

State Lands, Fees for Patents Issued for. Fees, for Patents and Certificates of Purchase. State Lands, Damages for Rights-of-Ways in Patents. State Lands, Damages for Rights-of-Way Through. Rights-of-Way, Through State Lands.

Under Section 6 of Chapter 147, Laws of 1909, a fee of two dollars should be charged for all patents hereafter issued.

Persons who received certificates of purchase of state lands prior to the passage of said Chapter 147 are entitled to patent containing no reservation of coal, oil and gas.

Persons receiving patents containing right-of-way for canals, ditches, etc., for the reclamation of arid lands are only entitled

to damage caused to their buildings and other improvements placed upon the land.

Helena, Montana, May 11, 1909.

Hon. F. H. Ray,
Register, State Land Office,
Helena, Montana.

Dear Sir:

I am in receipt of your letter of the 3rd instant, requesting an opinion upon the following questions :

"1. Prior to March 19, 1909, no fee was fixed by law for the issuance of patents for state land, therefore when a patent is hereafter issued, pursuant to contract of purchase issued prior to March 19, 1909, shall a fee of \$2.00 be charged as per Section 6, Chapter 147, page 291, Laws?"

"2. Shall the patent hereafter issued, under said contracts, contain a right-of-way reservation as per Section 31, Chapter 147-1909 laws, and also a reservation of coal, oil, and gas, as per Section 34, Chapter 147, 1909 laws, i. e., made prior to their enactment, March 19, 1909?"

"3. I find that all patents that have been issued since February 28, 1905, contain no right of way reservation for the United States Government, as required by Section 2, Chapter 53, page 117, 1905 Laws. However, that section specifically provides for reimbursing the person rightfully in possession of said lands for actual damages sustained, but no such protection is provided by Section 31, Chapter 147, 1909 laws. What protection has the original, or subsequent purchaser, of state lands, against damage by operation of Section 31, Chapter 147, 1909 laws?"

In answer to your first question, you are advised that, in our opinion, you should charge a fee of \$2.00 for the issuance of all patents issued by you after the passage and approval of said Chapter 147, Laws of 1909. Such fees are in the nature of a tax to pay for the services of the officer in issuing patents, and are credited to a fund for the purpose of reimbursing the state for the salary and expenses of the officers whose duty it is to issue such patents.

Paige on Contracts, p. 1748.

It does not impair the obligations of the contract theretofore entered into for the sale of the land, or affect any vested rights under such contract.

In answer to your second question, you are advised that, in our opinion, persons who were given certificates of sale of state lands prior to the passage and approval of said Chapter 147, Laws of 1909, are not subject to the provisions of said Chapter 147, relating to the reservation of rights of way, and of coal, oil and gas, which were not contained in the certificate of purchase, or in the law as it existed at the time such certificates were issued.

Certificates of purchase issued by a state are in the nature of con-

tracts for the sale of real estate by private individuals, and must be governed by the principles of law applicable to contracts of that kind.

26 Am. & Eng. Enc. L. pp. 370, 371.

The holder of a certificate of purchase issued prior to the passage and approval of Chapter 147 has a vested right in everything contained in the land described in the certificate, except such as was expressly reserved in the certificate or by the law in force at that time, and upon complying with the terms of the certificate of purchase is entitled to a patent conveying to him all such interest.

Subsequent statutes cannot change vested rights.

Page on Contracts, Section 1760.

In answer to your third question, you are advised that the law in force at the time of the execution of a contract is a part of such contract.

Page on Contracts, Section 1759.

Therefore, persons holding certificates of purchase, issued after the passage and approval of Chapter 53, Laws of 1905, are subject to the reservations for right of way to the United States government for reclamation purposes, as contained in said Chapter 53, even though such reservations were not specifically mentioned in the certificate of purchase or in the patent issued pursuant thereto. And, of course, the holders of such certificates of purchase issued under the law contained in said Chapter 53 would be entitled to reimbursement for the actual damages sustained, as provided in said chapter.

You are further advised that, in our opinion, Section 31 of said Chapter 147, Laws of 1909, repeals the provisions of said Chapter 53, Laws of 1905, as it provides that,

"There is hereby granted to the United States over all the lands now owned, or hereafter acquired by the State of Montana, a right-of-way for ditches, canals, tunnels, telephone and telegraph lines, now constructed, or to be constructed by the United States Government, in furtherance of the reclamation of the arid lands, and that all conveyances of state lands shall contain a reservation of such right-of-way."

This section makes an absolute grant to the United States of rights-of-way for the purposes therein mentioned, and therefore such rights-of-way having been granted by the state through these lands the purchaser of any such lands who has received his certificate of purchase since the passage of this law takes it subject to this grant made by the state to the United States government. If the right-of-way crosses his land at a point where it does not damage any improvements or cultivated land, in our opinion, the owner of the land would have no claim for damages for the construction thereof. On the other hand, as the right-of-way crossing the land is not definitely located at the time the person purchases the land from the state, and he erects buildings or cultivates land, and thereafter the right-of-way is definitely located so as to damage his buildings or cultivated lands, or the crops of the owner of such

land, then such owner would be entitled to the actual damage sustained by him to his improvements and cultivated land.

Yours very truly,

ALBERT J. GALEN,
Attorney General.