

**Carey Lands, Selection No. 5. Patents For, When May be
set Aside.**

(See Opinion.)

Helena, Montana, October 25, 1909.

Hon. Edwin L. Norris,
Governor of Montana,
Helena, Montana.

Dear Sir:

I acknowledge receipt of your favor of the 23rd instant, enclosing a letter from the Honorable George W. Wickersham, attorney general of the United States, addressed to you, relative to the Carey Land Selection No. 5, heretofore made on June 29, 1900, by the state arid land grant commission, the predecessor of the present Carey Land Act Board of the State of Montana.

In your communication you ask the opinion of this department as to whether there is any legal way to make re-conveyance of the lands in-

volved to the United States Government under existing state law.

From the facts within our knowledge it appears that these lands have been actually patented to the state by the United States, and, therefore, it is not within the power of the secretary of interior to restore such lands to the public domain for failure to comply with the act, as provided by the amendatory act of congress of March 3, 1901, (31 Stat. 1118; also p. 1557, U. S. Comp. Stats. of 1901.) The patents having been regularly issued it would seem that before the lands can be restored to the public domain title must be again vested in the United States Government; and this can only be in one of two ways: viz., either by a re-conveyance of the land or by cancellation of the patent, and it does not appear to us that the state is in position to deed the lands back, because of lack of statutory authority; and, further, if the law did permit such re-conveyance, it appears that the state is now bound by contract for the reclamation of the lands, entered into between the Carey Land Act Board and the Ames Realty Company, which would prevent reconveyance without the consent of said company.

I shall not attempt to further deal with any of the facts relating to the matter, deeming this phase of the subject proper to be presented to you by the Carey Land Act Board.

By the Act of Congress of June 11, 1896, (29 Stat. 413; also U. S. Comp. State, p. 1556), it is provided:

"That under any law heretofore or hereafter enacted by any state providing for the reclamation of arid lands in pursuance and acceptance of the terms of the grant made * * * a lien or liens is hereby authorized to be created by the state to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state without regard to settlement or cultivation."

Thus, it appears that the vital question involved under the law, as a matter of fact, is whether an ample supply of water has actually been furnished in a substantial ditch or canal, or by artesian wells or reservoir, sufficient to reclaim the lands, rather than as to whether the lands in question have been actually irrigated, reclaimed and occupied by actual settlers, as seems to have been the requirement under the Act of August 18, 1894, (28 Stat. 422, U. S. Comp., Stats. 1909, p. 1555.)

It is to be regretted, if the facts justify the institution of an action in the supreme court of the United States, reflecting upon the state of Montana in its dealings with the United States government with respect to these lands. However, the present administration has had nothing whatsoever to do with the segregation of these lands, this having been

done under a former administration and by the old state arid land grant commission. If there is any way by which the contemplated action can be postponed, it would seem desirable, as a charge in the United States supreme court that the lands were originally selected for fraudulent purposes, even though not sustained by the proof, would be far reaching and lasting in effect.

We cannot devise any legal manner by which the lands can be re-conveyed under existing statutes, and would, therefore, respectfully suggest that showing be made to the secretary of the interior as to the true state of facts by either the Carey Land Act Board or yourself.

The letter of the attorney general is herewith returned.

Very truly yours,

ALBERT J. GALEN,

Attorney General.