

Opinion No. 13-1078

July 10, 1913

BY: FRANK W. CLANCY, Attorney General

TO: Honorable R. P. Ervien, Commissioner of Public Lands, Santa Fe, New Mexico.

STATE LANDS.

Land Commissioner has no authority to quitclaim to U. S. unpatented land occupied by a settler.

OPINION

{*248} Referring to the matter of the land entry of Mrs. J. M. McNatt, concerning which I have before me, by reference from your office, a letter from Mr. James A. Baird to you and copy of another from the Assistant Commissioner of the General Land Office addressed to J. E. Edgington, County Surveyor of Otero County, if I understand the facts correctly, I do not see how it is within your power to initiate any proceedings for the benefit of Mrs. McNatt.

As near as I can understand the facts, the land upon which it is claimed that Mrs. McNatt actually resides and has resided for fourteen years, in section 12, township 16 south, range 13 east, was selected by the Territory of New Mexico for the benefit of the Deaf and Dumb Asylum in 1900. In 1907 Mr. McNatt made a homestead entry for a part of section 7 in township 16 south, range 14 east, and that this entry was intended to cover the land upon which he actually resides, but he obtained a patent for the land entered in March, 1908. The letter from the Assistant Commissioner suggests that, if these facts can be satisfactorily shown and if the state will execute a deed of re-conveyance to the United States, the state would be given credit for the amount so re-conveyed and then Mrs. McNatt, the present owner, can begin proceedings for the amendment of the patent.

I do not find that the statute authorizes you to re-convey land under such circumstances. By Chapter 37 of the Laws of 1913, you are authorized to quit claim to the United States title to lands set apart to the state which, through error of the Department of the Interior or local land office, have been patented to other persons, or on which, because of erroneous description, filings have been made, and to select other lands in lieu thereof. This authority does not cover the present case, as the land which Mrs. McNatt holds has not been patented to her, nor to anyone else, nor has any filing thereon been made because of erroneous description.

I suggest that, if Mrs. McNatt would initiate proceedings in the land office and if the Commissioner will cause an investigation to be made and as a result thereof shall ascertain that the patent should have been issued for the land in Section 12, and would

have been so issued, if the mistake had not been made, on that state of facts, you might treat the land as falling within the category of patented lands and make the re-conveyance. The practical difficulty, however, would be that the Commissioner would, undoubtedly, hold that when the homestead entry was made, if the land had been correctly described, {*249} it would not have been accepted, as the selection had been made and approved seven years earlier.

I return herewith the letters which you referred to me.