United States Department of the Interior
OFFICE OF THE SOLICITOR
ALASKA REGION

701 C Street, Box 34
Anchorage, Alaska 99513

IN REPLY REFER TO:

December 22, 1983

MEMORANDUM

To: State Director
Bureau of Land Management
Alaska

From: Regional Solicitor
Alaska Region

Subject: Right-Of-Way On A Native Allotment

You have asked whether a Native Allotment Certificate can be issued subject to a right-of-way. The short answer is that if the right-of-way was granted or acquired prior to the Native's entry on the allotment, the allotment should be issued subject to the right-of-way. This includes Omnibus Act roads, granted rights-of-way for roads, trails, pipelines, telephone lines and the like as well as rights-of-way used by the public that are not granted.

Discussion

1. Land used communally or by others is not available for native allotments.

The Alaska Native Allotment Act of 1906, 43 U.S.C. § 270-1 through 270-3 (1970), repealed by 43 U.S.C. § 1617 (1976), allows Alaska Natives to acquire up to 160 acres as an allotment by proof of substantially continuous use and occupancy for a period of five years. The land must be vacant, unappropriated, unreserved and non-mineral except that land valuable for coal, oil or gas may be allotted with the coal, oil or gas reserved to the United States.

As defined in the Native Allotment regulations, 43 CFR Section 2561.0-5(a):

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

Administrative case law has further amplified the concept of use and occupancy to provide that although evidence of use and occupancy goes only to a part of the area claimed, it will entitle the applicant to the remaining allotment land absent conflicting claims. See Emily B. Hunt, 23 IBLA 205 (1976). Cf. 43 CFR § 2561.0-8(b) which permits use and occupancy of a portion of a 40-acre subdivision to qualify for entitlement to the entire 40 acres. See also Allotment of Land to Alaska Natives, 71 I.D. 340, 359 (1964). In addition, consideration must be afforded to Native customs and mode of living as well as the climate and character of the land. John Nanalook, 17 IBLA 353, 356 (1974).

2. Pre-existing roads or trails are communal uses.

Where an existing trail crosses land claimed as a Native allotment, a factual determination must be made as to whether or not the public's use of the trail predated the applicant's use and occupancy of the land. If the applicant's use and occupancy predated the road or trail, then the subsequent public use of it was in trespass on the allotment claim. This is because Native occupancy segregates the land against other public uses. 43 CFR § 2091.6-3. If, however, the use of the trail by others predated the applicant's, then the applicant's use and occupancy of the land covered by the road or trail was not "potentially exclusive of others."

If the pre-existing road is an Omnibus Act road or a previously granted right-of-way, an additional basis exists on which the allotment applicant is not entitled to it; that is the land was not vacant, unreserved or unappropriated when the applicant entered it.

Roads or trails which predate the applicant's entry may also be public rights-of-way acquired under R.S. 2477 or may be private rights-of-way acquired by implication or necessity. Although BLM has occasionally found it necessary to adjudicate such non-granted rights-of-way, Nick Dire, 55 IBLA 151 (1981), Homer Meads, 26 IBLA 281 (1976), making the allotment subject to the right-of-way does not require an adjudication of the non-granted right-of-way. All that is necessary is to find that the applicant's use of a portion of the land he claims was not potentially exclusive of others.

3. Pre-existing road should be a "subject to" and not an excluded interest.

Assuming the public use of the road or trail predated the applicant's occupancy, how should the road or trail be protected in the grant of the allotment? Should the strip of land underlying the road be excluded from the allotment, or should the allotment be granted "subject to" the right-of-way?

If the strip of land is excluded, it will remain under BLM management with the State or an individual owning a right-of-way (easement) over it. It will be surveyed by the BLM when the exterior boundaries of the allotment are surveyed.

If the allotment is issued subject to the right-of-way, the allotment holder will own the land crossed by the road. If the public use of the road ceases and the right-of-way is abandoned, the allotment owner will attain full ownership. A "subject to" road will normally not be surveyed, although it could be, if the need existed, at non-federal expense.

The Department has abundant experience in resolving conflicting claims to a tract of land. As a general rule, whichever claimant's rights attached first prevails and the other claimant is out of luck. See e.g., U.S. v. Donald Flynn and Heirs of Henry Orock, 53 IBLA 208, 88 I.D. 373 (1981). Where rights-of-way are involved, however, the Department has held that the land may be granted to one claimant subject to the right-of-way of another. Southern Idaho Conf. of Seventh Day Adventists v. U.S., 418 F.2d 411 (9th Cir. 1969), State of Alaska, 62 IBLA 187 (1983), Eugene McCarthy, 14 L.D. 105 (1892), Instructions, 44 L.D. 359 (1915), Limitation of Access to Through-Highways Crossing Public Lands, 62 I.D. 158 (1955).

In 1892, in Eugene McCarthy, supra, the Department held that a prior grant to a railroad company for station purposes was not a fee interest but only an easement and that a subsequent mineral claimant can obtain a patent which includes the land occupied by the railroad but "subject to" the railroad's use right.

> If the land in dispute is not "needed" by the Company for the specified purposes, then the mineral claimant can mine the soil and take therefrom the minerals which belong to him, without infringing upon the grant to the company. If the company does not actually use the land in dispute for station purposes, then it will be presumed not to "need" it, and so long as this non-user continues the mineral claimant can use it for any purpose he pleases, provided he does not thereby interfere with any present or prospective use that may be needed by the company. If the company should at any time abandon the occupancy of the land, or should its right of way be lost or destroyed, the title of the mineral claimant thereto would become free and unrestricted.

14 L.D. 109.

The question was addressed in 1915 in the well known 44 L.D. 513 decision. There the Department ruled that the appropriation by the United States of linear rights-of-way across public lands did not remove the land from subsequent entry and disposal but simply protected the improvement and the surface use. The remaining interests in the land remained subject to entry and use by a homesteader.

In a related decision the Department had ruled that telephone lines constructed by the Department of Agriculture were not subject to disposal to a homesteader.

> ....under the circumstances of these cases, it seems unnecessary and inadvisable to reserve from disposition and eliminate from the entries and patents definite tracts or areas of land for the protection of such lines. It is believed that the solution of the matter is to convey all of the lands included within the area described in any

> such homestead entry, and all rights appurtenant thereto, except the property of the United States, namely, telephone lines and appurtenances and the right of the United States to maintain and operate the same so long as it shall be necessary.

44 L.D. 359 (Aug. 31, 1915). Five months later the Department extended the same ruling to roads and trails. 44 L.D. 513 (Jan. 13, 1916). Instruction memoranda issued by the BLM have developed the standard "subject to" language to implement the 44 L.D. 513 doctrine. The clause inserted in patents provides that the reservation continues "so long as needed or used for by the United States."

Where a granted right-of-way precedes a public land entry, the Departmental regulations from 1954-1979 provided expressly that anyone "entering or otherwise appropriating a tract of land, to part of which a right-of-way has attached under the regulations. . . [will] take the land subject to such right-of-way and without deduction of the area included in the right-of-way." 43 CFR 244.7 (1954), 43 CFR 2234.1-3(a) (1968), 43 CFR 2801.1-2 (1979).

The same principle is applied where free use permits are issued to public agencies: i.e., subsequent claims or entries take subject to the "superior right" of the permittee. 43 CFR 3621.2; State of Alaska, 46 IBLA 12 (1980).

The concept embodied in Eugene McCarthy, supra and 44 L.D. 513 that a linear type right-of-way need not segregate the entire fee interest in the land from subsequent disposition, applies, in my opinion, equally to granted and non-granted rights of way across land entered under Native allotment applications. If the prior public use is a linear type use, such as is normally embodied in a right-of-way, it should, in my opinion, be reserved by a "subject to" clause in the Certificate of Allotment.

4. Are there circumstances in which the full fee exclusion is required?

The 44 L.D. concept that only the easement is reserved from subsequent entry and not the land itself is relatively narrow and limited to linear type facilities such as transmission lines, roads, pipelines, and the like. I do not believe it applies to non-linear type uses such as storage yards or substantial

buildings. A certain degree of judgment is required, both in deciding whether the use warrants a "subject to" protection or a full fee exclusion and how wide the exclusion should be.

5. May the applicant amend his land description to exclude the right-of-way?

Some allotment applicants might prefer to have the land underlying the road or other linear use excluded so that the acreage will not come out of the 160-acre allotment entitlement. I do not believe the regulations permit this.

At the time most of the allotment entries would have occurred, the regulations provided expressly that in the case of granted rights-of-way anyone entering later would take "subject to" the right-of-way with no deduction of the acreage. See discussion and citations, supra.

In addition, the regulations require that each Native allotment tract be "in reasonably compact form." 43 CFR 2561.0-8(a). Although "reasonable" is a standard which allows considerable latitude, I do not believe an allotment would normally be held to be reasonably compact if it excludes a strip of land which bisects it. I would view the attempt to exclude a right-of-way in the same light as an attempt to exclude portions of less desirable land from within the allotment such as marsh or bogs.

My conclusion is supported by the Solicitor's 1964 Opinion "Allotment of Land to Alaska Natives," 71 I.D. 340, 359 (1964), which dealt with proposed regulations that would require allotments to be in tracts of not less than 40 acres and to conform to the rectangular survey system. The Solicitor ruled that the proposed regulations were within the Secretary's statutory authority.

> The burdens which would attend a contrary conclusion have proved to be substantial, both with respect to the practical administration of the program for Alaska allotments and with respect to the coordination of this program with other programs for the disposition of land in Alaska. Absent a reference to the regular rectangular survey, each allotment of land requires a special and detailed survey of the tract for which application is made. After the land is allotted,

> special steps must be taken to maintain records which relate the nonconforming grant of land to the regular rectangular survey of lands under which the ownership of other lands in Alaska is identified. Notwithstanding the careful maintenance of special records, the different systems of land identification appreciably increase the likelihood of boundary disputes and conflicting claims under Federal programs for the disposition of land in Alaska. These burdens appear to amply justify the rule as a reasonable one under the circumstances.

Although the proposed rule was not promulgated (See 43 CFR 2212.9-1(b) (Jan. 1, 1965 rev.), the considerations enumerated in defense of it also support the construction I have given to the "reasonably compact" requirement, which has been a regulatory requirement since 1963 (43 CFR 6714(b) (1963 rev.).

John M. Allen
Regional Solicitor

cc: Area Director, BIA, Juneau
Associate Solicitor, E&R
Associate Solicitor, IA