

L E T T E R

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING

In response to a resolution of September 11, 1890, report relative to the claims of settlers antagonized by the Northern Pacific Railroad Company.

OCTOBER 1, 1890.—Referred to the Committee on Public Lands and ordered to be printed, and also to be printed in the Record.

DEPARTMENT OF THE INTERIOR,
Washington, ———, 18—.

SIR: I am in receipt of Senate resolution of September 11, 1890, as follows:

Resolved, That the Secretary of the Interior be directed to inform the Senate what number of cases are now pending in his Department in which the claims of settlers are antagonized by the Northern Pacific Railroad Company, or by other companies whose roads were not constructed within the time required by the granting acts. And whether said Northern Pacific Railroad Company is now seeking a reversal of previous decision of the Department of the Interior, favoring settlement claims. And whether said Northern Pacific Railroad Company has at different times filed different maps of general route for any portion of its line through the same part of the country, and if so, whether public lands have been withdrawn from settlement and entry along each of said lines as the same was changed, or along additional routes prior to the definite location of the line of such portion of road, and whether the Department of the Interior maintains, or has maintained such withdrawals as an exclusion of the right of settlement and entry, prior to definite location. And specifically, what are the decisions of his Department upon the point of the legality of withdrawals on second or subsequent maps of general route, so filed, and of the validity of such indemnity withdrawals as against settlement rights under the terms of the grant to said company. And whether said company is seeking the reversal of previous decisions of the Department upon said points.

And he will further inform the Senate whether said Northern Pacific Railroad Company failed to definitely locate any portion of its road during the period within which, by the conditions of its charter, the road was required to be constructed, and what the decisions of his Department are upon the point of the legal right of a railroad company to definitely locate a line of road after the period when by law the entire road was required to have been completed. And whether the decision of Mr. Secretary Chandler upon this point has ever been overruled by subsequent Departmental decisions, or by the courts, and if not, whether the principle of said decision is applied in the practice of the Department to said Northern Pacific Railroad Company.

I referred the resolution to the Commissioner of the General Land Office for report upon the several inquiries contained therein, which is now before me, and I transmit herewith a copy for the information of the Senate.

The information called for in the resolution as to what number of cases are now pending in this Department in which the claims of settlers are antagonized by the Northern Pacific Railroad Company, or by

other companies, whose roads were not constructed within the time required by the granting acts, and whether the Northern Pacific Railroad Company has at different times filed different maps of general route for any portion of its line through the same part of the country, and if so, whether public lands have been withdrawn from settlement and entry along each of said lines as the same was changed, or along additional routes prior to the definite location of the line of such portion of road; and whether the Northern Pacific Railroad Company failed to definitely locate any portion of its road during the period within which by the conditions of its charter, the road was required to be constructed, is furnished in the report of the Commissioner from the records of the General Land Office.

The Northern Pacific Railroad Company has filed a number of motions for review of former decisions of the Department, in accordance with the rules of practice, some of which have been determined and others are now pending before the Department undetermined.

I am not aware of any decision of the Department in which the question of the legality of withdrawals on second and subsequent maps of general route was directly raised, except in the case of Guilford Miller, reported in the seventh volume of Land Decisions, page 100, and subsequent cases ruled thereby, and in the case of *Hayes vs. Parker* (2 L. D., 554).

In the case of Guilford Miller, the Department held that the sixth section of the act of July 2, 1864 (13 Stat., 365), making the grant to the Northern Pacific Railroad Company, provided for a withdrawal of lands within the granted limits upon the filing of map of general route, and that such withdrawal became operative upon the approval of the map by the Secretary of the Interior without any other act on the part of the executive authorities; that the withdrawal once exercised was thereby exhausted, and the legislature having definitely expressed the terms upon which a preliminary withdrawal, should be made, and the conditions and extent of such withdrawal, the legislative will must be taken to have been exhaustively expressed, and any other withdrawal is without legal force and effect.

It was further held that said section having expressly provided for a withdrawal of lands within the granted limits upon the filing of an approved map of general route, and directing that the pre-emption and homestead laws shall be extended over all other lands, is a mandate effectually prohibiting the exercise of executive authority to withdraw lands within indemnity limits upon the filing of map of definite location. Several other cases pending before the Department upon appeal, filed by the Northern Pacific Railroad Company, were ruled by this decision, and motions for review were filed in each of said cases under the rules, in which the company asked that the ruling in the case of Guilford Miller might be reconsidered and overruled, and now insist that the controlling record facts were not considered.

These reviews are now pending before the Department. In the case of *Hayes v. Parker* it was held that there can be but one legislative withdrawal upon a map of general route; but in that case it was decided that the map filed by the Northern Pacific Railroad Company in 1870 was not the map of general route, but a mere trial line, and the withdrawal made under that map was regarded as a mere executive withdrawal. Prior to the decision in the case of Guilford Miller the Land Office maintained the validity of both withdrawals, when the lands fell within the limits of both, holding that under the executive withdrawal entries or claims initiated prior to the receipt of said with-

drawal at the local office were excepted from the operation of the grant, while the legislative withdrawal took effect upon the filing of the map of general route in the General Land Office, and the company has claimed the benefit of both withdrawals as to all lands affected thereby which subsequently fell within the limits of definite location.

I am not aware that any withdrawals were made in indemnity limits upon map of general route, but where lands which were withdrawn within the granted limits on general route fell within the indemnity limits on definite location, the practice was to order the reservation thereof to be continued for indemnity purposes. The question as to the right of the Secretary to make any withdrawal of land within the limits of this grant, except that expressly provided for by the terms of the grant, was denied by the Department in the Guilford Miller decision, and the company is seeking a reversal of this ruling in the motions for review heretofore referred to.

I am not aware of any ruling of the Department upon the question, as to the "legal right of a railroad company to definitely locate a line of road after the period when by law the entire road was required to have been completed," except the decision of Secretary Chandler rendered April 29, 1876, upon the application of the Atlantic, Gulf and West India Transit Company, successors to the Florida Railroad Company, to file a map of definite location of that part of said road from Waldo to Tampa Bay. I presume this is the decision referred to in the resolution inquiring as to "whether the decision of Mr. Secretary Chandler upon this point has ever been overruled by subsequent departmental decisions, or by the courts, and if not, whether the principle of said decision is applied in the practice of the Department to said Northern Pacific Railroad Company."

I know of no decision of the Department or of the courts in conflict with the ruling of Secretary Chandler upon this point. In passing upon the application of the road to file a map of definite location of that part of the road from Waldo to Tampa Bay, made after the expiration of the time within which the company was required to complete the road under the terms of the grant, the Secretary said that "no map showing the definite location of the road to Tampa Bay has ever been filed in this Department," and, holding that the failure to designate the line of road until after the expiration of the time required for its completion should be accepted as an abandonment of that portion of the line of road, the Secretary declined to allow the filing of the map.

Subsequently the application was renewed before Secretary Schurz, and it was then shown that the company had filed in the General Land Office a map of definite location of said portion of the road December 14, 1860, but which had been lost or mislaid in returning it to the governor for the procurement of his certificate. The map presented with the application was a true copy of the original which had been filed in time, and the Secretary directed that the duplicate or copy map be filed, and that the necessary withdrawals be made. This ruling of Secretary Schurz was afterward affirmed by Secretary Teller (2 Land Decisions, 561), and by Secretary Lamar (5 Land Decisions, 107), in which it was clearly shown that the question before Secretary Chandler was whether a map of definite location can be filed after the expiration of the time allowed for the completion of the road; whereas the question before Secretary Schurz was whether a duplicate map of definite location may be received and filed in the General Land Office after the expiration of the time allowed for completing the road, upon proof that

it is a correct copy of an original map which was filed in time and which has been lost or destroyed.

For a full history of this case I refer to Senate Executive Document No. 91, first session, Forty-eighth Congress, and to the decisions of Secretaries Teller and Lamar above referred to.

While several parts of the Northern Pacific Railroad were not definitely located until after the expiration of the time required for its completion, it was all located by map of general route within the time allowed by law, and by map of definite location, prior to January 1, 1885, as will be seen by the accompanying report of the Commissioner of the General Land Office, except as to 225 miles, between Wallula Junction, Wash., and Portland, Oregon. There is nothing to show that the Chandler decision was considered in connection with these last withdrawals.

Respectfully submitted.

JOHN W. NOBLE,
Secretary.

The PRESIDENT OF THE SENATE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 23, 1890.

SIR: I am in receipt, through reference for report, of Senate resolution of September 11, 1890, as follows:

Resolved, That the Secretary of the Interior be directed to inform the Senate what number of cases are now pending in his Department in which the claims of settlers are antagonized by the Northern Pacific Railroad Company, or by other companies whose roads were not constructed within the time required by the granting acts; and whether said Northern Pacific Railroad Company is now seeking a reversal of previous decisions of the Department of the Interior favoring settlement claims; and whether said Northern Pacific Railroad Company has at different times filed different maps of general route for any portion of its line through the same part of the country, and if so, whether public lands have been withdrawn from settlement and entry along each of said lines as the same was changed or along additional routes, prior to the definite location of the line of such portion of road, and whether the Department of the Interior maintains or has maintained such withdrawals as an exclusion of the right of settlement and entry, prior to definite location; and specifically, what are the decisions of his Department upon the point of the legality of withdrawals on second or subsequent maps of general route, so filed, and of the validity of such indemnity withdrawals as against settlement rights under the terms of the grant to said company; and whether said company is seeking reversal of previous decisions of the Department upon said points.

And he will further inform the Senate whether said Northern Pacific Railroad Company failed to definitely locate any portion of its road during the period within which, by the conditions of its charter, the road was required to be constructed, and what the decisions of his Department are upon the point of the legal right of a railroad company to definitely locate a line of road after the period when, by law, the entire road was required to have been completed; and whether the decision of Mr. Secretary Chandler upon this point has ever been overruled by subsequent departmental decisions or by the courts, and, if not, whether the principle of said decision is applied in the practice of the Department to said Northern Pacific Railroad Company.

In reply, I have the honor to report that 4,725 cases are pending before this office and the Department, within the limits of the grants for roads not constructed within the time limited by law, and are distributed in tabulated statement accompanying this report, and marked Exhibit A.

The Northern Pacific Railroad Company has filed motions for the review of a number of departmental decisions in favor of settlers, some

of which have been disposed of, the former decisions being adhered to, and the remainder are still pending before the Department.

In the matter of the changes in the location of the general route of said Northern Pacific Railroad, I have to report as follows:

With letter of March 9, 1865, the honorable Secretary of the Interior inclosed a map showing the entire line of general route of said road, as adopted by the board of directors, but as the same did not appear to have been prepared after an actual survey of the county traversed, a withdrawal thereon was refused.

August 13, 1870, two maps were filed, showing the entire line of general route; but the same were accepted only within the States of Wisconsin and Minnesota and the then Territory of Washington, and to this extent withdrawals were ordered.

October 12, 1870, the Department accepted a map changing the location of the general route for a portion of the road in Minnesota, and the withdrawal made upon the map of August 13, 1870, was modified to agree with this change.

February 21, 1872, a map was filed, showing the general route through Dakota, Montana, Idaho, and a portion of Washington, to connect with the prior accepted portion at Wallula.

The acceptance of this map worked a change in the location within the then Territory of Washington from Wallula eastward to the Territory line, and the withdrawal of 1870 was modified accordingly.

These are the only changes in the general route of the main line or stem, viz, a portion in Minnesota and a portion in Washington.

August 20, 1873, the map showing the general route of the branch line was filed, extending from Lake Pend d'Oreille, Idaho, to Tacoma, Wash., upon which withdrawal was ordered.

November 24, 1876, an amended location was filed, extending from Snake River to Tacoma, within the State of Washington.

This map was not accepted, nor has any withdrawal been ordered thereon. June 11, 1879, a map showing an amended location was filed, extending from Twin Wells to Tacoma, which was accepted, for the reason that the new location was much shorter than the original location, and the company was required to execute a relinquishment in favor of all settlers included within the withdrawal upon the location of 1873 and excluded from the limits projected upon the new location of 1879.

In presenting the question as to the acceptance of the change in location it was stated by this office that "at present a very large body of land is withheld from settlement and entry which, by the amended line, would be released and restored to the Government, whilst the tract that would be required to be withdrawn is *not so large by some four million acres.*"

It will be seen that in the several cases where change was permitted the withdrawal originally ordered was modified to agree with the change in route.

As to whether the Department maintains or has maintained such withdrawals as an exclusion of the right of settlement and entry prior to definite location, I have to report that such withdrawals have been maintained under authority of the sixth section of the act of July 2, 1864, making the grant for said company.

It was first held that such withdrawals did not become effective until notice thereof was received at the district land offices, but, in the case of Buttz, executor, etc., vs. Northern Pacific Railroad Company (119 U. S., 55), it was held (syllabus) "when the general route of the road provided for

in section 6 of the act of July 2, 1864, was fixed, and information thereof was given to the Land Department by the filing of a map thereof with the Secretary of the Interior, the statute withdrew from sale or pre-emption the odd sections to the extent of 40 miles on each side thereof, and by way of precautionary notice to the public an executive withdrawal was a wise exercise of authority."

In the matter of change in location the Department held in the case of *Hayes vs. Parker et al.* (2 L. D., 554) that "the line of 1870, however, as respects the section of country in which the lands in controversy are located (being the lands affected by the change in location), *was not in fact the general route of said road.* It was at most a trial line; and a very large portion of the country included in it was not included in the general route of the road as *finally fixed.*"

In the case of said company against Guilford Miller (7 L. D., 100), it was held "that the filing and acceptance of an amended map of general route was without authority of law, and the executive withdrawal, made by the order of the Commissioner of the General Land Office, on the filing of said map, was without validity or sanction of law."

The withdrawals referred to as having been made upon the filing of the maps of general route were only to the extent of the *granted limits* provided for in the acts making the grants, but upon the definite location of the road the withdrawals were adjusted to such locations and the *indemnity lands* were then withdrawn.

These withdrawals of indemnity lands were respected by the Department and treated as a reservation from disposition of all kinds until, in the case last referred to, it was held that "the language in section 6 of the granting act, which expressly directed that the homestead and pre-emption laws should be 'extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company,' was a mandate effectually prohibiting the exercise of the executive authority to withdraw any lands on the line of said road," and it was further held that "such a withdrawal is in violation of law and without effect, except as notice of the limits within which the company would be entitled to select indemnity."

By order of August 15, 1887, the orders of withdrawal of indemnity lands were revoked and the lands not included in approved selections were restored.

In a number of cases decided by the Department under the principles announced in the Miller case, viz, the effect of withdrawals on maps of amended general route and for indemnity purposes, the company has filed motions for review, which motions are now pending before your office.

To this extent the company must be held to be seeking the reversal of previous decisions of the Department.

Under the decision of Hon. C. Schurz, Secretary of the Interior, dated June 11, 1879, the time limited within which the Northern Pacific Railroad should be completed expired July 4, 1879, and subsequent to that date maps of definite location were filed as follows:

July 20, 1880, Bismarek to Little Missouri River.

October 25, 1880, Little Missouri River to mouth of Glendive Creek.

October 4, 1880, Wallula to Spokane Falls.

June 25, 1881, Glendive Creek to Tongue River, and from Tongue River to eastern boundary of Crow Reserve.

June 27, 1881, through Crow Reserve.

August 30, 1881, Spokane Falls, Wash., to Lake Pend d'Oreille, Idaho.

July 6, 1882, last crossing of Yellowstone River (western boundary

of Crow Reserve) to Little Blackfoot River, and from Little Blackfoot River to southern boundary of Flathead Reserve.

July 6, 1882, junction with Lake Superior and Mississippi Railroad, in Minnesota, to township 47 north, range 2 west, Wisconsin.

September 22, 1882, Portland, Oregon, to Kalama, Wash.

December 12, 1882, Lake Pend d'Oreille, Idaho, to mouth of Missouri River, Montana.

June 8, 1883, through Flathead Reserve to mouth of Missouri River.

November 24, 1884, initial point at Ashland, Wis., westward 50 miles.

Branch Line: June 29, 1883, Yakima to Ainsworth; March 26, 1884, Tacoma to South Prairie; May 24, 1884, Yakima to Swank Creek; September 3, 1884, South Prairie to Eagle Gorge; December 8, 1884, Swank Creek to Eagle Gorge.

The resolution refers to the decision of Mr. Secretary Chandler in the matter of the grant for the Florida Railroad, dated April 29, 1876, wherein he held that "the important act of definitely locating the road can only be performed by or under the authority of the State, and it should be done within a reasonable time after the date of the grant, and in all cases before the expiration of the time fixed for completing the road; failure to discharge this duty should be taken as conclusive evidence of abandonment of the grant," and asks information as to whether said decision "has ever been overruled by subsequent departmental decisions or by the courts, and if not, whether the principle of said decision is applied in the practice of the Department to said Northern Pacific Railroad Company."

In the decision of Mr. Secretary Schurz, dated June 11, 1879, before referred to, in which he accepted the amended location of the branch line of said company, the questions presented were: (1) "Has the grant to the company lapsed by reason of the failure of the company to perform certain acts within the time specified in the granting statutes?" (2) If it has so lapsed, *can the Department recognize any acts by the company looking to the initiation of new rights or the enlargement of old ones?*" And, after holding that the time had not expired and that no proceedings could be taken by Congress to declare a forfeiture of the grant until one year after the time fixed for the completion of the road, viz, July 4, 1880, he proceeds:

If this be not the true construction of the various provisions of the acts of Congress in relation to this grant, still, under the rule announced by the Supreme Court in the case of *Schulenberg v. Harriman* (21 Wallace, 44), it must be held that until Congress does take some steps to declare a forfeiture of said grant, the same is in full force and effect.

In the case cited, the court say: "At common law the sovereign could not make an entry in person, and therefore, an office found was necessary to determine the estate; but, as said by this court in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the Government without these preliminary proceedings.'"

"In the present case no action has been taken, either by legislation or judicial proceedings, to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections." I am not advised that any proceedings have been taken to declare a forfeiture of the grant to this company; and if my views of the law above expressed are correct, the time has not yet arrived when Congress could take any proceedings to declare such a forfeiture; but, *in either event, the grant to-day must be held to be the same as it existed on the day when it was made and accepted by the company.*

It will be seen that the question as to the authority of the Department to recognize acts of the company looking to the initiation of rights, after failure of the company to perform certain acts within the

time specified in the granting act, is fully recognized in the decision last referred to, which is published in full in Senate Doc. No. 64, Forty-seventh Congress, first session, and to which reference is here made.

Withdrawals have been made upon the definite locations above enumerated (presumably under the decision referred to), which, to the extent of the granted limits, are still maintained.

The road, as shown in said locations, has been constructed and accepted by the President after examination by commissioners duly appointed, as provided for in the acts making the grant; but no patents have, as yet, issued including lands opposite road constructed out of time.

The resolution is herewith returned.

Respectfully,

LEWIS A. GROFF,
Commissioner.

The SECRETARY OF THE INTERIOR.

EXHIBIT A.

Tabulated statement of pending settlement claims within the limits of the grants to aid in the construction of railroads not built within the time limited in the acts making such grants.

	Entries pend- ing.	Appli- cations pend- ing.	Total.	Decided.		Cases before Secretary on appeal.
				For settler.	Against settler.	
Alabama and Chattanooga (Alabama).....		12	12	4	5	6
Atlantic and Pacific:						
Arizona.....	2	11	13			1
Missouri.....	19	7	26	1		2
New Mexico.....	34	5	39	2		15
California and Oregon (California).....	14	36	50	15		
Chicago, St. Paul, Minn. and Omaha (Wisconsin).....		381	381			
Florida Railway and Nav. Co. (Florida).....	95	131	226	12		12
Hastings and Dakota (Minnesota).....	18	41	59	3	2	7
St. Paul, Minn. and Man. (Minnesota).....	93	231	324	61	99	79
Hastings and Dakota and St. Paul, Minn. and Man., conflicting limits (Minnesota).....		411	411			
Jackson, Lansing and Saginaw (Michigan).....		17	17			
Marquette, Houghton and Ontonagon (Michigan).....	2	93	95			
Northern Pacific:						
Minnesota.....	187	60	247	22	5	26
North Dakota.....	23	45	68	14	17	31
Montana.....	102	129	231	69	3	71
Idaho.....	29	49	78	10	2	11
Oregon.....	119	251	370	2		2
Washington.....	128	789	917	213	134	242
Northern Pacific and St. Paul, Minn. and Man., conflicting limits (Minnesota).....		44	44			
Oregon and California (Oregon).....		29	29	20	1	11
St. Paul and Sioux City (Minnesota).....	3	74	77	2	2	4
Southern Minnesota (Minnesota).....	24	55	79	1	1	2
Southern Minnesota, and St. Paul and Sioux City, conflicting limits (Minnesota).....		53	53			
Southern Pacific (California).....	115	206	321	183		21
Selma, Rome and Dalton (Alabama).....	4	2	6			
Wisconsin Central (Wisconsin).....		10	10	8		1
Gulf and Ship Island (Mississippi).....	56		56			
Mobile and Girard (Alabama).....	22		22			
Coosa and Chattooga (Alabama).....	7		7			
Coosa and Tennessee (Alabama).....	5		5			
Oregon and California (Oregon).....	313		313			
Pensacola and Florida (Florida).....	29		29			
Ontonagon and State Line (Michigan).....	110		110			
Totals.....	1,553	3,172	4,725	642	275	544

The above statement includes all entries or applications pending involving lands within the limits of the roads mentioned, whether opposite the portion constructed within or out of time, or the unconstructed portion. As the pending bill proposes forfeiture of the grants opposite unconstructed road, its passage will dispose of a large number of the pending cases.

I have appended a statement showing the nature of action heretofore taken upon such cases, from which it will be seen that of those heretofore decided the greater number have been in favor of the settler, also the number of appeals taken from such decisions, which cases are now before the Department.

In the case of the Chicago, St. Paul, Minneapolis and Omaha Railway Company three hundred and eighty-one applications are pending. These are for lands within the indemnity limits, and, being withdrawn, are not subject to entry, but the lands will in all probability not be needed in satisfaction of the grant, and upon the final adjustment of the grant (which is now pending before the Department) they will be restored.

Of the entries pending a large number will upon examination be approved.

S. Ex. 239—2

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