FEES OF SURVEYORS-GENERAL.

CIRCULAR.

Commissioner Sparks to surveyors-general, October 13, 1886.

Surveyors-general will be permitted to furnish certified copies of field-notes, plats, and other papers from their records and to charge therefor such fees as are now allowed by law to registers and receivers, or to public officials in the state or territory for like services, not exceeding the fees prescribed for registers and receivers, and provided also, that such services are not performed in office hours by clerks paid by the United States, nor the government stationery or supplies used.

Approved:

L. Q. C. LAMAR,
Secretary.

MINING CLAIM—MILL SITE.

CHARLES LENNIG.

Both a water right and mill site claim may be located on the same tract of land.

Section 2337, R. S., contemplates the actual use, or occupation by improvements or otherwise, for mining or milling purposes, of the land; and it is not satisfied by the use for said purposes of the water from springs situated thereon.

Secretary Lamar to Commissioner Sparks, October 14, 1886.

I have considered the case of Charles Lennig, applicant for patent for the Eureka Mill Site, mineral entry No. 71, Prescott land district, Arizona, on appeal from your decision of February 18, 1886, holding said entry for cancellation.

The appeal purports to have been taken for the United Verde Copper Company, who show no interest whatever in the claim; but since your said decision appears to have recognized them as probably interested, I will waive this informality and treat the appeal as that of Lennig, the claimant of record.

It appears from the record before me that said mill site claim was filed February 18, 1882, in connection with a claim for the Eureka Lode, new mineral entry No. 70, under Section 2337 of the Revised Statutes. It further appears, and your said decision finds, that said mill site claim is situated about a mile from said lode claim, and is variously and commonly known as "Walnut Springs," "Ruffner's Springs," "Eureka Water Site," and "Eureka Mill Site;" that it contains the only springs within six miles of the Eureka lode, and was purchased by Lennig "for the purpose of obtaining the requisite water for mining purposes on the Eureka mine," and is described in the deed of conveyance as "that certain water right and water privilege;" and that the only evidence of

improvement on the land is a ditch for conveying water, and the only use of it shown has been the use of the water on the Eureka lode claim. From these facts said decision concludes that "it is clear that title to the property is sought chiefly, if not solely, as a water right and to control the springs in question," and that "the claimant has not shown such *use* or *occupation* of the *land* in question as is contemplated by Section 2337, R. S." And said decision holds that because this Department has ruled in the Pagosa Springs Case (1 L. D., 573), and in the case of Walter A. Chessman (2 L. D., 774), that "a water right cannot as such be patented under the mining laws,"—and because Sections 2339 and 2340, R. S., recognize and provide for the acquisition of "rights to the use of water for mining . . . . . or other purposes" by possession and use,—they cannot be construed as authorizing the issue of patent in such cases as that now under consideration.

The Pagosa Springs and Chessman cases, above cited, appear to have no application to the question raised by this case; the former rules that land is not patentable as mineral land because it contains a mineral spring, and the latter that land used for storing water may not be patented as placer land. In this case the record tends to show that a water right in the springs on the Eureka mill site, and a right of way over the public domain for the ditches leading therefrom to the Eureka lode, has vested in Mr. Lennig. These rights are acquired by priority of appropriation and are governed by local customs and laws (Broder *v.* Natoma Water Co., 101 U. S., 274), they are amply protected by the provisions of Sections 2339 and 2340, R. S., and I concur in your view that they are not patentable as water rights or rights of way. But it does not follow, from the fact that water rights are not patentable as such, that land containing water, in which a water right may be acquired, may not be patented as a mill site. The presence of water on the land often must be, and doubtless was in the case now before me, the chief reason for its selection as a mill site. I infer from the statement of the court in O'Keiffe *v.* Cunningham (9 Cal., 589), that the customs and laws in mining regions sanction the location of a tract of land both for water rights, or rights of way for ditches, and for mining purposes. It is entirely consistent with the United States laws, as I read them, that a tract of land may be covered by the water right of one person and by the settlement, mining, or mill site claim of another person. Hence it must follow, as there is no express probibition of it in the statutes, that a tract of land may be subject to both the water right and the mill site claim of the same person. And therefore the ownership of the Eureka water right does not bar Mr. Lennig's claim to the Eureka Mill Site, if he is otherwise within the terms of Section 2337, R. S., which reads as follows:

"Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and in-

cluded in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section."

The second clause of this section manifestly makes the right to patent a mill site dependent upon the existence on the land of a quartz-mill or reduction-works. But the terms of the first clause are more comprehensive. Under them it is not necessary that the land be actually a "mill-site." They make the use or occupation of it for mining or milling purposes the only pre-requisite to a patent. The proprietor of a lode undoubtedly "uses" non-contiguous land "for mining or milling purposes" when he has a quartz mill or reduction-works upon it, or when in any other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings" or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz-mill, I think it clear that he would be *using* it for mining or milling purposes. I am also of opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.

In the case at bar the record shows that the land is suitable for milling purposes, because it lies on the banks of a creek and also contains springs which supply an abundance of water. It was originally located "as a mill site or place upon which to erect a mill, furnace, or other works necessary for the reduction of ores from the Eureka mines or other mines in this district;" and the application now on file sets forth that it is "claimed by the said applicant as and for a mill site for the working of the ores from said mining claim." But in fact it has never been used or occupied for any such purpose. On the contrary, it appears that the said water is used in running a "*smelter located on the Eureka mine*," and that it is conveyed in pipes some two miles for that purpose. These facts show plainly that the land is not used or occupied for the purpose for which it was located, or for any purpose in connection with mining or milling. The use of the *water* is, in my judgment, not a use of the *land*.

I therefore affirm your decision.

RAILROAD LANDS RESTORED TO ENTRY.

NORTHERN PAC. R. R. CO.

Lands in Walla Walla land district, Washington Territory, withdrawn on the line of amended general route filed by the Northern Pacific Railroad Company, February 21, 1872, lying south of the territory affected by the definite location of said road, and east of the line showing the forty mile limit of that point of the route not yet definitely located, are restored to settlement and entry.

Acting Secretary Muldrow to Commissioner Sparks, October 18, 1886.

By letter of September 13, 1886, your office recommended that certain lands in the Walla Walla land district, Washington Territory, now withdrawn for the benefit of the Northern Pacific Railroad Company (13 Stat., 365), be restored to settlement and entry.

The lands referred to were within the limits of withdrawal ordered November 21, 1870, on map filed August 13, 1870, as map of general route. This route was afterwards changed, and a new map, filed as map of amended general route, was accepted February 21, 1872, and the withdrawal made thereon also embraced said lands.

On October 4, 1880, the map of definite location was filed on a still different line, and by this location the lands in question fell entirely outside the forty mile limits. But inasmuch as those lands lay within the withdrawal on the amended general route, their status, as affected by definite location, could not be ascertained until the southern terminal limit on definite location was fixed. Said terminal limit was fixed on August 16, 1881, and the lands in question fell outside and south of that line. The lands lie south of the territory affected by the definite location and east of the line showing the forty mile limit of that part of the road not yet definitely located. There seems to be no reason therefore why they should longer remain withdrawn, and indeed might have been restored in 1881 when other lands similarly situated were restored. I accordingly concur in said recommendation, and said lands will be restored to entry and settlement.

RAILROAD GRANT—MINERAL LANDS.

SAMUEL W. SPONG.

The statutory exception of mineral lands from the grant to this company, is construed to include only lands known to contain valuable minerals prior to the issuance of the patent.

Secretary Lamar to Commissioner Sparks, October 21, 1886.

I have examined the appeal of Samuel W. Spong from the decision of your office, dated December 23, 1882, refusing to allow him to file mineral application for the Marble Valley Quartz mine, lot No. 39, in Sec. 17, T. 9 N., R. 9 E., M. D. M., Sacramento land district, California.

The record shows that said application was made to the local land officers and refused by them on December 2, 1882, for the reason that said section was patented to the Central Pacific Railroad Company on the 27th day of June, 1867. Your office on appeal affirmed said decision, upon the ground that the exception in the grant to said company and in said patent is construed to mean lands *known* to contain valuable minerals prior to the issuing of the patent, and that subsequent discoveries would not affect the title of the company to the lands and mines subsequently discovered.

The section embracing said lot is designated by an odd number within the limits of the grant made by the act of Congress approved July 1, 1862 (12 Stat., 489), and amended by the act approved July 2, 1864 (13 Stat., 356), to said railroad company. In section three of the act of July 1, 1862, it is provided that "all mineral lands shall be excepted from the operation of this act;" and in section four of the amendatory act it is provided that "the term mineral land . . . . . shall not be construed to include coal and iron land."

It is strenuously insisted by counsel for the appellant, that Congress did not grant mineral lands to said company; that said patent, although including said section in terms, did not operate as a conveyance of the title to any land that may at any time be found to be mineral. It is not denied that said section was returned as agricultural by the United States surveyor; that it was regularly patented to said company, without fraud or mistake on the part of the land officers or said company, so far as is shown by the record. The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent.

It has been repeatedly held by the supreme court of the United States that a patent executed in the required form and by the proper officers for such a portion of the public domain as is by law subject to sale or other disposal passes the title thereto, and the finding of the facts by the Land Department which authorizes its issue is conclusive in a court of law and can not be collaterally assailed. Steel *v.* Smelting Company (106 U. S., 447).

In the case of Smelting Company *v.* Kemp (104 U. S., 636–641), the same court say, "It is this unassailable character of the patent which gives to it its chief, indeed its only, value as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation."

In the case of McLaughlin *v.* United States (107 U. S., 527), the court affirmed the decree of the circuit court canceling a patent issued

to said company, on the ground that the tract in question, at the time of the grant, was known to be mineral land by the appellant, and that, therefore, the patent was issued by inadvertence and mistake without authority of law. In the opinion of the court the inquiry is made, "Suppose that when such land has been conveyed by the government it is afterwards discovered that it contains valuable deposits of the precious metals unknown to the patentee or to the officers of the government at the time of the conveyance, will such subsequent discovery enable the government to sustain a suit to set aside the patent or the grant? If so, what are the rights of innocent purchasers from the grantee and what limitations exist upon the exercise of the government's right?"

The court, however, declined to give any answer to said inquiries.

In the case of Deffeback *v.* Hawke (115 U. S., 393), the court reviewed and commented on the several acts of Congress relative to the disposition of mineral lands, and held that the officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed, and that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper, can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands.

In said opinion the court say: "We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterward, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

In the case of Merrill *v.* Dixon (15 Nev., 405), the supreme court of Nevada, commenting upon the issuance of patents to railroad companies, containing the clause excluding mineral lands, should any such be found to exist in the tracts described in the patents, said: "For the purposes of this case, we shall consider that all mineral lands which were intended by Congress to be excluded and excepted from the operation of the grant to the railroad company were excluded and excepted by the patent conveying the lands to the said company."

To the same effect is the decision of the United States circuit court for the District of California, in the case of the Pacific Coast Mining and Milling Company *v.* Spargo *et al.*, reported in 8 Sawyer, 645.

While the exception of mineral lands from the grant to said company is clear and explicit, yet it does not appear from a careful consideration of the language of said grant that Congress intended to grant only such lands which may after the lapse of an indefinite number of years prove to be agricultural in character.

A careful examination of the whole record shows no error in the decision appealed from, and it is accordingly affirmed.

HOMESTEAD ENTRY—SINGLE WOMAN.

MARIA GOOD.

The right acquired by the original homestead entry of a single woman is not affected by her marriage prior to final proof.

Secretary Lamar to Commissioner Sparks, October 22, 1886.

I have considered the appeal of Maria Good, *nee* Wilcox, from your decision, dated July 14, 1886, holding for cancellation her homestead entry, No. 15,552. Said entry, it appears, was made September 28, 1880, and covers the NE. ¼ of Sec. 22, T. 3 S., R. 23 W., Kirwin, Kansas. November 7, 1885, claimant made final proof before the clerk of the district court, which proof was on the 11th of the same month rejected by the local office "because of insufficient residence."

From that action appeal was taken to your office.

Your decision sets out the following facts as shown by the record in the case, to wit, that claimant was a native born citizen of the United States and a single woman over twenty-one years of age at date of entry, soon after which she married; that her husband was a mechanic and worked in Norton, three miles distant; that claimant's statements are that she staid in Norton during the bad weather in winter, aside from which she resided continuously on the land; that the testimony of her witnesses make it appear that she staid in Norton winters and on the homestead summers; that she was never absent for more than three months at a time; that she has never moved her household goods from the land, and that the improvements, which are valued at $600, consist of a house, a well, wind-mill, sheds, an orchard of one hundred and twenty-eight trees, and fifteen acres under cultivation. Without passing upon the question of residence further than to say that "the testimony as to residence is not very clear, except that it was established in November, 1880," your decision proceeds to rule the case upon the fact of the marriage of appellant after having made her entry.

On this question you hold that "a woman who makes a homestead entry and subsequently marries before completing the same, forfeits her right thereby to acquire title to the land," and for that reason you dismiss the appeal from the action of the local office and hold the entry for cancellation.