

## Opinion No. 24-3756

February 15, 1924

**BY:** JOHN W. ARMSTRONG, Assistant Attorney General

**TO:** Requested by: Hon. Bradley M. Thomas, Clerk of the Carey Act Land Board.

**Under the Carey Act One Must Become an Actual Settler on the Land Before Being Entitled to Patent.**

### OPINION

{\*128} The substance of your inquiry is whether or not actual residence is essential to the securing of a Patent from the State under the Carey Act, and the statutes of this State.

We have examined several cases and authorities in connection with this question, and have concluded that the only safe course for the State to pursue in connection with this matter, is {\*129} to be guided by the ruling of the Department of the Interior, Washington, D. C. The Secretary of the Interior, on the point in question, states:

"These acts are construed by this Department in its opinion in the case of the State of Oregon (36 L. D. 509), which you cite. That opinion has never been over-ruled or modified but still stands as the ruling of the Department on the subject. With reference to the meaning of the terms "settlers", "bona fide settlers", and "actual settlers" as used in the acts in question, the opinion follows or adopts the definitions given in certain previous cases cited on page 512. For example in one of these cases, United States vs. Atterberry (8 L. D. 173, 176), it is said

'An actual settler is one who goes upon the public land with the intention of making it his home under the settlement laws and does some act in execution of such intention sufficient to give notice thereof to the public.'

Some of the other definitions declare that the settler must go upon the tract in his own person thus indicating that one cannot establish a settlement by merely taking and holding possession of the land through his agent, servant or tenant.

Under these definitions one who has merely "resided in the immediate vicinity" of the land but not actually on it cannot be said to be an actual or bona fide settler. The alternative provision of the Wyoming Rule which you quote is therefore in the opinion of this Department unwarranted by the statutes.

The Department's answer to your question is therefore that persons who purchase from a State lands patented to it under the Carey Act must in order to acquire a perfect title and one which is not liable to be defeated by forfeiture for condition broken establish an

actual settlement upon the particular tract purchased, and that merely residing in the vicinity is not sufficient."

Section 5283 Code 1915, among other things, requires the applicant to make final proof of reclamation, settlement and occupation, which proof shall embrace evidence showing that he is an **actual settler** on the land. The law appears not to prescribe any definite time for residence and that matter, of course, may be prescribed by a rule of your Board. If an applicant becomes an "actual settler" for any length of time, the requirement of the law, so far as time is concerned, appears to be met.

Two of the most important features of the Act, so far as the State of New Mexico is concerned, are reclamation and occupation. Certainly, these conditions may be met by applicant through his agent, servant or attorney. As to the meaning of the term "actual settler," however, we think the Board would better be guided by the interpretation placed thereon by the Interior Department.