

**School Lands, Indemnity Selections on Reservations. Lands,
Selection of Indemnity on Reservations. Indemnity Selections,
Lands on Reservations.**

In selecting indemnity lands on what was formerly the Flathead Indian Reservation, the state cannot select timber lands, as such lands have never been restored to and become a part of the public domain.

Helena, Montana, January 4, 1910.

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

Dear Sir:—

I am in receipt of your communication of December 23, 1909, enclosing therewith letter addressed to you by the honorable commissioner of the general land office; also a copy of a letter of instruction, addressed by the honorable commissioner to the register and receiver of the United States land office, at Kalispell, Montana; also a copy of the proclamation of the President of the United States, of date May 24, 1909, relative to the opening of the Flathead and other Indian reservations.

The letter of the honorable commissioner of the general land office, addressed to you, and his letter of instruction addressed to the honorable register and receiver, gives specific direction and instructions relative to making indemnity selections, and the land that is subject thereto.

There are certain propositions of law involved, deserving of consideration, relative to the right of the state of Montana to sections 16 and

36, in each township within the Flathead Indian reservation, and to which the state may, as a matter of law, be entitled upon the opening of that reservation on April 1, 1910, the right of the state to make indemnity selections, and also to what class or character of land, if any, these indemnity selections shall be limited.

Section 10 of the Act of Congress of February 22, 1889, (25 Stat. 676), known as "The Enabling Act" grants to the state of Montana sections 16 and 36 in every township within the state, and provides that the state shall have the right to make indemnity selections where such lands have been otherwise disposed of by or under authority of congress; provided sections 16 and 36 embraced in permanent reservations for national purposes shall not be subject to the grant nor to the indemnity provisions thereof, nor shall lands embraced in Indian reservations be subject to the grant or to the indemnity provisions thereof until the reservation shall have been,

1. Extinguished;
2. And such land be restored to and become a part of the public domain.

To restore lands to the public domain means to make them subject to the general land laws of the United States. Lands owned by the government and held for special purposes, or to be disposed of under special laws, cannot, so long as so held, be considered as having been restored to the public domain.

"The term 'public lands' or 'public domain' are habitually used in the United States to designate such lands of the United States or of the states as are subject to sale or other disposal under general laws, and are not held back or reserved for any special governmental or public purposes."

32 Cyc., 775;

Barker v. Harvey, 181 U. S. 481.

The Act of Congress of April 23, 1904, (33 Stat. 302), relating to the opening of the Flathead Indian reservation, and the subsequent acts of congress supplementary thereto and amendatory thereof, (35 Stat. 781; 35 Stat. 251; 35 Stat. 1039), provides, in section 8 of the original act:

"That when said commission shall have completed the classification and appraisal of all of said lands and the same shall have been approved by the secretary of the interior, the land shall be disposed of under the general provisions of the of the homestead, mineral, and town-site laws of the United States except such of said lands as shall have been classified as timber lands, and excepting sections 16 and 36 of each township, which are hereby granted to the State of Montana, for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said state, with the approval of the secretary of the interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the

opening of such lands to settlement; Provided, that the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre."

And the Act of Congress of March 3, 1909, (35 Stat. 781), provides,

"That all merchantable timber on said land returned and classified by said commission as timber lands shall be sold and disposed of by the secretary of the interior, for cash, under sealed bids or at public auction, as the secretary of the interior may determine, and under such regulations as he may prescribe: Provided, that after the sale and removal of the timber such of said lands as are valuable for agricultural purposes shall be sold and disposed of by the secretary of the interior in such manner and under such regulations as he may prescribe."

And this latter act further provides:

"That the secretary of the interior be, and he is hereby, authorized in his discretion to reserve from location, entry, sale, or other appropriation all lands within said Flathead Indian reservation chiefly valuable for power sites or reservoir sites."

It will be noticed that the original act of congress contains the provisions that the land shall be disposed of under the general provisions of the homestead, mineral and townsite laws of the United States, (33 Stat. 302),

"except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the state of Montana for school purposes."

The proclamation of the President, in opening this reservation, is no broader in its terms than is the law itself. If the statute had warranted it, and the proclamation of the President had provided that all the land within the reservation should be subject to disposal under the general land laws of the United States, then, with the opening of the reservation on April 1, 1910, the right of the state to sections 16 and 36 in each township would have attached at once. But the law of congress above referred to, relating to the opening of this Indian reservation, makes special exception of sections 16 and 36, and also specially excepts lands that are classified as timber lands. And although the Indian reservation will be extinguished on April 1, 1910, yet the second condition mentioned in the Enabling Act, when

"such lands be restored to and become a part of the public domain"

has not happened. It follows, therefore, that sections 16 and 36, and the lands classified as timber lands within this reservation, have not, and will not, become a part of the public domain, and that the state cannot therefore claim the same under the provisions of the Enabling Act. The state's right to sections 16 and 36, and its right to indemnity selections are derived from and based upon the laws of congress relating to the opening of this Indian reservation, and are not derived from nor based upon the provisions of the Enabling Act. The state, therefore, having acquired

its rights from these acts of congress, such rights are subject to all the provisions and exceptions constituting a part of the laws of congress.

Yours very truly,

ALBERT J. GALEN,

Attorney General.