SPECIAL PROCEEDINGS.

December 30th, 1911.

State Board of Land Commissioners, Helena, Montana.

Gentlemen:—

With respect to the recent trip made by Governor Norris and myself to Washington for the purpose of attending to certain administrative matters of state, and particularly with reference to matters in your department, I respectfully present this, my report, for your consideration and approval.

First:—The Mondell Bill.

Governor Norris and myself expressed opposition to this measure, which is designated to permit land grant states to relinquish state lands embraced within a Carey Land Irrigation Project and to make indemnity selections, using the lands so relinquished as a basis. This bill has been advocated by R. A. Carnochan of Butte, Montana, and his associates, in their attempted reclamation of lands embraced in what is known as the "Ruby Project" in Madison County. Our objections to this measure are chiefly because of the fact that under existing conditions lands of equal value cannot be obtained by the state as indemnity. Our views in this particular are fully embraced and set forth in a communication bearing date December 9th, 1911, addressed to Mr. R. A. Carnochan at Chicago, Illinois, a copy of which is hereto attached and submitted for your consideration, marked Exhibit "A."

Second:—State Forest Reservations.

On December 7th, Governor Norris and myself met with President Taft, Secretary of the Interior Fisher, Commissioner of the General Land Office Dennett, and Secretary of the Bureau of Forestry Potter, and explained to them the desire of this board to make relinquishment of all of the school lands embraced in United States Forest Reservations, whether surveyed or unsurveyed, and to obtain from the government in place and stead thereof, one compact body of timber land equal in the aggregate to the acreage of the lands by the state released, the same to constitute a state forest reservation and to be administered in accordance with state law upon the subject. We called attention to the fact that great conflict of authority would result, with accompanying injury to the government in the administration of its forestry policies, should the state now assert its right and title to lands embraced in United States Forest Reservations which were surveyed and the plats approved by the Secretary of the Interior before the creation of the Forest Reservations. Our contention was, and is, that the state's rights to School Sections 16 and 36 were at once vested in said sections upon survey and approval of the survey plats, and that now the state's possession and ownership thereof can be in nowise questioned or interfered with by the government by virtue of subsequent government proclamations including such lands in federal forest reservations. We stated that it was not the desire of the executive department of state to interfere wih the policies of the United States in administering federal forest reservations, but insisted that unless we could be given a compact body of forest land equivalent to the aggregate of the state's lands now embraced in forest reservations that, in the administration of the affairs of state, we would have to assert our possession and ownership of all lands in federal forest reservations which have been surveyed and the survey plats approved.

Attention was called to the provisions of the Borah Bill now pending before Congress, giving Idaho the right to make such relinquishment and exchange of land, and we gave this measure hearty approval, but insisted that it should be amended so as to extend the benefits thereof to the State of Montana. This led to a discussion of the con-

stitutionality of such a measure, in consequence of opposition said to be made by Senator Hepburn of Idaho. Senator Hepburn's opposition to such proposed measure is, undoubtedly; made because of the holding of the Supreme Court in the case of Balderson v. Brady, 107 Pac. 493, and 108 Pac. 742, to the effect that the grant of Sections 16 and 36 made by the Enabling Act is a grant IN PRESENTI, which at once vests title to the lands in the state, whether the lands be surveyed or unsurveyed. Advocacy of such construction of the Enabling Act would result, necessarily, in holding the Act of February 25th, 1891 (26 Stats, 796) unconstitutional as being in conflict with the provisions of the Enabling Act.

The Act of February 25th, 1891, recognizes the rights of settlers under the homestead laws, who have been bona-fide, in occupation of portions of either Sections 16 or 36 prior to survey as superior to those of the state, and requires the state to make indemnity selections. If this were to be held the proper construction of the law by the United States Supreme Court, hundreds, if not thousands, of individuals would be affected in their vested rights and deprived of valuable lands upon which they had settled and placed valuable improvements in good faith, and in consequence of indemnity selections made by the state to make good lands so lost to settlers, the state would be plunged into interminable difficulty and strife and it is questionable if at this late date the situation could ever be adjusted.

This subject was fully discussed and the President agreed with our view that such an act as that proposed is constitutional, and that the State of Montana should be made the beneficiary of the provisions of any such law under the conditions presented.

Attention was by us called to certain of the decisions of the courts upon the subject sustaining our contention, and for your information, and so that a record of same may be preserved they are here set forth:

> "They, the words 'thereby and is hereby granted' vests a present title * * * * though survey of the lands and the location of a road are necessary to give precision to it and attach it to any particular tract."
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> Leavenworth v. United States, 92 U. S., 733.
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> "The equitable title becomes a legal a title only upon the identification of the granted sections."
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> Desert Salt Lake Co., v. Trappy, 142 U. S. 241.
>
> U. S. v. Montana Lumber Co., 196 U. S. 573.
>
> Clements v. Gillette, 33 Mont., 321.
>
> Bullock v. Ruse, 81 Cal. 591.

The Honorable Secretary of the Interior, in a letter addressed to me, bearing date September 30th, 1909, has decided this question from the Government's viewpoint, and he also takes a view entirely contrary to the position of the supreme court of Idaho. In said opinion, he says:

> "By the Act of February 25th, 1891 (26 Stats. 796) Congress amended Sections 2275 and 2276 of the Revised Statutes

which relate to the school grants to the states generally, and provided a method of selecting indemnity therefor. As thus amended these sections clearly provide that if, prior to survey settlement is made under the pre-emption or homestead laws upon land afterwards found to fall within sections 16 and 36, such settlements shall be protected and the state is relegated to taking indemnity therefor. In construing the act making the grant to the state and the act of 1891 amending sections 2275 and 2276, this department has repeatedly and uniformly held that a state admitted to the Union under said Act of 1889 acquires no rights to lands in sections 16 and 36 prior to the survey, and that the provisions of the Act of 1889 where they conflict with sections 2275 and 2276, Revised Statutes, as amended, are superseded by the provisions of the amended sections, and that the grant of school lands provided for in the Act of 1889 must be administered and adjusted in accordance with the later legislation."

See State of Washington v. Kuhn, 24 L. D. 12.
Todd v. State of Washington, 24 L. D. 136.
South Dakota v. Riley, 34 L. D., 157.
South Dakota v. Thomas, 35 L. D., 171."

From this decision it appears that the state can have no legal title to such lands prior to survey as against the government, and that its equitable title is subordinate to the legal title which remains in the government until after identification of the lands by survey.

Third:—State Selections Within Territory Withdrawn Because of Coal Classifications.

The right of the state to protection against injury in filling its land grants because of withdrawal orders of the Secretary of the Interior by reason of supposed coal deposits was by us taken up and discussed with the President, Secretary of the Interior, and Commissioner of the General Land Office. It was by us insisted that by the Act of 1891 the law intended to aid the state in filling its land grants, which act was applicable to both Section 16 and 36 and the grants in quantity, and gave the state a preference right of making selections for a period of sixty days after the filing and approval of the survey plats, during which peroid of time no entries could be made. In further aid to the state in filling its grants the act of 1894 provides that the Governor may, by proclamation, segregate unsurveyed territory and that the same shall thereafter be with-held from entry or settlement until after survey and sixty days from the approval of the survey plats in order to enable the state to enter upon the land and make its examinations and selection. We called attention to the fact that the influx of settlers into the State of Montana was such that in order to assist the state in filling its grants, Governor Norris made a proclamation in 1909 segregating a large tract of unsurveyed lands located in Dawson, Valley, and Custer counties so as to enable the state to make its selections in accordance with the law, but notwithstanding such action so

taken by the governor in accordance with the law, it now appeared that the governor's proclamation is nullified, or at any rate suspended in consequence of a withdrawal order made by the Secretary of the Interior because of coal deposits alleged to exist in such land. It was by us insisted that where any such lands were withdrawn by order of the secretary of the interior that the state should be given sixty days' notice of any order thereafter made by the secretary of the interior releasing said lands, our contention being that the secretary of the interior should not be permitted by his order to nullify rights vested in the state by law. The President agreed with our views and insisted that the state should be given such protection and notice, and stated that it did not seem o him fair or just to take away from the state "the fat and leave to it the lean."

We then directed attention to the fact that where lands are withdrawn by order of the secretary of the interior because of coal classifications, that individuals are given the right of making entry upon said lands where waiver is made of the right to the coal, whereas the same privilege is not accorded to the state, thus further greatly hampering the state in filling its grants. After thoroughly discussing this subject it was concluded that it would be necessary to make amendment to existing laws so as to confer such right and authority upon the state, and to this end we took the subject up with Congressman Charles N. Pray, and he introduced a Bill known as H. R. 15455, entitled "A Bill to Amend Sections 1 and 2 of the Act of Congress of June 22nd, 1910, entitled 'An Act to provide for agricultural entries on coal lands, so as to include state land selections, indemnity, school and educational lands.'" This bill has the approval of the President and the Secretary of the Interior, and should be enacted into law without delay. In the event of its passage the state will be given much more valuable agricultural territory within which to make its selections. A copy of the bill hereinabove referred to is hereto attached for your information and consideration.

Fourth:—Patents and Approval of Selections.

With reference to delay in issuance of patents and approval of state selections, we were insistent that this subject should be investigated at once to the end that results might be speedily obtained. We explained that we could see no reason why there should be delay for ten years or more in issuing patents to the state for its land selections, or why the secretary of the interior should delay indefinitely in the approval of state selections. We insisted that we were entitled to action and that the interior department has no dealt fairly with the state by such continued procrastination.

We insisted that in all fairness, if our land selections were not to be approved, or the patents were not to be issued, we should be advised within a reasonable time so as to be given opportunity to protect the state and make lieu selections. The President agreed with our views in this matter, and Secretary Fisher and Commissioner Dennett promised to at once investigate the subject and take immediate action.

Fifth:—Notice of Settlement on School Sections Prior to Survey.

The subject of requiring the officers of local land offices to notify the state of alleged settlements upon school sections prior to survey was taken up and discussed with Commissioner Dennett, and a formal written communication was thereafter addressed to him upon the subject, and in consequence, he at once issued a circular to all Registers and Receivers of United States Land Offices requiring them to give notice to the state in all such cases. A copy of our letter addressed to the Commissioner upon this subject, his reply thereto, and the formal circular letters issued to Registers and Receivers of the Land Offices are attached to the report of Assistant Attorney General W. H. Poorman.

Sixth:—Indian Claims to School Sections Within the Flathead Indian Reservation.

The question of the right of Indians to relinquish trust patents issued to them for allotments and to select other lands in lieu thereof embraced within the limits of Sections 16 and 36 was discussed and considered and the state's position presented to Commissioner Dennett in writing, copy of which letter and his reply thereto is attached to the report of Assistant Attorney General W. H. Poorman, for your information.

You will notice by such exhibits that the state's contention is sustained by the Honorable Commissioner of the General Land Office, and it is held that Indians cannot obtain rights to state school sections after the right of the state to such sections attached under the provisions of the Act of April 23, 1904. In this connection, this holding disposes of the claims made adversely to the State of Montana by Julia Carron Keller, Flathead Allotee No. 1878 and Annie Keller, Flathead Allotee No. 1882; therefore the state's title to the lands involved in these specific contests is settled and this holding vests the same in the State of Montana.

In consequence of the great amount of work necessary to be done in handling and presenting these questions and the time required therefor, I thought best to call upon my assistant, W. H. Poorman, to join me in Washington so as to assist me in taking care of necessary details because of the fact that my engagements in Montana were such that it would be impossible for me to stay in Washington the time required to fully present these subjects and obtain action. Judge Poorman remained in Washington for about two weeks and fully cared for all of these matters, in accordance with my directions, and has made full and complete report concerning all the subjects hereianbove referred to, which report is hereto attached for your advice and information.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.