UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Anchorage Region
P. O. Box 166
Anchorage, Alaska 99501

June 30, 1964

Memorandum

To: State Director, Bureau of Land Management, Anchorage

From: Regional Solicitor, Anchorage

Subject: 44 LD 513 - Use and Notation

You have requested that I review the memorandum dated May 27, 1964 from the Chief, Lands and Minerals Management, relating to application of the Instructions dated January 13, 1916 (44 L.D. 513) to existing roads and trails providing access to areas of the public domain valuable, or potentially valuable, for recreation, timber, grazing or other types of public lands development. Bob Coffman and I discussed this subject prior to the issuance of his memorandum, and I am in agreement with the views he has expressed therein.

In your covering memorandum, you have raised certain questions concerning the utilization of existing roads and trails by BLM under the principles of 44 L.D. 513. You point out that apart from the system of public roads maintained by the State of Alaska there are existing roads and trails providing access into back-country areas. These roads and trails may be either of two types:

1. Historic roads and trails whose origin can not be definitely ascribed or traced to any federal construction program. These include the gold-rush trails, dog team trails, Indian trails, etc. Many of these trails are of scenic and historic interest and are considered to have value in your recreational program. Maintenance of these roads over the years has been haphazard.

2. Roads and trails originally constructed with federal funds, but which are no longer used or maintained by the constructing agency. As an example, you mention certain trails constructed with funds made available to the Fish and Wildlife Service to provide access to key fishing areas.

You ask whether these existing roads and trails may be appropriated by BLM under the 44 L.D. instructions so as to protect them from appropriation and closure or destruction by patentees under the public land laws. If so, you contemplate staking these roads and trails on the ground and noting their existence on the public land records.

Second, you ask whether the use of roads and trails by the public, absent any federal use or maintenance, would support appropriation under 44 L.D. instructions.

Finally, you present a situation where a road which was constructed by the Federal government with appropriated funds but which has not been federally maintained during recent years traverses entered lands. You wish to know whether this "public road" may be appropriated by notation on the public land records under the 44 L.D. instructions.

Initially, a distinction should be made between a road or trail which is a public highway and a road or trail which is merely a federal improvement or facility. A highway is a public road which anyone is free to use. In Alaska, a highway may be created by an act of the appropriate public authorities manifesting an intention to accept the grant of the right of way for public use or it may be created by public user for such a period of time and under such conditions as to prove that the grant has been accepted. Hamerly v. Denton, 359 P. 2d 121 (Alaska, 1961). R.S. sec. 2477 (43 U.S.C. sec. 932) which provides that

> The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

has been construed by the courts to constitute a congressional grant of a right of way for public highways across public lands. If the grant has been accepted by act of the public authorities or by public user, the road is a public highway and any entry of public lands traversed by it is subject to the easement in the public. An attempted appropriation by the United States under 44 L.D. instructions would be superfluous and inappropriate.

A road or trail, however, may be a federally owned improvement or facility, and not a public highway, even though the public may be permitted to use it. For example, an access road to a fire control station constitutes a federal improvement. In order for it to retain its status when the lands crossed by it have been entered, it must have been appropriated by the United States in accordance with the 44 L.D. instructions. If construction precedes entry of the lands, notation on the land

records evidences the appropriation. If construction has not taken place prior to entry, 44 L.D. 513 requires some action indicating upon the ground itself that the tract had been devoted to the public use--such as staking the area to be traversed, and therefore retained by the United States--accompanied by a setting aside of a sufficient part of the appropriation for construction. In other words, according to the instructions, the evidence must show that construction had been provided for prior to entry and will be immediately undertaken. It is important to bear in mind that the notation on the land records is not essential to the appropriation of the right of way. Appropriation may take place without any notation on the records and conversely, the notation on the land records, in and of itself, would not constitute a valid appropriation of the land. The purpose of the notation is to provide notice to the public that the tangible improvement, that is, the road or trail (or bridge, telephone line, building, etc.) is the property of the United States.

A road or trail originally constructed as a federal facility could, I think, be converted into a public highway through voluntary abandonment by the constructing federal agency and subsequent public use for a sufficient period of time and to a sufficient extent. But so long as it is used and maintained by the federal agency for an authorized federal purpose, it would not become a public highway and would remain the property of the United States.

In the case of entered lands, if the road was a public highway at the time the land was entered, the entryman takes subject to the public easement. Hemerly v. Denton, supra. If the road was originally a federal improvement which had been abandoned prior to entry, the entryman would not take subject to the right-of-way. Similarly, if the road was abandoned subsequent to the initiation of the entry, the entryman would be entitled to take free and clear of the right-of-way. Finally, if the road was abandoned prior to entry and appropriated by BLM for an authorized purpose prior to entry, the entryman would take subject to the appropriation of the right-of-way by BLM. The question of abandonment is one of fact to be resolved in each instance.

With respect to your second question, it should be initially recognized that whenever a right-of-way is desired to be appropriated, the right to appropriate must be established by Congressional authorization. Whether the right-of-way is to be appropriated for an existing road or a road to be constructed with federal funds, there must be authorizing legislation. The mere fact that an existing road or trail is desirable or useful is not sufficient to authorize its appropriation under 44 L.D. principles.

If appropriation of the right-of-way is authorized, it is my view that the 44 L.D. instructions would be applicable whether there was an existing road or whether the road was yet to be constructed. If the road is an existing facility, a notation on

the land records would evidence the appropriation. If the road is in such a state of disrepair as to require extensive repair or reconstruction before it could be used, the appropriation of the right-of-way, to be valid, would probably require some action on the ground, such as staking, accompanied by the setting aside of sufficient funds for its reconstruction or repair.

Finally, it is my view that public use alone is not a sufficient basis for a 44 L.D. notation. If the road is a public highway, the notation is without significance; the public easement is reserved under R.S. sec. 2477, supra. Use by the public, in and of itself, is not authority for appropriation by BLM under 44 L.D. principles. It must be borne in mind that BLM is not charged with the responsibility for maintaining the public road system in Alaska, and that any appropriation of a right-of-way for a road or trail must be pursuant to a function conferred upon BLM by the Congress.

William W. Redmond
Regional Solicitor

UNITED STATES GOVERNMENT

Memorandum

TO : DM-A

DATE:

FROM : Chief, Division of Resource Management

In reply refer to:
2098 (013)

SUBJECT: 44 LD 513, RS 2477 in Alaska

Attached is a staff report prepared in response to a series of recurring questions concerning the nature and application of 44 LD 513, RS 2477 and section line easements in Alaska. This report was prepared by Pat Beckley of my staff and has been reviewed by Robert Mothershed of the Regional Solicitor's staff.

Enclosure:
Report with enclosures

REPORT

ON

~~AS 19 5[illegible] RS 2477~~ / rea RS 2477 section

AND

~~SECTION LINE EASEMENTS~~ all "Section Line"

IN

ALASKA

Prepared by: Patrick C. Beckley
Chief, Branch of Lands and Minerals

Reviewed by: Robert Mothershed, Solicitor
Julienne Gibbons, Realty Specialist

OCTOBER 1977

I. 44 LD 513

44 LD 513 is an abbreviation that refers to a letter of instruction found in volume 44, Land Decisions, page 513, dated January 13, 1916. This instruction provides that where telephone lines, roads, trails, bridges and similar improvements have been constructed on federal lands with federal monies and are being maintained by and for the United States, the lands needed for such improvements may be retained for the use of the United States through the insertion of a reservation in final certificates and subsequent patents.

A good discussion of the 44 LD 513 may be found in the June 30, 1964, Regional Solicitor's memo on this subject (attached).

II. QUESTIONS ABOUT 44 LD 513

1. What actually makes the 44 LD 513 reservation effective?

Two actions are required:

a. Legislation which authorizes federal money for a proposed project or existing federal projects where money has already been spent in construction.

b. There must be a showing (appropriation) on the ground of the project. If the road or trail is existing, a notation on the land records will evidence the appropriation. If the road, etc., is not existing or in such disrepair so as to require extensive repair before use, the appropriation would require some action on-the-ground, i.e., staking of a centerline survey.

2. If federal monies were expended and construction done, but no notation is made on the records, is there still a 44 LD 513 right-of-way?

Yes, the actual showing on the ground constitutes the appropriation and thereby sets the effective date of the appropriation.

3. If a notation on the records is made for an existing road or trail on federal lands but no government money has been expended, is there an effective 44 LD 513?

No. Notation of the public land records does not by itself constitute appropriation. The purpose of notation is to provide notice to the public that the improvement is the property of the United States and to facilitate that reservation in subsequent conveyances of the land. Public use of an area, by itself, does not establish a 44 LD 513 right-of-way.

4. A 44 LD 513 reserves trails or other improvements for the federal government. Does this insure unrestricted public use of the improvement?

No. A road or trail may be a federally owned facility on public lands, and not be a public highway, even though the public may be permitted to use it. In Alaska, there has been little intensive land management of federal lands and properly reserved 44 LD's have been generally open to public use. An exception to this is the White Alice system and other 44 LD's reserved for the military.

5. What rights accrue to the public through public use of a 44 LD road and what happens if it's closed to public use by an entryman or land owner?

No rights accrue to the public through use permitted (or allowed informally) by the governement. The 44 LD only protects the government's rights and the public's use is incidental to that. The 44 LD does not become a public highway through permitted use by the general public. If a properly established 44 LD preceded an entry and public use of the 44 LD occurred before or after the entry, the entryman would not have the right to legally close off either the government's use or the public's use. If closure (physical blockage) does occur, the public and/or the government would each have to ~~secure~~ enforce its rights through the court system, if necessary.

6. How do 44 LD's affect settlement claims?

In the case of entered lands, if a road was protected by a 44 LD or was a public highway at the time the land was entered, the entryman receives title to the land subject to the right-of-way. If the road was originally a federal improvement which was formally abandoned by the government prior to entry, the entryman would not take subject to the right-of-way. Similarly, if the road was formally abandoned after the initiation of the entry, the entryman would be entitled to take free and clear of the right-of-way. Finally, if the road was formally abandoned by an agency of the government prior to entry but appropriated through 44 LD procedures by BLM, prior to entry, the entryman would take subject to the appropriation of the right-of-way by BLM. The question of abandonment is to be resolved in each instance by determining whether the government has formally abandoned the right-of-way through both non-use and a formal action indicating the intent of the government to abandon.

If construction has not taken place prior to entry, 44 LD 513 requires some action upon the ground itself that the tract had been devoted to the public use - such as staking the area to be traversed, and therefore retained by the United States, accompanied by a setting aside of a sufficient part of the

appropriated money for construction. In other words, according to the instructions, construction must have been provided for prior to entry and will be immediately undertaken. It follows then, that the U.S. may not establish a 44 LD 513 right-of-way after land is properly entered for a settlement claim. It is important to bear in mind that the notation on the land records is not essential to the appropriation of the right-of-way.

7. Can the location of a 44 LD right-of-way be moved unilaterally; by either a landowner or the government on a settlement claim or private land? If so, how is it made a part of the public land records?

No, it cannot be moved. As the basic authority for 44 LD 513's has been replaced by the Federal Land Policy and Management Act of 1976, neither landowners nor the government may move a 44 LD 513. The process now available to consenting parties (landowners and the government) is a formal relinquishment of the 44 LD and acquisition of an easement by the government. The relinquishment procedure involves a formal statement by the appropriate government official that the intent of the United States is to relinquish all rights relative to the right-of-way. This document should also be accompanied by a memo to the Branch of Land Title and Records requesting a removal of the 44 LD from the public land records. The other

step in the process is acquisition of an easement by the government which would follow already established BLM procedure (BM 2130).

8. If an entryman agrees to build alternate access leading from a public highway to a 44 LD 513 trail, how do we note the records to assure a reservation in the subsequent patent to protect the alternate access?

In the entryman provides alternate access on his claimed land, the U.S. could relinquish the old route and accept the alternate route using the procedures outlined above. It should be noted, however, that this action should be preceded by a field report and environmental analysis report. In some cases, this type of action can be locally quite controversial and public involvement should be incorporated into the environmental analysis as provided for in our standard Bureau procedures.

9. Can a 44 LD be legally restricted or blocked by a land owner?

A proper 44 LD 513 may not be blocked by private individuals, it may be blocked or restricted only by the federal government. A blockage on federal land by a private individual would be a form of adverse possession against the government and many courts have held that you cannot acquire any rights by adverse possession against a sovereign.