School Lands, Right of State to Unsurveyed.

The State of Montana has no enforceable right to school lands under the grant from Congress, as against the United States Government, before the same are officially surveyed.

Helena, Montana, June 17, 1907.

Hon. John P. Schmit,
Register State Land Office,
Helena, Montana.

Dear Sir:—

I am in receipt of your letter of June 4th, submitting for the consideration of this office the following question:

> "What is the right of the State, as against the Government of the United States, to unsurveyed lands which when surveyed will be within School Sections 16 and 36 in each township?"

In a letter addressed to the State Board of Land Commissioners,

April 14, 1905, this department considered at length the equities of the State as against trespassers and others holding possession of unsurveyed lands, which when surveyed will constitute a part of School Sections 16 and 36 under the Act of Congress of May 22nd, 1889, known as the Enabling Act.

The conclusion there reached was that the State has such an interest in these lands, prior to survey, as to enable it to protect them from trespassers and persons committing waste thereon.

Opinions of Attorney General, 1905-'06, p. 73, et seq.

But the question here is as to the rights and equities of the State as against the Government, who is the grantor of these lands to the State.

This is not a question to be settled by the rules of the Land Department, but rather by judicial interpretation and construction of the laws of Congress making the grant.

The granting words used in Section 10 of the Enabling Act with reference to this section are "Are hereby granted." And in Section 11 of the Enabling Act it is provided that these lands are not subject to any "entry under the land laws of the United States, whether surveyed or unsurveyed." The effect of this latter clause has been considered in Hydenfelt vs. Mining Co., 93 U. S. 634, and State ex rel Haire vs. Rice, 33 Mont. 365. If it had the effect of preventing parties who made bona fide settlement on these lands, prior to survey, from perfecting their title thereto after survey, it was remedied by the Act of Congress of February 25th, 1891, (26 Stat. at Lg. 796), which established the right of such settlers to obtain legal title to such land after survey. It seems to be a settled rule of law, that while such grants are grants in praesenti, yet, they do not attach to any specific tract or tracts of land as against the Government, until such land has been identified by official survey.

> "They (the words 'there be, and is hereby granted') vest a present title * * , though survey of the lands, and a location of the road are necessary to give precision to it and attach it to any particular tract."
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> Leavenworth, &c., vs. U. S., 92 U. S. 733.

The equitable title becomes a legal title only upon the identification of the granted sections.

> Desert Salt Co. vs. Tarpey, 142 U. S. 241.
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> U. S. vs. Montana Lumber Co., 196 U. S. 573.
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> Clemens vs. Gillette, 33 Mont. 321.
>
> Bullock vs. Rouse, 81 Cal. 590.

The State, then, has no legal title to these lands prior to survey, and its equitable title or right thereto, as against the Government, is subordinate to the legal title which still remains in the General Government.

The question which then presents itself, is,

What constitutes a survey?

It is fundamental that a sovereign makes its own surveys and

fixes the boundaries of grants made by it. A grantee cannot establish the boundaries of a grant made to him, by his own survey, nor can a court of justice do it. The government survey of the public lands is made by running and marking the lines of the townships and sections, and by marking the corners of the townships, sections and quarter sections, and by the approval of the plats and field notes of survey.

Sections 2395 et seq. Rev. Stats. U. S.

"It is not necessary that a whole township be surveyed at one time, and often different parts of a township are surveyed at different times. But no survey of any part is complete until the lines and corners about that part are run and established as required by the Statute."

Bullock vs. Rouse, 81 Cal. 590.

"Even after the principal meridians and the base line have been established, and the exterior lines of the township have been surveyed, neither the sections nor their subdivisions can be said to have any existence at all until the township is subdivided into sections and quarter sections by an approved survey. The lines are not ascertained by survey, but they are created."

Robinson vs. Forrest, 29 Cal. 325.

"There is in fact no such tract of land * * * until it has been located within the congressional townships by an actual survey and establishment of the lines under the authority of the United States. A person may be proximate to the lines that may be run,—may surmise the precise lands,—but a tract has no separate legal identity until a survey is made and approved under the authority of Congress."

Middleton vs. Low, 30 Cal. 605.

In the Rouse case above cited, lines had been established on three sides of the tract of land in question, but the court held that this was not a survey, for the reason that neither the plats nor field notes of survey contained any description of the particular tract in question.

In U. S. vs. Birdseye, 137 Fed. 516, it is said that a partial survey by the United States of a section of public land by running lines on two sides of it is insufficient to identify it as an odd-numbered section within a grant to the Northern Pacific Railroad Co. And in U. S. vs. Montana Lumber and Manufacturing Company, 196 U. S. 573, it is held that until the identification of the sections (Railroad Grant) by Government survey, the United States retains a special interest in the land.

The Supreme Court of Montana, in considering the question as to the right of the State to Sections 16 and 36, used this language:

"For it seems to be the rule applicable to such grants, that though they operate for some purposes as grants **in praesenti**, conveying the fee, yet, until the official survey is made and the plat has been approved by the Federal authorities, the grant is not effective to vest title to any specific portion of

the land described by the designation of section numbers only. (Middleton vs. Low, 30 Cal. 596; Medley vs. Robertson et al., 55 Cal. 396; Linn vs. Scott, 3 Tex. 67; United States vs. Montana L. & M. Co., 196 U. S. 673; 25 Sup. Ct. 367, 49 L. Ed. 604.) Even a partial survey of the particular section is not sufficient to identify it (United States vs. Birdseye, 137 Fed. 516.)"

Clemmons vs. Gillette, 33 Mont. 321.

From these decisions, and others therein cited as authority, the conclusion is inevitable that the State of Montana has no enforceable right to Sections 16 and 36 prior to survey thereof, as against the United States.

Yours very truly,

ALBERT J. GALEN,

Attorney General.