Taxation of Lands Under the Carey Land Ace—Carey Lands, Taxation of.

Lands under the Carey Land Act which have not been patented and which the state of Montana has not made proofs to the United States, are not subject to taxation as such.

November 22, 1920.

State Board of Equalization,
Helena, Montana.

Gentlemen:

After considerable delay the county attorney for Pondera County and the attorney for the appellants have submitted an agreed statement of facts with reference to the above matter.

From this statement and from the records in the office of the Carey Land Board the facts appear to be substantially as follows:

Under the provisions of the Carey Land Act the State of Montana filed certain lists with the Department of the Interior of the United States and procured the segregation from the public domain of the United States of about 72,000 acres of public lands. Thereafter the State of Montana entered into a contract with the Valier-Montana Land and Water Company whereby said company was to construct an irrigation system and procure and furnish a supply of water sufficient to reclaim and irrigate said lands. Entrymen made filings upon such lands, paid the fees of $1.50 an acre to the State of Montana, and entered into contracts with the company for the purchase of water rights for the irrigation of the lands, each individual entryman concerned in the appeal having fully completed his irrigation, cultivation, improvements, etc., has made proof under the State Carey Land Acts, and has received from the State a duplicate certificate reciting such facts. The Valier-Montana Land and Water Company has made proof to the State of Montana, showing that it has complied with the terms of its contract so far as procuring a sufficient supply of water and constructing an irrigation system for approximately 34,000 acres of land, and the State, in turn, has made the proper proofs to the United States covering the same, and the United States has issued to the State of Montana a patent for such 34,000, the State, in turn, having issued to the individual entrymen on said 34,000 acres patents for the lands embraced in their entries. None of this 34,000 acres is involved in this controversy. With reference to the remaining 38,000 acres, while the entrymen have made proofs to the State of Montana showing that the irrigation, cultivation, improvement, etc., of the land embraced in such entries has been fully completed and have received certificates from the State reciting such facts, the Valier-Montana Land and Water Company has not as yet made proofs to the State showing that it has procured a supply of water and has constructed an irrigation system sufficient to irrigate and reclaim such additional 38,000 acres, and neither has the State of Montana made the proofs to the United States to entitle it to receive a patent for such 38,000

acres. The entrymen on these 38,000 acres of unpatented land have been assessed with the land embraced in their entries, and this appeal is from such assessments.

With reference to the taxation of public lands of the United States, it has long been settled that so long as anything remains to be done, before an entryman or applicant is entitled to patent, the land is not subject to taxation, and that it is only when the entryman or applicant has done everything required of him to entitle him to patent, and there remains nothing but the mere ministerial act of the officers of the land department in issuing patent, that such lands become taxable.

Applying this rule here it will readily be seen that the lands in question cannot be taxable as there remains something more to be done before patent can be issued. While it is true that the individual entrymen have done all that the law requires them to do, yet these entrymen are not dealing directly with the United States, but are dealing directly with the State of Montana, the United States having nothing whatever to do with them, and it being wholly immaterial, so far as the right of the State to receive a patent is concerned, whether such entrymen have reclaimed, irrigated and improved such land as required by law, or whether such lands have been even entered. The right to patent does not depend upon the acts of any individual entryman, but upon the acts of the State of Montana, and before the United States can issue a patent it is the State of Montana who must make certain proofs, showing that the lands have been reclaimed by the procuring of water and the construction of an irrigation system sufficient to irrigate the same, and until such proofs have been made by the State of Montana something more than the mere ministerial act of the land officers in issuing patent remains to be done.

It, therefore, follows that lands entered under the Carey Land acts for which proofs of reclamation, etc., have not been submitted by the State of Montana to the United States are not subject to taxation, and the lands falling within the 38,000 acres above described, portions of which are included in the entries of the appellants, falling within that class, none thereof are subject to taxation, and the appeals herein should be sustained, and such assessments ordered stricken from the assessment books of Pondera County.

However, from the foregoing, it should not be understood that the appellants are the owners of no property, or interests in property, which is subject to taxation, because, as a matter of fact each appellant is the owner of certain property, or an interest in certain property which is subject to taxation. Each entryman has entered into a contract with the Valier-Montana Land and Water Company for the purchase of a water right for the irrigable portion of the land entered by him, the purchase price thereof being payable in fifteen installments, and such entrymen have paid on their contracts all of the way from one payment to payment in full. Where payment in full has been made by an entryman he is the owner of such water right, and the same is taxable to him at whatever its value may be, but where payment in full has not been made, but certain payments have been made, then such entryman is the owner of an equitable interest in

such water right to the extent of the payments made by him, and such equitable interest in such water right is taxable at what ever its value may be.

Respectfully,

S. C. FORD,

Attorney General.