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

701 C Street, Box 34
Anchorage, Alaska 99513

IN REPLY REFER TO

August 8, 1983

MEMORANDUM

To: State Director
Bureau of Land Management

From: Attorney
Office of the Regional Solicitor
Alaska Region

Subject: Processing of Public Land
Order 1613 Applications

In your opinion request of August 3, 1983, you ask the following questions in relation to the above-captioned subject:

1. If BLM has not adjudicated a properly filed application (complete with the appraised price as the BLM specified in the 1960's), and in the interim the applicant has disposed of the adjoining land, what rights, if any, does that original applicant retain?

2. For pending applications, what is the appropriate date of appraisal?

As more fully discussed below, the answers to your questions are as follows:

1. Until such time as an adjoining landowner's preference right application "vests," the applicant must continue to hold title to the adjoining land.

2. Once an adjoining landowner's preference right under PLO 1613 has vested, "equitable title" to the land applied for passes to the applicant and the Secretary is obligated to proceed to issuance of patent

regardless of subsequent events (such as the applicant's conveyance of title to his adjoining land to some third party).

3. Under PLO 1613, equitable title passes when an adjoining landowner makes application to purchase, his application is accepted by the Bureau of Land Management (BLM), the purchase price is tendered and accepted, and the BLM issues the applicant a cash certificate.

4. Although it is not appropriate for the BLM to refuse to issue a confirmatory patent to a PLO 1613 preference right applicant because subsequent to the vesting of equitable title to the lands applied for he/she has conveyed title to the adjoining land to some third party, it is possible that the applicant's equitable interest in the applied for lands may have passed by operation of law to his successors-in-interest. This is a matter of state law involving an interpretation of the specific conveyance documents, however, and the Department is without authority to resolve this issue as between the applicant and his successors.

5. Finally, we must reaffirm this office's opinion of March 8, 1979 that the appropriate appraisal date for PLO 1613 preference right applications can in no event be later than the date of vesting of equitable title (i.e., date of issuance of a cash certificate upon receipt of the purchase price).

BACKGROUND

In the Act of August 1, 1956, 70 Stat. 898, Congress instructed the Secretary to revoke certain existing highway withdrawals in the State of Alaska and replace such withdrawals with easements for highway purposes. Because in some instances the width of the proposed easements would be less than the width of the withdrawals they were replacing, Congress expressed concern about the equities of adjoining landowners. See legislative history, 1956 U.S. Code Cong. & Admin. News 4052-4055. To remedy this potential problem, sections 1 and 2 of the Act provided in pertinent part:

> . . . . Notwithstanding any statutory limitation on the area which may be included in an unpatented claim or entry, the Secretary may permit the amendment of the land description of a claim or entry on adjoining lands to include the restored lands.
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> The Secretary may sell such restored lands for not less than their appraised value, giving an appropriate preference right to the holders of adjoining claims or entries and to owners of adjoining private lands....

70 Stat. 898.

In implementation of the Act of August 1, 1956, the Secretary promulgated PLO 1613 (April 7, 1958), which revoked the highway withdrawals in question, replaced them with highway easements and provided adjoining landowners and claimants certain preference rights to then or thereafter purchase the land released from such withdrawals. As to the latter, Sections 7 and 8 provide that:

> 7. The lands released from withdrawal by paragraphs 1 and 2 of this order, which, at the date of this order, adjoin lands in private ownership, shall be offered for sale at not less than their appraised value, as determined by the authorized officer of the Bureau of Land Management, and pursuant to Section 2 of the act of August 1, 1956, supra. Owners of such private lands shall have a preference right to purchase at the appraised value so much of the released lands adjoining their private property as the authorized officer of the Bureau of Land Management deems equitable, provided, that ordinarily, owners of private lands adjoining the lands described in paragraph 1 of this order will have a preference right to purchase released lands adjoining their property, only up to the centerline of the highways located therein. Preference right claimants may make application for purchase of released lands at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management.

Lands described in this paragraph not claimed by and sold to preference claimants may be sold at public auction at not less than their appraised value by an authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the office in the Territory in which their title to their private lands is recorded. Such notice shall give the preference claimant at least 60 days in which to make application to exercise his preference right; and if the application is not filed within the time specified, the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to pay for the lands within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

8. The lands released from withdrawal by paragraphs 1 and 2 of this order, which at the date of this order, adjoin lands in valid unperfected entries, locations, or settlement claims, shall be subject to inclusion in such entries, locations and claims, notwithstanding any statutory limitations upon the area which may be included therein. For the purpose of this paragraph entries, locations, and claims include, but are not limited to, certificates of purchase under the Alaska Public Sale Act (63 Stat. 679 & 48 U.S.C. 364a - o) and leases with option to purchase under the Small Tract Act (52 Stat. 609; 43 U.S.C. 682a) as amended. Holders of such entries, locations, and claims to the lands, if they have not gone to patent, shall have a preference right to amend them to include so much of the released lands adjoining their property as the authorized officer deems equitable, provided, that ordinarily such holders of property adjoining the lands described in paragraph 1 of this order will have the right to include released lands adjoining such property only up to the centerline of the highways located therein. Allowances of such amendments will be conditional upon the payment of such fees and commissions as may be provided for in

> the regulations governing such entries, locations, and claims together with the payment of any purchase price and cost of survey of the land which may be established by the law or regulations governing such entries, locations and claims, or which may be consistent with the terms of the sale under which the adjoining land is held. Preference right claimants may make application to amend their entries, locations, and claims at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph, not claimed by and awarded to preference claimants, may be sold at public auction at not less than their appraised value by the authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the appropriate land office, or if the land is patented, in the Territory in which title to their private land is recorded. Such notice shall give the claimant at least 60 days in which to make application to exercise his preference right, and if the application is not filed within the time specified the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to make any required payments within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days. (Emphasis added.)

Id.

Pursuant to the provisions of § 21(a) of the Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, 145, the federal government's interest in the highway easements created by PLO 1613 were conveyed to the State of Alaska by the Secretary of Commerce by Quit Claim Deed (dated June 30, 1959). However, since the underlying fee title to the land in question remained in the federal government and under the jurisdiction of the Secretary of the Interior, the preference rights to such lands created by §§ 7 and 8 of PLO 1613 remain in effect to this date.

Although it is clear that the legislative intent of the Act of August 1, 1956 was to avoid the possibility that the revocation of the highway withdrawals in question would adversely affect the equities of adjoining landowners, subsequent events have raised precisely this possibility in a number of instances.

Over the years, a number of such adjoining landowners have made application to purchase the land between their property and the highway centerline. A few of these applications have been acted upon by the BLM and patent issued. Most of the applications have not been acted upon, however, even though a number of years have passed since the applications were filed. Since the filing of their applications, some of the applicants have conveyed their adjoining land to third parties while their applications were pending. Also, in at least one instance (Old Glenn Highway), the State of Alaska has relinquished a portion of its Omnibus Act highway easement. These events have raised precisely the possibility that Congress and the Department have tried to avoid: that is, the possibility that someone (the original preference right applicant) other than the present adjoining landowner will acquire title to the land released from withdrawal by PLO 1613 unencumbered by any highway easement.

DISCUSSION

Before proceeding further, some discussion of the concept of "equitable title" seems in order. In very general terms, an applicant for benefits under the public land laws does not receive "legal title" until such time as a patent is issued. However, "equitable title" usually vests in such applicants at some time prior to the actual issuance of patent. The exact time of the vesting of such equitable title varies depending upon the provisions of the specific federal statute the applicant is claiming under. The courts have established that equitable title vests when the claimant has performed all the requirements provided by the statute in question, and all that remains for the Secretary to do is to perform the purely ministerial task of determining whether the claimant has indeed met the statutory requirements and, if so, to issue a patent. Wyoming v. U.S., 255 U.S. 489 (1921). The effect of the vesting of equitable title in the

claimant is that the Secretary has no discretion in the issuance of patent and that events subsequent to such vesting can have no bearing upon the claimant's right to patent. Id. For the purposes of this memorandum, establishing when equitable title vests for a PLO 1613 preference claimant is of crucial importance.

Although the courts have not construed the preference right provisions of either the Act of August 1, 1956 or §§ 7 and 8 of PLO 1613, they have established when equitable title vests under the highly analogous preference right provisions of the Isolated Tracts Act, 43 U.S.C. § 1171. In Wilcoxson v. U.S., 313 F.2d 884 (D.C. Cir. 1963), the court held that regardless of the highly discretionary nature of the preference right provisions of the Isolated Tracts Act, supra, equitable title vested in a preference right claimant upon acceptance of the claimant's application by the Secretary, tender by the applicant of the purchase price, and issuance by the Department to the applicant of a cash certificate for the purchase price. Applying the rule announced in this case to the present situation yields the following results:

1. The legislative history of the Act of August 1, 1956, supra, clearly establishes that one of the statutory requirements to be met in order to exercise the preference right benefits authorized under the Act (and PLO 1613) is that the applicant in fact own lands adjoining lands released from the subject highway withdrawals.

2. It is clear that prior to the issuance of a cash certificate upon tender of the purchase price established pursuant to the provisions of §§ 7 and 8 of PLO 1613, the applicant has no vested rights as against the United States. The Yosemite Valley Case, 15 Wall. (82 U.S.) 77, 93-94; Wilcoxson v. U.S., supra at 888; George D. Jackson, 20 IBLA 253.

3. As such, up until the time of vesting of equitable title in the applicant (issuance of a cash certificate), the applicant cannot have conveyed his adjoining lands to a third party. If he has done so, his application (if still pending) should be rejected. If patent has been mistakenly issued, the Department should consider bringing an action to cancel the patent. However, if

the applicant possessed title to the adjoining lands up to the date of issuance of the cash certificate, his rights have vested and the fact that he has conveyed title to his adjoining lands to some third party subsequent to that date cannot affect his right to patent. Thus, if patent has already been issued, any attempt by the Department to cancel the patent will prove unsuccessful. If the application is still pending, the Department must proceed to issuance of a patent to the applicant.[1/]

4. If a preference right applicant relinquishes his rights under PLO 1613, even where such rights have vested, it seems clear that the present owner of adjoining land is free to apply for patent under §§ 7 or 8 of PLO 1613. This is because it was the clear

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1/ This does not necessarily mean, however, that the applicant in this situation will retain title to the land covered by the patent. In analogous situations, several state courts have held that the right to highway (or alley) acreage will be considered as "appurtenant" to the adjoining estate. Thus, when the adjoining estate is conveyed, the right to the highway acreage will be considered to run with the land and to pass to the grantee under the deed by operation of law, unless specifically and expressly retained by the grantor in the deed, even when the description contained in the deed does not include the appurtenant land. See e.g., Seefus v. Briley, 174 N.W.2nd 339 (Neb. 1970). The Alaskan state courts have not yet ruled on this issue, but the question is squarely before them in the context of a PLO 1613 preference right patent. Pavek v. Setters, Case No. 3AN 83-____ Civil (Alaska Superior Court, Third Jud. Dist.), filed July 29, 1983. In my opinion, the Alaska courts will adopt the Seefus rule as a matter of state law. Even so, whether or not title will be quieted in the PLO 1613 preference right applicant who receives patent, or in his successor-in-interest, will necessarily involve a case-by-case construction by the State courts of the specific deeds entered into by the parties subsequent to the vesting of equitable title in the preference right applicant.

Congressional intent of the Act of August 1, 1956 that the preference right in question be extended to the future adjoining land owner. See Opinion of the Regional Solicitor (dated March 10, 1978).

Finally, you have asked what the appropriate appraisal date is for PLO 1613 preference right applications now pending. Once again, whether equitable title has vested, and if so, when, is the determining factor. As pointed out in the Opinion of the Associate Solicitor, Branch of Realty (dated October 9, 1980), fair market value generally will be determined within six months of the issuance of patent regardless of when the PLO 1613 preference right application is filed. There is an exception to this general rule, however, not discussed in the Associate Solicitor's memorandum. That exception was discussed in this office's opinion of March 8, 1979, and once again involves the situation where equitable title has already vested.

The Interior Board of Land Appeals (IBLA) has held that where equitable title has vested in an applicant to purchase public lands (Small Tract Act), the applicable appraisal date for such lands can in no event be later than the date of the vesting of equitable title. Abraham Epstein, 24 IBLA 195 (1976). In coming to this decision, the IBLA distinguished many of the cases discussed in the Associate Solicitor's 1980 opinion as involving situations where equitable title had not vested in the claimant, and relied in part on the court's findings in Wilcoxson v. U.S., supra. Therefore:

1. For those pending PLO 1613 preference right applications for which equitable title has not yet vested in the applicant (i.e., a cash certificate has not yet been issued to the applicant), the land must be appraised at its present fair market value.

2. For those pending applications for which equitable title has vested at some prior date, fair market value must be determined as of a date no later than the date of the issuance of the cash certificate to the applicant.

If I can be of further assistance to you in this matter, please contact me.

Robert Babson