I concur:

PAUL H. GANTT, *Acting Chairman.*

Board Member HERBERT J. SLAUGHTER, who was on leave, did not participate in the disposition of this appeal.

RIGHTS OF MINING CLAIMANTS TO ACCESS OVER PUBLIC LANDS TO THEIR CLAIMS

Mining Claims: Generally—Rights-of-Way: Act of January 21, 1895

The United States Mining Laws give to the locators and owners of mining claims as a necessary incident the right of ingress and egress across public lands to their claims for purposes of maintaining the claims and as a means toward removing the minerals.

Mining Claims: Generally—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Rights-of-Way

The rights-of-way provided for in 43 CFR, 1954 Rev., 115, 154–179 (Supp.) for the Oregon and California Railroad and Reconveyed Coos Bay Grant lands were primarily for timber roads. Roads "acquired by the United States" as those words are used in those regulations, do not include roads constructed by others under statutory right for mining purposes.

Rights-of-Way: Act of January 21, 1895—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Rights-of-Way—Fees

One who applies for a right-of-way under the act of January 21, 1895, must comply with the requirements of the regulations and pay whatever fee that they require. And, whether he acquire a right-of-way under an appropriate rights-of-way act or use the land for that or any other purpose, he must comply with all applicable regulations issued under the Oregon and California Grant land laws, which are directed to the management of the area, but such regulations may not impose fees for the enjoyment of rights granted by other laws unless clearly authorized by law.

M–36584 OCTOBER 20, 1959

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have asked whether a mining claimant, who builds a road to his mining claim across public land, may be charged a fee for the use of such road, where no exclusive right-of-way is applied for or granted by the United States.

In the particular case to which you call my attention it is alleged that mining locations were made on public land more than 50 years ago and the claimant, to provide access to his claims and a way for hauling ore from the claims, constructed a road over public lands. Your inquiry will be discussed in the light of these allegations. Your

inquiry results because the regulations in 43 CFR, 1954 Rev., 115.154–179 may be susceptible of the construction that such a charge must be made. These regulations relate only to rights-of-way for tram roads *granted* under the act of January 21, 1895 (28 Stat. 635; 43 U.S.C., 1952 ed., sec. 956), and the act of August 28, 1937 (50 Stat. 874; 43 U.S.C., 1952 ed., sec. 1181a), and apply, primarily at least, to purchasers of timber on the Oregon and California Railroad Grant lands. Unless there is reason for saying that the act of August 28, 1937, contains provisions under which a charge may be made for using a road even though it is not a right-of-way granted under the 1895 act the principle or right to charge for the use of *any* road on public lands by *any* user as it is said the regulations applicable to the Oregon and California lands may indicate to be, would apply equally to the public lands generally. Since it has traditionally been customary for mining locators, homestead and other public land entrymen to build and/or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice.

I do not believe that a charge may be made in such cases. The general authority of the Secretary and the Director, Bureau of Land Management, over the public lands (5 U.S.C., 1952 ed., sec. 485; 43 U.S.C., 1952 ed., sec. 7 [see note fol.]) might be construed to permit it, were it not for the fact that legislation providing for the making of entries and locations necessarily presupposes a right of passage as an incident to the other rights granted, and the general rule that free passage over the public lands has always been recognized. Until recent years free *use* of the public range was the custom. See *Buford* v. *Houtz*, 133 U.S. 320 (1890) and *McKelvey* v. *United States*, 260 U.S. 353 (1922). Prior to the enactment of the mining laws, minerals in such lands were freely exploited by the public without hindrance. (1 Lindley, *Mines*, secs. 46 and 56, 3d ed. 1914, and cases cited.) The Taylor Grazing Act (43 U.S.C., 1952 ed., sec. 315) took away the free grazing privilege previously sanctioned by custom just as the mining laws of 1867 and 1872 took away the implied license to mine. But in both of these cases the changes were made by legislation, not by executive action. The Taylor Grazing Act and subsequent legislation have established a policy of management of the public lands similar, although, with minor exceptions, not as comprehensive or as rigid as that provided by law for certain reservations. Perhaps the control provided by law for national forest reserves more nearly approaches that provided for the Oregon and California Railroad Grant lands, and to a lesser degree the public domain grazing districts. As to such

national forest lands, Congress in the act of June 4, 1897 (30 Stat. 36; 16 U.S.C., 1952 ed., sec. 478), expressly reserved the right of ingress and egress to settlers, and to others for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," subject to compliance with the rules and regulations covering such national forests. The Department of Agriculture in its regulations, 36 CFR, 1949 ed., 251.5(c) (Supp.) does not even require the constructor of a road in such cases (said to have a "statutory right" of access), to obtain a permit, but, with minor exceptions, does require that permission be obtained by others. Thus the practice of that Department is directly contrary to the proposal discussed here. With respect to public lands in grazing districts the law reserves the right of ingress and egress and provides that nothing in it "shall restrict" mining activities, in substantially the same language as is used in the 1897 act, *supra*. The only applicable regulations of the National Park Service relate to Death Valley National Monument, 36 CFR, 1949 ed., 20.26(a)(4) (Supp.) and Mt. McKinley National Park, 36 CFR, 1949 ed., 20.44 (Supp.). Those regulations require only that a miner obtain a permit and as to Death Valley Monument, keep his road in good repair while using it. No fee is charged. Although not so stated as in the national forest regulations, the basis for the free use appears to be the "statutory right" of access.

In general Congress has recognized the right of "free passage or transit over or through public lands; * * *" and has enacted penal legislation to prevent its obstruction. Section 3, act of February 25, 1885 (23 Stat. 322; 43 U.S.C., 1952 ed., sec. 1062). It has also provided relief to the owners of mining claims where access was denied for any reason. Act of June 21, 1949 (63 Stat. 214; 30 U.S.C., 1952 ed., sec. 28b).

The genesis and history of the mining laws make it clear that Congress intended to give the miner free access to minerals in the public lands and to leave him free to mine and remove them without charge. Congress in the 1860's failed to go along with an executive recommendation for disposing of the minerals by lease in order to raise revenue. It has consistently since then left the miner free and untrammeled so far as his mineral rights are concerned. In recent years it has subsidized the miners of certain strategic and critical minerals. Further, Congress, in effect, confirmed the miner's rights previously exercised under sufferance as much as it granted mining rights. It declared the minerals to be "free," 30 U.S.C., 1952 ed., sec. 22, and by section 38 of that title it is declared, in effect, that a location need not be recorded in order to acquire the right to mine so far as the United States is concerned, adverse possession being sufficient. It has always

been recognized that the policy of Congress is to encourage the development of minerals and every facility is afforded for that purpose. *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673 (1888) and *Steel* v. *Smelting Company*, 106 U.S. 447 (1882).

Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads. In effect, it provided only for a procedure where possession could be maintained and patent to the land could be obtained. Otherwise the clear intent was that the miner should have the right to appropriate the minerals and convey them to market. Lindley in his 3d edition on *Mines*, volume 2, sections 629 and 631, points out that roadways are necessary as an adjunct to working a claim and as a means toward removing the minerals.

The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done in the construction of roads to carry ore from mining claims as legitimate development work accreditable to the claims as assessment and patent work. *Emily Lode*, 6 L.D. 220 (1887). In *Douglas and Other Lodes*, 34 L.D. 556 (1906), it held that such roadways were not applicable. But in *Tacoma and Roche Harbor Lime Co.*, 43 L.D. 128 (1914), after discussing a number of pertinent court and departmental decisions, the Department adopted the rule as stated in Lindley on Mines and allowed credit toward patent expenditures to a trail subject only to proof of the applicability of the trail work to specific locations. The principle was applied to an aerial tramway in *United States* v. *El Portal Mining Co.*, 55 I.D. 348 (1935), citing the *Tacoma* case, *supra*. These cases obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations even to the point of crediting expenditures made in that connection toward meeting the requirements of the statute. And, as already indicated, it has preserved that right in express terms in at least two general laws providing for Federal use of public lands.

We may reasonably apply here a principle that the courts have frequently applied in cases measuring the powers of the United States to legislate in relation to matters within the exclusive jurisdiction of a State, and the reverse. Executive action along the line proposed could be used to completely destroy the rights granted by Congress under the mining laws. It is true that where a tramway right-of-way is granted under the 1895 act, *supra*, the Department, for more than 20 years, has charged an annual rental. But that charge is made under the discretionary power granted by Congress to the Secretary under the act. Such rights when granted in the

past have vested an exclusive right of user in the mining claimant. A road constructed by a mining claimant for purposes connected with his claim, without the benefit of such a grant is not exclusive and there is no specific law giving the Secretary discretionary authority to grant that right-of-way "under general regulations" as under the 1895 act.

It appears that the presumed authority to charge a fee is based on 43 CFR, 1954 Rev., 115.171(b) (Supp.) providing for the payment by a permittee for the use of a road "constructed or acquired" by the United States. There is also authority to charge for tramroad rights-of-way, granted pursuant to 43 CFR, 1954 Rev., 244.52, in section 244.21 (Supp.). But both sections 115.171(b) and 244.21 pertain to *granted* rights-of-way. They do not apply to roads constructed by an entryman or locator solely to provide access to his entry or claim. The road was not built by the United States nor can it be deemed to have been acquired by it in the sense contemplated by section 115.171(b). Even if the word "acquired" as there used is given its broadest possible meaning it is not believed that it would encompass an access road of the kind discussed here. It is true that the title to the land is in the United States but the road is in the nature of a "private road" across another's land which is primarily used by one or more persons but which may be used by anyone. The United States can no doubt use such a road or permit its permittees or licensees to do so at least to the extent that it does not unduly interfere with its use for the legitimate purpose for which it was built. If it is abandoned for that purpose it falls in the public domain if used as a public road, otherwise it is the sole property of the United States.

In practice the Bureau of Land Management has granted tram road rights-of-way on the public domain elsewhere than on the Oregon and California Grant lands only where miners or others have desired an exclusive right of user. On the Oregon and California Grant lands, and interspersed public lands, the need for the use of such granted rights-of-way by a class of persons no doubt is such as to require all users to participate in their maintenance and this may well be justified, if not under the 1895 act certainly under the 1937 act, but this may be done without extending the fee principle to roads constructed under clearly implied statutory authority as ways of necessity, unless such extension is required or authorized by law.

With respect to timber roads on the Oregon and California Railroad Grant lands, it is noted that the regulation governing the grant of rights-of-way under the 1895 act also cites the 1937 Timber Management Act, *supra*, as statutory authority. The latter act gives the Sec-

retary broad authority in the management and sale of timber whereas the later act of April 8, 1948 (62 Stat. 162), extends the mining laws to the area with only two qualifications: (*1*) that the ownership and management of the timber is reserved to the United States and (*2*) that mining claimants must record their locations and assessment work affidavits in the land office. Beyond this the law vests no discretionary authority over such claims in the Secretary. This is a further reason for believing that Congress intended that, except as provided in the law, miners' rights on such land would be the same as on other public domain land. It is true that neither the 1937 act nor the 1948 act contains language respecting the right of passage similar to that in the National Forest and Taylor Grazing Acts. But this is far from conclusive of a different intent. In the light of the history of the 1948 act it seems likely that Congress did not then feel that it had intended in 1937 to affect mining rights in those lands at all. They had been consistently protected everywhere else. The 1948 act clearly intended to restore the status quo and to give to miners everything they enjoyed on public lands except as otherwise expressly provided.

I cannot agree with the State supervisor in his belief that the act of August 31, 1951 (65 Stat. 290; 5 U.S.C., 1952 ed., sec. 140), applies here. That act requires Federal agencies to charge for—

> any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility *performed, furnished, provided, granted, prepared, or issued by any Federal agency* * * *. (Italics added.)

The grant of the minerals with all incidents thereunto pertaining is direct from Congress to the miner. The act contains no language that could be construed to authorize a Federal agency to make a charge in such case. The act does not require that the Department examine all grants made by Congress and amend them so as to impose charges for rights freely granted, whether expressly as the right to locate and mine, or by reasonable, if not necessary, implication, as the right of passage.

The Bureau of Land Management has made no grant nor performed any service. The miner built the road by implied authority from Congress. He is liable in damages if he unnecessarily causes loss or injury to the property of the United States and, as previously stated, his right to use the road, even though he built it, is not exclusive but his right to use it for mining purposes is as evident as his right to mine.

Although no charge may be made on a road as constructed and used as a necessary incident to the maintenance of a mining location and its development, a miner who wishes to use a road built or acquired by the United States must comply with the applicable regulations. And, if he applies for and obtains a right-of-way under the 1895 act he must

pay whatever fee is required by the regulations. And, of course, any person who uses public land within the Oregon and California Grant lands area must comply with all applicable and reasonable regulations issued under the act of August 28, 1937, *supra*, as amended, for the management of the area, but that act does not supersede the mining laws.

EDMUND T. FRITZ,
Acting Solicitor.

ESTATE OF JOHN STEVENS OR JOHN STEPHENS

IA-1002 *Decided October 26, 1959*

Indian Lands: Descent and Distribution: Escheat

The next of kin of an Indian decedent, who is not an enrolled member of the Klamath Tribe with at least one-sixteenth degree of Indian blood of the Klamath Tribe, may not inherit the decedent's restricted or trust property within the Klamath Reservation, but such property will escheat to the Tribe.

APPEAL FROM AN EXAMINER OF INHERITANCE BUREAU OF INDIAN AFFAIRS

Clyde Busey, as guardian ad litem for Stanley Stevens, a mentally incompetent adult person, has appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance, dated September 24, 1958, denying his petition for a rehearing in the matter of the estate of John Stevens or John Stephens, who died intestate on or about December 29, 1941.

In his original order, dated July 2, 1958, the Examiner found that Stanley Stevens was the son and only apparent heir at law of John Stevens, but that he was not entitled to inherit the trust or restricted property herein involved because, as has been conceded, he was not an enrolled member of the Klamath Tribe, and thus did not qualify as an heir under the provisions of section 5 of the act of June 1, 1938 (52 Stat. 605, 606).[1] This section was repealed by the act of August 13, 1954 (68 Stat. 718, 721).

The real property herein involved is described as the NW¼ of Section 20, T. 36 S., R. 10 E., W.M., Oregon, containing 160 acres. The original allottee of that property was Kate Stanley, a Klamath Indian, to whom allotment No. 1553 was made and a trust patent

[1] "Hereafter only enrolled members of the Klamath Tribe of not less than one-sixteenth degree Indian blood of the Klamath Tribe shall inherit or take by devise any restricted or trust property within the Klamath Reservation * * *."