

State Lands, Advancing Expense of Survey of Unsurveyed Lands. Surveys. Advancement of Expense by State to Survey Government Land. State Lands, Application of Governor for Survey of.

Where the governor has made application for the survey of unsurveyed government lands, the same should be withdrawn from entry from the date of such application, and the commissioner of the general land office is not authorized to refuse to so withdraw it unless the state advances the money for paying the expense of the survey.

Helena, Montana, May 2, 1910.

Hon. Edwin L. Norris,  
Governor,

Helena, Montana.

Dear Sir:

I am in receipt of your communication of April 25, enclosing a letter from the commissioner of the general land office, dated April 20, 1910, regarding your application, as governor of the state, for the survey of certain townships in Montana, in which letter the commissioner states that,

"under existing regulations governing the survey of lands under the act of August 18, 1894, the withdrawal will not be ordered until the funds are available for the payment of the cost of the work, either by deposit made by the state or from the annual appropriation for surveys and re-surveys."

You request an opinion from this office as to whether such holding of the commissioner is in accordance with the statutes of the United States relating to the withdrawal of unsurveyed land, upon application for the survey thereof by the governor.

The act of August 18, 1849, (28 Stat. 394, and U. S. Comp. Statutes, p. 1483), authorizes the governors of certain designated states, including the state of Montana, to apply to the commissioner for a survey of any township of public land remaining unsurveyed; and, further provides, that:

"Upon the application of said governors the commissioner of the general land office shall proceed to immediately notify the surveyor general of the application made by the governor of any of the said states of the application made for the withdrawal of said lands, and the surveyor general shall proceed to have the survey or surveys so applied for made, as in the cases of other surveys of public lands."

This law further provides that the lands found to fall within the limits of any such township, as ascertained by the survey, shall be reserved, upon the filing of the application for survey, from any adverse appropriation by settlement, or otherwise, for a period extending from the date of the filing of such application for survey until the expiration

of sixty days from the date of filing of the township plat of survey in the proper district land office.

The above provision clearly shows that it is the intention of the law that the land is withdrawn and reserved from appropriation by settlement, or otherwise, from the date of filing of the application for survey by the governor, provided he publish the thirty days' notice in the manner required by the law.

The act further provides,

"that the commissioner of the general land office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate, of the withdrawal of such township or townships for the purpose hereinbefore provided."

In our opinion the above provisions of the law clearly provide that the filing of the application by the governor, and the publication of the notice, withdraws the land from appropriation by settlement, or otherwise, without any order on the part of the commissioner, the law simply making it the duty of the commissioner to notify the surveyor general, and the local land office, of the fact that such application has been filed.

If there are no funds available for the survey of such land at the time the application was filed, then the law provides that the surveyor general

"shall proceed to have the survey or surveys so applied for made as in the cases of other surveys of public land."

In the cases of surveys of public lands, of course, the surveyor general does not make the survey until the funds therefor are available, and in the case of applications for surveys by the governor he would pursue the same course, but the fact that there were no funds immediately available would not prevent the withdrawal of the lands, under said act, by operation of law immediately upon the filing of the governor's application.

In our opinion, the proviso contained in the act, to the effect that the governors of the several states named therein are authorized to advance money from time to time for the survey of townships withdrawn under such act, is simply for the purpose of enabling the governors to expedite the survey of these townships whenever, in their judgment, it is advisable so to do. But, in the event that they do not see fit to elect this option, in our opinion, it does not authorize the commissioner of the land office to refuse the withdrawal of such lands from appropriation by settlement, for as stated above, the land is by operation of law withdrawn from appropriation by settlement, or otherwise, immediately upon the filing of the application by the governor.

In my opinion, an appeal should be taken to the secretary of the interior, unless you find the delay necessarily caused by an appeal might result in loss of any of these lands to the state by reason of settlers going upon the same pending the appeal, in which event it might be advisable to advance the money for the surveys at this time.

The secretary of the interior, in the case of *Ensign v. State of*

Montana, 34 L. D., page 433, in construing said act of August, 1894, said:

“The language of the foregoing quotation from the act of 1894 clearly authorizes and requires the withdrawal of all of the lands in the townships for a survey of which application has been made.”

Very truly yours,

ALBERT J. GALEN,

Attorney General.