. 1925) 6 F. (2d) 675, 676 and *People v. Dorr* (1945) 68 Cal. App. (2d) 792, 157 P. (2d) 859. It is interesting to note that the case of *Cooper v. Roberts* (U. S. 1855) 18 How. 173, which had early decided that title to part of a school section 16 in Michigan which was known to be mineral nevertheless passed to that state because the act contained no mineral exception, was held to be distinguishable on the very logical ground that when the grant of school lands to Michigan was made (March, 1847) "the public policy respecting mineral lands had not been expressed in general and permanent laws." *United States v. Sweet*, *supra* note 82 at 573-574. See also *Dunbar Lime Co. v. Utah-Idaho Sugar Co.* (C. C. A. 8th 1926) 17 F. (2d) 351, 353, which states that the case of *United States v. Sweet* has settled this question as far as the western or mining states are concerned.

<sup>89</sup> (1925) 269 U. S. 250.

<sup>90</sup> The Court emphasizes the fact that swamp and overflowed and not school lands were involved, but there would seem to be no valid basis for invoking such distinction.

Another school section case which arose in Utah involved the Coal Land Law and the Leasing Act of 1920. Application had been made to the United States Land Office to purchase certain coal land included in a school land grant section. The lands had been reported by the surveyor as nonmineral and hence the state had sold and issued its patent for them. It had been the rule of the Federal Land Office to treat mineral applications to purchase school land as a contest of the state's right to such lands. While this contest was pending the Federal Leasing Act of 1920<sup>91</sup> had been enacted, providing for the leasing instead of outright disposal of certain mineral lands, including coal lands. The applicant to purchase the coal land contended that by his filing he had acquired a right which could not be abrogated by the subsequent passage of the Leasing Act, but the Supreme Court held that he had acquired no legal status other than that of a contestant and that "so nebulous and insubstantial a claim," which might never come to fruition, "presented no obstacle to the withdrawal of the privilege by the United States."<sup>92</sup> Where there is an application to purchase a school section as "known coal land" at the date of the school grant, the applicant in order to except this land from the operation of the grant must prove that either a coal mine has been opened on said land or coal produced therefrom.<sup>93</sup>

Congress adopted a different policy with respect to lands in Oklahoma. In the Act of 1906,<sup>94</sup> providing for its admission into the Union, the right of the state to receive mineral lands under the grants to it for school and other purposes was distinctly recognized—"a thing not permitted to a state where the mining laws are in force."<sup>95</sup>

In most of these grants of school lands to the states, Congress, while specific as to the purpose for which the land was granted, left to the legislatures of the states full power and authority to determine how the granted lands were to be disposed of, whether by sale or lease,

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The case of *Cooper v. Roberts* (U. S. 1855) 18 How. 173, 179-180, is also relied on by the court as authority for its announcement that, until Congress had adopted a definite policy of placing mineral lands in a separate category for purposes of disposition and had legislated accordingly, a grant of school lands to a state would not be ineffective merely because the particular lands in question were known to be mineral in character.

<sup>91</sup> (1920) 41 STAT. 437, 30 U. S. C. § 181 (1940).

<sup>92</sup> *Work v. Braffet* (1928) 276 U. S. 560, 565-566, *reversing* (App. D. C. 1927) 19 F. (2d) 666. This decision is cited in *Shores v. Utah* (1928) 52 Land Dec. 503, 504-505. See also *State of Utah* (1931) 53 Land Dec. 365, 368.

<sup>93</sup> *New Mexico v. Lane* (1917) 243 U. S. 52, 55.

<sup>94</sup> (1906) 34 STAT. 267.

<sup>95</sup> *Oklahoma v. Texas* (1922) 258 U. S. 574, 601. There were two exceptions to the Oklahoma policy, each confined to a limited area. *Id.* at 601.

and how any revenues derived from such disposition were to be devoted to the interests of the public schools. A very few of the states early adopted a policy of reserving title to these lands and leasing them, the rentals and royalties to be devoted to the upkeep of the schools. This foresighted plan has resulted in a constant and increasing income from this source in those states.

In most of the states, however, there was a mad political scramble to purchase these school lands outright, and they were sold for a mere pittance of the amounts that could have been realized had a wise and conservative plan of disposal been adopted. Many a scandal resulted, so that in 1910, when Arizona and New Mexico were admitted to the Union, Congress, to make sure that these school lands would be more wisely administered, adopted a new policy which found expression in the enabling act for these states. It was declared that lands granted and confirmed to these states shall be held in a continuing trust and be disposed by lease<sup>96</sup> or sale to the highest bidder at public auction. The proceeds were also to be treated as trust funds.<sup>97</sup> Since the grant, though made in trust, has been made by the general government in its sovereign capacity to the state in the exercise of its sovereign capacity, the matter rests solely in the good faith of the state, and the manner in which the state invests these trust funds may not be questioned or controlled in a suit brought by a private citizen.<sup>98</sup> The state holds and disposes of these school grant lands in its governmental, as distinguished from its proprietary, capacity.<sup>99</sup>

In a suit brought by the United States,<sup>100</sup> which, having created the trust, was in a position to question its proper administration, it was held not to be any violation of the trust provisions to meet expenses incurred in the execution of the trust out of funds belonging to the trust.

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<sup>96</sup>New Mexico reserves the minerals and mining rights in its sale of these lands and leases such rights on a royalty basis. *Terry v. Midwest Refining Co.* (C. C. A. 10th 1933) 64 F. (2d) 428, 430, 434. See also *State v. District Court* (1947) 51 N.M. 297, 183 P. (2d) 607.

<sup>97</sup>This interesting history and additional illuminating comments on the departure on the part of Congress from its previous traditional policy in this regard are set forth in detail in *Murphy v. State* (Ariz. 1947) 181 P. (2d) 336, 344-345, 351-353. The court scathingly criticizes "the ingenuity of politically ambitious men to obtain preferment" by improper use of the trust funds derived from the sale of such lands. *Id.* at 346.

<sup>98</sup>*Downer v. Graham* (C. C. A. 8th 1927) 21 F. (2d) 732, 733.

<sup>99</sup>*Malmo v. Case* (Wash. 1947) 184 P. (2d) 40, 42; *State v. Northwest Magnesite Co.* (Wash. 1947) 182 P. (2d) 643, 654.

<sup>100</sup>*United States v. Swope* (C. C. A. 8th 1926) 16 F. (2d) 215, 217, 219.



A state does not hold these lands as an instrumentality of the United States but in its own right, in trust, however, for the schools of the state. It may tax these lands when sold to a private purchaser because there is no analogy between such lands and federally owned lands which may not be taxed by a state.<sup>101</sup>

*Time When State's Title to School Land Takes Effect.* The date when a school land grant takes effect frequently assumes importance. The general rule is that the state's right to the land granted attaches as of the date of the grant if the land is already surveyed, and, if not, the land must be identified by an official survey. When the survey has been approved by the Land Department the grant becomes operative as to such land.<sup>102</sup>

A case illustrating this principle and involving a portion of a section 36 is *United States v. Wyoming*.<sup>103</sup> There were two main defenses to the suit. Wyoming claimed that the peculiar wording of its enabling act created an exception to the general rule that title to these school sections in place does not vest in the state until the sections have been surveyed, but the Supreme Court held otherwise, saying:

Vesting in the State an immediate and irrevocable interest in the school sections before such sections had been identified by survey would be to complicate the performance of the Government's obligation with respect to the public lands.<sup>104</sup>

The state also contended that the section had been surveyed in 1892, prior to its mineral character becoming known, and that, therefore, the state's title had vested on the date the survey was approved. The Supreme Court, however, noted that the survey had only fixed the exterior boundaries of the township and marked one mile intervals on those boundaries without subdividing the township into sec-

<sup>101</sup> *Kelly v. Allen* (C. C. A. 9th 1931) 49 F. (2d) 876, 878.

<sup>102</sup> *United States v. Wyoming* (1947) 331 U. S. 440; *United States v. Morrison* (1916) 240 U. S. 192, 210-212; *United States v. Ickes* (App. D. C. 1934) 72 F. (2d) 71, 75; *Work v. Standard Oil Co.* (App. D. C. 1927) 23 F. (2d) 750, 752, *rev'd on other grounds*, (1929) 278 U. S. 200, 208; *State of Utah v. Work* (App. D. C. 1925) 6 F. (2d) 675, 676. In this latter case the land had been included in a temporary petroleum withdrawal prior to the date of approval of the survey and, therefore, before the state's rights had vested. *People v. Dorr*, *supra* note 88.

<sup>103</sup> (1947) 331 U. S. 440. It will be noted that the leading cases on this subject of school lands are mainly suits involving valuable oil lands, brought by the United States on the theory that the school lands in question were known to be mineral at the effective date when title would otherwise have passed to the state, and hence have remained the property of the United States.

<sup>104</sup> *Id.* at 453.

tions, and that while section 36 lay in the southeast corner of the township and its southern and eastern boundaries were concurrent with the township boundaries, and while the section could have been identified by protraction of its two undetermined boundaries from the "one mile intervals" actually set on the township boundary, nevertheless, the northern and western section boundaries remained undetermined in fact, and, therefore, "This was not a completed survey of Section 36."<sup>105</sup>

A leading case on this subject of school land sections, which finally decided a question which, very strangely, had remained undecided for many years,<sup>106</sup> is *West*<sup>107</sup> v. *Standard Oil Co.*<sup>108</sup> This case became famous because of the magnitude of the interests involved and because Congress intervened to compel its prosecution. School section 36 was situated in the productive oil field of Elk Hills, Kern County, California, which nearby development had proven to contain petroleum of many millions of dollars in value. The Standard Oil Company had succeeded to any title that the state might have had as a result of the federal grant in aid of public schools.<sup>109</sup> On January 26, 1903 the public survey of the section had been approved, and in 1910 the state issued patents for the land. The federal granting act had not provided for the issue of patents and the state had no evidence of title having been confirmed to it by the federal government, nor had there been any contest in the Land Department between the state and an adverse claimant whereby the character of the land had ever been determined. It had been returned as mineral land by the official surveyor<sup>110</sup> and later withdrawn from entry by Presidential Order and placed in a naval petroleum reserve. A contest was initiated by the federal government in the United States Land Office to determine whether at the date of approval of the official survey in 1903 the section was known to be mineral in character. Secretary of Interior Fall had originally dismissed this contest on legal grounds, without the question of known

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<sup>105</sup> This case also discusses a very interesting point connected with the measure of damages for the wrongful extraction of mineral by the state's lessee, where the costs of extraction exceed the value of the mineral extracted and where the element of "good faith" is involved. A consideration of these features will be reserved for presentation later under the heading "Damages for Trespass."

<sup>106</sup> Over three quarters of a century, 1853-1929.

<sup>107</sup> West was at that time Secretary of the Interior, representing the United States.

<sup>108</sup> (1929) 278 U. S. 200, reversing *Work v. Standard Oil Co.* (App. D. C. 1927) 23 F. (2d) 750. See Colby, *The Law of Oil and Gas* (1942) 30 CALIF. L. REV. 245, 259-260.

<sup>109</sup> (1853) 10 STAT. 244.

<sup>110</sup> Another report had later classified it as non-mineral.

mineral character having been determined. This action provoked such criticism that Congress passed a special resolution<sup>111</sup> directing the Secretary to reopen the case and determine the issue of mineral character. Secretary Work, who had succeeded Fall, complied.<sup>112</sup> The oil company secured an injunction from the Supreme Court of the District of Columbia prohibiting the Land Department from proceeding with the contest, and this ruling was upheld by the court of appeals.<sup>113</sup> The Supreme Court of the United States<sup>114</sup> reversed these decisions and directed that the Land Department proceed with a determination of the mineral character, which was done, the Department's decision being that the land was known to be mineral at the date of approval of the survey in 1903 and hence that title remained in the United States.<sup>115</sup> The Supreme Court of the United States held that where there is involved an act granting public lands, but excluding those known to be mineral, the determination of the fact whether a particular tract is of mineral character ordinarily rests with the Secretary of the Interior. If the act provides for the issue of a patent, that instrument imports that a final determination of the non-mineral character of the land has been made and is conclusive of that point on collateral attack. The granting act may provide for other action by the Secretary equivalent to a patent, such as approval of a list of the lands,<sup>116</sup> which likewise imports that the necessary determination has been made.<sup>117</sup> Where the granting act makes no provision for issuance of patent or clear listing, as was the case here, the Secretary may have occasion to make a determination of the issue of known mineral character in a proceeding or contest where claims of right adverse to the state grant may be asserted. In such event any judgment evidencing title that may be issued as the result of such a contest imports the making of such determination. The Court held that Secretary Fall's

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<sup>111</sup> (1924) 43 STAT. 15.

<sup>112</sup> State of California, Standard Oil Co. of Calif., Transferees (1925) 51 Land Dec. 141.

<sup>113</sup> Work v. Standard Oil Co., *supra* note 108.

<sup>114</sup> West v. Standard Oil Co. (1929) 278 U. S. 200.

<sup>115</sup> United States v. California (1935) 55 Land Dec. 121, *aff'd*, (1936) 55 Land Dec. 532. The foregoing opinions contain an exhaustive consideration of the law and facts and are valuable because of the light they throw on this general subject. An attempt was made to upset this decision of the Land Department and to secure a retrial of the issues by the court, but it proved futile. Standard Oil Co. of Calif. v. United States (C. C. A. 9th 1940) 107 F. (2d) 402, *cert. denied*. (1940) 309 U. S. 654, 673.

<sup>116</sup> Sometimes referred to as "clear listing."

<sup>117</sup> Copper Belt etc. Co. (1934) 54 Land Dec. 475, 476; James R. Crawford (1931) 53 Land Dec. 435, 437.

dismissal of the contest proceedings on legal grounds, without making any determination of the mineral character of the land, was "quasi-judicial" and not a "judgment"<sup>118</sup> and, therefore, did not satisfy this last mentioned qualifying procedure.

We may conclude from the foregoing that where the school land granting act does not provide for issuance of patent or other official evidence of passage of title from the United States, and where there has been no contest or other decisive determination by the Land Department as to the mineral character of the land, this question remains an open one to be later determined with respect to any particular piece of land embraced in a school section when that question arises.<sup>119</sup> The issuance of a state patent for such land is apparently treated by the court as having very little, if any, weight as far as the determination of the vital question of mineral character is concerned. This decision has had the effect of throwing doubt on the validity of state school section titles which had long been thought to be secure and to have been placed beyond any possibility of successful questioning.<sup>120</sup>

In another respect the *Standard Oil* case<sup>121</sup> has settled a legal problem which had long remained without final answer. As Judge Lindley has pointed out,<sup>122</sup> while there was no procedure prescribed in the act requiring an investigation by the federal land department and a determination of the mineral character of the state school sections, it had become the custom for the state land officials before patenting any of these state school lands<sup>123</sup> to obtain from the register of the local United States Land Office in whose district the land was situated a certificate showing that as far as the federal land office records were concerned there were no conflicting filings. As Judge Lindley states, "there is absolutely no authority for this so-called

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<sup>118</sup> *West v. Standard Oil Co.* (1929) 278 U. S. 200 at 211-214.

<sup>119</sup> *Scharf and Havenstrite* (1941) 57 Land Dec. 348, 355-356.

<sup>120</sup> See also *Ames v. Empire Star Mines Co., Ltd.* (1941) 17 Cal. (2d) 213, 110 P. (2d) 13; *People v. Dorr*, *supra* note 88; *Sliger Gold Mining Co.* (1937) 56 Land Dec. 67, 72. The same principle applies to state patents issued under swampland grants to the states. *United States v. O'Donnell* (1938) 303 U. S. 501, 506, 508-509.

<sup>121</sup> *Supra* note 103.

<sup>122</sup> 1 LINDLEY, MINES § 144a.

<sup>123</sup> There is no provision in the federal granting act providing for the issuance of state patents for such school lands, and state legislation varies in the different states as to the requirements for the issuance of such patents. Unquestionably these state patents are not ordinarily open to collateral attack in those instances where the land is non-mineral and hence of the character contemplated as passing to the state by the grant. Where such lands were known to be mineral at the effective date of the grant, that question apparently remains open for determination.

'certificate'.<sup>124</sup> It certainly could have no bearing on the basic and vital issue, the determination of the character of the land. When the issuance of these certificates was called to the attention of the Secretary of the Interior, he expressly repudiated any authority residing in the local officials to make them.<sup>125</sup> The Supreme Court of California had at first held that state patents issued on the basis of such certificates could be attacked collaterally by a mineral claimant,<sup>126</sup> but later reversed this ruling and held that these certificates issued by the United States Register had such potent legal effect that the state patents based thereon could not be attacked collaterally.<sup>127</sup> The fact that the *Standard Oil* case has so positively decided that the issuance of a state patent for school land does not, except in cases where there has been some preliminary determination that the land is not mineral, preclude an inquiry as to the mineral character of such land confirms Judge Lindley's opinion on this point, and the California Supreme Court has recently announced that these certificates issued by the registers of local land offices "were unauthorized and of no binding effect."<sup>128</sup> The Land Department expresses the same view as to the effect of the *West v. Standard Oil* decision and concludes:

While there exists the presumption that the land passed to the State under its original grant, this presumption is not conclusive but is open to contestation in the Land Department. There is in such cases no preliminary adjudication, actual or presumed by the Land Department as to the character of the land. There is no antecedent judgment, as there is in homestead and preemption cases, which is final and conclusive upon collateral attack. It follows, the question may be raised at any time by anyone in privity with the Government whether the lands are within the purview of the grants, and a mining locator is in such privity. See Lindley on Mines, Sec. 144; *West v. Standard Oil Co.*, 278 U. S. 200, 219.<sup>129</sup>

Presumably, attacks on state patents of long standing, even where issued without any predetermination as to the question of mineral character, will be met by defenses such as laches, lapse of time, etc., which under proper circumstances preclude any inquiry into the ante-

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<sup>124</sup> 1 LINDLEY, MINES § 144a.

<sup>125</sup> Instruction (1902) 31 Land Dec. 212.

<sup>126</sup> *Hermocilla v. Hubbell* (1891) 89 Cal. 5, 26 Pac. 611.

<sup>127</sup> *Saunders v. La Purisima etc. Co.* (1899) 125 Cal. 159, 57 Pac. 656. See also *Worcester v. Kitts* (1908) 8 Cal. App. 181, 96 Pac. 335.

<sup>128</sup> *Ames v. Empire Star Mines Co., Ltd.* (1941) 17 Cal. (2d) 213, 110 P. (2d) 13. See also *People v. Dorr*, *supra* note 88.

<sup>129</sup> *Sliger Gold Mining Co.* (1937) 56 Land Dec. 67, 72.

cedent history of the grant.<sup>130</sup> Whether the federal statute of limitations<sup>131</sup> can be invoked seems still to be a moot question, at least as far as certification of lists of selected lands by the Land Department is concerned.<sup>132</sup>

*Indemnity Grants in Lieu of Lands in School Sections.* It was inevitable that some of the lands within the designated school sections granted to the states would be found to conflict with prior legal claims. These might be Spanish, Mexican, or French grants, reservations for government purposes, or prior legal occupancy under other claims of right. In addition, as we have just noted, in those states where the school land grants were subsequent to the declared policy of Congress to reserve mineral lands for separate and special disposition mineral lands were either expressly or impliedly reserved. This latter policy has resulted in a large total acreage of proven mineral land being carved out of these school sections and lost to the states, particularly in the mining states of the West where there exist extensive mineral deposits. Congress, however, carrying out its consistent policy of liberality to the newly erected states, with particular emphasis on aid for educational purposes, has remedied this situation and compensated for these losses by providing, either in the original granting acts or by supplemental legislation, that the states might select elsewhere from the public domain equivalent areas of land as indemnification and in lieu of the base lands so lost.

Again, when Congress created the vast reservations in the public domain of the West, at first designated as "Forest Reserves," now known as "National Forests," there were included within these extensive withdrawals of public lands innumerable school sections. In order to preserve the integrity of these forest reservations and to permit the states to acquire other lands not surrounded by large tracts in such reservations which were withdrawn from other disposal or settlement, the states affected were also given the right to select other lands from the public domain in lieu of such included lands. This right of selection of an equivalent acreage elsewhere operated to give a state a right to waive its claim to such included school sections and to select other

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<sup>130</sup> 3 LINDLEY, MINES § 784. Also see *United States v. Fullard-Leo* (1947) 331 U. S. 256.

<sup>131</sup> (1891) 26 STAT. 1093, 43 U. S. C. § 1166 (1940).

<sup>132</sup> The Land Department says this question "has not been authoritatively settled." *Copper Belt etc Co.* (1934) 54 Land Dec. 475, 479.

lands whether its title to the sections involved had become complete or not.<sup>133</sup>

Where the state had selected land in lieu of a school section included in a national forest at a time when neither base nor lieu lands were known to be mineral, and the state had done everything it was required to do to perfect its lieu selection, with a subsequent withdrawal of the land from private entry under the Act of 1910<sup>134</sup> having taken place, the selection will not be defeated even though it is still pending in the Land Department. The state has become the equitable owner of the land selected, and its rights are vested rights which all must respect. Any subsequent discovery of minerals will, therefore, not subject the land to the subsequent withdrawal order, for this would work "an inadmissible interference with vested rights."<sup>135</sup>

A case involving a state school lieu selection, which at first glance might seem inconsistent with the ruling in *Work v. Louisiana* and *Cooper v. Roberts*, is *Charleston Mining Co. v. United States*.<sup>136</sup> A deposit of phosphate rock was involved, and the federal government established the fact that the land in question, which was claimed as indemnity for a portion of a school section 16 in the State of Florida,<sup>137</sup> was mineral land and that the selector was guilty of fraud in furnishing a false affidavit. It was contended, however, that since the grant of the original school section to Florida, and also the selection of indemnity lands, was authorized by act of Congress dated March 3, 1845,<sup>138</sup> it was immaterial whether the lands selected were mineral or not. The trial court,<sup>139</sup> though it "was much impressed by this contention," relying on *United States v. Sweet*, held that the Act of 1845, though "broad enough to cover mineral lands," was contrary to the policy of Congress as expressed in the legislation relating to mineral lands referred to in the *Sweet* case. The court makes no mention of

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<sup>133</sup> *Payne v. New Mexico* (1921) 255 U.S. 367, 372-373; *California v. Deseret Water etc. Co.* (1917) 243 U.S. 415, 420.

<sup>134</sup> (1910) 36 STAT. 847, 43 U.S.C. § 141 (1940).

<sup>135</sup> *Wyoming v. United States* (1921) 255 U.S. 489, 501, 508-509. This decision was cited in *Copper Belt etc. Co.* (1934) 54 Land Dec. 475, 480; see also *New Mexico v. Shelton* (1932) 54 Land Dec. 112, 116.

<sup>136</sup> (1927) 273 U.S. 220, 224-227.

<sup>137</sup> The lands in question were a part of the public lands which the United States acquired by cession from Spain in 1821, and its mineral deposits are subject to the general mining laws of Congress. 1 LINDLEY, MINES § 28.

<sup>138</sup> (1845) 5 STAT. 788.

<sup>139</sup> *United States v. Charleston Mining & Mfg. Co.* (S. D. Fla. 1924) 298 Fed. 127, 129, *aff'd.*, (C. C. A. 5th 1925) 3 F. (2d) 1019.

*Cooper v. Roberts*, though it was commented on in the *Sweet* case and there differentiated on the ground that when the school grant to Michigan was made (1847), "the public policy respecting mineral lands had not been expressed in general and permanent laws, such as were afterwards enacted and carried into the Revised Statutes." Since the Florida school grant act antedated the similar Michigan act by two years, it would seem at first glance that the same rule would have applied. This is particularly true in view of the fact that the year following this decision by the trial court, in *Work v. Louisiana*, the Supreme Court of the United States again affirmed the rule announced in *Cooper v. Roberts*.<sup>140</sup> The Supreme Court in the Florida case did note the Louisiana decision, seemingly *contra*, but held that §§ 2275 and 2276 of the Revised Statutes, as amended by the Act of 1891,<sup>141</sup> superseded the indemnity land provision of the original Florida statute and required "that the indemnity lands to be conveyed thereunder shall not be mineral in character."<sup>142</sup>

In the selection of lieu or indemnity school lands it is essential procedure to submit the selection and the accompanying documents to the federal Land Department for approval, since the proceeding involves the granting of title to other federally owned public lands. In other words, all lieu lands must be selected "under the direction and subject to the approval of the Secretary of the Interior."<sup>143</sup> However, the officers of the Land Department do not have arbitrary authority to accept or reject a filing. They must give effect to the conditions existing when the selection was made, and if it was valid then they are not at liberty to disapprove or cancel it by reason of a subsequent change in the status of the base tract. These provisions under which selections are made are ones inviting and proposing an exchange of lands. Congress has said, in substance, to the states that they may select and take in lieu of base lands that are found to be mineral, to which other valid claims have already attached, or to which the states surrender title because the base land is in a federal reservation, a like area from the unappropriated nonmineral lands elsewhere on the public domain. Acceptance of such proposals and compliance with their terms confer vested rights in the selected lands which the land officers

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<sup>140</sup> The state grants to Louisiana were dated 1849 and 1850.

<sup>141</sup> (1891) 26 STAT. 796, 43 U. S. C. § 851 (1940).

<sup>142</sup> *Charleston Min. Co. v. United States* (1927) 273 U. S. 220, 227. Had the land in question been in one of the base school sections instead of a lieu selection the case would be governed by the *Cooper v. Roberts* and *Work v. Louisiana* decisions.

<sup>143</sup> *Payne v. New Mexico* (1921) 255 U. S. 367, 369.



cannot lawfully disregard. While the duty is cast upon the Secretary of ascertaining whether the selector is acting within the law in respect of both the base land and the land selected, and of approving or rejecting the selection accordingly, the power conferred is "judicial in its nature," and the lawfulness of the selections must be determined "as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections."<sup>144</sup>

*Act of 1927—Granting Mineral Lands in School Sections to States.* A radical change in the law governing the disposition of state school section lands was inaugurated with the passage of the Act of January 25, 1927.<sup>145</sup> The long standing policy of reserving known mineral lands from these school land grants and disposing of such reserved lands under the federal mining laws was terminated.

To summarize briefly, the previous policy had been to reserve from the operation of these school land grants all lands which were known to be mineral in character at the date they were officially identified by approval of the public survey of each school section or at the date of the grant, provided the section had already been officially surveyed. These school land grants, however, seldom made any provision for the issuance of patents, either federal or state, or any equivalent procedure to evidence the transfer of title of such school sections to private individuals. Until some definite determination had been made as to its known mineral character at the critical date, it was uncertain whether or not a grantee from the state had actually become vested with a title which was free from attack. This determination was a function exercised by the federal Land Department, representing the federal government in the disposition of its public lands. That Department early took the position that in the case of these school land grants the presumption existed that the land was of the character contemplated by the grants, and where identified by survey that title had passed to the state.<sup>146</sup> Until some occasion arose for the determination of the known mineral character of the land at the critical date, the possibility always remained that the title claimed by the state or its grantees might be unsettled by a proceeding in the Land Department

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<sup>144</sup> *Id.* at 370-373. See also *Wyoming v. United States* (1921) 255 U.S. 489, 500.

<sup>145</sup> (1927) 44 STAT. 1026, 43 U.S.C. § 870 (1940). See also *Instructions* (1927) 52 Land Dec. 51; (1928) 52 Land Dec. 273.

<sup>146</sup> Scharf and Havenstrite (1941) 57 Land Dec. 358, 356-357. This contains an exhaustive consideration of the history of these grants, the law governing their administration, and the Act of 1927.

to test this question. This state of uncertainty, which had on many occasions been called to the attention of Congress, resulted in the passage of the Act of 1927.<sup>147</sup>

The main purpose of the Act was to vest in the states title to those school section lands which were of known mineral character at the critical dates and which, were it not for the Act, would have been reserved from the operation of the prior school land grants.<sup>148</sup> It did not, however, validate or confirm prior unauthorized sales of known mineral lands, and it is still necessary to have a determination of whether or not the land was known mineral land at the time the state's rights under the original grant attached.<sup>149</sup> Of course, the Act does not affect the title to school section lands which were not known to be mineral in character on those effective dates even if minerals were subsequently discovered in them, nor does it affect the title to the mineral lands intended to be granted to the states by its terms where other valid claims of title under other laws had already become vested. The Land Department clearly retains jurisdiction to determine these last mentioned claims.<sup>150</sup>

This additional grant is made, however, upon the express condition that each state shall reserve "all the coal and other minerals in the lands so sold . . . together with the right to prospect for, mine and remove the same." The states are empowered to lease these mineral deposits "as the state legislature may direct," the proceeds to be devoted to the support of the public schools, and any violation of this mineral leasing policy will result in a forfeiture of such lands and minerals to the United States. Lands already reserved by the United States and all lands in Alaska are excluded from the operation of the act. Existing rights arising under other grants were recognized and the Act by its terms was not to apply to indemnity or lieu selections.

*Amendment of May 2, 1932.*<sup>151</sup> This amendment clarified the orig-

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<sup>147</sup> At the time of the enactment of this statute there were pending before the land department more than 1,700 proceedings based on alleged known mineral character of school section lands there brought into question. This situation had proved to be quite an embarrassment to state school funds. Scharf and Havenstrite, *supra* note 146 at 358.

<sup>148</sup> "The purpose and terms of the act, as well as its legislative history, seem clearly to indicate that the intention of Congress was to vest in the states, finally and irrevocably, the full title to school sections in place wherever the only bar to the operation of the previous school land grants was the then known mineral values of the lands, provided they had not become subject to rights, reservations or court proceedings or disposed of as indemnity or lieu lands." *Id.* at 358-359.

<sup>149</sup> Instructions (1930) 53 Land Dec. 30, 34-35.

<sup>150</sup> Scharf and Havenstrite, *supra* note 146 at 360-361.

<sup>151</sup> (1932) 47 STAT. 140, 43 U. S. C. § 870 (1940).

inal act by stating that its provisions were not to apply to lands "heretofore disposed of" by the states. It also permitted the states to relinquish title to lieu lands selected after the date of the act and thereby to become entitled to the base land, and<sup>152</sup> provided further that in the event of the restoration of lands previously reserved the provisions of the Act of 1927 granting such mineral school section lands to the states shall become effective.<sup>152</sup>

*Act of June 21, 1934.*<sup>153</sup> The Act of 1927 as amended in 1932 did not, however, entirely remedy the situation, and Congress was made aware of the fact that "to clear the atmosphere" more completely there should be provided some sort of evidence of a satisfactory title, which would set that matter at rest for all time. Therefore, the Act of 1934 was passed, authorizing the Secretary of the Interior, upon application by a state, to "cause patents to be issued to the numbered school sections in place" which had been "granted for the support of common schools" by any Act of Congress, including the Act of 1927, "to which title has vested or may hereafter vest in the grantee States, and which have not been reconveyed to the United States or exchanged with the United States for other lands." The date when title vested in the state and all limitations on the title were to be shown in the patents. It was expressly provided that "In all inquiries as to the character of the land for which patent is sought the fact shall be determined as of the date when the State's title attached."<sup>154</sup> Thus a conclusive determination of the facts essential to the vesting of title in the state, including that of mineral character at the critical time, and the issuance of a patent which may not be collaterally attacked to evidence such decision and divest the Land Department of further jurisdiction over the land, is now expressly authorized.<sup>155</sup>

The Act of 1927 has resulted in state leasing systems for all minerals in school section lands that these states had not already disposed of. The states concerned have quite uniformly enacted laws providing for the leasing of mineral lands in conformity with the provisions of this federal act.<sup>156</sup>

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<sup>152</sup> Instructions (1932) 53 Land Dec. 664, 665-666; State of New Mexico (1929) 52 Land Dec. 679.

<sup>153</sup> (1934) 48 STAT. 1185, 43 U. S. C. § 871a (1940).

<sup>154</sup> Scharf and Havenstrite, *supra* note 146 at 362-363.

<sup>155</sup> *Id.* at 364.

<sup>156</sup> California had anticipated this federal act, in so far as the leasing of its mineral lands are concerned. Prior to the passage of the federal act, California and its grantees owned all of the minerals in state school lands that were discovered and became known

This act, while salutary in purpose, has added some confusion to an already complicated legal situation. We have commented on some of the perplexing questions involving the mineral character of school lands when ownership of reserved minerals could only be acquired under the federal mining laws. It was then vital to determine the effective date of the school grant, since all known mineral lands as of such date were reserved to the United States to be disposed of under its mining laws. Now it becomes equally vital to determine whether any private rights under the federal mining laws have lawfully attached to such known mineral lands prior to January 25, 1927, because the federal act of that date expressly saves "all the rights of adverse parties recognized by existing law . . . ." We have, as a consequence, two important dates which must now be taken into consideration when claimants assert title under the federal mining laws to any portion of these school sections. A mineral claimant in order to prevail as to any portion of a school section must now prove that his mining claim was initiated prior to January 25, 1927<sup>157</sup> and also that the land so claimed was known to be mineral in character on and prior to the date the state's title would otherwise have become effective under its school land grant.<sup>158</sup>

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subsequent to the effective date when title to the school sections would normally pass to the state. In Cal. Stats. 1921, p. 404, California inaugurated a policy of reserving and leasing its mineral lands. This state act contained elaborate provisions governing the making of such leases. This act has been amended and added to from time to time, and when the federal act here under consideration was passed in 1927 California had already in substance complied with the federal act. California's mineral reservation and leasing provisions are now codified in CAL. PUB. RESOURCES CODE §§ 6401-6402, 6501-7055. This state leasing act is administered by a State Lands Commission of the Division of State Lands in the Department of Finance.

<sup>157</sup> *Mangan and Simpson v. Arizona* (1928) 52 Land Dec. 266, 268.

<sup>158</sup> *Instructions* (1930) 53 Land Dec. 30, 33-34; Scharf and Havenstrite, *supra* note 146 at 364.