THE RECLAMATION ACT

An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands. (Act of June 17, 1902, ch. 1093, 32 Stat. 388)

[**Sec. 1. Reclamation fund established from public land receipts except 5 per cent for educational and other purposes.**]—All moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act. (32 Stat. 388; 43 U.S.C. § 391)

Explanatory Notes

Codification. The text of this section as it appears in 43 U.S.C. § 391 differs from the above in the following substantive respects: (1) the phrase "officers designated by the Secretary of the Interior" is substituted for "registers and receivers" in view of the Acts of March 3, 1925, 43 Stat. 1145, and October 28, 1921, 42 Stat. 208, which consolidated the offices of register and receiver and provided for a single officer to be known as register; and (2) the phrase "and in the State of Texas" is added after "said States and Territories," in view of the Act of June 12, 1906, which is discussed below.

Proviso Relating to Support for Land-Grant Colleges. As originally enacted, the above section also contained a proviso to the effect that, if receipts from the sales of public lands were insufficient to fulfill the annual appropriations authorized by the Act of August 30, 1890, 26 Stat. 417, 7 U.S.C. § 322, for the support of land-grant colleges, the deficiency could be supplied from any moneys in the Treasury not otherwise appropriated. This provision was superseded by the Act of March 4, 1907, 34 Stat. 1281, which removed the requirement that the funds appropriated by the 1890 Act, as amended, are limited to those "arising from the sale of public lands." See 43 U.S.C. § 391 note and 7 U.S.C. §§ 321 note, 322.

Supplementary Provisions: Extension to Texas. The Act of February 25, 1905, extended the Reclamation Act to a portion of the State of Texas bordering the Rio Grande, and the Act of June 12, 1906, extended the Reclamation Act to the entire State. The 1905 and 1906 Acts appear herein in chronological order.

Supplementary Provisions: Advances to Reclamation Fund. The original concept of the 1902 Act was that the entire reclamation program would be financed from the reclamation fund. It became apparent, however, that receipts to the fund were not adequate to finance completely a program of the scope desired. The Act of June 25, 1910, and the Act of March 3, 1931, authorized $20,000,000 and $5,000,000, respectively, to be advanced to the reclamation fund from the general funds of the Treasury. The so-called Hayden-O'Mahoney amendment to the Act of May 9, 1938, effected a complete reimbursement of these advances. Beginning with appropriations in 1930 for the Boulder Canyon project, the annual program has been financed by appropriations in part from the reclamation fund and in part from the gen-

eral fund of the Treasury. The 1910, 1931 and 1938 Acts appear herein in chronological order.

Supplementary Provisions: Additional Receipts to Reclamation Fund. The following Acts, all of which appear herein in chronological order, authorize additional receipts to the Reclamation Fund as follows: (1) Section 5 of the Reclamation Act, all moneys received from entrymen or applicants for water rights; (2) Act of March 3, 1905, proceeds from sale of certain property and refunds from reclamation operations; (3) Section 2, Act of April 16, 1906, and section 3, Act of June 27, 1906, proceeds from sale of town lots; (4) Section 5, Act of April 16, 1906, and Hayden-O'Mahoney Amendment to Act of May 9, 1938, proceeds from power operations; (5) Act of October 2, 1917, receipts from lease of potassium deposits; (6) Act of July 19, 1919, proceeds from lease of, and sale of products from, withdrawn lands; (7) Section 35, Act of February 25, 1920, proceeds under Mineral Leasing Act; (8) Act of May 20, 1920, proceeds from sale of surplus lands; (9) Section 17, Act of June 10, 1920, charges arising from licenses for occupancy and use of withdrawn public lands; (10) Act of March 4, 1921, and Act of January 12, 1927, contributions and advances; (11) Act of June 6, 1930, money collected from defaulting contractors or their sureties; and (12) Hayden-O'Mahoney amendment to Act of May 9, 1938, all moneys received from reclamation projects including incidental power features thereof.

Editor's Note, Annotations. Miscellaneous annotations of opinions dealing with the Reclamation Act generally are found at the end of the Act.

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1. Reclamation fund—Generally

The official reports show that, in 1902, there were in 16 States and Territories 535,486,731 acres of public land still held by the Government and subject to entry. A large part of this land was arid, and it was estimated that 35,000,000 acres could be profitably reclaimed by the construction of irrigation works. The cost, however, was so stupendous as to make it impossible for the development to be undertaken by private enterprise, or, if so, only at the added expense of interest and profit private persons would naturally charge. With a view, therefore, of making these arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of all public lands in these 16 States and Territories should constitute a trust fund to be set aside for use in the construction of irrigation works, the cost of each project to be assessed against the land irrigated, and as fast as the money was paid by the owners back into the trust it was again to be used for the construction of other works. Thus the fund, without diminution except for small and negligible sums not properly chargeable to any particular project, would be continually invested and reinvested in the reclamation of arid land. *Swigart v. Baker,* 229 U.S. 187, 193–94 (1913).

The reclamation fund is a special fund, but not a trust fund. 14 Comp. Dec. 361, 364 (1907).

Since, in the absence of specific statutory authority, one department or branch of the Government is not authorized to enter into contracts with another such department or branch and to make payments thereunder, the General Land Office may not lawfully pay rent to the Reclamation Service for the use of a part of a warehouse when the reclamation fund is not depleted by such use. However, any cost of maintenance of the warehouse may be apportioned properly between the Reclamation Service and the General Land Office. 22 Comp. Dec. 684 (1916).

2. —Construction with other laws

The Act of June 27, 1906, 34 Stat. 518, granting to the State of California 5 per cent of the net proceeds of cash sales of public lands in that State, including sales made prior to its passage and since the admission of the State, does not authorize the withdrawal of any part of the proceeds of public lands of said State carried to the reclamation fund prior to its passage. Five per cent of the net proceeds of cash sales of public lands in the State of California made after the passage of the Act of June 27, 1906, is set aside by that act for educa-

tional purposes and excepted from moneys appropriated after its passage to the reclamation fund. 13 Comp. Dec. 289 (1906).

It is not the intent of Congress by the Acts of April 16 and June 27, 1906, 34 Stat. 116 and 520, to take away the right of the State of Idaho to the 5 per cent of the net proceeds of sale from public lands for the support of the common schools of the State lying within said State. If, however, the whole proceeds of said sales have been covered into the "reclamation fund" and the 5 per cent paid to the State out of the permanent indefinite appropriation therefor, the reclamation fund should be charged therewith. 20 Comp. Dec. 365 (1913).

Moneys paid to the Treasurer of the United States in accordance with the provisions of section 4 of the Act of August 20, 1912, 37 Stat. 321, authorizing the Attorney General to compromise suits involving lands purchased from the Oregon & California Railroad Co., are not "moneys received from the sale and disposal of public lands" within the purview of the reclamation act, but are "miscellaneous receipts." Effecting a compromise of a suit does not constitute a sale of public lands. Where a conveyance by a grantee of public lands is decreed void or is set aside if found voidable only, a forfeiture to the United States does not *ipso facto* result, and lands once granted by the United States cannot thereafter be classed as public lands so long as any unextinguished right or title therein under or through said grant exists. 20 Comp. Dec. 397 (1913).

Moneys received from royalties and rentals under the Act of October 2, 1917, 40 Stat. 297, which authorizes exploration for and disposition of potassium on public lands, should not first be deposited to the credit of sales of public lands, but should be credited directly to the reclamation fund. Comp. Dec., December 5, 1918.

3. —States covered

Because the emergency fund, established by the Act of June 26, 1948, is derived from the reclamation fund, it is limited in its application to the states named in section 1 of the Reclamation Act. Consequently, it is not available for use in Alaska. Memorandum of Deputy Solicitor Weinberg, April 14, 1964.

6. Deposits to fund—Leases

The full 100 percent of the proceeds of the lease is appropriated, without deduction, to the reclamation fund by section 1 of the Reclamation Act. Departmental decision, in re Owl Creek Coal Co., August 31, 1912.

Moneys derived by the Reclamation Service from the lease of lands in the Uintah Indian Reservation should be covered into the Treasury to the credit of the reclamation fund, the liability of the Reclamation Service to compensate the Indians for the use of such lands not affecting the disposition of the proceeds derived from their use. 14 Comp. Dec. 285 (1907).

The First Assistant Secretary, in modifying departmental instructions of Sept. 14, 1936, with reference to leases of land under the Taylor Grazing Act, held that the Secretary's authority to lease lands withdrawn in connection with a reclamation project, was recognized by the Congress in subsection I of the Act of Dec. 5, 1924, and that all leases of land withdrawn for reclamation purposes should be made under the authority of subsection I; that all such leases should be made in the form approved June 18, 1934; and that whatever moneys may yet be received from leases of withdrawn reclamation lands made in accordance with prior instructions of September 14, 1936, should be disposed of in accordance with subsection I. Instructions, M–29482 (October 8, 1937).

7. —Mineral leases

Lands withdrawn for a reservoir site or similar reclamation purposes which are essential to the project, and lands acquired by purchase or condemnation for the exclusive use of the project, may be developed for their mineral resources only by temporary leases for periods not inconsistent with the needs of the project, and the proceeds therefrom must be placed in the reclamation fund to the credit of the project. *J. D. Mell et al.*, 50 L.D. 308 (1924)

8. —Refunds

The amount of purchase money refunded in reclamation States, in cases of erroneous sales of public land, under the provisions of sections 2362 and 3689, Revised Statutes, should be deducted from the total sums received in said States in computing the amounts to be transferred to the reclamation fund by appropriation warrants. This section does not authorize the transfer to the reclamation fund of moneys paid to a receiver by an intended purchaser of public lands unless the sale is confirmed and the lands are actually conveyed by the United States to the purchaser. 20 Comp. Dec. 415 (1913).

Moneys erroneously paid to a receiver of public moneys by a would-be purchaser of public lands and which are required by law to be refunded are not moneys received from the sale or disposal of public lands within the meaning of this act. 20 Comp. Dec. 597 (1914).

9. —Advances

Where necessary canals, laterals, and structures properly a part of a Federal irrigation system cannot be constructed by the United States because funds are not available, a landowner may advance the needed moneys to the United States, and he may be later reimbursed, without interest, by credits upon his water charges as they become due. Departmental decision, October 8, 1919, Milk River.

16. Expenditures authorized—Generally

The authority of the Secretary respecting the use of the reclamation fund is to make preliminary investigations to determine the feasibility of any contemplated irrigation project, to construct reservoirs and irrigation works, and operate and maintain those thus constructed, and to acquire "for the United States by purchase or condemnation under judicial process" rights or property necessary for these purposes. *California Development Co.*, 33 L.D. 391 (1905).

In a decision rendered July 18, 1924 (A–2537), in connection with work under article 6 of the treaty with Great Britain regarding St. Mary and Milk Rivers, the Comptroller General ruled that the appropriation of $100,000 for investigations of secondary projects from the reclamation fund made by Act of January 24, 1923 (42 Stat. 1207), could not be used on work under said treaty, as the proposed work was not in connection with "examination and survey for the construction and maintenance of irrigation works, etc.," and not within the purpose for which the reclamation fund was established.

If a grantor of land to the United States for a nominal consideration pays the stamp taxes provided for deeds of conveyance under the "Revenue act of 1918," approved February 24, 1919 (40 Stat. 1057), he may properly be reimbursed therefor from the reclamation fund as a part of the consideration for the land conveyed. Comp. Dec., April 22, 1919.

17. —Research

The Bureau of Reclamation has basic authority to conduct weather modification research. This authority stems from the provisions of section 1 of the Reclamation Act of 1902 that the reclamation fund may be used "for the * * * development of waters for the reclamation of arid and semiarid lands." Letter of Solicitor Barry to Senator Jackson, June 11, 1964.

The Bureau of Reclamation is authorized under reclamation law to expend appropriations made from the general funds of the Treasury under the heading "General Investigations—general engineering and research" for atmospheric water resources research that is of primary benefit to States other than 17 Western States. Although expenditures from the Reclamation Fund may be made only for the benefit of the 17 Western States, expenditures from general fund appropriations are not so limited because section 2 of the Reclamation Act and section 8 of the Flood Control Act of 1944 evidence a Congressional intent to make the benefits of reclamation law available to all parts of the Nation notwithstanding the limitations on the use of the Reclamation Fund. Memorandum of Associate Solicitor Hogan, July 13, 1966.

18. —Litigation expenses

In view of the fact that the Reclamation Service must proceed in many cases in conformity with State laws, and it is necessary to institute cases in State courts or intervene in those brought by others, the expense of such proceedings in State courts in payment of lawful costs, including expenses of necessary printing and costs of appeal bonds, should be charged to the reclamation fund. It is understood, of course, that such proceedings on behalf of the United States will be instituted by or with the authority of the Attorney General, and that it is not intended by this decision to include compensation to attorneys or counsel. Comp. Dec., June 30, 1914, and December 6, 1916.

Costs in an action against an employee of the Reclamation Service which is defended for said employee by the United States are payable out of the reclamation fund. Comp. Dec., in re *Marley v. Cone* (Salt River), December 6, 1916.

19. —Rewards

The reclamation fund may not be used as a reward for the apprehension of an employee of the Reclamation Service who may have been guilty of a breach of trust. Departmental decision, January 28, 1910.

If, in the judgment of the Secretary of the Interior, the offering of a reward for the return of horses belonging to the Reclamation Service which have strayed away would be an appropriate means to be used to secure their return, he is authorized to make the offer under section 10 of the reclamation act. Comp. Dec., May 19, 1911.

If it is deemed necessary to operate a telephone line in connection with the work authorized under the reclamation act, the Secretary of the Interior unquestionably has the authority to take such action as may be necessary and proper to protect such telephone line from damage or interference while in the possession of the United States. The means to be employed for such protection is left largely in the discretion of the

Secretary. If, in his judgment, the offering of a reward for information leading to the conviction of any person willfully damaging or interfering with such telephone line would be a necessary and proper means to protect it from such damage or interference, payment from the reclamation fund of the reward so offered would be authorized when satisfactory proof of the earning thereof has been presented. Comp. Dec., March 7, 1913.

Sec. 2. [Authority to study, locate and construct irrigation works.]—The Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells. (32 Stat. 388; Act of August 7, 1946, 60 Stat. 866; 43 U.S.C. § 411)

EXPLANATORY NOTES

Provisions Repealed. The Act of August 7, 1946, 60 Stat. 866, which appears herein in chronological order, repealed those provisions of section 2 requiring annual reports to Congress. Before repeal of the reporting provisions, the section read as follows: "The Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed."

Editor's Note, Special Authorizations for Studies. From time to time Congress has authorized the Secretary of the Interior to undertake special studies of water resources developments involving reclamation. Although some of these Acts are included herein in chronological order and others are noted below, no systematic effort has been made to include all such authorizations.

Tri-County Project, Nebraska. The Act of Sept. 22, 1922, ch. 430, 42 Stat. 1057, authorized an additional investigation of the Tri-county project in Nebraska and an extension of the investigations into Adams County to ascertain whether it is practicable to convey for irrigation purposes flood waters from the Platte River onto the lands in the counties comprising the project.

Palo Verde and Cibola Valleys. Engineering and economic investigations in Palo Verde and Cibola valleys on the Colorado River were authorized by the Act of April 19, 1930, ch. 192, 46 Stat. 222.

Gila River Above San Carlos Reservoir. The Act of May 25, 1928, ch. 742, 45 Stat. 739, authorized an appropriation of $12,500 for surveys and investigations to determine the best methods and means of utilizing the waters of the Gila River and its tributaries above San Carlos reservoir in New Mexico and Arizona, provided the States of Arizona and New Mexico cooperated by appropriating an equal amount. Arizona by Act of its legislature November 28, 1926, appropriated $6,250 and New Mexico by Act of March 8, 1929, appropriated $6,250. The work was covered by contract dated August 12, 1929, with the States of Arizona and New Mexico, $12,500 having been appropriated by the Second Deficiency Act of March 4, 1929, 45 Stat. 1643.

Cabinet Gorge. An authorization of $25,000 to be appropriated to provide for studies for the development of a hydroelectric power project at Cabinet Gorge on the Clark Fork of the Columbia River, for irrigation pumping or other uses was made by the Act of August 14, 1937, ch. 619, 50 Stat. 638.

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1. Examinations authorized—Generally

The Reclamation Service cannot, while construction of a project is in progress, and prior to the laying out of its canals, undertake to reexamine, at the instance of individual claimants, particular tracts falling within the project, to ascertain whether or not such tracts are capable of service from

its projected canals. *Lewis Wilson,* 42 L.D. 8 (1913). See also 48 L.D. 153, amending paragraph 13 of general reclamation circular of May 18, 1916.

When the Secretary of the Interior in the exercise of a reasonable discretion determines as to the validity of title to and as to the value of a right to appropriate water for irrigation purposes to be acquired by him under the provisions of the Act of June 17, 1902, his decision is conclusive upon the accounting officers. 14 Comp. Dec. 724 (1908).

The drilling of wells for the purpose of determining whether underground water exists that may be made available in connection with a project comes within the power conferred by this section "to make examinations and surveys * * * for the development of waters." Op. Asst. Atty. Gen., 34 L.D. 533 (1906).

2. —Research

The Bureau of Reclamation is authorized under reclamation law to expend appropriations made from the general funds of the Treasury under the heading "General Investigations—general engineering and research" for atmospheric water resources research that is of primary benefit to States other than the 17 Western States. Although expenditures from the Reclamation Fund may be made only for the benefit of the 17 Western States, expenditures from general fund appropriations are not so limited because section 2 of the Reclamation Act and section 8 of the Flood Control Act of 1944 evidence a Congressional intent to make the benefits of reclamation law available to all parts of the Nation notwithstanding the limitations on the use of the Reclamation Fund. Memorandum of Associate Solicitor Hogan, July 13, 1966.

3. —Contributed funds

For some years prior to 1922 the Reclamation Service had been carrying on investigations on the Colorado River in the vicinity of Black and Boulder Canyons. Funds appropriated for fiscal year 1922 not being sufficient to continue these investigations, an arrangement was worked out whereby the City of Los Angeles and three other public bodies in Southern California interested in the proposed development on the Colorado River advanced the funds necessary to permit the investigation to continue.

The City of Los Angeles sued the United States to recover the sum of $55,000, contributed by it for that purpose under a contract dated February 16, 1922. Article 18 of the contract provided that, if the Congress, within two years of the date of the contract, authorized similar investigations by and on behalf of the United States and should make sufficient appropriations therefor and for reimbursement of funds advanced, then the Bureau would refund to the city such advanced funds or the appropriate share thereof. The sum of $50,283.35, from appropriations by Congress for the fiscal years 1923 and 1924, for continued investigations on the Colorado River, was not spent and reverted to the Reclamation Fund. The city petitioned the Court of Claims for reimbursement of its proportionate share of this money. The court held that the agreement was illegal and unenforceable since it violated Sections 3679 and 3732 of the Revised Statutes (31 U.S.C. 665, 41 U.S.C. 11). *City of Los Angeles v. United States.* 107 Ct. Cl. 315, 68 F. Supp. 974 (1946).

6. Works authorized—Generally

The general statutory authority of the Secretary for construction of irrigation works is sufficiently broad to authorize preparatory work, such as land leveling, roughing in of farm distribution systems, and the planting of cover crops on public lands within an irrigation project. Solicitor White Opinion, 59 I.D. 299 (1946).

7. —Drainage works

It is well settled that the United States may construct drainage works as a part of its irrigation system; the necessity for drainage and the methods of conducting the work are in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the courts. *United States v. Ide,* 277 Fed. 373 (8th Cir. 1921), *affirmed* 263 U.S. 497 (1924). See also *Weymouth v. Lincoln Land Co.,* 277 Fed. 384 (8th Cir. 1921).

The Secretary of the Interior has authority to provide for drainage as part of an irrigation project in order to prevent damage to property from the operation of the irrigation system. *Nampa & Meridian Irr. Dist. v. Bond,* 283 Fed. 569 (D. Idaho 1922), 288 Fed. 541 (9th Cir. 1923), 268 U.S. 50 (1925).

The drainage system authorized by reclamation law is that which will provide drainage necessary to the successful operation of the complete project, and as a general matter the acreage limitations of the law do not apply to it. Memorandum of Chief Counsel Fix to Commissioner, May 12, 1948.

8. —Artesian wells

The phrase "including artesian wells" is used to describe one class of irrigation works to be constructed in carrying out the scheme for reclaiming arid lands provided for in

the act, and it is not contemplated by this section that such wells may be sunk as a part of the preliminary examinations authorized therein, nor is it permissible to sink an artesian well where it is believed that if water is found it will not be suitable or needed or used for irrigation purposes. Instructions, 32 L.D. 278 (1903).

Sec. 3. [Withdrawal of lands for irrigation works—Withdrawal of lands susceptible of irrigation—Homestead entries—Determination whether project is practicable—Restoration and entry—Commutation.]—The Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided,* That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided,* That the commutation provisions of the homestead laws shall not apply to entries made under this act. (32 Stat. 388; 43 U.S.C. §§ 416, 432, 434)

EXPLANATORY NOTES

Codification. The first part of this section through the first proviso and ending with the words "and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry" is codified as section 416, title 43, U.S. Code. The balance of the section, except for the words "in tracts of not less than forty nor more than one hundred and sixty," is codified as section 432. The reference to the size of the tracts is incorporated in section 434.

Supplementary Provision: Entries of Units Less than Forty Acres; Additional Entries, Desert Land Entries. Section 1 of the Act of June 27, 1906, authorizes the Secretary of the Interior, under certain conditions, to establish a unit of less than forty acres as the minimum entry. Section 2 authorizes one who has relinquished lands covered by a bona fide unperfected entry to make an additional entry. Section 5 deals with the case of a desert land entry on lands subsequently withdrawn under the Reclamation Act. The Act appears herein in chronological order.

Supplementary Provision: Entries of Irrigable Lands Prohibited Until Certain Actions Taken. Section 5 of the Act of June 25, 1910, 36 Stat. 836, provides that no entry shall thereafter be permitted on lands withdrawn for irrigation purposes until the Secretary has established the unit of acreage, fixed the water charges and the date when the water can be applied, and made public announcement of the same. The Act appears herein in chronological order.

Additional Supplementary Provisions. Additional supplementary provisions relating to the subjects of withdrawals, entries and farm units are referenced in the index.

Cross Reference, Homestead Laws. Relevant extracts from the homestead laws are included in the appendix.

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I. WITHDRAWALS

1. Withdrawals, generally—Purpose of

The authority to withdraw lands for irrigation purposes conferred upon the Secretary of the Interior is a special authority to make withdrawals for a particular purpose and is limited to the specific uses provided for in the Act, or to uses incident to and in the furtherance thereof. Op. Asst. Atty. Gen., 33 L.D. 415 (1905).

The Secretary of the Interior has no authority under this Act to withdraw lands for reservoir sites with a view to the use of the waters impounded therein for domestic purposes. Op. Asst. Atty. Gen., 33 L.D. 415 (1905).

Public lands adjacent to reclamation withdrawn lands bordering Lake Havasu may be withdrawn pursuant to the Reclamation Act and leased to the State of Arizona where the withdrawal will implement in part the Lower Colorado Land Use Plan with its concomitant reclamation benefits such as facilitating the Bureau's control over the use of the lake waters and shores. Memorandum of Associate Solicitor Hogan, October 9, 1964.

The Reclamation Act authorizes the withdrawal of public lands from entry to provide pasture for Government animals used in carrying on operations under the act. Departmental decision, March 21, 1910, Lower Yellowstone.

2. —Discretion of Secretary

The discretion of the Secretary of the Interior in making first-form withdrawals of lands cannot be questioned, and no application to enter can be allowed on the ground that the land is not needed. *Ernest Woodcock*, 38 L.D. 349 (1909).

The withdrawal of land for irrigation purposes under this section is a matter that was committed to the Land Department exclusively, and, in the absence of fraud on the part of the officials of that Department, could not be reviewed by the courts. *Donley v. West*, 189 Pac. 1052 (Cal. App. 1920), reversed on rehearing on other grounds, 193 Pac. 519 (Cal. App. 1920), error dismissed, 260 U.S. 697 (1922).

3. —First and second form withdrawals

There are two classes of withdrawals authorized by the Act, one commonly known as "withdrawals under the first form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other, commonly

known as "withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works but which may possibly be irrigated from such works. General Land Office Circular, June 6, 1905, 33 L.D. 607.

Two classes of withdrawals are provided for by this section, and the exception of homestead entry from the second does not apply to the first; withdrawals and reservations thereunder being necessarily absolute. *United States v. Hanson,* 167 Fed. 881, 93 C.C.A. 371 (Wash. 1909).

The proviso of section 5 of the Act of June 25, 1910, as amended, making lands reserved for irrigation purposes and relinquished from prior entries subject to entry under this section, applies only to lands withdrawn under this section as susceptible of irrigation under a proposed project, and not to lands withdrawn as required for the construction of irrigation works. *United States v. Fall,* 276 Fed. 622, 57 App. D.C. 100 (1921).

Where the Secretary of the Interior by approval of farm unit plats under the provisions of the Act of June 17, 1902, heretofore or hereafter given, has determined, or may determine, that the lands designated thereon are irrigable, the filing of such plats in the office of the Commissioner of the General Land Office and in the local land offices shall be regarded as equivalent to an order withdrawing such lands under the second form under said Act, and as an order changing to the second form any withdrawal of the first form then effective as to any such tracts. Department decision, 37 L.D. 27 (1908).

The distinction between "forms of withdrawals," that is, between "first form withdrawals" (for irrigation works) and "second form withdrawals" (for irrigable land), was made administratively to recognize the distinction that in the latter case, irrigable lands so withdrawn under section 3 of the Reclamation Act could be entered under the homestead laws in advance of the availability of water from the project. This distinction was no longer pertinent after the enactment of section 5 of the Act of June 25, 1910, 36 Stat. 835, which precluded entry until after the Secretary had established the unit of acreage, fixed the water charges and the date of water availability, and made public announcement of the same. For this reason, the Bureau of Reclamation has abandoned the use of second form withdrawals. Associate Solicitor Fisher Opinion, M–36433 (April 12, 1957), in re disposal of lands, Guernsey Reservoir, North Platte Project.

4. —Procedures

Any withdrawal otherwise valid shall not be affected by failure to note same on tract book or otherwise follow the usual procedure. Instructions, 42 L.D. 318 (1913). See 48 L.D. 153, amending paragraphs 13, 14, and 16, and revoking paragraph 15 of general reclamation circular of May 18, 1916.

Under existing departmental procedures and regulations approved by the President, orders withdrawing public lands for reclamation purposes are effective when approved by the Commissioner of Reclamation and concurred in by the Bureau of Land Management, and are effective to constitute valid notice as to persons not having actual knowledge thereof when filed with the Division of the Federal Register, National Archives. Associate Solicitor Soller Opinion, M–36382 (October 24, 1956).

6. Lands and interests affected by withdrawal—Generally

Under this section, the Secretary of the Interior had authority to withdraw from public entry lands constituting a reservoir site sought to be appropriated by a water and power company, and the laws of the United States in reference to the disposition of public lands of the United States being paramount and exclusive, a water and power company could not acquire an easement on lands of a reservoir site, withdrawn from entry by the Secretary of the Interior, by virtue of any compliance with Civ. Code 1913, para. 5337, 5338. *Verde Water & Power Co. v. Salt River Valley Water Users' Assn.,* 197 Pac. 227, 22 Ariz. 305, *cert. denied,* 257 U.S. 643.

The withdrawal authority of section 3 of the Reclamation Act must be construed broadly. Accordingly, withdrawal orders are effective as to public lands which were not technically open to "public entry" at the time of the order, such as forest reserves and school lands reserved for the benefit of a Territory but not granted to it. Assistant Secretary Davidson Opinion, 59 I.D. 280 (1946).

7. —National parks

The Secretary of the Interior has the same right to withdraw lands within the Yosemite National Park, created by the Act of October 1, 1890, 26 Stat. 650, for the uses and purposes contemplated by the Act of June 17, 1902, that he has to withdraw lands for such purposes within forest reservation created under authority of the Act of March 3, 1891, 26 Stat. 1095. Op. Asst. Atty. Gen., 33 L.D. 389 (1904).

8. —Forest reserves

Under the Act of February 15, 1901, 31 Stat. 790, lands in forest reserves created

under authority of the Act of March 3, 1891, 26 Stat. 1095, may be appropriated and used for irrigation works constructed under authority of the Act of June 17, 1902, as well as for works constructed by individuals. Op. Asst. Atty. Gen., 33 L.D. 389 (1904).

9. —Military reservations

Congress having by the Act of July 5, 1884, 33 Stat. 103, provided for the disposal of lands in abandoned military reservations, the Secretary of the Interior is without authority to dispose of such lands in any other manner or to segregate them for use in connection with an irrigation project. Instructions, 33 L.D. 130 (1904).

Lands formerly within the Fort Buford Military Reservation were by the Act of May 19, 1900, 31 Stat. 180, restored to the public domain and made subject to existing laws relating to disposal of the public lands, except such laws as are not specifically named therein, and are subject to withdrawal under the Reclamation Act as other portions of the public domain subject to entry under the general land laws; and a withdrawal of such lands for reclamation purposes is effective as to all of the lands for which entry was not made within three months from the filing of the township plat and prior to the withdrawal. Op. Asst. Atty. Gen., 34 L.D. 347 (1905).

The fact that the Act of April 18, 1896, 29 Stat. 95, provides that the lands in the abandoned portion of the Fort Assiniboine Military Reservation, thereby opened to entry, shall be disposed of only under the laws therein specifically named, does not prevent a withdrawal under the Act of June 17, 1902, of any of said lands as to which no vested right has attached. *Mary C. Sands,* 34 L.D. 653 (1906).

10. —Indian lands

Where under the Act of March 3, 1905, 33 Stat. 1069, lands of the Uintah Indian Reservation have been set apart and reserved as a reservoir site for general agricultural development and subsequently have been withdrawn, under section 3 of the Reclamation Act, from all forms of sale and entry, the United States is liable upon an implied contract to the Indians of said reservation for the occupancy and use of said lands to the extent that the use made of them is inconsistent with the rights of the Indians to use and occupy them or leave them open to sale and entry for their benefit, and the reclamation fund is applicable to the payment thereof. 14 Comp. Dec. 49 (1907).

The Secretary of the Interior, by departmental orders of January 31 and September 8, 1903, withdrew for flowage purposes under the Reclamation Act of June 17, 1902, land in sections 4, 6, 8, 16, 20, 22, 28 and 34, T. 16 N., R. 21 W., and in section 12, T. 16 N., R. 22 W., G. & S. R. M. Executive Order of February 2, 1911, subsequently withdrew these lands as an addition to the Fort Mohave Indian Reservation. Congress by Act of May 23, 1934, 48 Stat. 795, recognized Indian ownership of the lands and confirmed the Executive Order of February 2, 1911. The Department held that the reclamation withdrawals of January 31 and September 8, 1903, were ineffective and that title to said lands being in the Fort Mohave Indian Reservation, the Indians are entitled to compensation for land required by the Bureau of Reclamation for flowage purposes on account of the construction of Parker Dam, Arizona. Solicitor Margold Opinion, M–28589 (August 24, 1936).

The Chemehuevi Indians claimed compensation for lands to be flooded by the Parker Reservoir, Parker Dam project, but the Metropolitan Water District, which was acquiring the right of way for the reservoir under contract with the United States, contended that it was not necessary to purchase the lands since they had been withdrawn for reclamation purposes by departmental orders of July 2, August 26 and September 15, 1902, and February 5 and September 8, 1903. On February 2, 1907, the lands were withdrawn from settlement and entry pending action by Congress authorizing the addition of the lands to various mission Indian reservations. The Department held that at most the reclamation withdrawals established the right of the Bureau of Reclamation to utilize the land for reclamation purposes as and when the need arose, but that the Indians must be paid for the land, their occupation of which long antedated the reclamation withdrawals, and was subsequently recognized by the order of February 2, 1907. Solicitor Margold Opinion, M–30318 (December 15, 1939).

11. —Minerals and mineral lands

The right of the Government to appropriate public land for use in the construction and operation of irrigation works under the Act of June 17, 1902, is not affected by the fact that the land is mineral in character. Instructions, 35 L.D. 216 (1906). *Loney v. Scott,* 57 Or. 378, 112 Pac. 172 (1910).

The authority of the Secretary of the Interior to withdraw "lands" for reclamation purposes includes within its scope the authority to withdraw the minerals in lands where the surface has been patented by the Government but the title to the min-

erals is retained by the Government. Solicitor White Opinion, M–36142 (October 29, 1952), in re lands of Ute Indian Tribe.

12. —Mining claims

Unpatented mining claims were subject to order of the Secretary of the Interior pursuant to this section withdrawing certain land except any tract "title" to which had passed out of the United States, from public entry, and therefore the mining claims were not subject to relocation on alleged default by locators after the withdrawal order. *Walkeng Mining Co. v. Covey,* 352 P. 2d 768 (Ariz. 1960).

A mining claim as to which the claimant was in default in the performance of annual assessment work at the date of a withdrawal for the construction of irrigation works under the Reclamation Act does not except the land from the force and effect of the withdrawal. *E. C. Kinney,* 44 L.D. 580 (1916).

A mineral location founded on actual discovery of a valuable deposit of mineral within the limits of the claim, and maintained in accordance with the mining laws and local regulations, excepts the land from the operation of a withdrawal under this Act. Instructions, 32 L.D. 387 (1904).

13. —Settlers and entrymen

By the mere filing of an application to enter under the homestead law, upon which action is suspended, and tender of the necessary fees, the applicant acquires no vested right to or interest in the land applied for, nor does such application have the effect to segregate the land from the public domain, so as to prevent a withdrawal thereof for reclamation purposes. *John J. Maney,* 35 L.D. 250 (1906); *Charles G. Carlisle,* 35 L.D. 649 (1907). Decision modified; see 48 L.D. 153; C.L. 1013, June 15, 1921.

The Reclamation Act contains no provision for the recognition or protection of any right of a settler on unsurveyed public lands which may be withdrawn and reserved thereunder for use in the construction of irrigation works, nor is there any such provision in the Act of June 27, 1906, 34 Stat. 519, or other statute of the United States, and such settler has no right which he can oppose to the taking of the land for such purpose. *United States v. Hanson,* 167 Fed. 881, 93 C.C.A. 371 (Wash. 1909).

An application to make soldiers' additional entry, although filed prior to the passage of the act and pending at the date of an order withdrawing the lands covered thereby under the provisions of said act, is not effective to except the lands from such withdrawal. *Nancy C. Yaple,* 34 L.D. 311 (1905).

Even though approved by the Commissioner of the General Land Office, an application to make soldiers' additional entry will not, prior to the allowance of entry thereon, prevent a withdrawal of the land covered thereby. *Charles A. Guernsey,* 34 L.D. 560 (1906).

Order withdrawing land from entry under this section did not relieve entryman from the duty of claiming land and complying with Homestead Law as to residence and cultivation prior to amendment of 1912, where the land officials made a public announcement that the withdrawals of lands were not permanent, but were for the purpose of enabling preliminary investigations to be made as to the feasibility of irrigation project. *Bowen v. Hickey,* 200 Pac. 46, 53 Cal. App. 250 (1921), *cert. denied.* 257 U.S. 656.

By a successful contest against a desert-land entry the contestant does not acquire such a preference right of entry as will, prior to its exercise, except the land from the operation of a withdrawal made under this Act. *Emma H. Pike,* 32 L.D. 395 (1902.)

The regulations of 1909 purporting to extinguish a statutory preference right of entry to lands covered by a reclamation withdrawal are without force and effect. *Wells v. Fisher,* 47 L.D. 288 (1919).

Where homestead or desert-land entries are included within first-form reclamation withdrawals, they should not be suspended, but allowed to proceed to final proof, certificate, and patent, and the land, if thereafter needed by the United States for reclamation purposes, reacquired by purchase or condemnation. Instructions, 43 L.D. 374 (1914), overruling Op. Asst. Atty. Gen., 34 L.D. 421, and *Agnes C. Pieper,* 35 L.D. 459 (1907).

Upon the cancellation of a homestead entry covering lands embraced within a subsequent withdrawal made under the Act, the withdrawal becomes effective as to such lands without further order. *Cornelius J. MacNamara,* 33 L.D. 520 (1905).

No such rights are acquired by settlement upon lands embraced in the entry of another as will attach upon cancellation of such entry, where at that time the lands are withdrawn for use in connection with an irrigation project; nor is there any authority for purchase by the Government of the settler's claim or of the improvements placed upon the land by him. *George Anderson,* 34 L.D. 478 (1906).

Where lands subject to an existing homestead entry are withdrawn under the

Reclamation Act, the withdrawal becomes effective as to such land without any further order as soon as the existing entry is canceled, and the land is thereafter no longer subject to homestead entry while remaining so withdrawn. *James F. Rapp*, A–25284, 60 I.D. 217 (1948).

Where land in a desert-land entry is withdrawn under the Reclamation Act and the entry is subsequently canceled, the withdrawal becomes effective as to such land upon the cancellation of the entry. *George B. Willoughby*, 60 I.D. 363 (1949).

14. —Contests

Contests will be allowed of entries embracing lands within a reclamation withdrawal even though the successful contestant's preferred right of entry may be futile unless and until the withdrawal is revoked. Instructions, 41 L.D. 171 (1912).

A protest by one claiming under a placer location against a conflicting desert-land entry, will be allowed, even though the land was withdrawn under this section, in order to clear the record of one of the antagonistic claims. *New Castle Co. v. Zanganella*, 38 L.D. 314 (1909), overruling *Fairchild v. Eby*, 37 L.D. 362 (1908).

15. —Smith Act lands

A first form withdrawal is effective as to unentered public lands notwithstanding the fact that the lands previously were approved by the Secretary as being subject to the Smith Act. *McDonald*, 69 I.D. 181 (1962), *overruling Bill Fults*, 61 I.D. 437 (1954), in re desert land entries within Imperial Irrigation District.

Where assessments were levied by an irrigation district under the Smith Act of August 11, 1916, against unpatented land in an existing desert-land entry, the irrigation district can enforce the lien arising from such assessment by a sale of the land in accordance with the provisions of the act, despite the cancellation of the entry and the withdrawal of the land under the Reclamation Act during the intervening period, because the right of the district to enforce its lien by sale of the lands is a "valid existing right" not affected by the withdrawal. The purchaser of the land at such a sale may obtain a patent to the land only if he submits proof of the reclamation and irrigation of the land, as required by the Reclamation Act, and pays to the United States the amounts required under that act. *George B. Willoughby*, 60 I.D. 363 (1949).

16. —Water rights

There is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water. Op. Asst. Atty. Gen. 32 L.D. 254 (1903). But cf. *Arizona v. California*, 373 U.S. 546, 595–601 (1963).

17. —School lands

Lands reserved for school purposes to the State of Arizona, even after survey, were subject to reclamation withdrawal under section 3 of this Act if withdrawn at the time of the admission of the Territory of Arizona to statehood. Assistant Secretary Davidson Opinion, 59 I.D. 280 (1946).

18. —Selected lands

Where the affidavit as to the character and condition of the land accompanying an application to make selection under the exchange provisions of the Act of June 4, 1897, 30 Stat. 36, is executed before the selector acting as notary public, such affidavit is void, and the application can therefore have no effect to except the lands covered thereby from a subsequent withdrawal embracing the same in accordance with the provisions of section 3 of this Act. *Peter M. Collins*, 33 L.D. 350 (1904).

A first-form withdrawal under the Reclamation Act does not defeat the equitable title of the selector acquired under an indemnity school selection if the selection was legal and completed prior to withdrawal. *State of California and Overland Trust & Realty Company*, 48 L.D. 614 (1921).

The location of Valentine scrip upon unsurveyed public land in conformity with the law and departmental regulations is such an appropriation of the land as cannot be defeated by a subsequent reclamation withdrawal, notwithstanding the selection had not been adjusted to an official survey, and the selector cannot thereafter be deprived of his rights thus acquired except in the manner prescribed by the Reclamation Act. *Edward F. Smith*, et al., 51 L.D. 454 (1926).

19. —Timber and stone laws

A withdrawal of lands under this Act will defeat a prior application to purchase the same under the timber and stone laws where, at the date of withdrawal, the applicant had acquired no vested right to the lands embraced in his application. *Board of Control, Canal No. 3, State of Colorado v. Torrence*, 32 L.D. 472 (1904).

20. —Railroad rights-of-way

No such right is acquired by virtue of an application for right-of-way for a railroad under the Act of March 3, 1875, 18 Stat.

482, before the approval thereof, and prior to the construction of the road, as will prevent the Secretary of the Interior from withdrawing the lands covered thereby for use as a reservoir under the Reclamation Act. Op. Asst. Atty. Gen., 32 L.D. 597 (1904).

The Southern Pacific Company in 1916 filed a general map of the station grounds at Mohawk, Ariz., adjoining its right-of-way and in 1936 filed for approval a map giving the exact location points. In 1929 the Bureau withdrew the land under a first form reclamation withdrawal for the Gila project. The General Land Office, as a condition precedent to approval of the map, requested that a stipulation be signed making certain reservations to the United States. The First Assistant Secretary in decision A–20886, of July 24, 1937, held that the execution of the stipulation could not lawfully be required since the station grounds were private property at the time of the reclamation withdrawal and were not affected thereby. The station grounds were held to be subject to the provisions of the act of August 30, 1890, 26 Stat. 391, making reservations for ditch and canal rights-of-way.

26. Withdrawn lands—Generally

Withdrawals made by the Secretary of the Interior under the first form, of lands which are required for irrigation works have the force of legislative withdrawals and are effective to withdraw from other disposition all lands within the designated limits to which a right has not vested. Instructions, 32 L.D. 387 (1904).

Reclamation withdrawn lands are "reserved lands" and therefore are not subject to Executive Order No. 6910 of November 26, 1934, and Executive Order No. 6964 of February 5, 1935. G.L.O. Circular No. 1351, 55 I.D. 247 (1935).

The State of Utah appealed from decision of the General Land Office, dated January 14, 1930, that the rights of the State of Utah did not attach to certain land in sec. 16, T. 3 S., R. 25 E., S. L. M., because of a phosphate reserve. The Department ruled that inasmuch as the lands were embraced in a reclamation withdrawal and later a phosphate reserve, they were not subject to section 6 of the Utah Enabling Act (granting, with other land, all sections 16 to the state, unless in a reservation) and would not be until the reservations, including the reclamation withdrawal, were extinguished and the lands restored to and become a part of the public domain. Decision of Assistant Secretary, April 18, 1931.

Accretions to withdrawn land became part of that land and subject to the withdrawal. Solicitor Barry Opinion 72 I.D. 409, 411 (1965), in re Palo Verde Valley color of title claims. Accord: *Beaver v. United States,* 350 F. 2d 4 (9th Cir. 1965), cert. denied 383 U.S. 937 (1966); *Myrtle White,* 56 I.D. 300 (1938).

Public lands on the east side of the Colorado River which were withdrawn for reclamation purposes remain subject to the withdrawal after artificial cuts in the river channel place them on the west side of the river. This follows from the rule of law that where the channel of a river changes by avulsion, title to the avulsed land is not lost by the former owner. Solicitor Barry Opinion, 72 I.D. 409 (1965), in re Palo Verde Valley color of title claims.

Land included in a reclamation withdrawal is subject to disposition under the Recreation and Public Purposes Act, 43 U.S.C. § 869 et seq. *Carl F. Murray and Clinton D. Coker,* A–28188, 67 I.D. 132 (1960).

27. —Settlement and entry (other than under Reclamation Act)

Withdrawal from entry of public lands required for irrigation works, under this section, is absolute, and, until its restoration to entry, land so withdrawn is not subject to entry, and no right thereto can be initiated by any settler thereon. *Donley v. West,* 189 Pac. 1052 (Cal. App. 1920), reversed on rehearing on other grounds, 193 Pac. 519, 49 Cal. App. 796 (1920), error dismissed, 260 U.S. 697 (1922); *Donley v. Van Horn,* 193 Pac. 514, 49 Cal. App. 383 (1920), *cert.* dismissed, 258 U.S. 634, error dismissed, 260 U.S. 697.

Occupancy by private individual of public lands during time order of withdrawal from entry under this section is in force constitutes trespass, and occupant's improvements are made at his own risk. *Capron v. Van Horn,* 258 Pac. 77, 201 Cal. 486 (1927).

No rights accrue from an alleged settlement on lands covered by a first-form withdrawal under section 3 of the Reclamation Act. *Noah Kesterson,* A–21260 (February 2, 1939).

A homestead application cannot be allowed on land covered by a first-form reclamation withdrawal at the time of entry. *John Dondero,* A–25582 (November 29, 1949).

An application to make homestead entry for land embraced within a first form withdrawal should not be allowed nor received and suspended to await the possible restoration of the lands to entry, but should be rejected. *Ernest Woodcock,* 38 L.D. 349 (1909).

Lands withdrawn from entry, except un-

der the homestead laws, in accordance with this act, are not, during the continuance of such withdrawal, subject to entry under the desert land laws. *James Page,* 32 L.D. 536 (1904).

By the provision that lands susceptible of irrigation under a project shall be withdrawn "from entry, except under the homestead laws", Congress intended to inhibit any mode of private appropriation of such lands except by such entry under the homestead laws as requires settlement, actual residence, improvement, and cultivation; hence such lands are not subject to soldiers' additional entry under section 2306, Revised Statutes. *Cornelius J. MacNamara,* 33 L.D. 520 (1905); *William M. Woodridge,* 33 L.D. 525 (1905); *Mary C. Sands,* 34 L.D. 653 (1906).

28. —Mining locations

Withdrawals under the first clause are not subject to location for mining purposes, being reserved for Government use, while lands withdrawn under the second clause are disposed of only for homesteads, and as all lands open to homestead entry are subject to mining location, lands withdrawn under the second clause are so subject. *Loney v. Scott,* 112 Pac. 172, 57 Or. 378 (1910).

Lands valuable for mineral deposits and embraced within a withdrawal of lands susceptible of irrigation by means of a reclamation project are not thereby taken out of the operation of the mining laws, but continue open to exploration and purchase under such laws. Instructions, 35 L.D. 216 (1906).

Lands covered by a first-form reclamation withdrawal are not open to mining locations where they have not been opened to mineral entry by the Secretary of the Interior. *Harry A. Schultz, et al.,* A–26917, 61 I.D. 259 (1953).

Neither the Atomic Energy Act of 1946, as amended, 42 U.S.C. §§ 2011, *et seq.,* nor the Mining Claims Restoration Act of 1955, 30 U.S.C. § 621, *et seq.,* open reclamation withdrawn land to location under the mining laws. *A. W. Kimball, et al.,* A–27526, 65 I.D. 166 (1958).

Where lands which are subject to a reclamation withdrawal appear to be of greater value for business purposes than for mineral development, an application to restore the lands to location and entry under the mining laws will be denied. *Arthur G. Klinger,* A–26195 (June 27, 1951).

Lands dedicated for public park purposes under section 3 of the Gila Project Act of July 30, 1947, subject to a mineral reservation to the United States, remain subject to the reclamation withdrawal, and the Department may properly decline, under the Act of April 23, 1932, to open them to mineral location. *M. W. Bobo, et al.,* A–26613 (July 13, 1953).

A petition for the restoration to mineral entry of land withdrawn for reclamation purposes under section 3 of the Reclamation Act and subsequently also withdrawn by Presidential Executive Order as part of the Imperial National Wildlife Refuge, is properly denied when mining operations would interfere with the purposes of the refuge, even though the Bureau of Reclamation has no objection to such restoration, and even though the Executive Order cites the Act of June 25, 1910, which extends the mining laws to lands withdrawn thereunder. The President has inherent authority to withdraw public lands for public purposes apart from the statutory authority vested in him by the 1910 Act. *P&G Mining Company,* A–27829, 67 I.D. 217 (1960).

29. —Mineral leasing

Withdrawals under the second form do not affect coal lands. *Albert M. Crafts,* 36 L.D. 138 (1907), overruling *John Hopkins,* 32 L.D. 560 (1904).

The Secretary of the Interior has discretionary authority under section 13 of the Mineral Leasing Act of February 25, 1920, to deny an application for oil and gas prospecting permit embracing lands within a reclamation withdrawal, which, though owned by the United States, have been dedicated to purposes authorized by law, if the permit may not be granted except at the risk of serious impairment or perhaps complete loss of their use for the purpose to which dedicated. *Martin Wolfe,* 49 L.D. 625 (1923).

Public lands withdrawn for a reservoir site, which cannot be restored to the public domain without damage to the project, or which have, because of improvements placed thereon, become lands that may be sold only for the benefit of the reclamation fund, are not subject to the operation of the Mineral Leasing Act of February 25, 1920. *J. D. Mell, Inc.,* 50 L.D. 308 (1924).

30. —Selection

Land withdrawn under this section cannot be selected as lieu land by the State of California under the Act of May 2, 1914, 38 Stat. 372, granting the right to select "vacant" and "unreserved" land in lieu of certain school lands. *Donley v. Van Horn,* 193 Pac. 514, 49 Cal. App. 383 (1920), cert. dismissed, 258 U.S. 634, error dismissed, 260 U.S. 697.

Lands withdrawn under the second form are not subject to selection under the ex-

change provisions of the Act of June 4, 1897, 30 Stat. 26. *Santa Fe Pacific R.R. Co.*, 33 L.D. 360 (1904).

Public land which is included in a first form reclamation withdrawal is not open to selection and disposal under the private exchange provisions of section 8 of the Taylor Grazing Act. *Perley M. Lewis*, A–26748 (June 9, 1954).

31. —Leases and permits

The Secretary of the Interior may establish rules as to the use of withdrawn lands while not needed for the purpose for which they are reserved, and may lease them for grazing, the revenue going into the reclamation fund. *Clyde v. Cummings*, 101 Pac. 106, 35 Utah 461 (1909).

The Secretary of the Interior has authority to make temporary leases of lands reserved or acquired by purchase for use in connection with an irrigation project contemplated under the provisions of the Reclamation Act where use under the proposed lease will not interfere with the use and control of the lands when needed for the purposes contemplated by the reservation or purchase. Op. Asst. Atty. Gen., 34 L.D. 480 (1906).

Whenever it is reasonably necessary for the preservation of the buildings, works, and other property, or for the proper protection and efficiency of any reclamation project, or where special conditions make it advisable, first form withdrawn or purchased lands may be leased to the highest bidder for a term to be decided upon by the Reclamation Service as the conditions may arise. Reclamation decision, March 23, 1917.

On July 8, 1933, the Secretary of the Interior approved the leasing of lands until they were needed regardless of the form in which they were withdrawn.

Leases for grazing lands should be awarded to the high bidder, even if the previous lessee of the land is low. Decision of First Assistant Secretary, January 30, 1934.

The Secretary of the Interior has authority to lease first and second form withdrawn lands without advertisement, and to prescribe method of determining the lease value by such plan as he deems expedient and for the best interests of the United States and the project. Solicitor Opinion, M–27790 (December 18, 1934).

Both the National Park Service and the Bureau of Reclamation, in administering their respective areas withdrawn under the first form in connection with the Boulder Canyon project, may grant leases for land and permits to engage in business activities to private individuals without advertising for proposals or securing competitive bids. Solicitor Margold Opinion, M–28694 (October 13, 1936).

When a lease of grazing lands is canceled for failure to pay the agreed rental but the lessor still continues occupancy and later submits a bid for a new lease upon the same land, accompanied by a deposit of the first year's rent under the new lease, it is proper to apply such deposit against the indebtedness to the United States arising out of the old lease. Dec. Comp. Gen., A–58113 (December 3, 1934).

If land under first form reclamation withdrawal is leased under the Recreation and Public Purposes Act, 43 U.S.C. § 869 et seq., the Secretary may require, as a condition of the lease, that the lessee pay the annual water charges for the lands involved on account of the reclamation project. Memorandum of Associate Solicitor Soller, in re Worland Saddle Club application, Hanover Bluff Unit, Missouri River Basin Project, September 24, 1957.

All leases of lands withdrawn for reclamation purposes should be made under subsection I of the Act of December 5, 1924, as Congress by that subsection recognized the authority of the Secretary of the Interior to lease such lands. First Assistant Secretary Opinion, M–29482 (October 8, 1937).

On February 3, 1928, the Commissioner, Bureau of Reclamation, recommended to the Secretary of the Interior the adoption of a policy of permitting the water users on the projects transferred to them for operation, to lease for grazing and agricultural purposes, all withdrawn or acquired lands where such lease would not interfere with the purposes for which withdrawn or acquired, the water users to make the leases, collect the charges, and handle all details in connection with such transactions. The recommendation was returned to the bureau without approval by First Assistant Secretary E. C. Finney under date of February 21, 1928, with the statement that such procedure would be illegal.

32. —Rights of way

A withdrawal under the Reclamation Act will not bar the allowance of an application for right-of-way for private irrigation canal under the Act of March 3, 1891, over the withdrawn lands, where the allowance of the application will not interfere with the use of the lands by the United States in connection with the administration of the reclamation act and where the water proposed to be conveyed over such right-of-way has not been appropriated and is not claimed by the United States. *Boughner v. Magenheimer, et al.*, 42 L.D. 595 (1913).

The Under Secretary on December 10, 1938, held that the Federal Water Power

Act of June 10, 1920, as amended by section 201 of the Act of August 26, 1935, 49 Stat. 838, covers lands held or acquired in connection with reclamation projects, and applications for licenses for the transmission of hydroelectric power across the project lands should be made to the Federal Power Commission. Letter of Under Secretary, December 10, 1938, in re Yakima-Sunnyside project.

On December 18, 1941, the Under Secretary approved procedure for granting rights of way for electrical transmission, telegraph and telephone lines over lands acquired or withdrawn for reclamation purposes.

The General Railroad Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934, *et seq.*, does not apply to lands withdrawn through a first-form withdrawal. *Southern Pacific Railroad Company*, A–26143 (August 20, 1951).

33. —National forests

Reclamation withdrawals within the national forests are dominant, but until needed by the Reclamation Service, the lands will remain for administrative and protection purposes under control and direction of the Forest Service. Departmental decision, February 27, 1909.

While the Secretary of the Interior may determine what lands within national forests withdrawn for reclamation purposes are necessary for the proper protection of reservoirs constructed under the Reclamation Act, he has no power to lease such lands, since authority in that regard is specifically granted to the Secretary of Agriculture. But in recognition of the needs of the Reclamation Service and to forestall any contracts detrimental to a reclamation project, all leases should be subject to the prior approval of the Secretary of the Interior. 31 Op. Atty. Gen. 56 (1916). But see Act of July 19, 1919, conferring certain jurisdiction on the Secretary of the Interior.

34. —Sand and gravel

Removal of gravel from first form lands is unauthorized, as it contemplates a diminution in the freehold estate. Departmental decision, July 21, 1916, Huntley project.

The removal of surface rock on first-form lands may be permitted when such removal makes available for use of the service of the better class of rock in the interior of the deposit. Departmental decision, January 25, 1917, Rattlesnake Hill, Truckee-Carson.

The removal of sand and gravel for private purposes from land withdrawn under the first form is authorized, provided the privilege is granted under competitive conditions and on terms adequately protecting the rights of the United States. Departmental decision, April 13, 1929, Boulder Canyon project.

41. Revocation of withdrawals—Generally

A homestead entry, which was void when made, because the land was withdrawn as required for reclamation construction, is not validated by a subsequent order of the Secretary of the Interior declaring the land not needed for construction purposes. *United States v. Fall*, 276 Fed. 622 (App. D.C. 1921).

The Act of April 21, 1928, as amended, provides that the holder of a tax title on a reclamation homestead entry is entitled to the benefits of an assignee of such an entry under the Act of June 23, 1910; and the privileges under the Act of June 23, 1910, which are granted to the holder of a tax title under the Act of April 21, 1928, as amended, are not extinguished by the elimination of the entry from the reclamation withdrawal after the interest of the holder of the tax title was acquired. *Ralph O. Baird*, A–26773 (November 3, 1953).

A settlement upon public lands, withdrawn at date of settlement, is valid against everyone except the United States, and where one settles prior to survey, upon withdrawn lands embraced within a school section, the right of such settler to make entry upon approval of the survey and vacation of the withdrawal is paramount to the right of the State under its school land grant. *State of Idaho v. Dilley*, 49 L.D. 644 (1923).

Where revocation of order which withdrew land from entry in connection with reclamation project under this section, and approval of selection of patentee of part of such land in lieu of school land were simultaneous acts, approval of lieu selection took place before land became "unreserved" and "vacant" public land, subject to disposal under the Act of May 2, 1914, 38 Stat. 372, and gave patentee no rights therein except as against United States on expiration of period of limitation on patent under 43 U.S.C. § 1166. *Capron v. Van Horn*, 258 Pac. 77, 201 Cal. 486 (1927).

Though entry on public land was unauthorized, occupancy at time of revocation of order withdrawing land from entry under this section, became lawful, especially where occupant had applied for desert land entry, and made improvements, and land on revocation of withdrawal order ceased to be "vacant" or "unreserved" land under the Act of May 2, 1914, 38 Stat. 372. *Capron v. Van Horn*, 258 Pac. 77, 201 Cal. 486 (1927).

In action by patentee to quiet title against person who had possession and made im-

provements while land was withdrawn from entry under this section, and who had applied for desert land entry, evidence was insufficient to support finding that defendant's unauthorized possession was not in good faith. *Capron v. Van Horn,* 258 Pac. 77, 201 Cal. 486 (1927).

Where lands formerly in Ute Reservation, which were withdrawn under this section, were subsequently restored to public domain, the Indians were not deprived of their interest therein. *Confederated Bands of Ute Indians v. United States,* 112 Ct. Cl. 123 (1948).

Lands formerly in the Ute Reservation, listed in the Secretary's return to the call, which were withdrawn for public purposes prior to June 28, 1938, under authority of this section, and which remained so withdrawn on June 28, 1938, were held for disposal for the benefit of the Indians on that date, since under this section, the lands had not been assigned to use or actually used, and had been subsequently restored to public use. *Confederated Bands of Ute Indians v. United States,* 112 Ct. Cl. 123 (1948).

42. —When effective

Where lands which have been withdrawn from all disposition are restored to entry, no application will be received or any rights recognized as initiated by the tender of an application for any such lands until the order of restoration is received at the local land office. *George B. Pratt, et al.,* 38 L.D. 146 (1909).

43. —Contestant's preference right of entry

Under the Act of May 14, 1880, 21 Stat. 140, providing that where any person has contested and procured the cancellation of any homestead entry he shall be allowed 30 days to enter the lands, where the Department of the Interior entertained a contest while the land involved was withdrawn from entry under the Reclamation Act, it properly permitted the successful contestant to enter the lands within 30 days after restoration of such lands to entry. *Edwards v. Bodkin,* 241 Fed. 931 (D. Cal. 1917), affirmed 265 Fed. 621 (9th Cir. 1920). Accord: *McLaren v. Fleischer,* 185 Pac. 961, 181 Cal. 607 (1919), affirmed 256 U.S. 477 (1921); *Culpepper v. Ocheltree,* 185 Pac. 971 (Cal. 1919), affirmed 256 U.S. 483 (1921).

Any right under regulation 7 of June 6, 1905, issued by the Secretary of the Interior, which successful contestant of homestead entry on land withdrawn as susceptible of irrigation might have had, was lost by promulgation of regulation 6 of January 19, 1909, as land before termination of contest or entry by contestant was withdrawn for irrigation works. *Edwards v. Bodkin,* 249 Fed. 562, 161 C.C.A. 488 (Cal. 1918), overruling 42 L.D. 172; affirmed 267 Fed. 1004 (D. Cal. 1919), affirmed 265 Fed. 621 (9th Cir. 1920), affirmed 255 U.S. 221 (1921).

Where it did not appear that a contest was duly instituted, so as to give the land office jurisdiction to determine rights to the land, there being no question of fraud on the Government, the decision of the land office as to rights to arid land withdrawn after entry under this section, but later released, is not binding. *Edwards v. Bodkin,* 267 Fed. 1004 (D. Cal. 1919), affirmed 265 Fed. 621, affirmed 255 U.S. 221.

Where land embraced in a homestead entry was withdrawn for use in connection with a reclamation project pending a contest which resulted in cancellation of the entry, the successful contestant upon restoration of the land is entitled to a period of 30 days from the date of such restoration within which to exercise his preference right to entry. *Beach v. Hanson,* 40 L.D. 607 (1912); *Wright v. Francis,* et al., 36 L.D. 499 (1908).

A successful contestant cannot be permitted to make entry in exercise of his preference right while the lands he seeks to enter are embraced in a first form withdrawal under the Reclamation Act; but under the regulations of August 24, 1912, 41 L.D. 171, and September 4, 1912, 41 L.D. 421, he may exercise that right at any time within 30 days from notice that the lands involved have been released from withdrawal and made subject to entry. *John T. Slaton,* 43 L.D. 212 (1914).

44. —Desert land entries

In view of this section, section 5 of the Act of June 27, 1906, as amended, is applicable to a homestead entry, and the failure of an entryman on arid lands withdrawn under this section to continuously reside or cultivate the same cannot, the lands being later released, be deemed an abandonment. *Edwards v. Bodkin,* 267 Fed. 1004 (D. Cal. 1919), affirmed 265 Fed. 621, affirmed 255 U.S. 221.

In action to recover real property and quiet title, defendant holding possession of Government land and making improvements under application for desert land entry during pendency of order withdrawing land from entry under this section and at and after time of revocation of such order, was entitled to land as against patentee whose selection thereof in lieu of school land under Act of May 2, 1914, c. 75, 38 Stat. 372, was approved at time of revocation of order,

as defendant in possession and making improvements became rightful occupant when land was thrown open to entry. *Capron v. Van Horn,* 258 Pac. 77, 201 Cal. 486 (1927).

45. —Second withdrawal

All entries of lands withdrawn under the Act are subject to the conditions imposed by this section, and a revocation of the withdrawal operates to remove those conditions and leaves the entries in the same situation as entries made prior to the withdrawal, and such conditions cannot, by force of a second withdrawal, be reimposed upon such of the entries made during the period of the first withdrawal as had not been perfected at the date of the second withdrawal. Op. Asst. Atty. Gen., 34 L.D. 445 (1906).

II. RECLAMATION ENTRIES

51. Reclamation entries—Generally

Congress, in establishing a limitation on the size of entries on public lands under section 3 of the Reclamation Act of 1902, and on the maximum acreage for which a water-right could be acquired under section 5 of that Act, had as its purpose to provide homes on the arid lands of the West, the prevention of land monopoly, and the avoidance of land speculation. Solicitor Barry Opinion, 68 I.D. 372, 378 (1961), in re proposed repayment contracts for Kings and Kern River projects.

52. —Homestead laws, generally

In the withdrawal of lands under the second form there was an exception in favor of homestead; that is to say, such lands were not withdrawn from public entry under the homestead laws, but were continued to be open to such entry, "subject to all the provisions, limitations, charges, terms, and conditions" of the Act. *Edwards v. Bodkin,* 249 Fed. 562 (1918); affirmed *Edwards v. Bodkin* 267 Fed. 1004 (D.C. Cal. 1919); decree affirmed, *Bodkin v. Edwards,* 265 Fed. 621 (C.C.A. 1920); decree affirmed, 255 U.S. 221 (1921).

Although an entry is made under the provisions of the Reclamation Act of 1902, it is subject to the same requirements as entries made under the homestead laws. *Daniel H. Simkins,* A–26274 (March 11, 1952).

Entry of lands within a reclamation project can be initiated by settlement. In section 3 of the Reclamation Act the word "only," in the provision that "public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws," applies to and qualifies the clause "under the provisions of the homestead law." *Chapman v. Pervier,* 46 L.D. 113 (1917).

A homestead entry of a farm unit within a reclamation project, regardless of the area embraced therein, is the equivalent of a homestead entry for 160 acres outside of a project; but in fixing the area that should be charged against the entryman by reason of such entry, under the provision in the Act of August 30, 1890, 26 Stat. 371, that not more than 320 acres in the aggregate may be acquired by any one person under the agricultural public-land laws, the reclamation entry should be taken into account at its actual area and not charged as 160 acres. *Henry C. Taylor,* 42 L.D. 319 (1913).

Entrymen on lands expected to be irrigated from a reclamation project must comply with all requirements of the homestead laws even though it is impossible to cultivate the land without irrigation from the project. Instructions, 32 L.D. 633 (1904); *Jacob Fist,* 33 L.D. 257 (1904).

A settler on unsurveyed land in a school section who after survey and after withdrawal of the land under the Reclamation Act as susceptible of reclamation under an irrigation project was permitted to make entry for the full area of 160 acres, acquires rights by such settlement and entry which bar the attachment of any rights to the land on behalf of the State under its school grant. He must, however, conform his entry to a farm unit. *Sarah E. Allen,* 44 L.D. 331 (1915), modifying *Sarah E. Allen,* 40 L.D. 586 (1912) and *William Boyle,* 38 L.D. 603 (1910).

A homesteader whose entry is within the irrigable area of an irrigation project, but not subject to the restrictions, limitations, and conditions of the Act, cannot under the law, prior to the acquisition of title to the land, enter into an agreement to convey to a water users' association any portion of the land embraced in his entry, to be held in trust and sold for the benefit of the homesteader to persons competent to make entry of such lands. Op. Asst. Atty. Gen., 34 L.D. 532 (1906).

53. —Residence

Temporary withdrawal order does not suspend the requirements as to residence and irrigation until the lands are restored to entry, particularly where the Department notifies entrymen that it does not so construe the withdrawal. *Bowen v. Hickey,* 200 Pac. 46, 53 Cal. App. 250 (1921), cert. denied, 257 U.S. 656 (1921).

A reclamation homestead entry may be canceled where it is shown that the statutory requirement of the homestead laws with respect to the maintenance of residence has

not been met. *Kind v. Selstad,* 60 I.D. 382 (1949).

A homestead entry is subject to cancellation where the entryman has not resided upon the entry for the minimum length of time required by the homestead law. Visits of a transitory and temporary character to a homestead entry by the entryman are not sufficient to constitute actual residence. *United States v. Jesse J. Shaw,* A–26247 (December 29, 1951).

The requirement of the homestead law that the entryman must establish residence on his entry within a maximum period of 12 months from the allowance of his entry is not satisfied by clearing and leveling the land and cultivating it, where the entryman has lived with his family in rented premises in the vicinity of the entry and has never eaten, slept, or kept any possessions on the entry. *Boyd L. Hulse v. William H. Griggs,* A–28288, 67 I.D. 212 (1960).

Where an entryman fails to establish residence on his entry within 12 months from the allowance of his entry, the entry must be canceled. *Boyd L. Hulse v. William H. Griggs,* A–28288, 67 I.D. 212 (1960).

Where an entryman spent most of his waking hours upon the homestead, and had a habitable house thereon in which he ate some of his meals, took daytime naps, and entertained visitors, but slept every night in his son's home two miles from the homestead, he was not actually residing upon the homestead within the meaning of the homestead laws. *Daniel H. Simkins,* A–26274 (March 11, 1962).

54. —Preference right of entry

A successful contestant in exercising his preference right of entry upon lands within a reclamation project is limited to one farm unit, although such unit may embrace less than the area covered by the entry he contested. *Joseph F. Gladieux,* 41 L.D. 286 (1912).

Lands subject to entry within reclamation projects are no exception to the rule of law that an outstanding preference right of entry of certain lands is not, of itself, a bar to settlement thereupon, the settlement being subject, however, to the preference right if exercised. *Chapman v. Pervier,* 46 L.D. 113 (1917).

55. —Additional entries

The right of additional homestead entry granted by section 6 of the Act of March 2, 1889, 25 Stat. 854, cannot be exercised upon lands within a reclamation project. *Gjerluf Hanson,* 40 L.D. 234 (1911).

An entry of lands subject to the provisions of the Reclamation Act will not be allowed as additional to a prior entry subject only to the provisions of the general homestead law. *Charles O. Hanna,* 36 L.D. 449 (1908).

A person who has made homestead entry for any area within a reclamation project cannot make an additional entry for lands outside a project. *Bert Scott,* 48 L.D. 85, 87 (1921); see also 48 L.D. 113.

56. —Relinquishment of entry

An applicant who has been granted a water right in connection with a reclamation homestead application for land within a petroleum reserve is entitled, upon withdrawal of the application rather than accept a surface patent, to repayment of the water charges, where he had no knowledge of the petroleum withdrawal and the public notice pursuant to which he made payment failed to state that any of the land was within a reserve. *Dorsey L. Rouse,* 50 L.D. 379 (1924).

57. —Desert land entry

A desert entryman whose land is included within a reclamation project may elect to proceed with the reclamation thereof on his own account, and thus acquire title to all, or so much of, the land included within his entry as he can secure water to irrigate or accept the conditions of the Reclamation Act and acquire title thereunder to 160 acres; but he cannot avail himself of both the reclamation project and other means of reclamation and thus acquire title to more than 160 acres of land. *Robert J. Slater,* 39 L.D. 380 (1910).

58. —Farm units and area of entry

The Secretary of the Interior is empowered to fix the limit of area for each homestead entry under the same project according to the quality and character of the land with reference to its productive value, whether the areas of the entries are uniform or not. Instructions, 32 L.D. 237 (1903).

Every entry of lands within the limits of a withdrawal under this Act is subject to reduction to a farm as thereafter established by the Secretary of the Interior, and improvements placed upon the different subdivisions by the entryman prior to such reduction are at his risk. *Jerome M. Higman,* 37 L.D. 718 (1909).

Rule applied to reclamation homestead entries coming within the provisions of the Reclamation Act, that when the excess area in an entry above 160 acres is less than the deficiency would be if the smallest subdivision were excluded, it may be included in the entry; where it is greater it must be excluded. General Land Office Instructions, 38 L.D. 513 (1910).

Where a portion of a homestead entry made subject to the provisions of the Reclamation Act is subsequently eliminated from the project, and the portion remaining within the project is designated as a farm unit, the entryman may retain either the farm unit or the portion lying without the limits of the project, at his election, and the entry will be canceled as to the remainder. In view of the equities in this particular case, direction is given that if the entryman so desires the portion of the entry eliminated from the project may be again brought thereunder and added to the farm unit with a view to permitting him to complete entry for the entire tract. *Laurel L. Shell,* 39 L.D. 502 (1911).

A successful contestant in exercising his preference right of entry upon lands within a reclamation project is limited to one farm unit, although such unit may embrace less than the area covered by the entry he contested. *Joseph F. Gladieux,* 41 L.D. 286 (1912).

Settlement upon any portion of a farm unit entitles the settler to claim, by virtue of such settlement, only lands contained in that farm unit. *McDonald* v. *Rizor,* 42 L.D. 554 (1913).

Where an entryman of lands within a reclamation project fails, after notice, to conform his entry to an established farm unit, the Secretary of the Interior has the power to so conform the entry. *Mangus Mickelson,* 43 L.D. 210 (1914).

Where a farm unit which has been surveyed without segregation of a railroad right-of-way contains lands on both sides thereof, disposition of such unit under the reclamation homestead act will be made in accordance with the survey without any deduction from the purchase price as to diminution in area caused by the right-of-way, but the water charges will be based on the irrigable area only. *James A. Power, et al.,* 50 L.D. 392 (1924).

Under the Act of June 25, 1910, as subsequently amended, lands reserved for irrigation purposes are not subject to settlement or entry until the Secretary of the Interior shall have established the unit of acreage per entry and announced that water is ready to be delivered, and no exception to the rule can be made in favor of an applicant who seeks to make an additional entry of such lands in the exercise of a preference right acquired by contest. The prior holding in *Henry W. Williamson,* 38 L.D. 233 (1909), that a person holding an original homestead entry for less than 160 acres could be permitted to make additional homestead entry for land embraced in a second-form withdrawal where farm units had not been established is no longer applicable under the Act of June 25, 1910. *Bert Scott,* 48 L.D. 85 (1921); see also 48 L.D. 113.

59. —Entryman's interest

Upon the death of a homesteader, having an entry within an irrigation project, leaving a widow, and only minor heirs, his right may, under section 2292, Revised Statutes, be sold for the benefit of such heirs. If in such case the land has been subdivided into farm units, the purchaser takes title to the particular unit to which the entry has been limited; but if subdivision has not been made, he will acquire an interest in only the land which would have been allotted to the entryman as his farm unit; in either case taking subject to the payment of the charges authorized by the Reclamation Act and regulations thereunder and free from all requirements as to residence and cultivation. *Heirs of Frederic C. De Long,* 36 L.D. 332 (1908).

A homestead entry, within a reclamation project, upon which the ordinary requirements of the homestead laws have been completed, is a property subject to mortgage which cannot be defeated by acts of the entryman or his assignee, and such entry cannot be cancelled upon contest in derogation of the right of the mortgagee to comply with the further provisions of the law looking to completion of title. *Watson v. Barney, et al,* 48 L.D. 325 (1921).

Issuance of a patent to a reclamation homestead entryman is mandatory (assuming no pending contest) under the proviso to section 7 of the Act of March 3, 1891, 26 Stat. 1095, two years after he has completed all requirements for entry, that is, conforms his entry to a farm unit, shows reclamation of one-half the irrigable area of the unit, assumes the payment of a water right, pays all the water-right charges which have accrued, makes proof of these facts, and pays the required final commissions, for which receipt issues. Instructions, 50 L.D. 506 (1924).

60. —Rights of way

Homesteaders without patents, but lawfully in possession of lands withdrawn for irrigation under a reclamation project, may grant rights of way over their settlements to a railroad company, and approval of the Secretary of the Interior is not required. *Minidoka & S.W.R.R. Co. v. United States,* 235 U.S. 211 (1914), reversing 190 Fed. 491 and affirming 176 Fed. 762.

Sec. 4. [Contracts for construction—Public notice of irrigable lands, limit of area, charges per acre, and method of payment.]—Upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work. (32 Stat. 389; Act of May 10, 1956, 70 Stat. 151; 43 U.S.C. §§ 419, 461)

EXPLANATORY NOTES

Codification. All of the first sentence relating to contracts for construction and public notice of charges, together with the proviso providing for an eight-hour day, is codified as section 419, title 43 of the U.S. Code, with the omission of the phrase "in the reclamation fund", in reference to the availability of funds, and the phrase "not exceeding ten", in reference to the number of installments. The substance of the second sentence, relating to the basis for establishing the amount of the charges, is codified as section 461.

1956 Amendment. The Act of May 10, 1956, 70 Stat. 151, eliminated the words formerly at the end of the proviso "and no Mongolian labor shall be employed thereon."

Supplementary Provisions: Time and Manner of Repayment. The Reclamation Extension Act of 1914 extended the repayment period from ten to twenty years, payable in one initial installment and fifteen additional installments beginning with the sixth year. Section 46 of the Omnibus Adjustment Act of 1926 substituted repayment by an irrigation district for payment by individual water right applicants, and extended the repayment period to forty years. Section 9(d) of the Reclamation Project Act of 1939 authorizes the Secretary to establish special rates for an initial development period not to exceed ten years before the regular forty-year repayment period commences, and section 9(e) authorizes the execution of a water service contract in lieu of the forty-year repayment contract. Additionally, a large number of general and special acts authorize a moratorium on annual payments, amendment of existing contracts, extension of the repayment period, waiver of certain charges, variations in the amount of each annual payment, or other forms of relief.

Supplementary Provision: Presidential Approval of New Projects. Section 4 of the Act of June 25, 1910, 36 Stat. 836, provides that no new reclamation projects may be started thereafter unless approved by direct order of the President. The Act appears herein in chronological order.

Supplementary Provisions: Amount of Construction Costs Repaid by Irrigators. The original concept of the Reclamation Act was that the projects constructed thereunder would serve the single purpose of irrigation, and the second sentence of section 4 therefore contemplates that the irrigators would repay all of the construction costs. As the program evolved, however, it was recognized that other purposes were also served, and that construction costs would be allocated to these other purposes. This principle was formally recognized as general law in sections 9(a) and 9(b) of the Reclamation Project Act of 1939.

Supplementary Provision: Withdrawal of Public Notice. The Act of February 13,

1911, authorizes the Secretary of the Interior to withdraw any public notice issued theretofore and to modify any water right application or contract made on the basis thereof. The Act appears herein in chronological order.

Editor's Note, Annotations. Annotations of opinions are not included that deal with the large mass of litigation involving contract disputes or matters that fall under the traditional subject of Government procurement policies and contracts. Also omitted are opinions dealing with the eight-hour work day, as this subject is covered by other statutes of general application to all Government agencies.

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1. Construction of projects—Generally

Irrigation works for the reclamation of arid and semi-arid lands perfectly and comprehensively fill the idea of "public works of the United States." 26 Op. Atty. Gen. 64 (1906).

This Act contemplates the irrigation of private lands as well as lands belonging to the Government, and the fact that a scheme contemplates the irrigation of private as well as a large tract of Government land does not render the project illegal, so as to prevent the condemnation of land necessary to carry it out. *Burley v. United States,* 179 Fed. 1, 102 C.C.A. 429 (Ida. 1910), affirming 172 Fed. 615.

Under the authority conferred upon the Secretary by the Act he may, in his discretion, enter into contracts for the construction of irrigation works or construct such works by labor employed and operated under the superintendence and direction of Government officials. Op. Asst. Atty. Gen., 34 L.D. 567 (1906).

The contract with the Orchard Construction Company, owners of the stock of the Grand Mesas Company, which had certain rights of irrigation in the Grand Valley, whereby the Government abandoned a certain part of its project and permitted the company to construct a private irrigation ditch through an area south of the Grand River, the company transferring one-half of its stock to the United States to secure it against any claim on the part of the company or its associates for an excessive use of the waters of Grand River, the stock to be returned if the United States did not proceed with its Grand Valley project, may be regarded as void, and the stock should be returned. 27 Op. Atty. Gen. 360 (1909).

2. —Discretion of Secretary

The Secretary of the Interior is not required to proceed with the construction of the Baker project, Oregon, even though Congress has appropriated funds therefor, if he is unable to find that the project is feasible and that the costs will be repaid to the United States, as required by subsection B, section 4, of the Act of December 5, 1924, 43 Stat. 702, and section 4 of the Act of June 17, 1902, 32 Stat. 389, and unless a contract has been executed and confirmed as required by the Act of May 10, 1926, 44 Stat. 479. 35 Op. Atty. Gen. 125 (1926); 34 Op. Atty. Gen. 545 (1925). See also Solicitor's Opinions dated June 11, 1926, and July 20, 1925.

3. —Availability of funds

The National Irrigation Act of June 17 1902, gives the Secretary of the Interior authority to let contracts for the construction of reclamation works only when "the necessary funds * * * are available in the reclamation fund," and if these funds are not available and sufficient, no such authority exists. 27 Op. Atty. Gen. 591 (1909).

Regulations authorizing the engineers of the Reclamation Service to enter into contracts with water users or water users' asso

ciations, or with representative committees of the settlers to advance moneys and perform work in the construction of irrigation works, certificates to be issued therefor, redeemable at face value in part or full payment of the charges against the lands of the holders of the certificates, were unauthorized by Act of June 17, 1902, and the Secretary of the Interior had no authority to enter into such contracts, and certificates so issued cannot be used by the original payee or transferee as a discharge pro tanto of his indebtedness upon the land, but the certificates are evidence of work performed, and the work may be paid for, as upon a quantum meruit, if the money is available in the reclamation fund. 27 Op. Atty. Gen. 360 (1909).

The objection raised in 27 Op. Atty. Gen. 360, was not that the money subscribed by the water users' association was not in the reclamation fund, but that the fund contemplated by the Act of June 17, 1902, was to be created from the proceeds of the sale of Government lands, and there was no provision for augmenting it by private enterprise, and that the power of the Secretary of the Interior to let contracts for reclamation projects was specifically restricted to the amount of money available in the reclamation fund as constituted by law. 27 Op. Atty. Gen. 591 (1909).

There is no statute authorizing the Secretary of the Interior to enter into contracts contemplating a cooperative plan whereby the United States enters into an agreement with a water users' association, by which the association undertakes to perform certain work within certain maximum prices, the work to become the property of the United States upon acceptance, payment therefor to be made by the association in certificates of work performed, which certificates are to be accepted by the United States in reduction of charges against particular tracts, as an equitable apportionment thereof. 27 Op. Atty. Gen. 591 (1909).

Where necessary canals, laterals, and structures, properly a part of a Federal irrigation system, cannot be constructed by the United States because funds are not available, a landowner may advance the needed moneys to the United States, and he may be later reimbursed, without interest, by credits upon his water charges as they become due. Departmental decision, October 8, 1919, Milk River project.

4. —Lands, exclusion of

Under this section, articles of incorporation of Salt River Valley Water Users' Association and its contract with the United States in construction of the Salt River project, Secretary of the Interior had authority to exclude lands lying within reclamation district and to cancel stock of owners thereof in the association, on determining that area of lands included in district was greater than could be watered from supply stored and developed by works constructed or to be constructed. *Salt River Valley Water Users' Ass'n v. Spicer,* 236 Pac. 728, 28 Ariz. 296 (1925).

Determination of the Secretary of the Interior, in approving survey board's exclusion of certain lands within Salt River Reclamation District, after determining that area of land included in District was greater than could be watered from supply stored and developed by works constructed or to be constructed, was not a ministerial act, but exercise of discretion, and not subject to review by the courts. *Ibid.*

Secretary of the Interior's approval of survey board's exclusion of certain lands within Salt River Reclamation District, whose owners had subscribed for stock in association, formed to co-operate with United States in construction of the project, and who had paid all assessments levied, until their lands were excluded, after determining that area of land included in District was greater than could be watered from supply stored and developed by works then constructed or to be constructed, was valid, since, under association's articles of incorporation and its contract with the United States government, discretion of Secretary in excluding land was to be based on water to be impounded and raised by works specifically built or definitely determined to be built at time of his action. *Ibid.*

5. —Status pending completion

During the construction of a Government project the temporary use of the canals of an irrigation system purchased by the Government for conveying to lands water that would otherwise be allowed to go to waste, is not incompatible with the purpose, but is directly in pursuance of the object for which the property was acquired. Departmental decision, December 6, 1906.

The Reclamation Service cannot, while construction of a project is in progress, and prior to the laying out of its canals, undertake to reexamine, at the instance of individual claimants, particular tracts falling within the project to ascertain whether or not such tracts are capable of service from its projected canals. *Lewis Wilson,* 42 L.D. 8 (1913). See also 48 L.D. 153, amending paragraph 13 of General Reclamation Circular of May 18, 1916.

Contracts by a water users' association to receive additional subscriptions to stock and to grant water rights were not unauthorized,

on the ground that the reclamation project had been completed, and that the lands proposed to be taken into the project were not included in the area fixed and limited by the Secretary of the Interior, under this section, where the capacity of the project to supply water for irrigation had been substantially enlarged, and such contracts had been approved by the Secretary of the Interior under this section. *Bethune v. Salt River Valley Water Users' Ass'n.*, 227 Pac. 989, 26 Ariz. 525 (1924).

11. Water service—Generally

The provision in section 5 of the Reclamation Act of 1902 that "no right to the use of water for land in private ownership shall be sold" for more than 160 acres means that the use of project facilities shall not be made available to a single owner for service to more than 160 acres. Sections 4 and 5 of the 1902 Act, read together, indicate that the "sale" referred to is not merely a commercial transaction, but is the contract by which the government secures repayment and the water user obtains benefits resulting from construction of the federal project. Solicitor Barry Opinion, 71 I.D. 496, 501 (1964), in re application of excess land laws to private lands in Imperial Irrigation District.

It is not optional with an entryman of lands within a reclamation project to take or refuse water service from the project; but he is compelled to take the water service and to pay the charges fixed therefor. *Mangus Mickelson,* 43 L.D. 210 (1914).

Agreements for the purchase of lands, for water rentals, for conveyance of water rights, and similar instruments, contractual in form, relating to the adjustment of vested water rights, executed in behalf of the United States by some officer of the Reclamation Service for purposes within the purview of Act of June 17, 1902, are unlawful when a member of Congress is a party to or interested therein. 26 Op.Atty. Gen. 537 (1908).

12. —Corporations

No applications will be received from corporations on reclamation projects. That Congress did not intend that the reclaimed lands upon which the Government is expending the money of all the people should be the subject of corporate contract is conclusively established by the fact that the Secretary is authorized to fix the farm unit on the basis of the amount of land that will support a family. These lands are to be the homes of families. But existing corporations to which water rights have heretofore been granted should be permitted to continue without interference, and in view of past departmental decisions applications by corporations pending at this date may be allowed. Departmental decision, July 11, 1913, 42 L.D. 250. *Pleasant Valley Farm Co.,* 42 L.D. 253 (1913).

Religious, educational, charitable, and eleemosynary corporations are excepted from the decision of July 11, 1913. Departmental decision, December 5, 1916.

If an individual owns lands for which he makes water-right application duly accepted by the United States and the land is later in good faith transferred to a corporation, the corporate owner is entitled thereafter to the same treatment as other landowners on a project. Departmental decision, December 6, 1916, in re *The Santaquin Lime and Quarry Co.,* Truckee-Carson.

There is no statute which prohibits a corporation from taking a reclamation entry by assignment and there would be no objection to accepting the water-right application of the corporation in such a case where its intention is to protect its security in a loan transaction and not to hold and cultivate the land in competition with families. *Great Western Insurance Co.,* A–16335 (February 8, 1932).

13. —States and other public bodies

Agencies of a State government are entitled to become takers of water under a reclamation project for the lands benefited. Departmental decision, May 12, 1909.

An incorporated town organized as a city of the sixth class under the laws of the State of California (General Laws, 1909, ch. 7, p. 843) is entitled to make water-right application on the usual form to secure water from a Federal reclamation project for irrigating and beautifying a small tract of land which it owns, located outside the city limits and occupied by the septic tanks of the municipality. Departmental decision, July 13, 1917, Orland.

14. —Servicemen

The status of one qualified to make water-right application under the reclamation act of June 17, 1902 (32 Stat. 388), is not changed by a temporary service away from home in the Army, Navy, or Marine Corps of the United States, and a water-right application executed by any such person at any point where he may be engaged in the line of duty may be received and approved if otherwise found acceptable. Departmental decision, December 22, 1917, C.L. 720.

15. —Water users' association

Where defendants over whose land certain irrigation ditches belonging to a government irrigation project were located

became members of a water users' association which owned the project prior to its incorporation in the government work, and one of the by-laws of the association provided that such rules and regulations as the Secretary of the Interior might promulgate relating to the administration and use of the water should be binding on the stockholders of the association, and the Secretary put into effect certain rules prohibiting water users from cutting the banks of any canals or laterals and from taking water therefrom except at places designated by the government, defendants were estopped to claim the right to break down the banks of a lateral ditch and take water therefrom at a point not so designated, on the ground that, because they owned the fee in the soil of the ditch, they were entitled to take water at whatever point they desired. *United States v. Bunting,* 206 Fed. 341 (D. Ore. 1913).

Where a water users' association organized for the purpose of guaranteeing payment of the construction cost of a Federal irrigation project, having executed a contract with the United States for that purpose, makes assessments against its members to raise a fund with which to conduct litigation to avoid paying project costs, the United States will not assist the association in collecting such assessment by requiring prospective water users to show as a condition precedent to acceptance of water right applications that such assessments have been paid. Departmental decision, May 4, 1918, Boise.

Subscriptions to water users' association stock were construed in *Michaelson v. Miller,* 26 P. 2d 378 (Idaho 1933) which outlines the history of the Payette-Boise Water Users' Association, Boise project. Michaelson was the receiver of the association and brought actions against various stockholders of the association to foreclose liens created by assessments under stock subscription contracts to meet corporate expenses (not indebtedness to the United States). The defendants had refused to sign the "court form" of water-right application contract prescribed as a result of *Payette-Boise Water Users' Assn. v. Cole,* 263 Fed. 734 (D. Idaho 1919) and alleged that by so doing they had lost their status as stockholders. This contention was not sustained, and the liens were enforced, together with deficiency judgments where the land failed to sell for sufficient to pay the assessments.

16. —Desert land entries

Lands held by virtue of a desert-land entry are held in private ownership within the meaning of the act, and the entryman or his assignee is entitled to the same rights and privileges and is subject to the same conditions and limitations, so far as right to the use of water is concerned, as any other owner of lands within the irrigable area of an irrigation project. Instructions, July 14, 1905, 34 L.D. 29. [See Act of June 27, 1906, 34 Stat. 519.]

17. —Equitable owner of land

Persons holding contracts to purchase lands from a State, on deferred payments, no conveyance of title to be made to the purchasers until full payment, are entitled, if not in default and their contracts are in good standing, to subscribe for and purchase water rights under the reclamation act for irrigation of such lands, subject to the provisions and limitations of that act. Instructions, September 11, 1911, 40 L.D. 270.

18. —Carey Act lands

Individual owners of lands acquired under the provisions of the Carey Act may be supplied with such additional water from reservoirs constructed under the reclamation act as may be necessary to fully develop and reclaim the irrigable portions of such lands, subject to all the conditions governing the right to the use of water under any particular project. Op. Asst. Atty. Gen., 35 L.D. 222 (1906).

19. —Conditions

The provision in the form for water-right application by private landowner requiring applicant to agree to grant and convey to the United States, or its successors, all necessary rights of way for ditches, canals, etc., for or in connection with the project, is a proper requirement warranted by the spirit and intent of the reclamation act, and an applicant for water right will be required to conform thereto as a condition to allowance of his application. *C. M. Kirkpatrick,* 42 L.D. 547 (1913).

The provision in the form of water-right application by private landowner requiring him to bind himself not to convey the land voluntarily to any person not qualified under the reclamation law to purchase a water right, upon condition that the application and any "freehold interest," sought to be conveyed shall be subject to forfeiture, is a reasonable and proper requirement, and an application from which such provision has been eliminated will not be accepted. *Ibid.*

The provision in the form of water-right application by private landowner requiring applicant to agree that the United States, or its successors, shall have full control over all ditches, gates, or other structures owned or controlled by applicant and which are necessary for the delivery of water, is in accordance with departmental regulations, and being a necessary incident to the proper

management and operation of the project by the United States or its successors, is impliedly authorized by the reclamation act, and a water-right applicant will be required to conform thereto. *Ibid.*

Whatever may be the extent of the discretion of the Secretary of the Interior in the case of a reclamation project, where the charge for water and conditions of purchase are announced in advance of construction as required by statute, he could not exercise unlimited power to determine the conditions on which water would be supplied, where the project was constructed under the mutual understanding that landowners might procure water by paying their ratable proportion of the cost of construction and submitting to other equal and reasonable conditions. *Payette-Boise Water Users' Ass'n v. Cole,* 263 F. 734. (D. Idaho 1919).

20. —Quantity of water

An application for water for land in a reclamation project, providing that the measure of the water right was that quantity of water which should be beneficially used for irrigation, not exceeding the share proportionate to irrigable acreage of the water available as determined by the project manager or other proper officer during the irrigation season for the irrigation of lands under the land unit, did not authorize the project manager or other officer to decide whether a landowner needed water, but only to determine the amount of water actually available, but was too indefinite, and landowners could not be required to execute it as a condition of obtaining water. *Payette-Boise Water Users' Association v. Cole,* 263 Fed. 734 (D. Idaho 1919).

21. —Reinstatement

Where a water-right application for land held in private ownership has been canceled for default in payment of building, operation, and maintenance charges, such application may be reinstated upon full payment of all accrued charges. Departmental decision, April 3, 1916, 45 L.D. 23.

22. —Rentals of water

Water in irrigation canals constructed and operated under the reclamation act, which has not become appurtenant to any land and is not needed for irrigation, may be temporarily disposed of by lease, in the discretion of the Secretary of the Interior, the proceeds to become a part of the reclamation fund. *Alhambra Brick & Tile Co.,* 40 L.D. 573 (1912).

As an emergency measure to save growing crops, the director is authorized to supply squatters upon withdrawn lands under the reclamation projects with water on a rental basis, pending decision as to their rights to the land, subject to the provision that water shall be furnished only to such settlers as file a certain designated application therefor. Department decision, May 27, 1912.

Lands too alkaline to produce profitable crops may be supplied with water for a nominal rental, in order to encourage washing the alkali from the soil. Departmental decision, March 29, 1913, C.L. 88.

26. Public notice—Generally

The requirement of this section, that the cost of a project shall be estimated and apportioned before construction, may be waived by settlers and the Secretary of the Interior, and was waived where there was no formal compliance with such requirement and all parties understood that ultimately the settlers would reimburse the government for its actual and necessary outlay. *Payette-Boise Water Users' Assn. v. Cole,* 263 F. 734 (D. Idaho 1919).

The determination by the Secretary of the Interior of the practicability of a project and the making of the construction contracts are conditions precedent to the estimate of cost and the public notice, under this section. *Yuma County Water Users' Assn. v. Schlecht,* 262 U.S. 138 (1923).

Though there was a substantial and material difference between preliminary engineering estimates of the cost of an irrigation project and a later estimate, the courts will not interfere, in the absence of some substantial showing that the action of the Secretary of the Interior in publishing notice of charges based on such original estimates was fraudulent or arbitrary or so erroneous as to justify an inference of illegality or wrongdoing, especially where the increased cost was due to unexpected physical difficulties, higher wages, change of plans, increased mileage of canals, etc. *Yuma County Water Users' Assn. v. Schlecht,* 275 Fed. 885 (9th Cir. 1921), affirmed 262 U.S. 138 (1923).

A public notice by the Secretary of the Interior, specifying lands for which water would be furnished under an irrigation project, the classes of charges therefor, and the construction charge as $75 per acre of irrigable land, payable in installments as enumerated, was in accord with this section, authorizing the Secretary to give public notice of the number of annual installments, to be determined with a view of returning to the reclamation fund the "estimated cost" of the project, by which is meant, not the actual, exact final sums paid for construction, but such sums as it is believed after careful computation will cover the expenses directly and fairly connected

with the construction of the project. *Yuma County Water Users' Assn. v. Schlecht,* 275 Fed. 885 (9th Cir. 1921), affirmed 262 U.S. 138 (1923).

The Secretary of the Interior has no general statutory authority to suspend, even temporarily, public notices issued by him pursuant to section 4 of the Act of June 17, 1902, of lands irrigable under reclamation projects, nor does he possess supervisory power to do so in the absence of a specific statute authorizing it. Shoshone Irrigation project, 50 L.D. 223 (1923). [But see Act of February 13, 1911, 36 Stat. 902, authorizing the Secretary of the Interior to withdraw public notices issued under section 4 of the Reclamation Act.]

Contracts by water users' association to receive additional subscriptions to stock and to grant water rights were not unauthorized, on the ground that the reclamation project had been completed, and that the lands proposed to be taken into the project were not included in the area fixed and limited by the Secretary of the Interior, under this section, where the capacity of the project to supply water for irrigation had been substantially enlarged, and such contracts had been approved by the Secretary of the Interior under the Act of February 13, 1911. *Bethune v. Salt River Valley Water Users' Assn.,* 227 P. 989, 26 Ariz. 525 (1924).

Under date of July 31, 1929, the department approved a recommendation of the commissioner, Bureau of Reclamation, to the effect that a new entryman taking up land under the Belle Fourche project where a prior entry has been canceled after payment of only one construction charge installment, would be required at the time of making entry to pay such first installment and the remaining installments would be collected by the irrigation district under its contract with the United States. This plan dispenses with a public notice in cases where a district has assumed the obligation of paying charges at fixed rates.

27. —What constitutes

This section contemplates a precise and formal public notice, stating the lands irrigable under a project, the limit of area for each entry, the charges per acre, the number of annual installments, and the time when payments shall commence. *Yuma County Water Users' Assn. v. Schlecht,* 262 U.S. 138 (1923).

Preliminary, tentative opinions of the cost of constructing projected irrigation works, expressed by government engineers and officials in official correspondence and in statements at a meeting of prospective water-users, do not constitute the estimate of cost, or the public notice, required by this section, and, though relied upon by the water-users in subjecting their lands to the project, do not bind or estop the government from afterwards fixing the construction charges against the lands pursuant to this section, in accordance with a higher estimate arrived at in the light of further investigation and experience. *Yuma County Water Users' Assn. v. Schlecht,* 262 U.S. 138 (1923).

Under this section, correspondence between the Secretary of the Interior and officials of the Reclamation Service relative to estimates of the cost prior to the date of a contract between the landowners and the United States, for the payment thereof could not be regarded as a public notice to the former, nor as binding on the Government. *Yuma County Water Users' Assn. v. Schlecht,* 275 Fed. 885, (9th Cir. 1921), affirmed 262 U.S. 138 (1923).

28. —When required

The time within which the notice may be given, after determination of the practicability of the project and the making of construction contracts, is left to the sound discretion of the Secretary; and he may delay the notice while the question of cost remains in doubt. *Yuma County Water Users' Assn. v. Schlecht,* 262 U.S. 138 (1923), affirming 275 Fed. 885 (9th Cir. 1921).

The time of giving public notice of charges under section 4 of the Reclamation Act after the letting of the contracts is left to the discretion of the Secretary of the Interior, and notice might reasonably be delayed until the completion of the project. Moreover, when a contract fixing the amount and terms of payment of construction costs is entered into with an irrigation district pursuant to the Act of May 15, 1922, there was no purpose to be served by issuing the public notice. *Lincoln Land Co. v. Goshen Irr. Dist.,* 42 Wyo. 229, 293 Pac. 373, 376, 378–79 (1930).

29. —Amendment of

Where after application for water rights for the irrigable area of a farm unit, under the terms and for the acreage fixed in the published notice, a second notice is given showing an increased irrigable area in the farm unit and fixing a different rate per acre, the applicant is entitled to complete payment for the area originally fixed at the rate specified in the first notice, but as to water right for the additional irrigable acreage shown by the second notice, he will be required to pay at the rate fixed in the latter notice. *Walter L. Minor,* 39 L.D. 351 (1910).

Upon the issuance of public notices pur-

suant to section 4 of the Reclamation Act of June 17, 1902, the construction charges specified in the notices become fixed charges against the lands, and the acceptance and approval of water-right applications in a sense create a contractual relation between the applicants and the United States for the payment of the charges by the water users and the furnishing of irrigation water by the Government that cannot be changed except with the consent of both parties. *Shoshone irrigation project,* 50 L.D. 223 (1923).

36. Charges—Generally

The Department of the Interior is without authority to charge interest on the return of costs allocated to irrigation because Congress has not specifically authorized such charge. Letter of Acting Commissioner Lineweaver to Mr. William A. Owen, February 12, 1952.

The Secretary of the Interior can only make such charges to reimburse reclamation fund for construction of a project as are provided for in this section. *Fox v. Ickes,* 137 F.2d 30, 78 U.S. App. D.C. 84 (1943), cert. denied 320 U.S. 792.

The practice of the department in fixing a definite charge per acre in each project to cover this cost of construction, and to assess annually a specific amount per acre for operation and maintenance, collecting the same from the landowners, is correct. 27 Op. Atty. Gen. 360 (1909).

Settlers on lands within an irrigation project, with the understanding that water shall be supplied to their lands and that the cost of the works will be assessed against them, are not concluded by the decision of the Secretary of the Interior as to what their interest in the works shall be nor as to what sum shall be assessed against their lands for cost of construction, but have rights which may be judicially determined. *Payette-Boise Water Users' Assn. v. Bond,* 269 F. 159 (D. Idaho 1920).

In decision A–32702, of September 14, 1935, the Comptroller General held that the reclamation fund could not be reimbursed for expenditures made over a period of prior years for surveys and investigations of the All-American canal, California, as the allotment for construction of this canal was secured under the N.I.R.A., an emergency relief measure to quickly increase employment, and that most of this preliminary work seemed to be general investigations chargeable only to the reclamation fund.

The revolving fund features of section 4 are not applicable to nonreimbursable funds expended in connection with a reclamation project (Deschutes project). Letter of Acting Attorney General to Secretary of the Interior, September 7, 1937.

In letter dated February 18, 1918, the United States Commissioner of Internal Revenue holds that payments covering the construction charges on Federal reclamation projects are not allowable deductions in income-tax returns as the water rights secured by the payment of such charges are perpetual in nature, and the amount so paid should be added to the capital investment in order to determine the gain or loss resulting from the transaction upon subsequent disposal of the land and water rights. As to the operation and maintenance charges the commissioner holds them to be an ordinary and necessary expense of doing business, and that the amounts so paid are deductible in the income-tax returns.

In case the actual cost of a reclamation project exceeds the estimated cost of construction, it is the duty of the Secretary of the Interior to revise the estimate and make the charges sufficient to reimburse the reclamation fund for the cost of construction. *Mangus Mickelsen,* 43 L.D. 210 (1914).

37. —Contracts

Where a reclamation project was constructed with the mutual understanding that settlers would reimburse the Government for the actual outlay, and contracts had been made to supply irrigation districts and others with water, settlers were entitled to some authoritative description of the property to which their rights related, and a definition of the extent of their interest in the project, before they could be required to pay and to have from an authoritative source and of record a declaration of the cost of the project and of the portion of which it was intended they should become the beneficial owners, and could be required to pay the cost only of such portion of the works, or such interest therein as was set apart for the use of their lands. *Payette-Boise Water Users' Assn. v. Cole,* 263 F. 734 (D. Idaho 1919).

Where instead of estimating and apportioning the cost of a reclamation project before construction, it was mutually understood that the settlers would reimburse the Government for the actual cost, they were chargeable with the actual cost only, and the Secretary of the Interior was without discretion in fixing the charge, the actual cost of the project being a matter for judicial investigation and determination. *Payette-Boise Water Users' Assn. v. Cole,* 263 F. 734 (D. Idaho 1919).

Under a contract by which the government took over the canal system of an irrigation company for the purpose of incorporating it in a larger government

project, and providing that "an equitable proportion of the cost of maintaining and operating the system of irrigation works which may be constructed by the United States on the south side of the Boise Valley, as may be determined by the Secretary of the Interior, shall be paid to the United States by the holders of said certificates of stock," the fact that during the construction of the government project the manager made charges for water furnished such stockholders on a different basis did not affect the right and duty of the Secretary, after completion of the project, to make the apportionment as expressly provided in the contract. *New York Canal Co. v. Bond,* 273 F. 825 (D. Idaho 1921).

Where a contract between a water users' association and the United States provides that the association will promptly collect or require payment for that part of the cost of a reclamation project which shall be apportioned by the Secretary of the Interior to its shareholders, and also that payments for the water rights will be made and enforced by proper means, the fact that the cost is greater than was estimated cannot be urged as a ground for equitable relief. *Yuma County Water Users' Assn. v. Schlecht,* 275 F. 885, (9th Cir. 1921), affirmed 262 U.S. 138 (1923).

38. —Increase

Under this section, the cost is to be estimated and apportioned before construction, and in case of settlement under such conditions the price cannot be later increased, though the published estimate is insufficient to cover the actual cost. *Payette-Boise Water Users' Assn. v. Cole,* 263 F. 734 (D. Idaho 1919).

Where the Secretary of the Interior in the exercise of his discretion withdrew certain lands from an irrigation project and confined it to the area described in the public notice to the landowners affected, the latter, who contracted to pay for that part of the cost which should be apportioned to them by the Secretary, could not restrain the local reclamation officers from turning off the water for failure to pay an assessment in excess of the original estimate and of the actual value of work to be constructed, on the ground the system was not completed when the suit was filed. *Yuma County Water Users' Assn. v. Schlecht,* 275 F. 885 (9th Cir. 1921), affirmed 262 U.S. 138 (1923).

Action to enjoin the Secretary of the Interior from carrying out his intention as expressed in notice, to make charge for water distributed to land which was over and above amount determined to be within obligations of contract signed by water users' predecessors in interest, was not rendered "moot" by Secretary's revocation of notice, where Secretary still intended to impose such charge. *Fox v. Ickes,* 137 F. 2d 30, 78 U.S. App. D.C. 84 (1943), cert. denied 320 U.S. 792.

Where a new reservoir was constructed in violation of the provisions of reclamation law regarding construction charges, water users were entitled to injunction restraining Secretary of the Interior from imposing rental charge on any water which Secretary determines might be used on plaintiff users' land, in order to pay construction costs in the reservoir system of the project above the construction charge authorizedly fixed. *Fox v. Ickes,* 137 F. 2d 30, 78 U.S. App. D.C. 84 (1943), cert. denied 320 U.S. 792.

39. —Items included

The United States may assess operation and maintenance charges against water users as well as construction charges. To hold otherwise would greatly deplete, if not entirely consume, the Reclamation Fund, thus diverting the proceeds of the public domain to the payment of local expenses. This interpretation of the Reclamation Act has been recognized by Congress. *Swigart v. Baker,* 229 U.S. 187 (1913).

The purpose of this Act is to encourage the settlement and cultivation of public lands, and it contemplates that such lands may be entered on as soon as the irrigation system is so far completed that water may be furnished thereon for irrigation purposes; and when the act empowers the Secretary of the Interior to fix and determine the charges against the land, it must have intended that he should cover the cost of maintenance and operation while in control of the United States as well as construction. *United States v. Cantrall,* 176 F. 949 (C.C. Ore. 1910).

The provision in forms for the water-right applications requiring payment by applicant of "betterment" or maintenance charges is a proper requirement under the reclamation laws, and the fact that at the time entry was made there was no specific mention of "betterment" charges in the water-right application forms then in use will not relieve the entryman from payment of betterment charges legally assessed against his land. *C. M. Kirkpatrick,* 42 L.D. 547 (1913).

The cost of drainage work done for the benefit of lands in the project, or to protect other lands from conditions resulting from the construction and operation of the project, was chargeable against the project

lands. *Payette-Boise Water Users' Assn. v. Cole,* 263 F. 734 (D. Idaho 1919).

While administrative expenses of the reclamation service, such as salaries of the administrative officers and of those who assisted them in the performance of administrative duties, are not chargeable as part of the cost of a project, the cost of services rendered to that particular project, such as the keeping of its accounts, preparation of engineering specifications, or purchasing and forwarding supplies, whether such services are rendered at the place of the project or elsewhere, or for such project alone or in connection with others, in such case prorative, is properly chargeable as a part of its cost. *Payette-Boise Water Users' Assn. v. Bond,* 269 F. 159 (D. Idaho 1920).

The full amount of the claim of a contractor on an irrigation project, which is being contested by the Government in the Court of Claims, cannot properly be charged to the settlers as a part of the cost of the project. "It is a matter of common knowledge that such claims are usually susceptible to compromise and adjustment, and if the settlers are to be charged with a specific amount, the best settlement possible should have been made. * * * If the reclamation officials and the plaintiff cannot agree as to the proper amount to be charged on account of the contingent liability, or if a settlement agreeable to all parties cannot be made with the claimants, the full claim should be permitted to stand as a charge only upon condition and with the understanding that, in case the Government is successful in defeating it, appropriate credit be given the settlers." *Payette-Boise Water Users' Assn. v. Bond,* 269 F. 159 (D. Idaho 1920).

40. —Apportionment

Where the irrigable area of a legal subdivision embraced in an entry within a reclamation project is shown on the duly approved farm-unit plat to be greater than the entire area of such legal subdivision shown on the prior township plat, applications for water rights and payments therefor should be made on the basis of the actual irrigable area, and not on the basis of the acreage shown on the township plat. *J. E. Enman,* 40 L.D. 600 (1912).

An applicant for water rights under a reclamation project is required to pay for water for the entire irrigable area of his entry as shown on the plat upon which the construction charges were apportioned; and where mistake in the plat is alleged as to the irrigable area of the entry, application for correction thereof should be made to the local officer of the Reclamation Service. *Williston Land Co.,* 39 L.D. 2 (1910). [But see Regulations for Minidoka project, approved March 6, 1916.]

No deduction from the irrigable area subject to water charges will be made on account of easements for highways or irrigating ditches. *Williston Land Co.,* 39 L.D. 2 (1910). [But see Reclamation Circular Letter No. 569, July 11, 1916.]

The Reclamation Act provides that the cost of the project shall be imposed upon the land benefited equitably, which is to say ratably. No authority exists in the Reclamation Act, either in express terms or by necessary implication, that some of the lands benefited might be required to contribute one sum and other lands a greater or less sum, for such rule of apportionment would be inequitable and not ratable. Op. Asst. Atty. Gen., October 25, 1910, *In re Prosser Falls L. & P. Co.* (Yakima); *Williston Land Co.,* 37 L.D. 428. [But see Op. Atty. Gen., May 1, 1911 (Lower Yellowstone), with accompanying papers, in effect to the contrary.]

Where landowners within a reclamation project outside of an irrigation district are charged $80 per acre, while those within the district are charged only $70, because of the possibility that all those outside the district will not take water, those paying such higher price are entitled to the additional service for which they pay, and if seven-eighths of the acreage takes water, they are entitled to the water rights for the entire acreage. *Payette-Boise Water Users' Assn. v. Cole,* 263 F. 734 (D.C. Idaho 1919).

In computing the acreage on which the cost of an irrigation project was to be charged, a general deduction from the lands within the limits of the project of 10,000 acres, because it was "estimated" that such quantity would prove incapable of irrigation, because rough or sandy or from seepage, was not justified, where no land was described and excluded, and all lands within the project were equally entitled to water if demanded, and where specific tracts had already been excluded as non-irrigable. *Payette-Boise Water Users' Assn. v. Bond,* 269 F. 159 (D. Idaho 1920).

41. —Payment

A successful contestant of an entry within a reclamation project will be required, in making entry in exercise of his preference right, to pay the building charge obtaining at the time his application is filed, and is not entitled to the rate in effect when the former entry was made nor to credit for the payments made by the former entry-

man. *Henry A. Schroeder,* 40 L.D. 458 (1912).

Where after entry of a farm unit within a reclamation project the farm-unit plat is amended and the entryman in conforming his entry to the amended plat retains only part of the land originally entered he is entitled to have the payments theretofore made on account of building charges and on account of the Indian price for the land credited to the retained portion, but is not entitled to have the payments on account of operation and maintenance so credited. *Eugene F. Windecker,* 41 L.D. 389 (1912).

There is nothing in the act to prohibit a graduated scale of the annual payments required of users of water from projects constructed thereunder, and in all cases where it is deemed advisable this plan of payment may be adopted. Instructions, August 16, 1905, 34 L.D. 78.

42. —Waiver, extension and other relief

Water may be furnished without operation and maintenance charge for the irrigation of the grounds about country schoolhouses upon reclamation projects. Departmental decisions, January 11, 1912, and October 24, 1919.

When the Secretary of the Interior has fixed the number of installments to be paid for a water right and the time of payment, he is without authority to suspend payment of same in case the alkali has risen to the surface of the soil and interfered with the crop returns from the land. Departmental decision, *In re Sam Hammond* (Truckee-Carson), September 24, 1909. See regulations of the Secretary, August 11, 1915, governing extension of relief to water users whose lands are temporarily affected by seepage, alkali, etc., to such an extent as to render them impracticable of profitable cultivation.

Water cannot be furnished from a reclamation project to a State experiment farm free of charge. Departmental decision, September 15, 1909, *In re Idaho State Experiment Farm.*

The relinquishment of a homestead entry within the irrigable area of an irrigation project, where the entryman is in default in the payment of any annual installment, does not relieve the land of such charge, and a succeeding entryman takes it subject thereto. Instructions, July 16, 1906, 35 L.D. 29.

Except where specifically authorized by law, the Secretary of the Interior is not empowered to grant extensions of time, either directly or indirectly, for the payment of charges accruing from individual water users upon reclamation projects. *Shoshone irrigation project,* 50 L.D. 223 (1923).

43. —Collection

A corporation with which, as the representative of its shareholders, who are parties accepted by the United States as holders of water rights in a project under the Reclamation Act of June 17, 1902, the United States makes a contract for the benefit of such shareholders relative to the supply of water to and the dues to be paid by the shareholders, and which covenants in the contract to collect dues for the United States and guarantees the payment thereof, is a proper party plantiff in a suit to enjoin officers of the United States from collecting unlawful charges from the shareholders, turning the water from their lands, and canceling their water rights and homestead rights because they fail to pay such charges. *Magruder v. Belle Fourche Valley Water Users' Assn.,* 219 F. 72, 133 C.C.A. 524 (8th Cir. 1914).

A suit was brought by the United States in the Wyoming Federal District Court to recover maintenance charges, including charges for 1922, 1923, and 1924. The defendant had failed to pay charges for prior years or for the years 1922 to 1924, and the water had been shut off. Defendant maintained that for 1922, 1923, and 1924 he did not receive water, and therefore that for these three years he could not be charged for the use of it. The court ruled that the Secretary, being authorized to make rules and regulations for the government of irrigation projects, and fix maintenance charges, providing the manner in which they shall be paid, the obligation of the defendant became fixed and definite and is recoverable in an action brought for that purpose. *United States v. Parkins,* 18 F. 2d 643 (1926), Wind River (Indian) project.

Where the Secretary of the Interior in the exercise of his discretion withdrew certain land from an irrigation project and confined it to the area described in the public notice to the landowners affected, the latter, who contracted to pay for that part of the cost which should be apportioned to them by the Secretary, could not restrain the local reclamation officers from turning off the water for failure to pay an assessment in excess of the original estimate and of the actual value of work to be constructed, on the ground that the system was not completed when the suit was filed. *Yuma County Water Users' Assn. v. Schlecht,* 275 F. 885 (9th Cir. 1921), affirmed 262 U.S. 138 (1923).

Sec. 5. [Reclamation requirements for entrymen—No water for more than 160 acres of private lands in one ownership—Residence of landowner—Receipts to reclamation fund.]—The entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. All moneys received from the above sources shall be paid into the reclamation fund. (32 Stat. 389; § 1, Act of December 16, 1930, 46 Stat. 1029; § 8, Act of September 6, 1966, 80 Stat. 639; 43 U.S.C. §§ 392, 431, 439)

Explanatory Notes

Codification. So much of the first sentence as states the requirement for an entryman to reclaim one-half of the irrigable area for agricultural purposes is codified in section 439, title 43 of the U.S. Code. The second sentence is codified as section 431, and the last sentence as section 392.

1966 Amendment: Commissions. Section 8 of Public Law 89–554, the Act of September 6, 1966, 80 Stat. 639, repealed what was originally the fifth and last sentence of the section, which read as follows: "Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act." The sentence was previously codified as section 381, title 43 of the U.S. Code. Public Law 89–554 codified title 5 of the U.S. Code relating to Government Organization and Employees.

1930 Amendment: Payment and Forfeiture. Section 1 of the Act of December 16, 1930, 46 Stat. 1029, repealed what was originally the third sentence of the section which read as follows: "The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon." The sentence was previously codified as section 476, title 43 of the U.S. Code. The first part of the sentence was superseded by section 4 of the Act of August 9, 1912, which authorized the Secretary to designate fiscal agents to whom shall be paid sums due on reclamation entries and water rights. The last part of the sentence, relating to cancellation and forfeiture for nonpayment, was superseded by section 3 of the Reclamation Extension Act of 1914. Both the 1912 and 1914 Acts appear herein in chronological order.

1914 Supplementary Provision: Reclamation and Cultivation. Section 8 of the Reclamation Extension Act of 1914, which appears herein in chronological order, authorizes the Secretary to require reclamation and cultivation of one-fourth the irrigable area within three years, and one-half the irrigable area within five years, of the filing of the water-right application or entry.

1912 Supplementary Provision: Payments for Patents and Water-Right Certificates. The Act of August 9, 1912, provides that a patent and a final water-right certificate may be issued upon payment of all charges due at the time, with a lien in favor of the United States attaching to the land and water rights for the payment of all sums due or to become due the United States. The Act appears herein in chronological order.

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1. Reclamation of entry—Generally

Order withdrawing land from entry under section 3, reclamation act, did not relieve entryman from the duty of reclaiming land under section 5, reclamation act, and complying with homestead law as to residence and cultivation under Revised Statutes, United States, sections 2289–2291, 2297, prior to amendment of 1912, where the land officials made a public announcement that the withdrawals of lands were not permanent, but were for the purpose of enabling preliminary investigations to be made as to feasibility of irrigation project. *Bowen v. Hickey,* 53 Cal. App. 250, 200 Pac. 46 (1921), cert. denied 257 U.S. 656 (1921).

2. —Interest of entryman

Under provisions of this section that entryman upon lands in a reclamation project before receiving patent shall, in addition to compliance with the homestead laws, reclaim at least one-half of total irrigable area and pay charges, an application to make reclamation homestead entry and the acceptance of it by the United States constitute a "contract" to the effect that when entryman has complied with legal requirements as to residence on and cultivation and reclamation of his land, and made acceptable proof of his compliance, government will issue a patent evidencing entryman's ownership of the land. *Jolley v. Minidoka County,* 106 P. 2d 865, 61 Idaho 696 (1940).

Under the Act of April 21, 1928, 45 Stat. 439, lands of a homestead entryman after compliance with all requirements of homestead laws as to residence, improvement and cultivation, but before final proof of reclamation of land is made, are subject to taxation by state and political subdivisions, regardless of when homestead entry was made. *Jolley v. Minidoka County,* 106 P. 2d 865, 61 Idaho 696 (1940).

Lands entered within a reclamation project are not subject to State taxation before the equitable title has passed to the entryman; and that title does not pass until the conditions of reclamation and payment of water charges due at time of final proof, imposed by the amended reclamation act, have been fulfilled in addition to the requirements of the homestead act. *Irwin v. Wright,* 258 U.S. 219 (1922), *overruling United States v. Canyon County,* 232 Fed. 985 (D. Idaho 1916) and *Cheney v. Minidoka County,* 26 Idaho 471, 144 Pac. 343 (1914), which held that the entryman has a taxable interest after compliance with the requirements of the homestead laws but before compliance with the additional requirements of the reclamation act. *Accord: Wood v. Canyon County,* 253 P. 839, 43 Idaho 556 (1927). *Casey v. Butte Co.,* 217 N.W. 508 (S. Dak. 1927). But see Act of April 21, 1928.

3. —Homestead laws

The provisions of the three-year homestead act of June 6, 1912, 37 Stat. 123, respecting cultivation, have no application to entries made under the reclamation act; but the reclamation laws require, as a prerequisite to the issuance of final certificate and patent, that the entryman shall have reclaimed, for agricultural purposes, at least one-half of the total irrigable area of his entry and paid all reclamation charges at that time due. *Wilbur Mills,* 42 L.D. 534 (1913).

The provisions of the three-year homestead law respecting cultivation do not apply to entries made subject to the reclamation act. *Rosa Voita,* 43 L.D. 436 (1914).

Upon the death of an entryman who has made satisfactory homestead final proof on a reclamation farm unit, the homestead becomes a part of his estate and as such subject to distribution, and is not an unperfected entry subject to the provisions of section 2291, Revised Statutes. The conditions imposed by the reclamation act as to reclamation, payment of charges, and filing of water-right application are conditions not of homestead law or proof but arising out of reclamation and imposed as a further requirement. *Heirs of Wm. L. Natzger,* 46 L.D. 61 (1917). See also *Edward Pierson,* 47 L.D. 625 (1921).

4. —Minerals

When land within a reclamation homestead entry upon which final reclamation proof has not been submitted is reported as prospectively valuable for oil and gas, the owner of the entry is correctly required to file consent to a reservation in the United States of the oil and gas in the land covered

by the entry. *L.S. Strahan,* A–26716 (August 21, 1953).

When land within a reclamation homestead entry upon which final reclamation proof has not been submitted and final certificate has not issued is reported as prospectively valuable for oil and gas, the claimant to the land is correctly required to file consent to a reservation in the United States of the oil and gas in the land included within the entry. *Jean W. Richards,* A–26718 (June 30, 1953).

Where a person applies for the reinstatement of his canceled homestead entry and it then appears upon the basis of the available geological data that the land covered by the entry is not valuable for oil and gas, the applicant should not be required to execute an oil and gas waiver as a condition precedent to the reinstatement of the entry. *Carl O. Olsen,* A–26432 (October 7, 1952).

11. Excess land laws—Generally

Nothing in the Reclamation Act of 1902 or its legislative history suggests that private landowners with water rights could participate in a project, pay their share of its cost, but be exempt from acreage limitation. Solicitor Barry Opinion, 71 I.D. 496, 502 (1964), in re application of excess land laws to private lands in Imperial Irrigation District.

The provision in section 5 of the Reclamation Act of 1902 that "no right to the use of water for land in private ownership shall be sold" for more than 160 acres means that the use of project facilities shall not be made available to a single owner for service to more than 160 acres. Sections 4 and 5 of the 1902 Act, read together, indicate that the "sale" referred to is not merely a commercial transaction, but is the contract by which the government secures repayment and the water user obtains benefits resulting from construction of the federal project. Solicitor Barry Opinion, 71 I.D. 496, 501 (1964), in re application of excess land laws to private lands in Imperial Irrigation District.

Congress, in establishing a limitation on the size of entries on public lands under section 3 of the Reclamation Act of 1902, and on the maximum acreage for which a water-right could be acquired under section 5 of that Act, had as its purpose to provide homes on the arid lands of the West, the prevention of land monopoly, and the avoidance of land speculation. Solicitor Barry Opinion, 68 I.D. 372, 378 (1961), in re proposed repayment contracts for Kings and Kern River projects.

The drainage system authorized by reclamation law is that which will provide drainage necessary to the successful operation of the complete project, and as a general matter the acreage limitations of the law do not apply to it. Memorandum of Chief Counsel Fix to Commissioner, May 12, 1948.

12. —Constitutionality

This section providing that no right to use of water should be sold for lands in excess of 160 acres in single ownership is not unconstitutional as a denial of due process and equal protection of the law, and does not amount to a taking of vested property rights both in land and irrigation district water or discriminate between nonexcess and excess landowners. *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275 (1958).

13. —Construction with other laws

The provisions of reclamation law of general application dealing with land limitations include section 5 of the Act of June 17, 1902, sections 1 and 2 of the Warren Act of 1911, section 3 of the Act of August 9, 1912, section 12 of the Reclamation Extension Act of 1914, and section 46 of the Omnibus Adjustment Act of 1926. Solicitor Barry Opinion, 71 I.D. 496, 501 (1964), in re application of excess land laws to private lands in Imperial Irrigation District; Solicitor Harper Opinion, M–33902 (May 31, 1945), in re applicability of excess land provisions to Coachella Valley lands.

Section 46 of the 1926 Act and section 12 of the 1914 Act deal specifically with the breakup of pre-existing holdings, while the 1902 and the 1912 Acts are relevant to the issue of the effect of excess land limitations on the coalescence of holdings. Solicitor Barry Opinion, 68 I.D. 372, 375, 376, 390, 404 (1961), in re proposed repayment contracts for Kings and Kern River projects.

The excess land limits of general reclamation law do not apply to projects established under the Water Conservation and Utilization Act. The farm units established by the Secretary may be greater or less than 160 acres. Solicitor Harper Opinion, M–34062 (August 9, 1945), in re Balmorhea project.

14. —State laws

Section 8 of the 1902 Act does not override the excess land provisions of section 5, nor compel the United States to deliver water on conditions imposed by the State. It merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of Federal projects. *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 291–2 (1958).

15. —Assessment of excess lands

A corporate landowner which, as required by section 12 of the Reclamation Extension Act of 1914, agreed to dispose of its excess lands, could not, after construction of the project, escape assessment of such lands by an irrigation district under state law on the grounds that its lands were not benefited. *Lincoln Land Co. v. Goshen Irr. Dist.*, 42 Wyo. 229, 293 Pac. 373 (1930).

Irrigable lands in excess of 160 acres, in the sole ownership of a corporation, which are shown by the general trend of the evidence to be benefited by an irrigation project so that their value becomes enhanced thereby, are properly included within the irrigation district and assessable accordingly, notwithstanding the inability under the Federal laws of the owner to receive water for more than 160 acres, as the basis of special improvement taxation is property benefit independent of ownership conditions. *Shoshone Irr. Dist. v. Lincoln Land Co.*, 51 F. 2d 128 (D. Wyo. 1930).

There is no merit to the contention by defendant, in an action contesting the outcome of an election of governor of a district of the Salt River Valley Water Users Association, that landowner's constitutional rights will be invaded by granting them water rights for only 160 acres while subjecting their entire acreage to assessments according to benefits. *Saylor v. Gray*, 41 Ariz. 558, 20 P. 2d 441 (1933).

In an action of foreclosure brought by the Enterprise Irrigation District against the Enterprise Land & Investment Co. to foreclose delinquency-assessment certificates issued for delinquent assessments over a period of several years, the defendant company, owner of more than 160 acres of irrigable land within the district, interposed a defense of fraud on the part of the district directors. These officers were charged with constructive fraud in assessing benefits to lands which could not receive water for irrigation from works constructed by the United States because of the ineligibility of the owner to receive water under rules imposed by section 5 of the act of June 17, 1902, limiting the furnishing of water from such works to lands in single ownership in excess of 160 acres. The defense was denied by the trial court, whose decision was reversed by the Supreme Court of Oregon, the latter holding that the answer stated a valid defense to the foreclosure action. *Enterprise Irrigation Dist. v. Enterprise Land & Investment Co.*, 300 Pac. 507 (Ore. 1931). But see *Klamath County v. Colonial Realty Co.*, 7 P. 2d 976, 139 Ore. 311 (1932) in which the same court under a slightly different state of facts, reached a different conclusion, and in which said court now appears to be in harmony in this matter with the courts of the other arid states and with its own earlier decisions.

16. —Standing to sue

There is nothing in the excess land statutes to indicate that Congress intended to confer a litigable right upon private persons claiming injury from the Secretary of the Interior's failure to discharge his duty to the public. *Turner v. Kings River Conservation Dist.*, 360 F. 2d 184, 198 (9th Cir. 1966).

17. —Vested water rights

In connection with the purchase of a partially completed canal system from a private company as part of the Umatilla reclamation project, the provision of section 5 of the Act of June 17, 1902, restricting the sale of a right to use water for land in private ownership to not more than one hundred and sixty acres, does not prevent allowing the continued flowage through the canal to be constructed under the project of water for 300 acres covered by a vested water right which is not acquired for the project, inasmuch as no sale of such water is involved. Op. Asst. Atty. Gen., 34 L.D. 351 (1906).

The departmental regulation, currently found at 43 CFR 230.70, which provides that section 5 of the Act of June 17, 1902, does not prevent the recognition of a vested water right for more than 160 acres and the protection of same by allowing the continued flowing of the water covered by the right through works constructed by the Government under appropriate regulations and charges, applies only to special situations where existing physical facilities or water rights are acquired under the authority of section 10 of the 1902 Act for incorporation in a project and where the lands to which the water right appertains are not included within that project. This regulation was intended as a codification of the Opinion of Assistant Attorney General, 34 L.D. 351 (1906). Solicitor Barry Opinion, 71 I.D. 496, 511–12, note 29 (1964), in re application of excess land laws to private lands in Imperial Irrigation District.

18. —Delivery of water

The limitation intended by the reclamation law, as set forth in section 5 of the Reclamation Act of 1902 and as supported by the plain language of section 3 of the Act of August 9, 1912, relates to the area in private ownership to which water may be delivered, and not to the quantity of water. A private owner will not be supplied with water, whether a full or supplemental supply, for use upon a tract exceeding 160

acres. The language in section 2 of the Warren Act referring to "an amount sufficient to irrigate 160 acres" is not intended to change this rule. Solicitor Patterson Opinion, M–21709 (March 3, 1927), in re proposed contract concerning Gravity Extension Unit, Minidoka project.

The restriction in the reclamation laws against furnishing project water to an acreage greater than 160 acres in a single ownership does not permit the furnishing of water alternately or in rotation to two or more 160-acre parcels of a larger single holder. Memorandum of Chief Counsel Fix to Commissioner, May 12, 1948.

31. Ownership of excess lands—Generally

A qualified water-right applicant may, after having disposed of a previously acquired water-right, make another application, and as to the latter, may be considered in the position of an original applicant. A landowner may be the purchaser of the right to the use of water for separate tracts at the same time, provided he can properly qualify and the tracts involved do not exceed 160 acres in the aggregate. Departmental decision, *In re Wm. B. Bridgman* (Sunnyside), November 20, 1909.

Congress is without power to control or regulate the sale or acreage of lands in private ownership within reclamation projects; but, so long as the projects are under Government control, may determine the acreage for which water may be supplied through such projects to any one landowner. *Amaziah Johnson,* 42 L.D. 542 (1913).

32. —Coalescence of holdings

A widow who succeeds to her husband's unperfected homestead entry by operation of law is entitled to complete it upon the same terms and conditions as were required of her husband. Therefore, the fact that she had previously acquired a water right for lands held by her in private ownership, the acreage of which, when added to the acreage of the entry, exceeds 160 acres, does not prevent her from completing the entry under the reclamation act. *Anna M. Wright,* 40 L.D. 116 (1911).

A person who holds a farm unit shall not be permitted before full payment has been made on the appurtenant water right, to acquire other lands with appurtenant water rights unless the water-right charges on the latter have been fully paid. A person may hold private lands with appurtenant water rights up to the limit of single ownership fixed for the project in one or more parcels before full payment of the water-right charge, but may not acquire other lands with appurtenant water rights unless the water-right charges thereon have been paid in full. The limit of area of the farm units and of single private-land holdings to which water rights are appurtenant, and as to which water-right charges have not been paid in full, shall in no case exceed 160 acres. Departmental decision, July 22, 1914, 43 L.D. 339. Departmental instructions of July 1, 1920, amend paragraph 41 of general reclamation circular of May 18, 1916, 45 L.D. 385. See C.L. 911, July 6, 1920, or 47 L.D. 417. See Act of August 9, 1912, 37 Stat. 265, and notes thereunder. See amendment of section 23, regulations of May 18, 1916, 43 CFR 230.21.

One who acquires lands of a reclamation homestead entryman at a tax sale pursuant to the Act of April 21, 1928, as amended, is subject to the provisions of reclamation law including the excess lands provisions. This result follows from the provisions of the 1928 Act that the holder of such tax deed or tax title is entitled to the rights and privileges of an assignee under the Act of June 23, 1910; and the latter Act makes the assignee "subject to the limitations, charges, terms and conditions of the reclamation act." *James P. Balkwill,* 55 I.D. 241 (1935).

33. —Husband and wife

An administrative determination that 320 acres of irrigable land can be held in community ownership is a reasonable construction of the excess land provisions of the Federal Reclamation Laws. In the practical application of such a determination, technical differences in the quality and extent of a wife's interest in community property may properly be disregarded. Solicitor Harper Opinion, M–34172 (August 21, 1945).

34. —Corporations

There is no *legal* objection to the acquisition of a water right by a water users association or other corporation if it is not otherwise disqualified under the excess land laws by reason of ownership of other lands on which there exist unpaid betterment and building charges. However, the Department has ruled as a matter of policy that water applications will not be accepted from corporations, Instructions, 42 L.D. 250 (1913), *Pleasant Valley Farm Co.,* 42 L.D. 253 (1913), unless the corporation acquires a patent and water right solely to protect its security in a loan transaction and with the intention of reselling it at more propitious times, *Great Western Insurance Co.,* A–16335 (February 8, 1932). Consequently, under this policy, where the Grand Valley Water Users Association has acquired several farm units at tax sales to protect its lien, it may receive a patent to one farm unit for security purposes and may bid

at tax sales for unlimited acreage for the purpose of protecting its lien and with the intent of reassigning its interest to qualified persons within a reasonable time. *James P. Balkwill,* 55 I.D. 241 (1935).

35. —Federal government

The Federal Subsistence Homesteads Corporation, being wholly financed and controlled by the United States Government and serving no function other than aiding in the purchase of subsistence homesteads by individuals as provided by section 208 of the National Recovery Act, does not fall within the category of corporations which it was the intention of Congress should be barred from acquiring or controlling lands within Reclamation projects; nor does the statutory limitation of individual holdings to 160 acres apply to such a corporation. Solicitor Margold Opinion, 54 I.D. 566 (1934).

36. —Joint operations

A landowner may deed his excess acreage to one of his children, or anyone else for that matter, and arrange to operate the alienated property with his own as one unit, provided he has divested himself of ownership in good faith and the child or other recipient of the property receives the full benefits of the operation of his own acreage. Letter from Commissioner Straus to Senator Joseph C. O'Mahoney, December 29, 1948.

Several farmers each holding 160 acres may farm their lands jointly as a unit under a proper mutual agreement, assuming all other requirements of Reclamation law have been met. Letter from Commissioner Straus to Senator Joseph C. O'Mahoney, December 29, 1948.

41. Residency of landowner—Generally

To entitle an applicant for the use of water for lands held in private ownership within the irrigable area of an irrigation project under this Act to the benefits of this Act, he must hold the title in good faith, and his occupancy must be bona fide and in his own individual right. Instructions, May 21, 1904, 32 L.D. 647.

The term "in the neighborhood" held to mean within 50 miles. Departmental decision, January 20, 1909.

Where a tract of land under a reclamation project is owned by two or more persons jointly, unless each is a "resident" or an occupant on the land, no right to use water to irrigate the same can be acquired under this section. Departmental decision, January 12, 1910.

The residence requirements provided for in section 5 of the Reclamation Act of June 17, 1902, apply to all persons acquiring by assignment water-right contracts with the United States, unless prior to such assignment the final water-right certificate contemplated by section 1 of the Act of August 9, 1912, has been issued, in which event the land may be freely alienated, subject to the lien of the United States. *H. G. Colton,* 43 L.D. 518 (1915).

The residence requirement of this section in reference to private lands is fully complied with if, at the time the water-right application is made, the applicant is a bona fide resident upon the land or within the neighborhood. After approval of the application further residence is not required of such applicant, and final proof may therefore be made under the Act of August 9, 1912, without the necessity of proving residence at the time proof is offered. Departmental decision, April 19, 1916.

Paragraph 105 of the general reclamation circular approved May 18, 1916, 45 L.D. 385, 43 C.F.R. 230.102 provides that in case of the sale of all or any part of the irrigable area of a tract of land in private ownership covered by a water-right application which is not recorded in the county records, the vendor will be required to have his transferee make new water-right application for the land transferred. *Held,* that in making the new application it is immaterial whether or not the transferee be "an actual bona fide resident on such land or occupant thereof residing in the neighborhood." Reclamation decision, July 25, 1917, *In re J. W. Merritt,* Truckee-Carson.

46. Payment of charges—Generally

One holding a mortgage against only a part of a tract of land in private ownership upon a Federal reclamation project for which entire tract a water-right application has been made, may pay up from time to time the charges on that portion of the tract covered by the mortgage in the event the landowner fails to pay. Departmental decision, July 13, 1917.

Fiscal agents upon United States reclamation projects are authorized to accept from water users money tendered in payment of an accrued installment of either construction, operation and maintenance, or rental charges, for any year, even though installments for a previous year remain unpaid. Reclamation decision, August 6, 1917; C.L. No. 680.

In cases where the title to lands under water-right application upon a Federal reclamation project is in dispute, and the land is in possession of one other than the record owner, the Reclamation Service may deliver water to the party in possession, upon payment in advance of the operation and

maintenance charges. Reclamation decision, August 24, 1917, *In re Wood v. Eggleston,* Truckee-Carson.

The Federal statutes relative to the payment of debts and demands due the United States do not require the acceptance of money only in the settlement of such debts and demands, and accordingly the proper administrative official representing the United States may, where it would be to the interest of the United States, accept a "call" warrant for indebtedness of an irrigation district under its contract with the United States Reclamation Service for drainage construction and reservoir storage capacity, such warrant to be held by the United States until paid. *Pioneer Irrigation District,* 54 I.D. 264 (1933).

47. —Overdue payments

The provision in section 5 of the Reclamation Act that failure to make payment of any two annual installments when due shall render the entry subject to cancellation, with forfeiture of all rights under the act, is not mandatory, but it rests in the sound discretion of the Secretary of the Interior whether the entryman in such case may thereafter be permitted to cure his default by payment of the water charges, where he has continued to comply with the provisions of the homestead law; and in event an entry has been canceled for such failure, the Secretary may, in the absence of adverse claim, authorize reinstatement thereof with a view to permitting the entryman to cure his default. *Marquis D. Linsea,* 41 L.D. 86 (1912).

Inasmuch as the Acts of June 17, 1902, and August 13, 1914, did not peremptorily declare in mandatory language that forfeitures must be declared, or that they will necessarily result by operation of law as soon as defaults in payments by water users on reclamation projects have occurred, it rests within the sound discretion of the Secretary of the Interior to determine whether an entryman may thereafter be permitted to cure the default by payment of the charges. *Shoshone irrigation project,* 50 L.D. 223. (1923).

The Department on December 24, 1935, cancelled water right application of J. W. Thompson, Yuma irrigation project, for nonpayment of construction charges more than one year in arrears. Pablo Franco later acquired the land and applied for reinstatement of the water right application. The Under Secretary, in letter of May 9, 1936, rejected Franco's application, stating that the Department was without authority to grant the application for reinstatement because the money previously paid by Thompson on this water right application, under section 5 of the Reclamation Act, had been forfeited to the United States.

No power exists in the Secretary of the Interior to formally grant specific extension of time for payment of overdue water-right charges. Departmental decision, April 22, 1909.

The provisions of section 5 of the Reclamation Act and of sections 3 and 6 of the Reclamation Extension Act of August 13, 1914, regarding one year of grace for the payment of overdue water charges refer only to the drastic remedies of cancellation and forfeiture and not to the right to bring suit in a court for collection of a water charge past due and unpaid. Reclamation decision, December 4, 1917, *U.S. v. Edison E. Kilgore,* Shoshone. See Secretary's regulations of February 27, 1909, regarding delinquent payments, 37 L.D. 468.

Where entries and water-right applications have been held for cancellation for failure to pay the building charges, pending final action, water may be furnished for the land upon proffer of the portion of the installments for operation and maintenance. Departmental decision, February 9, 1909.

Where a water-right application for land held in private ownership has been canceled for default in payment of building, operation, and maintenance charges, such application may be reinstated upon full payment of all accrued charges. Instructions, 45 L.D. 23 (1916).

48. —Nonirrigable lands

The director is authorized to assent to the release from stock subscription of any and all lands in any and all projects heretofore or hereafter shown by official survey or by the original or amended farm unit plats to be nonirrigable; also, to assent to the reduction of stock subscription for any such lands to the acreage so shown as irrigable. Department decisions, March 11, 1912, and September 16, 1912.

49. —Litigation to enjoin collection

A corporation with which, as the representative of its shareholders, who are parties accepted by the United States as holders of water rights in a project under the reclamation act, the United States makes a contract for the benefit of such shareholders relative to the supply of water due and the dues to be paid by the shareholders and which covenants in the contract to collect dues for the United States and guarantees the payment thereof, is a proper party plaintiff in a suit to enjoin officers of the United States from collecting unlawful charges from the shareholders, turning the water from their lands, and canceling their water rights and homestead rights be-

cause they fail to pay such charges. *Magruder et al. v. Belle Fourche Valley Water Users' Association,* 219 Fed. 72, 133 C.C.A. 524 (1914).

An injunction will not lie against the project manager of the Flathead Indian Reclamation project to restrain the shutting off of water to enforce the payment of charges due under orders of the Secretary of the Interior (a) unless the Secretary of the Interior were joined as a party defendant where the United States conceded the existence of the water supply claimed by the plaintiff below or (b) unless the Secretary of the Interior and the United States were joined as parties defendant, where the United States disputed the plaintiff's claim of a water supply, and where the allowance of the plaintiff's claim would affect the Government water supply available for the Flathead project. *Moody v. Johnson,* 66 F. 2d 999 (9th Cir. 1933).

Sec. 6. [Reclamation fund to be used for operation and maintenance—Management of works to pass to landowners—Title.]—The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided,* That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress. (32 Stat. 389; 43 U.S.C. §§ 491, 498)

EXPLANATORY NOTES

Codification. The first clause, down to the proviso, relating to operation and maintenance, is codified as section 491, title 43, U.S. Code. The balance of the section is codified as section 498.

Supplementary Provisions. A number of general and specific provisions relating to charges for, and transfer of, operation and maintenance, have been enacted and are referenced in the index. Statutes of general application include the Reclamation Extension Act of 1914 and the Fact Finders' Act of 1924, which appear herein in chronological order.

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1. Operation and maintenance—Generally

The Attorney General for New Mexico ruled July 5, 1917, that persons fishing in the Elephant Butte dam, Rio Grande project, must have a State license. On August 3, 1917, the Bureau held that persons fishing in said reservoir must comply with State law but must also have the consent of the United States.

The Secretary of the Interior is an indispensable party to a suit by water users to enjoin the project manager of the Yakima project from refusing to deliver quantities of water to which they claimed they were entitled under contracts with the United States, when such refusal was done at the direction of the Secretary. *Moore v. Anderson,* 68 F. 2d 191 (9th Cir. 1933).

2. —Charges for

The United States may assess operation and maintenance charges against water users as well as construction charges. To hold otherwise would greatly deplete, if not entirely consume, the Reclamation Fund, thus diverting the proceeds of the public domain to the payment of local expenses. This interpretation of the Reclamation Act has been recognized by Congress. *Swigart v. Baker,* 229 U.S. 187 (1913).

The Secretary of the Interior, being authorized to tax and determine the charges, is authorized to divide the same into two parts—one for construction and the other

for maintenance and operation; and hence he is authorized to impose reasonable assessments on land irrigated prior to the time when payment of the major portion of the cost of construction had been made and the works passed under management of the owners of the irrigated land. *United States v. Cantrall,* 176 Fed. 949 (C.C. Ore. 1910).

Where by a contract between the United States and landowners tributary to a Federal irrigation system, such landowners agreed to pay to the United States the charges duly levied against their lands for the construction and maintenance of the system, they were only liable for such reasonable charges as the Government was authorized to collect proportionate to their share of the cost of maintaining and operating the system, and not such as might be arbitrarily fixed in advance by such Secretary or other governmental officer. *Ibid.*

3. —Transfer of

The Secretary of the Interior is not authorized by the Reclamation Act to turn over the operation and maintenance of completed reclamation projects, in whole or in part, or to any extent, to water users' associations before the payments by such water users for water rights are made by the major portion of the lands irrigated by such works. 30 Op. Atty. Gen. 208 (1913); but see section 5 of the Act of August 13, 1914, which authorizes the Secretary to transfer the care, operation and maintenance of all or any part of a project to a water users' association or irrigation district.

4. —Negligence actions

A petition for damages against a State irrigation district for negligent maintenance of a canal was held to be no cause of action, in view of the State statutes and the contract making the district merely a fiscal agent for the United States, which operated and maintained the works. *Malone v. El Paso County Water Improvement Dist. No. 1,* 20 S.W. 2d 815 (Tex. Cir. App. 1929).

Where alleged negligence of federal government, while in control of maintenance and operation of irrigation system, could not be imputed to irrigation district, defendant in suit by district to foreclose land for delinquent assessments could not maintain a claim for affirmative relief against district by way of recoupment, set-off or counterclaim based on such negligence. *Klamath Irr. Dist. v. Carlson,* 157 P. 2d 514, 176 Ore. 336 (1945).

11. Title to property—Generally

The gravity extension unit (Gooding division) of the Minidoka project was constructed by the United States under a repayment contract with American Falls Reservoir District No. 2. It diverts water from the Snake River below Minidoka dam in an area of slack water caused by Milner dam, which was built in 1903 by the Twin Falls Land and Water Company, and is operated and maintained by the Twin Falls Canal Company. The latter brought suit against the American Falls Reservoir District No. 2 for a proportionate share of the costs of construction and operation of Milner dam. The suit was dismissed on the grounds: (1) that the United States, not the reservoir district, was the proper party defendant, notwithstanding a provision in the repayment contract that the district would hold the United States harmless against claims in favor of the owners of Milner dam, because under section 6 of the Reclamation Act title to and management and operation of the works remained in the Government; and (2) that the gravity diversion works were not damaging plaintiff's water rights or its use of Milner dam. *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2,* 59 F. 2d 19 (9th Cir. 1932); affirming 49 F. 2d 632 (D. Idaho 1931); see also 45 F. 2d 649 (D. Idaho 1930) overruling demurrer to amended complaint.

The United States is not an indispensable party to a suit by a landowner receiving water from the Yakima project to enjoin the Secretary of the Interior from imposing additional charges for water delivery, representing part of the cost of the new Cle Elum reservoir, beyond those stated in a repayment contract with a water users' association and in the public notice issued by the Secretary, because the landowner, not the United States, is the owner of the water right under Federal and State law and under contract with the Secretary. This ownership is wholly distinct from the property right of the Government in the irrigation works. The suit is to enjoin the Secretary from enforcing an order, the wrongful effect of which will be to deprive the landowner of vested property rights, and may be maintained without the presence of the United States. *Ickes v. Fox,* 300 U.S. 82 (1937). See also *Fox v. Ickes,* 137 F. 2d 30 (D.C. Cir. 1943), cert. denied, 320 U.S. 792.

In suit by irrigation district to foreclose for delinquent taxes and assessments, evidence adduced by defendant under claim for affirmative relief by way of recoupment, set-off or counterclaim was insufficient to sustain allegation that alleged federal control, which would defeat defendant's right to affirmative relief against district, was a

subterfuge and fraud, in that district had paid major portion of cost of project. *Klamath Irr. Dist. v. Carlson.* 157 P. 2d 514, 176 Ore. 336 (1945).

Irrigation district, by instituting suit to foreclose certificates of delinquency in irrigation assessments, was not estopped from meeting defendant's allegations, which were foundation of defendant's plea for affirmative relief, that district had paid major portion of cost of project and that federal operation was a fraud and subterfuge by proof that aggregate payments were not sufficient to entitle plaintiff to take control of operation of irrigation project, and that no subterfuge or fraud had been practiced. *Klamath Irr. Dist. v. Carlson,* 157 P. 2d 514, 176 Ore. 336 (1945).

The United States is an indispensable party to a suit by the City of Mesa, a municipal corporation, to condemn a portion of the electrical plant and system operated by the Salt River Project Agricultural and Improvement District as an integral part of the Salt River reclamation project; and the United States not having consented to the suit, the court is without jurisdiction to entertain the action. *City of Mesa v. Salt River Project Agricultural Improvement and Power District,* 101 Ariz. 74, 416 P. 2d 187 (1966).

In the construction of the American Falls Reservoir of the Minidoka project, Idaho, the Secretary of the Interior, pursuant to act of Congress of Mar. 4, 1921, 41 Stat. 1367, 1403, acquired by purchase or condemnation the fee simple title to certain lots adjacent to the town of American Falls. Power County, Idaho, assessed these lots as the property of the American Falls Reservoir District. The United States, claiming that the District had no equity in the lots, and that the placing of the lots on the assessment roll would constitute a cloud on the title of the United States, brought proceedings to have the assessments declared void. The Court held that when the Secretary of the Interior, under authority of the Congress purchases lands, the fee simple title is in the United States until the United States disposes of them; that neither the States nor their subdivisions have the power to tax property of the United States; that the lots when acquired by the United States became a necessary and proper part of the reservoir enterprise and incidental thereto, and that the only interest the District has in the reservoir is the right to receive water delivered to it by the United States therefrom. The taxing proceedings were decreed void. *United States v. Power County, Idaho, et al.,* 21 F. Supp. 684 (1937).

Sec. 7. [Authority to acquire property—Attorney General to institute condemnation proceedings.]—Where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice. (32 Stat. 389; 43 U.S.C. § 421)

EXPLANATORY NOTES

Supplementary Provision: Exchanges. Section 14 of the Reclamation Project Act of 1939 authorizes the Secretary to acquire lands for the relocation of property in connection with the construction or operation and maintenance of any project, and to enter into contracts for the exchange of water, water rights, or electric energy. The Act appears herein in chronological order.

Exchange of Lands, North Platte Project. An exchange of lands on the North Platte project between the United States and the Swan Land and Cattle Company was authorized by the Act of August 9, 1921, ch. 55, 42 Stat. 147. The land was conveyed to the United States by deed dated September 12, 1921, and recorded in Goshen County, Wyoming, October 10, 1921. Patent issued February 15, 1922—Cheyenne No. 849041.

Editor's Note, Annotations. Annotations of opinions dealing with aspects of property acquisition including condemnation proceedings which are common to all Government agencies, such as valuation of property, payment of interest, acceptability of title, and so forth, are not included.

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1. Purpose of acquisition—Generally

The Act of June 17, 1902, does not authorize the use of the reclamation fund for the purchase of any land except such as may be necessary in the construction and operation of irrigation works. *California Development Co.*, 33 L.D. 391 (1905).

The United States has constitutional authority to organize and maintain an irrigation project within a State where it owns arid lands whereby it will associate with itself other owners of like lands for the purpose of reclaiming and improving them, and for that purpose it exercises the right of eminent domain against other land owners to obtain land necessary to carry the proposed project into effect. *Burley v. United States,* et al., 179 F. 1, 102 C.C.A. 429, 33 L.R.A. (N.S.) 807 (Idaho 1910), affirming 172 F. 615 (C.C. 1909). See also *Magruder v. Belle Fourche Valley Water Users' Assn.*, 219 F. 72, 133 C.C.A. 524 (S. Dak. 1914).

The fact that a scheme contemplates the irrigation of private as well as government land does not prevent condemnation of land necessary to carry it out. *Burley v. United States,* 179 F. 1, 102 C.C.A. 429, 33 L.R.A. (N.S.) 807 (Idaho 1910).

Lands condemned by the United States under the Reclamation Act for right of way for a canal or ditch required in the carrying out of an irrigation project are taken for a public use. *United States v. O'Neill,* 198 F. 677 (D. Colo. 1912).

The Department of the Interior had right to condemn 277.97 acres of land in the County of Madera, California, for navigation, reclamation, and storage of waters of the San Joaquin and Sacramento Rivers, irrigation and power purposes, since those purposes were "public purposes." *United States v. 277.97 Acres of Land,* 112 F. Supp. 159 (D. Cal. 1953).

2. —Discretion of Secretary

In a proceeding by the United States to condemn land for reservoir purposes whether a more feasible plan of irrigation than the one adopted might be devised, or some other site selected for the reservoir, is immaterial, the determination of the proper Government authorities being conclusive. *United States v. Burley,* 172 F. 615 (C.C. Idaho 1909), affirmed 179 F. 1, 102 C.C.A. 429, 33 L.R.A. (N.S.) 807 (1910).

Where Congress left determination of need for particular realty for navigation, reclamation, and storage of waters of rivers, and for irrigation and power purposes to Secretary of the Interior, courts had no right to question manner in which the Secretary of the Interior exercised the delegated power. *United States v. 277.97 Acres of Land,* 112 F. Supp. 159 (D.C. Cal. 1953).

When the Secretary of the Interior in the exercise of a reasonable discretion determines as to the validity of title to and as to the value of a right to appropriate water for irrigation purposes to be acquired by him under the provisions of the act of June 17, 1902, his decision is conclusive upon the accounting officers. 14 Comp. Dec. 724 (1908).

3. —Relocation of property

Where establishment of a reservoir under the Reclamation Act involved flooding part of the town, the United States had constitutional power to take by condemnation other private land near by, in the only practicable and available place, as a new town site to which the buildings affected could be moved at the expense of the United States and new lots be provided in full or part satisfaction for those flooded. The fact that, as an incident of such a readjustment, there may be some surplus lots of the new town site which the Government must sell does not characterize the condemnation as a taking of one man's property for sale to another. *Brown v. United States,* 263 U.S. 78 (1923), affirming *United States v. Brown,* 279 F. 168 (1922). See also section 14 of the Reclamation Project Act of 1939.

4. —Related lands

The Reclamation Act permits the United States to acquire strips of land, aggregating 10 per cent of the irrigable area of a project,

and establish and maintain thereon plantations of trees and shrubs to serve as windbreaks, in order to facilitate and protect the agricultural development of the adjacent irrigable lands and to protect irrigation canals and laterals. Departmental decision, July 24, 1912 (Umatilla).

5. —Research and development

The Secretary of the Interior is authorized to purchase or lease lands for a "development farm" in the nature of a field laboratory where this is an appropriate method of developing data relevant to such factors as classification of lands, suitability of crops, and repayment ability of irrigators. Acting Solicitor Burke Opinion, M–36219 (May 12, 1954).

11. Property or interest involved—Generally

The Secretary of the Interior has no authority under the provisions of the Act of June 17, 1902, to embark upon or commit the Government to any irrigation enterprise that does not contemplate the absolute transfer of the property involved to the United States. *California Development Co.*, 33 L.D. 391 (1905).

The Act contemplates that the United States shall be the full owner of irrigation works constructed thereunder, and clearly inhibits the acquisition of property, for use in connection with an irrigation project, subject to servitudes or perpetual obligation to pay rents to a landlord holding the legal title. Op. Asst. Atty. Gen., 34 L.D. 186 (1905).

In the acquisition of interests in real property, if not administratively objectionable, title may be acquired subject to (a) any existing coal or mineral rights reserved or outstanding in third parties and (b) any existing rights of way in favor of the public or third parties for roads, railroads, telephone lines, transmission lines, ditches, conduits or pipe lines, on over or across the property, although the property is under contract, to be conveyed to the United States in fee simple free of lien or encumbrance. Central Valley project, letter of July 9, 1940.

There is no authority for the use of the reclamation fund, either directly by the Secretary or indirectly by advancement to others, for the purchase of lands or other property outside of the territorial limits of the United States. *California Development Co.*, 33 L.D. 391 (1905).

The Secretary of the Interior may not, in the acquisition of land needed for a reservoir to be constructed by the Bureau of Reclamation, agree that as a part of the consideration the landowner shall have the perpetual right to utilize any power facilities afforded by the reservoir. Decision of First Assistant Secretary, December 15, 1936, in re Truckee Storage project, Boca reservoir.

The Secretary has full authority to purchase lands necessary for reservoir purposes, to arrange the terms of purchase, and to allow the vendor to retain possession until the land may be actually needed where by so doing the purchase may be more advantageously made; but he has no authority under said act to lease such purchased lands after the Government has taken possession thereof. Instructions, 32 L.D. 416 (1904).

12. —Existing irrigation system

Where an irrigation system already constructed and in operation may be utilized in connection with a greater system to be constructed under the provisions of the Act of June 17, 1902, its purchase for such purpose comes within the purview of the act. *California Development Co.*, 33 L.D. 391 (1905).

The Act affords authority for the purchase of an incomplete irrigation system to be used in connection with and to become a part of a larger system contemplated by the Government. Op. Asst. Atty. Gen., 34 L.D. 351 (1906).

13. —Indian lands

The United States has authority to condemn tribal lands of the Crow Tribe for construction of Yellowtail Dam, under section 9(c) of the Flood Control Act of 1944 and the Federal Reclamation Laws; under the general condemnation act of August 1, 1888, 55 Stat. 357, 40 U.S.C. § 257; and under the several acts appropriating money for preconstruction work and for initiation of construction. *United States v. 5,677.94 Acres of Land*, 162 F. Supp. 108 (D. Mont. 1958); *ibid*, 152 F. Supp. 861 (D. Mont. 1957); Opinion of Solicitor Davis, M–36148 (Supp.) (February 3, 1954).

Under the provisions of the Reclamation Act, the Secretary of the Interior has power to acquire the rights and property necessary therefor, including those of allottee Indians, by paying for their improvements, and giving them the right of selecting other lands. The restrictions on alienation of lands allotted to Indians within the area of the Milk River irrigation project do not extend to prohibiting an allottee Indian from selling his improvements to the United States and selecting other lands so that the United States could use the lands selected for purposes of an irrigation project as provided by Act of Congress. *Henkel* v. *United States*, 237 U.S. 43 (1915), affirming 196 F. 345, 116 C.C.A. 165 (1912).

14. —School lands

Until so authorized by Congress, neither the Department nor the Territorial Government of Arizona has power to dedicate for use in connection with an irrigation project, lands in said territory which, by section 2 of the Act of February 2, 1863, 12 Stat. 664, sec. 1946, R.S., have been reserved for school purposes to the future State to be erected, including the same. Instructions, 32 L.D. 604 (1904).

15. —Municipal property

Although land owned by a municipality was being devoted to public use, the Secretary of the Interior had authority to condemn such land for Missouri River Basin project. *United States v. 20.53 Acres of Land in Osborne County, Kansas, City of Downs,* 263 F. Supp. 694 (D. Kansas 1967).

16. —Water rights

The United States had power to acquire through exercise of eminent domain water rights of riparian owners and overlying owners on river below Government dam. *State of California v. Rank,* 293 F. 2d 340 (9th Cir. 1961), modified on other grounds 307 F. 2d 96, affirmed in part 372 U.S. 627, affirmed in part, reversed in part on other grounds sub. nom. *Dugan v. Rank,* 372 U.S. 609 (1963).

17. —Personal property

An engine necessary for the purpose of carrying out the provisions of this Act may be acquired under this section. *United States v. Buffalo Pitts Co.,* 234 U.S. 228 (1914).

18. —Leasehold

The Secretary is authorized by this section to acquire a leasehold interest. Acting Solicitor Burke Opinion, M–36219 (May 12, 1954), in re authority to lease or purchase lands for development farms on reclamation projects.

19. —Easements and rights-of-way

Where the United States acquired a primary easement to construct an irrigation ditch on the land of defendant, it also acquired the right, as a secondary easement, to go upon land to maintain, repair, and clean ditch, but such secondary easement can be exercised only when necessary, and in such reasonable manner as not to increase the burden upon defendant's land. *Mosher v. Salt River Valley Water Users' Assn.,* 209 P. 596, 24 Ariz. 339 (1922).

20. —Power sites

In proceedings by the Federal Government to condemn land located at Kettle Falls on the Columbia River in the State of Washington, uplands which power company had purchased and developed as a power site could not be disassociated from bed of river and flow of stream in creating a value for power site purposes, and company could not introduce evidence showing value of uplands for power site purposes, separate from use of bed of river and flow of stream. *Washington Water Power Co. v. United States,* 135 F. 2d 541 (9th Cir. 1943).

In condemnation proceedings for the acquisition of lands for the Grand Coulee dam, the defendant Continental Land Company claimed compensation for the inherent adaptability of its uplands for dam-site purposes for the production of electrical power. On appeal the Circuit Court affirmed the lower court holding that the Columbia River was a navigable stream and that the Company had no inherent right in the uplands for special use as against the Government's dominant right to the river bed for navigation; that the Company was limited to the reasonable market value of the upland for any purpose to which the lands may reasonably be adapted now or in a reasonable time in the future, and that the Continental Land Company had produced no proof of any possibility, reasonably near or remote, or at any time, that the land would be or could be used for dam-site purposes. *Continental Land Co. v. United States,* 88 F. 2d 104 (9th Cir. 1937).

21. —Noncompensable claims

The Secretary has no authority under the seventh section of this Act to compensate settlers upon lands within the limits of a withdrawal made in connection with an irrigation project, unless they have in good faith acquired an inchoate right to the land by complying with the requirements of law up to the date of the withdrawal and have such a claim as ought to be respected by the United States. Op. Asst. Atty. Gen., 34 L.D. 155 (1905).

Where a lease provides that the lessor can terminate it on 30 days' written notice and that lessee's improvements remaining on the premises after expiration of the 30 day period shall become the property of the lessor, its successors or assigns, and where lessor after conveying the property to the United States, gives the required notice of termination, which is formally accepted by the lessee, the United States, after the expiration of the notice period, cannot compensate lessee for moving of improvements. Dec. Comp. Gen., A–14629 (June 24, 1926). [Ed. note: Relief was subsequently granted the lessee through a private relief act dated March 3, 1927, 44 Stat. 1844.]

The United States does not impliedly

promise to compensate persons engaged in stock raising for the destruction of their business, or the loss sustained through the enforced sale of their cattle, the result of the inundation of their lands by the construction of a dam which arrests flood waters. *Bothwell v. United States,* 254 U.S. 231 (1920).

Where, in proceedings by the United States to condemn land overflowed by the construction of a dam, damages for loss from a forced sale of the landowners' cattle and the destruction of their business were denied, and the landowners brought suit in the Court of Claims, they were in no better position in respect to such damages than if no condemnation proceedings had been instituted. *Bothwell v. United States,* 254 U.S. 231 (1920), affirming 54 Ct. Cl. 203 (1918).

31. Condemnation proceedings

In proceedings by the United States to condemn right of way for a ditch under the Reclamation Act which provides a fund from which the damages assessed shall be paid, it is not necessary that the damages shall be assessed and paid before the Government may be allowed to take possession. *United States v. O'Neill,* 198 F. 677 (D. Colo. 1912). See also 5 Comp. Gen. 907 (1926).

Where land is condemned pursuant to section 7, for reclamation projects, the judgment is not required to be certified to the Congress, but may be paid from applicable reclamation funds. Such judgments are required by the Act of February 18, 1904, 33 Stat. 41, to be paid on settlements by the General Accounting Office. 5 Comp. Gen. 737 (1926).

The fact that the taking of realty by the Secretary of the Interior was for construction of distribution system did not require that contract with an irrigation district precede the taking. *United States v. 277.97 Acres of Land,* 112 F. Supp. 159 (D. Cal. 1953).

Government may dismiss or abandon petition in condemnation proceedings at any time before taking property, notwithstanding owners claim for damages was in excess of district court jurisdiction. *Owen v. United States,* 8 F. 2d 992 (C.C.A. Tex. 1925).

36. Physical seizure (inverse condemnation)

(Editor's Note: See also opinions annotated under the Fifth Amendment, the Sundry Civil Expenses Appropriation Act of March 3, 1915, and the Federal Tort Claims Act as codified June 25, 1948.)

The authorization in section 7 of the Reclamation Act of 1902 that the Secretary of the Interior may "acquire any rights or property," "by purchase or by condemnation under judicial process," extends to the taking of private water rights by physical seizure as well as by purchase or formal condemnation. *Turner v. Kings River Conservation Dist.,* 360 F. 2d 184, 192 (9th Cir. 1966).

The substantial reduction in the natural flow of the San Joaquin River as the result of the impoundment and diversion of the flow at Friant Dam upstream constitutes a seizure or taking, in whole or in part, of rights which may exist in the continued flow and use of the water; it does not constitute a trespass against such rights. This seizure was authorized by Congress when it authorized the project, and any relief to which claimants of the rights may be entitled by reason of such taking is by suit against the United States under the Tucker Act, 28 U.S.C. § 1346. *Dugan v. Rank,* 372 U.S. 609 (1963). (Ed. note: The Tucker Act is the Act of March 3, 1887, 24 Stat. 505. It authorized suits to be brought in the Court of Claims against the United States in certain cases, including claims founded upon the Constitution. This includes claims based upon the Fifth Amendment provision that private property shall not be taken for public use without just compensation. 28 U.S.C. § 1346 relates to the jurisdiction of the Federal District Courts in such cases, and 28 U.S.C. § 1491 relates to the jurisdiction of the Court of Claims. These sections appear herein in the appendix.)

United States had right to acquire by physical seizure water rights of riparian owners and overlying owners on river below Government dam and was not required to resort to judicial condemnation proceedings. *State of California v. Rank,* 293 F. 2d 340 (9th Cir. Cal. 1961), modified on other grounds 307 F. 2d 96, affirmed in part 372 U.S. 627, affirmed in part, reversed in part on other grounds sub. nom. *Dugan v. Rank,* 372 U.S. 609 (1963).

In actions in the Court of Claims for damages resulting from an unforeseen flooding of claimants' soda lakes following construction and operation of a Government irrigation project by which water was brought into the watershed, held (1) That allegations that the water percolated through the ground, due to lack of proper lining in the Government's canals and ditches, the manner of their construction and the natural conditions, were not intended to set up negligence, but merely to show causal connection between the project and the flooding, and hence did not characterize the cause of action as *ex delicto;* (2) That, as no intentional taking of claimants' property could be implied, the Government

was not liable *ex contractu*, assuming such causal relation. *Horstmann Co. v. United States* and *Natron Soda Co. v. United States*, 257 U.S. 138 (1921), affirming 54 Ct. Cl. 169, 214 (1919), 55 Id. 66 (1920).

An injury caused by the construction and operation of a Government irrigation project, which by seepage and percolation necessarily influences and disturbs the ground water table of the entire valley where plaintiffs' lands are situated, is *damnum absque injuria*. *Ibid.*

(Editor's note: The *Horstmann* and *Natrona Soda* cases are probably not good law today. See cases noted under the Fifth Amendment.)

41. Availability of funds

The authority to purchase property given by section 7 is an authority to make such purchases out of the reclamation fund available therefor at the time such purchases are made, and does not include authority to make purchases on the credit of the reclamation fund or in anticipation of a future increment therein. 27 Comp. Dec. 662 (1921).

42. Exchanges

The Secretary has no authority to permit the owner of lands needed for a reservoir to be constructed under said act to select other lands of the same area within the district that may be made susceptible of irrigation from the proposed reservoir, in exchange for the lands so needed for reservoir purposes. Op. Asst. Atty. Gen., 32 L.D. 459 (1904). But see section 14 of the Reclamation Project Act of 1939.

43. Option to purchase

The act does not authorize the expense of procuring mere options to purchase rights of way, water rights, or lands. 9 Comp. Dec. 569 (1903).

44. State laws

A state, though it can bestow on citizens property rights which the United States must respect, cannot take from the United States power to acquire such property rights. *State of California v. Rank*, 293 F. 2d 340, modified on other grounds 307 F. 2d 96, affirmed in part 372 U.S. 627, affirmed in part, reversed in part on other grounds sub. nom. *Dugan v. Rank*, 372 U.S. 609 (1963).

The power conferred on the Secretary of the Interior by the Reclamation Act to condemn lands necessary for use in constructing irrigation works is not subject to limitation by State statutes relating to the exercise of the power of eminent domain of the State nor is its exercise governed by a State procedure requiring the necessity of the taking in each particular case to be determined by a local commission, but such necessity is a matter to be determined by the Secretary, whose decision is not reviewable by the courts. *United States v. O'Neill*, 198 F. 677 (D. Colo. 1912).

Where the Government acquires an irrigation system held in private ownership, for use in connection with a reclamation project under the Act of June 17, 1902, it takes the same free from any obligation or control of State authority theretofore existing. Op. Asst. Atty. Gen., 37 L.D. 6 (1908).

Sec. 8. [Irrigation laws of States and Territories not affected—Interstate streams—Water rights.]—Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right. (32 Stat. 390; 43 U.S.C. §§ 372, 383)

EXPLANATORY NOTE

Codification. The proviso is codified in section 372, title 43 of the U.S. Code. The preceding portion of the section is codified in section 383.

NOTES OF OPINIONS

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1. State laws—Generally

In choosing between users within each state and in settling the terms of his contracts for the use of stored Colorado River water, the Secretary is not bound, either by section 18 of the Boulder Canyon Project Act, or by section 8 of the Reclamation Act, to follow State law. Although section 18 allows the States to do things not inconsistent with the Project Act or with federal control of the river, as for example, regulation of the use of tributary water and protection of present perfected rights, the general saving language of section 18 cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by section 5. *Arizona v. California,* 373 U.S. 546, 580–90 (1963).

Section 8 of the Reclamation Act does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. Rather, the effect of section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made. *City of Fresno v. California,* 372 U.S. 627, 630 (1963).

Section 8 of the 1902 Act does not override the excess land provisions of section 5, nor compel the United States to deliver water on conditions imposed by the State. It merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of Federal projects. *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 291–2 (1958).

Even though navigation is mentioned as one of the purposes of the Central Valley Project, Congress realistically elected to treat Friant Dam not as a navigation project but as a reclamation project, with reimbursement to be provided for the taking of water rights recognized under State law, in accordance with section 8 of the Reclamation Act, and this election is confirmed by administrative practice. Accordingly, the judgment of the Court of Claims will be upheld granting compensation to the owners of so-called "uncontrolled grass lands" along the San Joaquin River which depend for water upon seasonal inundations resulting from overflows of the river. *United States v. Gerlach Live Stock Co.,* 339 U.S. 725 (1950).

Section 8 of the Reclamation Act of 1902 requires federal officers to recognize state-created water rights and pay for them if taken, but it does not limit the authority of federal officers to take such rights for just compensation. *Turner v. Kings River Conservation Dist.,* 360 F. 2d 184, 194–95 (9th Cir. 1966).

Section 8 of the Reclamation Act of 1902 does not compel the United States either to acquire or to deliver water on conditions imposed by the State. *Turner v. Kings River Conservation Dist.,* 360 F. 2d 184, 197–98 (9th Cir. 1966).

There is nothing in the language of this section to indicate that the intent of Congress was to go further than to recognize and prevent interference with the laws of the State relating to the appropriation, control, or distribution of water. *San Francisco v. Yosemite Power Co.,* 46 L.D. 89 (1917).

2. —Navigable waters

Where the Government has exercised its right to regulate and develop the Colorado River and has undertaken a comprehensive project for improvements of the river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws. *Arizona v. California,* 373 U.S. 546, 587 (1963).

The privilege of the States through which the Colorado River flows and their inhabitants to appropriate and use the water is subject to the paramount power of the United States to control it for the purpose of improving navigation. *Arizona v. California, et al.,* 298 U.S. 558, 569 (1936), rehearing denied, 299 U.S. 618 (1936).

The Secretary of the Interior is under no

obligation to submit the plans and specifications for Boulder Dam and Reservoir to the State Engineer as required by Arizona law because the United States may perform its functions without conforming to the police regulations of a State. *Arizona v. California,* 283 U.S. 423, 451 (1931).

Where reclamation projects are involved on navigable waters, even though power element is absent, federal government will not brook interference by the States. *United States v. Fallbrook Public Utility Dist.,* 165 F. Supp. 806 (D. Cal. 1958).

Congress has control over navigable streams and the waters thereof, and no claim based upon appropriation of such waters for irrigation purposes, made without the sanction of Congress, should be recognized by the Secretary of the Interior as valid. *California Development Co.,* 33 L.D. 391 (1905).

3. —Public lands

In a suit for the equitable apportionment of the waters of the interstate non-navigable North Platte River among three States, it is not necessary to pass upon the contention of the United States that it owns all the unappropriated water in the river by virtue of its original ownership of the water as well as the land in the basin, where the rights to the waters required for the reclamation projects on the river have been appropriated under State law pursuant to the directive of section 8 of the Reclamation Act, where the individual landowners have become the appropriators of the water rights appurtenant to their land, and where the decree in the case is limited to natural flow, not storage water, and does not involve a conflict between a Congressionally provided system of regulation for Federal projects and an inconsistent State system. *Nebraska v. Wyoming, et al.,* 325 U.S. 589, 611–16, 629–30 (1945).

There is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water. Op. Asst. Atty. Gen., 32 L.D. 254 (1903). But cf. *Arizona v. California,* 373 U.S. 546, 595–601 (1963).

4. —Procedures

The bureau made application for storage of additional water in Arrowrock reservoir. The laws of the State of Idaho specifically require that a bond be furnished in support of such an application and provide that failure to file the bond would be an abandonment of the permit. The Comptroller General held that since the furnishing of the bond and the continued validity of the permit were necessary in order to assure the Government its priority in the water rights, the premiums on the bond could be paid as a necessary incident to the construction and operation and maintenance of the Boise project. Dec. Comp. Gen., B–10509 (February 3, 1941).

In order to conform as nearly as possible to the laws of Wyoming, the Farmers Irrigation District should submit to the United States proof of beneficial use of water delivered to it by the United States under its Warren Act contract, and the United States, acting through the Secretary of the Interior, should make such proof of beneficial use in Nebraska of Pathfinder reservoir water as may be required by the Wyoming laws, attaching to such proof Warren Act contracts of all contractors who are entitled to the use of any Pathfinder storage and any proof of beneficial use they may have submitted to the United States. Solicitor's decision, April 17, 1936.

Under section 8 of the Reclamation Act of June 17, 1902, the 5-year period for completion of irrigation appropriations fixed by the State law for the development of a water supply for a reclamation project in Idaho is applicable to the United States. *Pioneer Irrigation District v. American Ditch Association, et al.,* 1 Pac. 2d 196, 52 Idaho 732 (1931).

The Reclamation Act not only recognizes the constitution and laws of the state providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws. *Burley v. United States,* 179 F. 1, 102 C.C.A. 429, 33 L.R.A. (N.S.) 807 (Idaho 1910).

5. —Adoption of Federal law

The 160-acre limitation is a basic part of federal reclamation policy, and the state legislature has adopted this concept as state policy for federal projects by authorizing irrigation districts to cooperate and contract with the United States under reclamation law. *Ivanhoe Irr. Dist. v. All Parties,* 53 Cal. 2d 692, 3 Cal. Rptr. 317, 330, 350 P. 2d 69, 82 (1960).

6. —Rights of way to United States

[Ed. Note—The Act of September 2, 1964, as amended by the Act of October 4, 1966, authorizes the Secretary of the Interior to pay just compensation for utilization of rights of way reserved to the United States under State law.]

Under a statute of Wyoming (Laws 1905

ch. 85) granting rights of way over all lands of the State for ditches "constructed by or under the authority of the United States," and providing that reservations thereof shall be inserted in all State conveyances, patents of school land issued by the State to private parties expressly subject to rights of way "reserved to the United States," are subject to the right of the United States thereafter to construct and operate irrigation ditches for a reclamation project over the lands conveyed by the patents. This right may be exercised by straightening and using as a ditch, a natural ravine to collect waters appertaining to the Federal project which have been used in irrigating its lands and are found percolating where they are not needed, and to conduct them elsewhere for further use upon the project. *Ide v. United States,* 263 U.S. 497 (1924), affirming *United States v. Ide,* 277 Fed. 373 (C.C.A. Wyo. 1921).

Under Idaho Session Laws 1905, p. 373, granting right of way over State lands for ditches constructed by authority of the United States, the United States was authorized to construct an irrigation canal across land sold by State subsequent to the enactment of the statute. The contention of the landowner that under the State Constitution, the Board of Land Commissioners, and not the legislature, was authorized to dispose of State lands was admitted by the court, which, however, held that the constitutional provision related only to disposition and sale and not to the mere grant of an easement which could be effectuated by the State legislature. *United States v. Fuller,* 20 F. Supp. 839 (D. Idaho 1937).

The right-of-way granted under Utah law to the United States for ditches includes the right to operate a fifty foot high boom for cleaning the canal, and the cost to a utility company in raising its transmission lines to accommodate such boom is not compensable. *United States v. 3.08 Acres of Land, etc.,* 209 F. Supp. 652 (D. Utah 1962).

A 1905 Washington statute providing that in the disposal of lands granted by the United States, the State "shall reserve for the United States" a right-of-way for ditches, etc., for irrigation works, constituted a present, absolute grant to the United States, and such grant could not be defeated by a subsequent conveyance of the rights-of-way and without actual notice to the grantee. *United States v. Anderson,* 109 F. Supp. 755 (E.D. Wash. 1953). *Contra: United States v. Pruden,* 172 F. 2d 503 (10th Cir. 1949), construing an Oklahoma statute.

11. Interstate conflicts—Generally

As to the words "and nothing herein shall in any way affect any right of any state or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof" in this section, the U.S. Supreme Court in *Wyoming v. Colorado,* 259 U.S. 419 (1922) said: "The words * * * constitute the only instance, so far as we are advised, in which the legislation of Congress relating to the appropriation of water in the arid land region has contained any distinct mention of interstate streams. The explanation of this exceptional mention is to be found in the pendency in this court at that time of the case of *Kansas v. Colorado,* wherein the relative rights of the two states, the United States, certain Kansas riparians and certain Colorado appropriators and users in and to the waters of the Arkansas river, an interstate stream, were thought to be involved. Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation should be left to judicial determination unaffected by the act—in other words, that the matter be left just as it was before. The words aptly reflect that purpose."

Nebraska brought suit against Wyoming in the Supreme Court for an equitable apportionment between the two States of waters of the North Platte river, alleging that the laws of both of these States recognize the doctrine of prior appropriation, and that Wyoming, in spite of Nebraska's protestations, neglected to control appropriators, whose rights arise under the law of Wyoming, from encroaching upon the rights of Nebraska appropriators. Wyoming on Jan. 21, 1935, 294 U.S. 693, entered a motion to dismiss. The court, in denying the motion, held that Nebraska had cited no wrongful act by Colorado, and even though the river rises and drains a large area in that State, Colorado is not an indispensable party; that the Secretary of the Interior, as an appropriator under the irrigation laws of Wyoming, will be bound by the adjudication of Wyoming's rights, and is not an indispensable party; that the allegations of the bill are not vague and indefinite; and if Nebraska's contention that there are no tributaries of the North Platte and the Platte rivers between the state line and the City of Grand Island, Nebraska, supplying any substantial amount of water, be not a fact, Wyoming may make this an issue to be determined by proof. *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935).

In view of the Reclamation Act, the Warren Act, and the legislation of Wyoming

and Nebraska, an appropriation by the United States Reclamation Service for the irrigation of lands in Nebraska was valid, though the source of the supply was in Wyoming. *Ramshorn Ditch Co. v. United States,* 269 F. 80 (8th Cir. 1920).

The North Side Canal Co. entered into a contract with the United States for the purchase of storage rights in the Jackson Lake reservoir in Wyoming, the water stored therein to be used in Idaho. The State of Wyoming assessed taxes against the interest of the canal company in the reservoir and the canal company resisted the payment of such taxes. The trial judge held that the taxes were properly levied. *Northside Canal Co.* v. *State Board of Equalization, Wyoming,* 8 F. 2d 739 (D. Wyo. 1925). The case was appealed to the Circuit Court of Appeals for the Eighth Circuit, which reversed the decision of the District Court of the United States for the District of Wyoming and held that the attempted tax is wholly null and void for the reason that the water rights in question are appurtenant to the lands on which the water has been applied to beneficial use, which lands are located in the State of Idaho and are therefore not within the jurisdiction of Teton County, Wyoming, for taxation purposes. 17 F. 2d 55 (1926), cert. denied 274 U.S. 740 (1927). Similar ruling in *Twin Falls Canal Co.* v. *State of Wyoming.*

Subsequently to this decision the Legislature of Wyoming passed an act (chapter 36, Session Laws, of Wyoming, 1927), in effect attempting to make water rights acquired under the laws of Wyoming taxable. Thereafter the State attempted to levy taxes upon the water rights, the taxability of which was litigated in the foregoing suit. The district court, in *Twin Falls Canal Co. v. Teton County,* unpublished memorandum decision dated November 14, 1928, held that the nontaxability of these water rights by Wyoming was *res judicata,* and the taxes were therefore annulled.

United States' appropriation, from territory of New Mexico, of all unappropriated water in Rio Grande did not render such water as found its way to Texas untouchable by policy of water rights and appropriations under Texas law. *El Paso County Water Imp. Dist. No. 1 v. City of El Paso,* 133 F. Supp. 894 (D. Tex. 1955), affirmed in part, reformed in part on other grounds, 243 F. 2d 927 (5th Cir. 1957), cert. denied 355 U.S. 820.

16. Rights of United States—Generally

The United States, by filing with the State of Oregon notices of intent to appropriate and thereafter impounding waters for the Klamath project, pursuant to State law, did not become the owner of the water in its own right. Dec. Comp. Gen. B–125866 (September 4, 1956).

In view of the compact among the states of Texas, New Mexico, and Colorado concerning use of Rio Grande water, and in view of the United States' appropriation of water for use of water improvement district, the City of El Paso was not entitled to appropriate water already appropriated for use of the district. *El Paso County Water Imp. Dist. No. 1 v. City of El Paso,* 133 F. Supp. 894 (D. Tex. 1955), affirmed in part, reformed in part on other grounds 243 F. 2d 927 (5th Cir. 1957), cert. denied 355 U.S. 820.

By filing notices of intent to appropriate and thereafter impounding water of Rio Grande River, pursuant to authority granted by this section, the United States did not become owner of water in its own right. *Hudspeth County Conservation and Reclamation Dist. No. 1 v. Robbins,* 213 F. 2d 425 (5th Cir. 1954), cert. denied, 348 U.S. 833.

Under the Reclamation Act, the right of the United States as a storer and carrier is not necessarily exhausted when it delivers the water to grantees under its irrigation projects. *Nebraska v. Wyoming,* 325 U.S. 589 (1945).

In constructing reclamation project the property right in a water right is separate and distinct from the property right in reservoirs, ditches, or canals, in that water right is appurtenant to the land owned by the appropriator, and is acquired by perfecting an "appropriation", that is, by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. *Nebraska v. Wyoming,* 325 U.S. 589 (1945).

The scope of the appropriative water rights in connection with a Federal reclamation project must be regarded, under the law of Nebraska, as the same as those in connection with any irrigation canal. That is, although the right to the beneficial use of the water for irrigation is appurtenant to the land and vested in the landowner, the owner of the irrigation project also has an interest in such appropriative rights which entitles him to representatively secure and protect the full measure of beneficial use for the landowners as well as to effectuate the object of the project or canal as an enterprise. *United States v. Tilley,* 124 F. 2d 850, 860–61 (8th Cir. 1941), cert. denied, 316 U.S. 691 (1942).

Federal government's diversion, storage and distribution of water at reclamation project pursuant to Reclamation Act and contracts with landowners did not vest in United States ownership of water rights

which remained vested in owners as appurtenant to land wholly distinct from property of government in irrigation work, while government remained carrier and distributor of water with right to receive sums stipulated in contract for construction and annual charges for operation and maintenance of work. *Ickes v. Fox,* 300 U.S. 82 (1937); *Nebraska v. Wyoming,* 325 U.S. 589 (1945).

Under the Act of June 17, 1902, the Secretary of the Interior in operating an irrigation project is in the position of a carrier of water to all entrymen in the project, and he is not obligated to furnish any more water than is available. *Fox v. Ickes,* 137 F. 2d 30, 78 U.S. App. D.C. 84 (1943), cert. denied 320 U.S. 792.

Whatever rights the United States may have to divert waters from a stream in Nevada under permits issued by the state engineer as against an irrigation company and the extent thereof must be determined by the law of Nevada. *United States v. Humboldt Lovelock Irr. Light & Power Co.,* 97 F. 2d 38 (9th Cir. 1938), cert. denied 305 U.S. 630.

The Government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its prejudice. *West Side Irr. Co. v. United States,* 246 Fed. 212, 158 C.C.A. 372 (Wash. 1917), affirming *United States v. West Side Irr. Co.,* 230 Fed. 284 (D.C. 1916).

17. —Suits by United States

In view of this section, requiring Secretary of the Interior to proceed in conformity with state law in his administration of the Reclamation Act, the district court had jurisdiction to review state engineer's decision approving voluntary application of United States for a change of the diversion place of some of the irrigation waters of the United States notwithstanding that the law may be different as applied to the United States as to payment of costs, estoppel, and abandonment. *United States v. District Court of Fourth Judicial Dist. in and for County,* 238 P. 2d 1132, 121 Utah 1 (1951), rehearing denied 242 P. 2d 774, 121 Utah 18.

In suit by the United States to enjoin an irrigation company from diverting irrigation water allegedly purchased and owned by the United States, the appointment of a water master was unnecessary, since injunction could enjoin company from interfering with diversion and storage of water by the United States and could enjoin company from diverting and storing water, and by such an injunction the District Court could protect the United States against unlawful invasions of its rights by company without the appointment of a water master. *United States v. Humboldt Lovelock Irr. Light & Power Co.,* 97 F. 2d 38 (9th Cir. 1938), cert. denied 305 U.S. 630.

The rule of comity did not require that a suit by the United States in a federal court to enjoin an irrigation company from diverting irrigation water allegedly purchased and owned by the United States should await determination of company's suit in a Nevada court to enjoin others from interfering with its diversion and storage of water where the United States was not a party to that suit. *United States v. Humboldt Lovelock Irr. Light & Power Co.,* 97 F. 2d 38 (9th Cir. 1938), cert. denied 305 U.S. 630.

A suit wherein a Nevada court adjudicated water rights allegedly owned by the United States and also the rights of an irrigation company was no obstacle to a suit by the United States in a federal court to enjoin company from interfering with its rights as against contention that suit contemplated an adjudication of water rights and that they were in *custodia legis. United States v. Humboldt Lovelock Irr. Light & Power Co.,* 97 F. 2d 38 (9th Cir. 1938), cert. denied 59 S. Ct. 94, 305 U.S. 630.

In action in state court to determine water rights in which United States intervened by leave and did not request removal to federal court, state court had jurisdiction to enter decree fixing priorities of United States, and the United States would be bound by the decree. *Pioneer Irrigation Dist. v. American Ditch Assn.,* 1 P. 2d 196, 50 Idaho 732 (1931).

In a suit by United States to enforce terms of contract entered into by defendant, a mutual irrigation company, which provided that it should not divert more than 80 cubic feet per second from stream and the Government proceeded with a reclamation project based on such contract, defendant cannot defeat the contract on the theory that it should not be construed as abandonment of rights of its stockholders. *West Side Irrigation Co. v. United States,* 246 Fed. 212, 158 C.C.A. 372 (Wash. 1917). For subsequent suit involving these same limiting agreements see *United States v. Union Gap Irr. Dist.,* 39 F. 2d 46 (9th Cir. 1930).

The government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its prejudice. *United States v. West Side Irr. Co.,* 230 F. 284 (D. Wash. 1916).

The fact that the United States has appropriated all of the unappropriated water of a stream in a county for an irrigation project, as permitted by a law of the State,

does not give it standing to maintain a suit to enjoin a prior appropriator from using an excessive amount of water unless it is alleged and proved that it had acquired the right to such water under its own appropriation. *United States v. Bennett,* 207 Fed. 524 (C.C.A. Wash. 1913).

The United States, like an individual, can restrain a diversion which operates to its prejudice and where the United States had examined, surveyed, located and had in operation extensive irrigation works for the storage, diversion and development of water from the Yakima river for the reclamation of arid lands and it appeared that an irrigation company had appropriated and was diverting and using quantities of water in excess of the amounts to which it was entitled, thereby entailing great damage upon the United States, the United States was entitled to an injunction to restrain the defendant from such use of the water in the river above, as to materially lessen the quantity at complainant's point of diversion which it had lawfully appropriated and which was necessary to the success of its project and fulfillment of its contracts. *United States v. Union Gap. Irr. Co.,* 209 F. 274 (D. Wash. 1913).

18. —Suits against the United States

A suit by riparian and overlying landowners to enjoin officials of the Bureau of Reclamation from impounding water at a federal dam on the San Joaquin River so as to protect plaintiffs' vested water rights was in fact a suit against the United States without its consent, in view of the fact that the decree granted by the lower court to enjoin the action unless a physical solution was provided would have interfered with public administration, required expenditure of public funds, and would have required the United States, contrary to the mandate of Congress, to dispose of irrigation water and to deprive the United States of full use and control of reclamation facilities. *Dugan v. Rank,* 372 U.S. 609 (1963).

The substantial reduction in the natural flow of the San Joaquin River as the result of the impoundment and diversion of the flow at Friant Dam upstream constitutes a seizure or taking, in whole or in part, of rights which may exist in the continued flow and use of the water; it does not constitute a trespass against such rights. This seizure was authorized by Congress when it authorized the project, and any relief to which claimants of the rights may be entitled by reason of such taking is by suit against the United States under the Tucker Act, 28 U.S.C. § 1346. *Dugan v. Rank,* 372 U.S. 609 (1963). (Ed. note: The Tucker Act is the Act of March 3, 1887, 24 Stat. 505. It authorized suits to be brought in the Court of Claims against the United States in certain cases, including claims founded upon the Constitution. This includes claims based upon the Fifth Amendment provision that private property shall not be taken for public use without just compensation. 28 U.S.C. § 1346 relates to the jurisdiction of the Federal District Courts in such cases, and 28 U.S.C. § 1491 relates to the jurisdiction of the Court of Claims. These sections appear herein in the Appendix.)

Where riparian rights of landowners along branch channel of San Joaquin River were subordinate to water rights of corporation which, with its subsidiary and affiliated companies, owned rights to use very substantial portion of flow of San Joaquin River, and United States, which, in carrying out Central Valley Project for irrigation purposes, formulated plan whereby waters of San Joaquin River were diverted and waters of Sacramento River were substituted therefor, entered into contract with corporation and its subsidiaries for such substitution, and United States faithfully and fully delivered substitute waters, and landowners suffered no actual damage because of substitution, any impairment of landowners' rights because of substitution was at most a technicality, for which landowners could not recover from United States, since United States could not with impunity take away substitute waters. *Wolfsen v. United States,* 162 F. Supp. 403, 142 Ct. Cls. 383 (1958), cert. denied 358 U.S. 907.

Where the United States in 1908 appropriated all the water of the Rio Grande River above lands in Hudspeth County Conservation and Reclamation District No. 1, riparian rights of owners of land in Hudspeth District were destroyed in 1908, and their alleged right of action against the United States for the taking of riparian rights was barred by limitations in 1958. *Bean v. United States,* 163 F. Supp. 838, 143 Ct. Cls. 363 (1958), cert. denied 358 U.S. 906.

The United States is not an indispensable party to a suit by a landowner receiving water from the Yakima project to enjoin the Secretary of the Interior from imposing additional charges for water delivery, representing part of the cost of the new Cle Elum reservoir, beyond those stated in a repayment contract with a water users' association and in the public notice issued by the Secretary, because the landowner, not the United States, is the owner of the water right under Federal and State law and under contract with the Secretary. This ownership is wholly distinct from the property right of the Government in the irrigation works. The suit is to enjoin the Sec-

retary from enforcing an order, the wrongful effect of which will be to deprive the landowner of vested property rights, and may be maintained without the presence of the United States. *Ickes v. Fox,* 300 U.S. 82 (1937). See also *Fox v. Ickes,* 137 F. 2d 30 (D.C. Cir. 1943), cert. denied, 320 U.S. 792.

A judicial apportionment of the unappropriated waters of the Colorado River among the states of the Colorado River Basin cannot be made without an adjudication of the rights of the United States, to control navigation and to impound and control in Boulder reservoir the disposition of surplus water in the stream not already appropriated, as any right of Arizona to the unappropriated waters in the Colorado River is subordinate to and dependent upon the right of the United States to such waters. Hence, the United States is an indispensable party to such apportionment proceedings. *Arizona v. California,* 298 U.S. 558 (1936).

The United States made application on March 30, 1921, for a diversion permit of 8,000 acre feet of the waters of the Snake River and for a storage permit of 3,000,000 acre feet per annum in connection with the Minidoka project. From 1930 to 1932 the American Falls District obtained water from the Government's natural flow or diversion permit, but in 1933 the United States required the District to use storage flow in alternate years. The district brought an action against the State Water Master. The court ordered the suit dismissed on account of the absence of the United States but on September 28, 1936, in denying a petition for a rehearing, modified its opinion to state that because the United States was not made a party to the suit, the court could not adjudicate the water rights. *American Falls Reservoir District No. 2 v. Crandall, et al.,* 82 F. 2d 973, 85 F. 2d 864 (C.C.A. Idaho 1936).

The word "control" in section 8 of the Reclamation Act providing that nothing therein shall be construed to affect or interfere with State laws relating to control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, held not to warrant inference that Congress thereby intended to relegate suit against United States or Secretary of the Interior involving right, title, or interest of United States, to State court for determination, or to deny United States or Secretary the right of removal. *North Side Canal Co. v. Twin Falls Canal Co.,* 12 F. 2d 311 (D. Ida. 1926).

19. —Seepage

Where the United States in 1906 and 1908 appropriated all of the unappropriated water of the Rio Grande for operation of the Elephant Butte Project, the United States also acquired the right to any incidental seepage of such waters. *Hunter v. United States,* 159 Ct. Cl. 356 (1962).

The abandonment of seepage waters from the Rio Grande reclamation project in the past by the United States did not constitute abandonment of the right to use such waters when needed in the future; and plaintiffs' use of such seepage waters did not create in them rights superior to those of the United States to control and prescribe the use of these waters. *Bean v. United States,* 163 F. Supp. 838 (Ct. Cl. 1958), cert. denied, 358 U.S. 906 (1958).

The United States' rights as a storer and carrier of project water are not exhausted with a single application of the water to land, but the water may be recaptured and reused as developed water. *Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins,* 213 F. 2d 425 (5th Cir. 1954), cert. denied, 348 U.S. 833 (1954). Although the United States, as owner of an irrigation project, may retain control over and re-use seepage waters from the project, when return flows to the river are abandoned, they become subject to appropriation down stream. *Nebraska v. Wyoming, et al.,* 325 U.S. 589, 633–37 (1945).

The United States purchased, for the Vale reclamation project, a one-half interest in the reservoir of the Warmsprings Irrigation District. The district agreed, in a contract with the United States, to accept return flow, drainage or waste water escaping from the Vale project and being available for diversion by the district's canals, as a part of the district's share of the stored water from Warmsprings reservoir. It was disputed whether, under the contract, the district must give the United States credit in Warmsprings reservoir storage only for the water leaving the Vale project above ground, or also for the water leaving the project by deep percolation, and later finding its way into the watercourses whence it might be diverted into the canals of the district. It was held by the Court, in construing the contract, that both surface flow and deep percolation water escaping from the Vale project and being available for diversion into the canals of the district could be the bases of a contract claim by the United States for storage in the reservoir. As the court interpreted the law of Oregon, water escaping from the Vale project by deep percolation is of a public character, even as against the United States. *United States v. Warmsprings Irr. Dist.,* 38 F. Supp. 239 (D. Ore. 1941).

The right of the United States in water appropriated generally for the lands of a

reclamation project is not exhausted by conveyance of the right of user to grantees under the project and use of the water by them in irrigating their parcels, but attaches to the seepage from such irrigation, affording the Government priority in the enjoyment thereof for further irrigation on the project over strangers who seek to appropriate for their lands. *Ide v. United States,* 263 U.S. 497 (1924), affirming *United States v. Ide,* 277 Fed. 373 (1921).

Under the Warren Act a contract between the United States and a land company for the delivery to the latter of water which escaped by seepage from the canal of a reclamation project was a valid contract which gave the United States the right to conserve and deliver water thereunder. *Ramshorn Ditch Co. v. United States,* 269 Fed. 80 (8th Cir. 1920), affirming 254 Fed. 842 (D. Neb. 1918). *Accord: United States v. Tilley,* 124 F. 2d 850, 858–63 (8th Cir. 1941), cert. denied 316 U.S. 691 (1942).

Where waste water arising from a Federal irrigation project, after percolation, is recovered by the Government by means of drainage ditches, with the intention of conserving and applying it to a beneficial use, the Government has a superior right to the water. *Griffiths v. Cole,* 264 Fed. 369 (D. Ida. 1919).

Landowners within a Federal irrigation project cannot avail themselves of waste and seepage water arising in connection with the operations of the project when such water is claimed by the Government. Memorandum decision June 26, 1918, by State District Judge Isaac F. Smith, in re petition Nampa-Meridian Irrigation District for confirmation of contract with the United States. Boise project.

26. Rights of water users—Generally

Where interest of United States in proceedings to obtain adjudication of water rights for irrigation and other purposes was only that of carrier or trustee in behalf of owners of water, title to which was sought to be adjudicated, United States immunity as sovereign government could not be extended to the water users. *City and County of Denver v. Northern Colorado Water Conservancy Dist.,* 276 P. 2d 992, 130 Colo. 375 (1954).

Where water rights on which Federal water project rested pursuant to this chapter had been obtained in compliance with state law, and pursuant to government's action individual landowners had become the appropriators of the water rights, the United States being the storer and carrier, the rights acquired by landowners were as definite and complete as if they were obtained by direct cession from the Federal Government, so that even if the government owned unappropriated rights, they were acquired by landowners in manner contemplated by Congress. *Nebraska v. Wyoming,* 325 U.S. 589 (1945).

In constructing a reclamation project, the property right in water right is separate and distinct from property right in reservoirs, ditches, or canals, in that water right is appurtenant to land, the owner of which is the appropriator, and is acquired by perfecting an "appropriation," that is, by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. *Nebraska v. Wyoming,* 325 U.S. 589 (1945).

Although the doctrine of prior appropriation fixes priorities among individual appropriators in the use of water according to maxim, qui prior in tempore, prior in jure est, it confers no right to waste water upon prior appropriator whose right is qualified by limitation, made in favor of subsequent appropriators and widest possible use of water on arid lands, that all of water he uses must be beneficially applied and with reasonable economy in view of conditions under which application must be made. *Burley Irr. Dist. v. Ickes,* 116 F. 2d 529, 73 App. D.C. 23 (1940), cert. denied 312 U.S. 687 (1941).

The United States is not an indispensable party to a suit by a landowner receiving water from the Yakima project to enjoin the Secretary of the Interior from imposing additional charges for water delivery, representing part of the cost of the new Cle Elum reservoir, beyond those stated in a repayment contract with a water users' association and in the public notice issued by the Secretary, because the landowner, not the United States, is the owner of the water right under Federal and State law and under contract with the Secretary. This ownership is wholly distinct from the property right of the Government in the irrigation works. The suit is to enjoin the Secretary from enforcing an order, the wrongful effect of which will be to deprive the landowner of vested property rights and may be maintained without the presenc

of the United States. *Ickes v. Fox,* 300 U.S. 82 (1937). See also *Fox v. Ickes,* 137 F. 2d 30 (D.C. Cir. 1943), cert. denied, 320 U.S. 792.

27. —Beneficial use

A beneficial use of waters alone gives user no vested right to them, and preceding the beneficial use there must have been a filing of a notice of intent to appropriate. *Bean v. United States,* 163 F. Supp. 838, 143 Ct. Cl. 363 (1958), cert. denied 358 U.S. 906.

Under this section, users of water from Rio Grande project have a defeasible interest, which is always at risk of loss by unjustifiable delay in making or continuing beneficial use. *El Paso County Water Imp. Dist. No. 1 v. City of El Paso,* 133 F. Supp. 894 (D. Tex. 1955), affirmed in part, reformed in part on other grounds 243 F. 2d 927, cert. denied 355 U.S. 820.

Notwithstanding the quantities of water stated in water right contracts, the measure of the water right of a water user on a Federal reclamation project is the amount that can be put to beneficial use. *Fox v. Ickes,* 137 F. 2d 30 (D.C. Cir. 1943), certiorari denied, 320 U.S. 792.

There is an important distinction between beneficial use and economical use of water. A property right once acquired by the beneficial use of water is not burdened by the obligation of adopting methods of irrigation more expensive than those considered reasonably efficient in the locality. *Fox v. Ickes,* 137 F. 2d 30, 35 (D.C. Cir. 1943), cert. denied, 320 U.S. 792.

Mere diversion and storage of water does not constitute appropriation thereof, but water must be applied to beneficial use to constitute appropriation. *Ickes v. Fox,* 85 F. 2d 294, 66 App. D.C. 128 (1936), affirmed 300 U.S. 82, rehearing denied, 300 U.S. 640.

By the provisions of this section the right to the use of water acquired must be appurtenant to the land and the beneficial use is the basis, the measure, and the limit of the right. *Imperial Water Co. No. 5 v. Holabird,* 197 F. 4, 116 C.C.A. 526 (Cal. 1912). See also *Gutierres v. Albuquerque Land & Irr. Co.,* 188 U.S. 545 (1903); *United States v. Bennett,* 207 F. 524, 525, 125 C.C.A. 186 (Wash. 1913); *United States v. Conrad Inv. Co.,* 156 F. 123 (C.C. Mont. 1907), affirmed 161 F. 829, 88 C.C.A. 647; *San Joaquin & Kings River C. & I. Co. v. Stanislaus County,* 191 F. 875 (C.C. Cal. 1911), reversed on other grounds 233 U.S. 454; *United States v. Union Gap Irr. Co.,* 209 F. 274 (D.C. Wash. 1913).

There can be no beneficial use of water for irrigation until it is actually applied to reclamation of the land. The final and only conclusive test of reclamation is production. This does not, perhaps, necessarily mean the maturing of a crop, but certainly does mean the securing of actual growth of a crop. Departmental decision, February 5, 1909.

28. —Appurtenant to land

This section providing that Rio Grande project water should be appurtenant to land irrigated must be construed consistently with provision upholding the force of state laws. *El Paso County Water Imp. Dist. No. 1 v. City of El Paso,* 133 F. Supp. 894 (D.C. Tex. 1955), affirmed in part, reformed in part on other grounds 243 F. 2d 927, cert. denied 355 U.S. 820.

In Nevada and in the states of the arid region generally, water for irrigation is appurtenant to the land irrigated, and hence is the property of the landowner, *United States v. Humboldt, Lovelock Irr. Light & Power Co.,* 19 F. Supp. 489 (D. Nev. 1937), reversed on other grounds 97 F. 2d 38, cert. denied 305 U.S. 630.

Water, appropriated by application thereof to beneficial use on appropriator's land, becomes part of and appurtenant to the land. *Ickes v. Fox,* 85 F. 2d 294, 66 App. D.C. 128 (1936), affirmed 300 U.S. 82, rehearing denied 300 U.S. 640.

Upon the issuance of a water-right certificate the right evidenced thereby becomes appurtenant to the land, subject to forfeiture for failure to pay the annual installments at the time and in the manner prescribed by law and the regulations, and a subsequent purchaser of the land succeeds to the rights and status of the original owner, subject to the same charges and conditions. *Fleming McLean,* 39 L.D. 580 (1911).

29. —Power purposes

Where a canal drop is not developed for power purposes as a part of a Federal reclamation project, the water users do not acquire a property interest in the energy of the falling water either as an incident of their right to the use of project water or as an incident of their obligation to repay the costs of the irrigation works which made the power drop possible; and therefore the United States may make development of the site available to a Warren Act contractor without the concurrence of the water users or the irrigation district which executed the repayment contract. Solicitor Margold Opinion M–28725 (October 6, 1936), in re use of power site at C drop, Klamath project.

30. —Warren Act

Land in the Hudspeth County Conservation and Reclamation District No. 1 is not a part of the Rio Grande Irrigation Project of the United States, and waters of the Rio Grande River delivered to landowners in the Hudspeth District were delivered, not pursuant to notices of appropriation of 1906 and 1908 filed by the Bureau of Reclamation of the Department of the Interior, but pursuant to contracts entered into under the Warren Act, between the Hudspeth District and Bureau of Reclamation, and such contracts gave landowners no vested rights to the use of the water, and landowners could not recover from United States for taking of alleged water rights. *Bean v. United States,* 163 F. Supp. 838, 143 Ct. Cl. 363 (1958), cert. denied 358 U.S. 906.

Sec. 9. [Allocation of funds to States and Territories of origin.]—*Repealed.*

EXPLANATORY NOTE

Repealed. Section 9 was repealed by section 6 of the Act of June 25, 1910, 36 Stat. 836, which appears herein in chronological order. As originally enacted, the section read as follows: "That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: *Provided,* That the Secretary may temporarily use such portion of said funds for the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each 10-year period after the passage of this act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid."

Sec. 10. [Necessary and proper acts and regulations.]—The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect. (32 Stat. 390; 43 U.S.C. § 373)

EXPLANATORY NOTES

Administrative Organization. The Reclamation Service was established within the Geological Survey of the Department of the Interior in July, 1902. In March, 1907, the Service was given bureau status under a director. The name of the Reclamation Service was changed to Bureau of Reclamation on June 20, 1923, and the position of Commissioner of Reclamation was established. The Act of May 26, 1926, which appears herein in chronological order, provides that the Commissioner of Reclamation shall be appointed by the President.

Previous Bills. A large volume of original bills were introduced in the Congress prior to the enactment of the Reclamation Act—22 Senate bills, 54 House bills, 2 Senate joint resolutions and 2 House joint resolutions. Unpublished volume entitled "Reclamation Act, Original Bills, 1899–1901", Engineering files, Bureau of Reclamation.

Legislative History. S. 3057, Public Law 161 in the 57th Congress. S. Rept. No. 254. H.R. Rept. No. 1468.

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1. Reclamation Act—Generally

A reclamation project is designed to benefit people, not land. *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 297 (1958).

The history of the Reclamation Act of 1902 shows that it was the intent of Congress that the cost of each irrigation project should be assessed against the property benefited and that the assessments as fast

as collected should be paid back into the fund for use in subsequent projects without diminution. This intent cannot be carried out without charging the expense of maintenance during the Government-held period as well as the cost of construction. *Swigart v. Baker,* 229 U.S. 187 (1913).

Subsequent legislative construction of a prior act may properly be examined as an aid to its interpretation. The repeated and practical construction of the Reclamation Act of 1902 by both Congress and the Secretary of the Interior, in charging cost of maintenance as well as construction, accords with the provisions of the act taken in its entirety and is followed by the court. *Swigart v. Baker,* 229 U.S. 187 (1913).

The Federal reclamation law is contained in the Reclamation Act of June 17, 1902, which, together with acts amendatory and supplementary thereto, forms a complete legislative pattern in the field. Solicitor Harper Opinion, M–33902, at 2 (May 31, 1945), in re applicability of excess land provisions to Coachella Valley lands.

The irrigation systems on the Flathead Indian Reservation do not constitute a reclamation project as contemplated by the Reclamation Act of June 17, 1902, and the amendments thereto. *Flathead Lands,* 48 L.D. 475 (1921).

The project manager (superintendent) of a Federal irrigation project is the Government representative through whom the project is managed and carried on. He is engaged in the administration of a Federal law and has the right to bring into the Federal courts controversies to which he is made a party touching the validity or propriety of acts done by him in his representative capacity. When sued in a State court for damages on account of his alleged negligence in operating a project canal, he can remove the cause to a Federal court. *Whiffin v. Cole,* 264 Fed. 252 (D. Ida. 1919).

The Act contemplates the irrigation of private lands as well as lands belonging to the Government and the fact that a scheme contemplates the irrigation of private as well as a large tract of Government land does not render the project illegal, so as to prevent the condemnation of land necessary to carry it out. *Burley v. United States,* 179 Fed. 1, 102 C.C.A. 429 (Ida. 1910).

Whatever may be its maximum power under the Constitution, it is thought that by the Reclamation Act Congress has chosen to confer authority upon the Secretary of the Interior only to undertake projects the primary or predominant purpose of which is to reclaim public lands. *Griffiths v. Cole,* 264 Fed. 374 (D.C. Ida. 1919).

The Act of June 17, 1902, outlines a comprehensive reclamation scheme, and provides for the examination and survey of lands and for construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semi-arid lands. *Henkel v. United States,* 237 U.S. 43 (1915).

In the construction of works for the irrigation of arid public lands, the United States is not exercising a governmental function, nor even a strictly public function, but is promoting its proprietary interests. *Twin Falls Canal Co. v. Foote,* 192 F. 583 (D. Ida. 1911).

The Reclamation Act is not a "revenue law" within the meaning of Revised Statutes, section 643, allowing removal to Federal Courts of suits brought in state courts "against any officer appointed under or acting by authority of any revenue law of the United States." *Twin Falls Canal Co., Ltd. v. Foote,* 192 Fed. 583 (D. Ida. 1911); *City of Stanfield v. Umatilla Water Users' Assn.,* 192 Fed. 596 (D. Ore. 1911).

2. —Constitutionality

There can be no doubt of the Federal government's general authority to construct projects for reclamation and other internal improvements under the general welfare clause, article I, section 8, of the Constitution as well as article IV, section 3, relating to the management and disposal of federal property. *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 294 (1958).

In conferring power upon Congress to tax "to pay the Debts and provide for the common Defense and general Welfare of the United States," the Constitution delegates a power separate and distinct from those later enumerated, and one not restricted by them; thus Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose. It is now clear that this includes the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement. *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 738 (1950).

The United States has constitutional authority to organize and maintain an irrigation project within a State where it owns arid lands whereby it will associate with itself other owners of like lands for the purpose of reclaiming and improving them, and for that purpose it exercises the right of eminent domain against other land owners to obtain land necessary to carry the proposed project into effect. *Burley* v. *United States, et al.,* 179 Fed. 1, 102 C.C.A.

429 (Ida. 1910), affirming 172 Fed. 615 (C.C. 1909). See also *Magruder v. Belle Fourche Valley Water Users' Assn.*, 219 Fed. 72, 133 C.C.A. 524 (S.D. 1914).

The Reclamation Act is within the power of Congress as to lands within the States as well as Territories, under Constitution, article 4, section 3, giving it power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States", and is not in violation of the Constitution on the ground that it authorizes the expenditure of public money without an appropriation, since it is in itself an appropriation of the proceeds of land sold, nor as delegating legislative authority to the Secretary of the Interior. *United States v. Hanson,* 167 Fed. 881, 93 C.C.A. 371 (Wash. 1909).

6. Powers of Secretary—Generally

Section 10 of the Reclamation Act does not authorize the Secretary to construct extra capacity in a sewerage system beyond the needs for project construction purposes, and make this capacity available to an adjacent town in return for the town's agreement to operate and maintain the system. The proposed use would violate R.S. § 3678, 31 U.S.C. § 28, which limits the use of appropriated funds to the objects for which the appropriation is made, unless otherwise provided by law. 34 Comp. Gen. 599 (1955), in re Glendo, Wyoming.

In cases where, because of administrative laxity in enforcing the excess land limitations of reclamation law, or because projects were initiated prior to the enactment of section 46 of the 1926 Act, owners of excess lands have been receiving water therefor without having executed recordable contracts, the Secretary, in the exercise of his authority to perform all acts necessary and proper to carry the reclamation laws into full force and effect (sec. 10 of the Reclamation Act of 1902; sec. 15 of the Reclamation Project Act of 1939), may permit the continued delivery of water to such excess lands on condition that the owner, by the execution of a recordable contract, agrees to dispose of such lands within a reasonable time on reasonable conditions. Associate Solicitor Cohen Opinion, M–34999 (October 22, 1947).

Secretary of the Interior had power to execute a plan of conservation whereby he stopped winter flow of water through power plant in irrigation district, ceased producing power in nonirrigating season for purpose of conserving such water for irrigating season, contracted with private power company to supply commercial demand in district, and preserved the profitable commercial power business which would otherwise have been lost through lack of dependable source of power during irrigation season. *Burley Irr. Dist. v. Ickes,* 116 F. 2d 529, 73 App. D.C. 23 (1940), cert. denied 312 U.S. 687.

Neither the Boulder Canyon Project Act nor the Reclamation laws generally authorize the Secretary of the Interior to establish a Federal reservation, in connection with the construction of the dam and powerplant, over which the United States would have exclusive jurisdiction pursuant to a Nevada statute generally ceding jurisdiction over lands acquired by the United States for public buildings. *Six Companies, Inc. v. DeVinney, County Assessor,* 2 F. Supp. 693 (D. Nev. 1933).

The Secretary of the Interior has no general supervisory authority under section 441, Revised Statutes, under section 10 of the Act of June 17, 1902, or under section 15 of the Act of August 13, 1914, to suspend public notices issued under the reclamation law. In re Shoshone irrigation project, 50 L.D. 223 (1923).

See C.L. 818, May 12, 1919, regarding authority of Secretary of the Interior to provide means for extermination of grasshoppers and other pests.

Under the Reclamation Act the Secretary of the Interior has power to contract with an irrigation district to supply, or partially supply, the district with water. *Pioneer Irr. Dist. v. Stone,* 23 Idaho 344, 130 Pac. 382 (1913); *Hillcrest Irr. Dist. v. Brose,* 24 Ida. 376, 133 Pac. 663 (1913); *Nampa & Meridian Irr. Dist. v. Petrie,* 153 Pac. 425 (1915). See also *Nampa & Meridian Irr. Dist. v. Petrie,* 223 Pac. 531, 37 Ida. 45 (1924).

7. —Leases and permits

The Secretary of the Interior may establish rules as to the use of withdrawn lands while not needed for the purpose for which they are reserved, and may lease them for grazing and limit animals to be grazed thereon; the revenue derived going into the reclamation fund. *Clyde v. Cummings,* 101 Pac. 106, 35 Utah 461 (1909).

There is no general statutory authority for leasing Government-owned land, and the Secretary of the Interior may adopt such methods as he deems in the best interest of the United States and the project. In the administration of the Boulder Canyon project area, the Bureau of Reclamation and the National Park Service may grant leases for lands and permits to engage in business activities to private individuals without advertising for proposals or securing competitive bids. Solicitor Margold Opinion M–28694 (October 13, 1936).

An easement for the construction and maintenance of an electrical transmission line over lands purchased under the reclamation law could be granted for a maximum period of 50 years on certain conditions administratively imposed. Solicitor's Opinion, M–24897 (December 31, 1928), Newlands project.

The Secretary of the Interior has authority to make temporary leases of lands reserved or acquired by purchase for use in connection with an irrigation project contemplated under the provisions of the Reclamation Act where use under the proposed lease will not interfere with the use and control of the lands when needed for the purposes contemplated by the reservation or purchase. Op. Asst. Atty. Gen., 34 L.D. 480 (1906).

Temporary leases for grazing and other agricultural purposes may be made of lands acquired through condemnation proceedings for reservoir or canal purposes in reclamation projects during such periods as may elapse between the acquisition of title and the actual use of the same for reservoirs and canals. All such leases should state the purpose for which the lands were acquired and that such purpose will not in any manner be interfered with or delayed by the lease; should specifically provide for the immediate, or speedy, termination of the lease in event it is desired to utilize the land or any part thereof for reclamation works, or in event the work of reclamation is found to be hindered or delayed by reason thereof; and should be limited to one year, but may contain provision for renewal for the succeeding year in event the lands should not sooner be needed for reclamation purposes. Instructions, 39 L.D. 525 (1911).

Whenever it is reasonably necessary for the preservation of the buildings, works, and other property, or for the proper protection and efficiency of any reclamation project, or where special conditions make it advisable, first-form withdrawn or purchased lands may be leased to the highest bidder for a term to be decided upon by the Reclamation Service (Bureau of Reclamation) as the conditions may arise. Reclamation decision, March 23, 1917.

The Secretary has full authority to purchase lands necessary for reservoir purposes, to arrange the terms of purchases, and to allow the vendor to retain possession after the Government has taken possession until the land may be actually needed where by so doing the purchase may be more advantageously made; but he has no authority under said act to lease such purchased lands after the Government has taken possession thereof. Instructions, 32 L.D. 416 (1904).

8. —Overseas projects

Section 10 of the Reclamation Act is to be construed as relating only to projects of the United States and does not authorize the Bureau of Reclamation engineers to review designs for two dam projects in Ceylon, and prepare supplemental plans and specifications therefor, with funds to be provided in advance by the Government of Ceylon. Dec. Comp. Gen. B–60382 (October 8, 1946).

16. Rules and regulations—Generally

This section gives the Secretary of the Interior no authority or power that he would not have if it were omitted. Op. Atty. Gen., April 27, 1905.

Rules and regulations prescribed by the Secretary of the Interior under statutory authority have the effect of statutes and will be judicially noticed by the courts. *Alford et al. v. Hesse,* 279 Pac. 831 (Calif. 1929).

While this section authorizes the Secretary of the Interior to make such regulations as may be necessary and proper to carry this act into full force and effect, he is not authorized to amend, modify, or change statutory provisions fixing rights of a successful contestant, who has secured cancellation of any pre-emption homestead or timber culture entry. *Edwards v. Bodkin,* 249 Fed. 562, 161 C.C.A. 488 (Cal. 1918).

A rule by the Secretary of the Interior, the import of which is to carry into effect the provisions of an act relating to the public lands, is valid, and has the same binding force as the law itself. *Clyde v. Cummings,* 101 Pac. 106, 35 Utah 461 (1909).