1 of 1 DOCUMENT

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Department of the Interior

44 I.D. 513; 1916 I.D. LEXIS 167

January 13, 1916

HEADNOTES: [**1]
[*513] ROADS, TRAILS, BRIDGES, ETC. IN NATIONAL FORESTS -- EXCEPTION IN PATENTS.

Where "roads, trails, bridges, fire lanes, telephone lines, cabins, fences, and other improvements necessary for the proper and economical administration, protection, and development of the national forests," have been actually constructed and are being maintained upon public lands of the United States under the provisions of the act of March 4, 1915, or survey has been made and the area needed for such improvements definitely fixed and the construction thereof has been provided for and will be immediately undertaken, and the lands are thereafter disposed of under any of the public land laws, the final certificate and patent should except such portion thereof as is so devoted to public purposes.

ACTION: INSTRUCTIONS.

OPINIONBY: JONES

[*514] JONES, First Assistant Secretary:

I am in receipt of your [Secretary of Agriculture] letter of November 4, 1915, referring to the instructions of this Department, dated *August 31, 1915 [44 L.D., 359],* to the Commissioner of the General Land Office, concerning constructed Forest Service telephone lines crossing lands within national forests and listed and entered under the [**2] homestead law of June 11, 1906. The Commissioner of the General Land Office was there instructed as follows:

In cases where telephone lines or like structures have been actually constructed upon the public lands of the United States, including national forest lands, and are being maintained and operated by the United States, and your office is furnished with appropriate maps or field notes by the Department of Agriculture so prepared as to enable you to definitely locate the constructed line, proper notation thereof should be made upon the tract books of your office and if the land be thereafter listed or disposed of under any applicable public-land law, you should insert in the register's final certificate and in the patent when issued the following exception:

"Excepting, however, from the conveyance that certain telephone line and all appurtenances thereto, constructed by the United States through, over, or upon the land herein described, and the right of the United States, its officers, agents, or employees to maintain, operate, repair, or improve the same so long as needed or used for or by the United States."

In your present communication, you refer to the appropriation act [**3] of March 4, 1915 (38 Stat., 1100),

containing the following provision:

For the construction and maintenance of roads, trails, bridges, fire lanes, telephone lines, cabins, fences, and other improvements necessary for the proper and economical administration, protection and development of the national forests, $ 400,000 --

and state as follows:

This act provides for the construction of such improvements of the foregoing class as may be necessary for the purpose already enumerated, and provides as well for the maintenance of those which are already constructed. The expenditure of money from this subappropriation, in accordance with its provisions, would appear to me directly to result in devoting to public purposes the land upon which such money is expended. This expenditure may be either for construction or maintenance. One of the first and most desirable things, either for construction or maintenance, is definite location by means of survey. I see no reason why the expense of such survey should not be charged against the subappropriation quoted, and it would appear to me that such expenditure would in itself be sufficient to devote the land to public purposes as being "necessary [**4] for the purpose of proper and economical administration, protection, and development of the National Forests."

I shall appreciate it if you will advise me whether in the case of such expenditure and the subsequent listing of the land, your Department has authority to include such an exception in the final certificate and patent, provided at the time of listing you are furnished with evidence of the fact that a certain part of the land has been so devoted to public purposes, accompanied by the necessary tracings showing the location and extent of such appropriation.

[*515] I am of the opinion that the same reasoning as adopted in the Department's instructions of August 31, 1915, to the Commissioner of the General Land Office, relative to telephone lines constructed under authority of similar appropriation acts applies to the other kinds of improvements mentioned in the above act of March 4, 1915; and that similar exceptions as to lands needed for such improvements may be inserted in the register's final certificate, and in the patent when issued. Your communication, however, would appear to take the view that a mere preliminary survey is sufficient as a devotion of the land to [**5] the public use indicated. Without expressing a definite opinion at this time, I would incline to the view that a mere preliminary survey, which might or might not be later followed by construction, is not an appropriation of the land to the public use. It would seem that some action indicating upon the ground itself that the tract has been devoted to the public use, is necessary -- such as staking the area to be retained by the United States, accompanied by a setting aside of a sufficient part of the appropriation for construction. In other words, the case should be one of either actual construction, or in which the evidence shows that the construction has been provided for, and will be immediately undertaken.

A copy of this communication has been furnished the Commissioner of the General Land Office, for his information.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFederal GovernmentPropertyGovernmentsPublic LandsForest Lands

ATTACHMENT 3

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.

SOURCE:
BLM (Bonnell)

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. Hamerly 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

William W. Redmond
Regional Solicitor

William L. HAMERLY, Appellant,
v.
Daniel Webster DENTON, Appellee.
No. 47.

Supreme Court of Alaska.
Jan. 27, 1961.

Action to enjoin obstruction of road. The District Court, Third District, J. L. McCarrey, Jr., J., entered judgment in plaintiff's favor, and defendant appealed. The Supreme Court, Dimond, J., held that dedication could not be implied from homesteaders' establishment of road which had no substantial use except when occasion made it convenient for persons to visit homesteaders socially, for business purposes, or out of curiosity.

Reversed and remanded with directions.

1. Public Lands ⇐64

Federal statute granting right of ways for construction of highways over public lands not reserved for public uses is operable in Alaska and constitutes congressional grant of right of way for public highways across public lands. 43 U.S.C.A. § 932.

2. Public Lands ⇐64

Before a highway may be created, there must be either positive act on part of appropriate public authorities of state clearly manifesting intention to accept grant, or there must be public user for such period of time and under such conditions as to prove grant has been accepted. 43 U.S.C.A. § 932.

3. Public Lands ⇐64

Party claiming that road became public highway under federal statute granting highway right of ways over public lands by virtue of public use had burden of proving that highway was located over public lands and that character of use was such as to constitute acceptance by public of the statutory grant. 43 U.S.C.A. § 932.

359 P.2d—8½

4. Public Lands ⇐4

The term "public lands" means lands which are open to settlement or other disposition under land laws of United States, and does not encompass lands in which rights of public have passed and which have become subject to individual rights of a settler.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Lands".

5. Public Lands ⇐35(1), 64

Portion of land covered by valid entry under Homestead Laws is segregated from public domain until such time as entry may be cancelled by government or relinquished and is not included in congressional highway right of way grants. 43 U.S.C.A. § 932.

6. Public Lands ⇐40, 102

Abandonment or cancellation of homestead entry only brings land within category of public lands with reference to public use in future.

7. Highways ⇐17

Evidence of public use of road during periods that land was not subject of homesteaders' claims was insufficient to justify finding that public highway was created across homestead. 43 U.S.C.A. § 932.

8. Highways ⇐5

Desultory use of dead-end road or trail running into wild, unenclosed, and uncultivated country, does not create a public highway. 43 U.S.C.A. § 932.

9. Dedication ⇐16(1)

There is "dedication" when owner of interest in land transfers to public the privilege of use of such interest for public purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Dedication".

10. Dedication ⇐41, 44, 45

Question of whether there has been dedication is question of fact; this fact will not be presumed against landowner, but burden rests on party relying on dedication to establish it by clear and unequivocal proof.

11. Dedication ⇐20(5)

Dedication could not be implied from establishment by homesteaders of road which had no substantial use except when occasion made it convenient for persons to visit homesteaders socially, for business purposes, or out of curiosity.

12. Dedication ⇐41

Intention to dedicate could not be presumed from fact that homesteaders apparently did not attempt to stop sightseers and hunters from occasionally using road they had established.

13. Dedication ⇐15

Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient.

14. Dedication ⇐15

Passive permission by landowner is not in itself evidence of intent to dedicate; intention must be clearly and unequivocally manifested by acts that are decisive in character.

15. Easements ⇐7(4)

Statute which prescribes ten-year period of limitation for actions brought to recover real property and purports only to bar remedy may be used as basis of establishing easement of right of way across another's land. A.C.L.A.1949, § 55-2-2.

16. Easements ⇐8(1)

Use alone for statutory period, even with knowledge of owner, does not establish easement. A.C.L.A.1949, § 55-2-2.

17. Easements ⇐36(1)

There is presumption that one who enters into possession or use of another's property does so with owner's permission and in subordination to owner's title, and this presumption is overcome only by showing that such use was not only continuous and uninterrupted, but was openly adverse to owner's interest, i. e., by proof of distinct and positive assertion of right hostile to that of owner.

18. Easements ⇐36(3)

Evidence failed to establish easement by adverse use of road over homesteader's land. A.C.L.A.1949, § 55-2-2.

19. Easements ⇐18(3)

Homesteader who knew, long before doing anything to develop homestead, that he had problem of obtaining access to his property and could not count on using one-eighth mile long road crossing second homestead was not entitled by "justice of the situation" to injunction against obstruction of the road by second homesteader, although first homesteader's only other access was by road which was approximately two miles long and traversed property of two or three other persons.

20. Assault and Battery ⇐37, 39

Party who suffered no physical or mental injury from discharge of rifle which was fired in his general direction while he was cutting homesteader's fence across road on homesteader's land was not entitled to award representing actual or compensatory damages for assault and was therefore not entitled to punitive damages.

John C. Hughes, Hughes & Thorsness, Anchorage, for appellant.

John M. Savage, Robison, McCaskey Savage & Lewis, Anchorage, for appellee.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

DIMOND, Justice.

This is a controversy over a road which crosses Hamerly's property and gives access beyond to Denton's homestead. Hamerly objected to its use by Denton, and the latter, claiming it to be a public highway, brought an action to enjoin its obstruction. The district court entered judgment in Denton's favor, and Hamerly has appealed.

The question to be decided is whether this road is a "highway" within the meaning of Section 932, Title 43 U.S.C.A., which provides:

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

[1, 2] The operation of this statute in Alaska has been recognized.[1] The territorial District Court and the highest courts of several states have construed the act as constituting a congressional grant of right of way for public highways across public lands. But before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.[2]

[3] It is not claimed that the road in controversy became a public highway by any act of the public authorities. Rather, it is contended that a highway was established by public use. Thus, in the court below Denton had the burden [3] of proving (1) that the alleged highway was located "over public lands" [4], and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant.

[4, 5] The term "public lands" means lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler.[5] When a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain. It has been appropriated to the use of the entryman, and until such time as the entry may be cancelled by the government or relinquished, the land is not included in grants made by Congress under 43 U.S.C.A. § 932.[6] Consequently, a highway cannot be established under the statute during the time that the land is the subject of a valid and existing homestead claim.[7]

[6] The road involved in this case crossed land which was the subject of various homestead claims beginning in 1925 and ending in 1938 with the issuance of a homesite patent to Hamerly. The first entry was made by Murphy who filed his application for a homestead on November 28, 1925. He relinquished his claim on December 9, 1927 and then filed again on January 25, 1928. This latter entry was closed out by the land office on June 23, 1942.

The second entry was made by King who filed his application for a homestead on August 10, 1942. He relinquished his entry on November 19, 1946.

The next claimant was Hamerly who made his entry on March 8, 1948. This entry was closed out by the land office on November 7, 1955 for failure to meet the statutory requirements of cultivation. Hamerly filed a second homestead entry on January 11, 1956, and this entry likewise was closed out on June 18, 1956. On June 19, 1956 Hamerly filed a homesite entry to protect the house which he had built on the prop-

1. Berger v. Ohlson, D.C.D.Alaska 1938, 9 Alaska 389; Clark v. Taylor, D.C.D. Alaska 1938, 9 Alaska 208; United States v. Rogge, D.C.D.Alaska 1941, 10 Alaska 130.

2. See Berger v. Ohlson and Clark v. Taylor, supra note 1; Kirk v. Schultz, 1941, 63 Idaho 278, 119 P.2d 266; Leach v. Manhart, 1938, 102 Colo. 129, 77 P.2d 652; Lovelace v. Hightower, 1946, 50 N.M. 50, 168 P.2d 864; Hatch Bros. Co. v. Black, 1917, 25 Wyo. 109, 165 P. 518; State ex rel. Dansie v. Nolan, 1920, 58 Mont. 167, 191 P. 150; Montgomery v. Somers, 1907, 50 Or. 259, 90 P. 674.

3. See Korf v. Itten, 1917, 64 Colo. 3, 169 P. 148, 149.

4. 43 U.S.C.A. § 932.

5. Korf v. Itten, supra note 3, 169 P. at pages 150–151; Bardon v. Northern Pacific R. Co., 1892, 145 U.S. 535, 12 S.Ct. 876, 36 L.Ed. 806.

6. Atchison, Topeka & Santa Fe R. Co. v. Richter, 1915, 20 N.M. 278, 148 P. 473, L.R.A.1916F, 969.

7. See: Atchison, Topeka & Santa Fe R. Co. v. Richter, supra note 6; Korf v. Itten, supra note 3, 169 P. at pages 150–151; Bardon v. Northern Pacific R. Co., supra note 5; Red River and Lake of the Woods R. Co. v. Sture, 1884, 32 Minn. 95, 20 N.W. 229.

erty, and patent was issued to him on April 1, 1958.

Hence, from 1928 to 1958 there were four gaps in the possession of the land:

1. From December 9, 1927 to January 25, 1928.

2. From June 23, 1942 to August 10, 1942.

3. From November 19, 1946 to March 8, 1948.

4. From November 7, 1955 to January 11, 1956.

It was only during those periods of time that public use of the road could constitute acceptance of the grant made by 43 U.S.C.A. § 932. Use made of the road at other times when the land was the subject of existing homestead or homesite entries may not be considered. However, the court below held otherwise. It stated that—

> "* * * it would seem that if the public had been using a particular route *during the period of the entry*, as soon as entry was closed out by the Bureau of Land Management a public highway would be created." (Emphasis added.)

In this, the court was in error. The question of whether a public right of way has been acquired must be determined by the conditions as they existed when action was taken to acquire the right of way. If the conditions were such that the lands were not public lands—having been taken up under homestead applications—then the congressional grant was not in effect. Public use of the road would be of no avail since there would be at that time no offer which the public could accept. The fact that the entries were later relinquished or cancelled would not change the condition so as to make the road a public highway at the time of relinquishment. The abandonment or cancellation of a homestead entry only brings the land within the category of public lands with reference to public use in the future.[8] Consequently, it must be determined whether during the gaps between entries there is evidence of public use sufficient to create a public highway.

[7] The record shows that between 1927 and 1942 the road was used as follows: Charles Lechner, Jr., as a boy, had ridden a bicycle on the road occasionally between 1933 and 1936. Jack Werner had driven his car on the road one or two times to look at a cabin in 1941. Fred Kilcheski traveled on the road to visit Murphy (the first homestead entryman) in 1929. David Fleming had used the road in 1938 and 1939 for hunting and to cut poles to use as a framework for a boat skid.

Entryman King operated a pig farm on the property. During World War II he sold pigs to the Army, and Army trucks used the road to haul garbage for the pigs. Fred Kilcheski said that he saw the trucks using the road daily during the period of two weeks in 1943. Wesley Martin testified that he went to the pig farm once between 1940 and 1944 to buy a horse. Martin Goresen had walked to the pig farm once or twice between 1941 and 1943 out of curiosity. David Fleming had visited the pig farm many times out of curiosity.

This evidence is not enough to support a finding that a public highway was established. Murphy relinquished his first homestead claim in December 1927, and there was no evidence that the road was used at all between then and January 1928 when Murphy's second entry was made. The next "open" period was between June 23 and August 10, 1942, and there is no evidence of travel on the road during that specific period of time which could establish a public right of way.

The land was also open to the public from November 1946 to March 1948, and again from November 1955 to January 1956. But the evidence as to public use during those times is meager and far from convincing. Delbert Owen hunted in the area eight or ten times a year since 1947. During the spring and summer of 1947 Wayne Hein-

8. Korf v. Itten, supra note 3, 169 P. at page 151; Burdon v. Northern Pacific R. Co., supra note 5, 145 U.S. at page 538, 12 S.Ct. at page 857, 36 L.Ed. 809.

baugh drove over the road quite a few times as far as the hog ranch which was then abandoned. He didn't state what purpose he had in making these journeys. He also walked over the road in 1948, but apparently only once. James Forth was hunting rabbits in the area and went as far as the pig farm on two occasions in the fall of 1948. Martin Goresen estimated that he had used the road about twenty times between 1947 and 1954 for the purpose of trapping and hunting. Chris Sorenson recalled that as a sightseer he drove over the road on one occasion in 1947.

[8] There simply is not enough evidence of public use to justify the lower court's finding that a public highway was created across Hamerly's homesite. During the periods that the land was not the subject of homesteaders' claims, its use was infrequent and sporadic. Those who did use the road had no real interest in the lands to which it gave access. They were merely sightseers, hunters and trappers. The road could not be considered as something that was either necessary or convenient for the accommodation of the public. Where there is a dead end road or trail, running into wild, unenclosed and uncultivated country, the desultory use thereof established by the evidence in this case does not create a public highway.[9]

Denton also claims that the public acquired a right of way by use of the road during periods when the land was in the possession of homestead claimants. He bases this argument on theories of dedication and adverse user.

[9, 10] There is dedication when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose.[10] It is a question of fact whether there has been a dedication. This fact will not be presumed against the owner of the land; the burden rests on the party relying on a dedication to establish it by proof that is clear and unequivocal.[11]

[11–14] It is true that the road was used during the tenures of homesteaders Murphy and King, between 1927 and 1942. But the road was initially established by these homesteaders for their own use. It had no other substantial use except when occasion made it convenient for persons to visit Murphy and King, either socially or for business purposes or simply out of curiosity. It cannot be implied from this that either Murphy or King intended to dedicate the road for public use. Nor can such intent be presumed from the fact that the homestead claimants apparently did not attempt to stop sightseers and hunters from occasionally using the road. Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient.[12] Passive permission by a landowner is not in itself evidence of intent to dedicate.[13] Intention must be clearly and unequivocally manifested by acts that are decisive in character.[14]

[15] Section 55-2-2, A.C.L.A.1949 prescribes a ten year period of limitation for actions brought to recover real property. While this statute purports only to bar a remedy, it may be used as the basis of establishing an easement of right of way across another's land.[15] Denton argues that such an easement was created by the desultory or occasional use made of the road by the

9. See Kirk v. Schultz, supra note 2, 119 P.2d at page 268; State ex rel. Dansie v. Nolan, supra note 2, 191 P. at page 152; Town of Rolling v. Emrich, 1904, 122 Wis. 134, 99 N.W. 464.

10. 6 Powell, Real Property § 934, at 346 (1958).

11. Id. § 935, at 352; Dugan v. Zurmuehlen, 1927, 203 Iowa 1114, 211 N.W. 986; People ex rel. Markgraff et al. v. Rosenfield, 1943, 383 Ill. 468, 50 N.E.2d 479, 482.

12. People ex rel. Markgraff, et al. v. Rosenfield, supra note 11, 50 N.E.2d at page 482.

13. Burk v. Diers, 1918, 102 Neb. 721, 169 N.W. 263, 265.

14. Dugan v. Zurmuehlen, supra note 11, 211 N.W. at page 988.

15. See Ringstad v. Grannis, 9 Cir., 1948, 171 F.2d 170, 173, 12 Alaska 190, 196.

public which extended over a period of more than ten years.

[16–18] Use alone for the statutory period—even with the knowledge of the owner—would not establish an easement. When one enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title. This presumption is overcome only by showing that such use of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i. e., by proof of a distinct and positive assertion of a right hostile to the owner of the property.[16] No such showing was made in this case. The evidence does not establish an easement by adverse use.

[19] In support of the judgment below Denton asks this court to consider what he terms the "justice of the situation". He maintains that he must travel approximately one-eighth of a mile through Hamerly's property in order to have reasonable access to his homestead, and that his only other access is by a road which is approximately two miles long and which traverses the property of two or three other persons. It would be unjust, he maintains, to deny him the use of the road on Hamerly's property.

As authority for this theory Denton refers to a Colorado case[17] where, he states, the court expressly discussed and took into consideration in its decision the justice of the situation in a case very similar to this case.

It is true that the Colorado court found that there would be injustice in permitting a landowner to close a road crossing his property, because this would be of great damage to the individual who sought to use the road. But the court also said that this would be unjust because it would "deny to the public a right it is entitled to enjoy."[18] The court found that the road involved in that case was one over which the public had been accustomed to travel for more than half a century, and that a highway had been established by public use under 43 U.S. C.A. § 932. Hence, if the public had acquired a right of way, justice would demand that the road be available for public use. That is a far different situation from that which exists here, where there had been insufficient use to establish a highway.

Denton had lived in the City of Seward, which is not far from the premises in controversy, since 1946. He had been in the vicinity of the road in controversy between 1946 and 1948 but had never used it during that period. He stated that the only person he had seen using it was Hamerly.

Denton applied for a 35 acre homestead in 1955, and he used the road once in that year to look the country over. In 1956 he made application for additional homestead acreage. In that year, and before he had done anything to create a habitable dwelling or otherwise improve his homestead, he discussed the use of the road with Hamerly, and was told that Hamerly did not want anybody using the road. Denton talked to Hamerly once again, but the parties could not reach any agreement on this point.

About six months later Denton attempted without success to obtain an easement from Hamerly. In 1958 he obtained a boxcar for conversion into a dwelling for himself and his family, and moved it across Hamerly's property with the latter's permission. For a few days after that he used the road until Hamerly objected. Denton then attempted to obtain permission from Hamerly to use the road for a period of sixty days, but no agreement was reached.

These incidents have significance. They establish that long before Denton took any action to establish a dwelling on his homestead, or did anything to develop it, he knew that there was a problem of obtaining access to his property and that he could not count on using the road crossing Hamerly's

16. Roberts v. Jaeger, D.C.D.Alaska 1914, 5 Alaska 190; Roediger v. Cullen, 26 Wash.2d 690, 175 P.2d 669, 673.

17. Leach v. Manhart, 1938, 102 Colo. 129, 77 P.2d 652.

18. Leach v. Manhart, supra note 17, 77 P.2d at page 654.

homesite. Denton could not have been misled by any action on Hamerly's part that the road was a public right of way. He nevertheless commenced his homestead settlement without making prior arrangements for adequate access other than by Hamerly's road. If Denton now suffers an inconvenience, this is of his own doing, and not Hamerly's. There is no injustice here. There would be injustice, however, if this court were to require Hamerly to divest himself of property rights in order to accommodate Denton where there is no legal or factual basis for the creation of an easement across his property.

Denton testified that because of Hamerly's actions he was obliged to expend money in constructing another road for access to his property. The district court found that he had suffered damages in the amount of $250, and awarded such damages against Hamerly on the basis of the latter's action in preventing Denton from using the road. Since this court has held that Hamerly's action in forbidding use of the road was not unlawful, that portion of the findings and judgment below are without factual or legal basis.

[20] Hamerly testified that he had placed a wire fence across the road and that on two occasions Denton had cut it. The second time this happened, Hamerly fired a rifle in Denton's general direction, but without hitting him. The court below found that Denton was entitled to the sum of $100 for a wrongful assault made by Hamerly and to punitive damages in the sum of $1.00.

There was no proof, however, that Denton suffered any injury, either physical or arising from mental suffering and fright. In fact, he never mentioned the incident in his testimony. Consequently, there was no basis for the $100 award which presumably represented actual or compensatory damages for the assault.

There also was no basis for the award of punitive damages. Although this court does not condone Hamerly's attempt to take the law into his own hands, it is disinclined to depart from the general rule that the right to punitive damages is dependent upon the right to recover compensation for actual injury.[19]

Finally, the court awarded Denton attorney's fees in the sum of $250, plus costs. In view of the conclusions reached here, this portion of the judgment must also be set aside.

The judgment of the district court is reversed, and the case is remanded to the Superior Court, Third District, for proceedings that may be necessary in conformity with this opinion.

Ben H. SVACEK, Appellant,

v.

Rose SHELLEY, Appellee.

No. 55.

Supreme Court of Alaska.

Feb. 1, 1961.

Action for personal injuries sustained when plaintiff was assaulted with a knife, against perpetrator of the assault, and against the perpetrator's employer. The State Superior Court, Third District, Edward V. Davis, J., entered judgment on verdict against perpetrator and directed a verdict in favor of the employer, and the plaintiff appealed. The Supreme Court, Arend, J., held that question whether the employer employed perpetrator knowing that he was a dangerous person or retained him in her service after she learned or should have known of his dangerous propensities was for jury.

Reversed and remanded for new trial.

19. See Annotation, 1961, 17 A.L.R.2d 527.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON
Administrative Judge

WE CONCUR:

FREDERICK FISHMAN
Administrative Judge

JAMES L. BURSKI
Administrative Judge

DOYON, LIMITED

5 ANCAB 77

Decided *October 10, 1980*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-19155-20.

Reversed in part; stipulation approved.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands: Department of the Interior Instructions, 44 L.D. 513 (1916)

Construction and maintenance of an authorized Federal improvement on public lands under principles of Department of the Interior *Instructions*, 44 L.D. 359 (1915) and 44 L.D. 513 (1916), does not cause an appropriation of land affected and thus does not affect the right of selection by a Native corporation under the provisions of ANCSA.

2. Patents of Public Lands: Department of the Interior Instructions, 44 L. D. 513 (1916)

The Federal interest retained in an authorized improvement constructed and maintained under principles of *Instructions*, 44 L.D. 513 (1916), is limited to the improvement itself. The exception for the improvement is inserted in a patent for the purpose of giving public notice that the improvement is there; eliminating the improvement from the conveyance; and for assuring any attendant right of the Federal Government to go onto the land for purposes consistent with its ownership in the improvement.

3. Alaska Natives Claims Settlement Act: Definitions: Public Lands: Department of the Interior Instructions, 44 L.D. 513 (1916)

Inasmuch as the Federal interest in an improvement constructed and maintained on public land pursuant to *Instructions*, 44 L.D. 513 (1916), does not effect a segregation of, nor is it an interest in, the land itself, but is limited to the improvement, it cannot be considered as a possible exception to being "public land" within meaning of § 3(e)(1) of ANCSA.

4. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes

Lands affected by construction and maintenance of a linear pipeline under principles of *Instructions*, 44 L.D. 513 (1916), are not "lands withdrawn or reserved for national defense purposes" within the meaning of the exception in § 11(a)(1) of ANCSA.

5. Patents of Public Lands: Department of the Interior Instructions, 44 L.D. 513 (1916)

A notation on the land records of a 44 L.D. 513 interest must be removed, and no reservation of such interest can be included on subsequent patents, when the subject improvement is no longer needed or used for or by the United States.

6. Alaska Native Claims Settlement Act: Definitions: Public Lands: Department of the Interior Instructions, 44 L.D. 513—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Settlement Approval

Where the record is uncontested and supports a factual finding that the United States no longer uses or needs an improvement pursuant to the principles of *Instructions*, 44 L.D. 513 (1916), the Board can accept a stipulation by the parties to remove the reservation of interest from a conveyance document.

APPEARANCES: Elizabeth S. Taylor, Esq., for Doyon, Ltd.; Shelley J. Higgins, Esq., Office of the Attorney General, for State of Alaska; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

Doyon, Ltd., appeals Bureau of Land Management decision to include in a Decision to Issue Conveyance reservation of the Haines-Fairbanks pipeline right-of-way, and of the right to operate and maintain the same so long as needed or used by the United States.

The issue decided is whether the Board will approve a stipulated agreement between Appellant, Doyon, Ltd., and the Bureau of Land Management that the pipeline right-of-way shall not be reserved to the United States in the conveyance document.

The right-of-way is noted on the public land records as a 44 L.D. 513 interest.[1] While both Doyon, Ltd. and the Bureau of Land Management agree that the reservation should be deleted from conveyance to Doyon, there is substantial disagreement both as to the effect of a 44 L.D. 513 interest, and the circumstances under which such an interest is terminated.

These disagreements raise questions of law which could prevent the Board from approving the stipulated agreement. For this reason, the Board rules on the questions of law raised in this appeal, prior to ruling on the stipulated agreement.

The Board determines that the Federal interest retained pursuant to *Instructions*, 44 L.D. 513, is limited to the improvement—in this case, the pipe itself—and therefore such interest does not cause any appropriation of the underlying land; that the Federal interest is not excepted from withdrawal or selection under ANCSA by either § 11(a)(1) or § 3(e)(1); and that the Federal interest retained pursuant to *Instructions*, 44 L.D. 513, terminates when the improvement is no longer needed or used for or by the United States. The Board concludes there are no legal impediments to approving the stipulated agreement and that the record of this appeal con-

[1] 44 L.D. 513 notations are notations to the land records made by the Bureau of Land Management pursuant to *Instructions* set forth at page 513 of volume 44 of the Land Decisions issued on Jan. 13, 1916. Reference is also made to 44 L.D. 359 issued Aug. 31, 1915.

tains sufficient factual basis to support a conclusion that Federal use and occupation of the linear pipeline has ceased.

Therefore, the Board approves the parties' stipulation that the Haines-Fairbanks pipeline right-of-way shall not be reserved to the United States in the conveyance document to Doyon.

Procedural Background

On Apr. 2, 1975, Doyon, Ltd. (Doyon) filed selection application F–19155–20, *as amended*, under provisions of § 12(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611(c) (1976 and Supp. I 1977)) for lands withdrawn pursuant to § 11(a)(1) for Native Village of Northway.

On June 23, 1978, the Bureau of Land Management (BLM) issued a Decision to Issue Conveyance (DIC) including land in T. 15 N., R. 19 E., C.R.M., affected by this partial decision. The DIC specified the grant of lands shall be subject to a reservation of the Haines-Fairbanks pipeline right-of-way, as follows:

> The conveyance issued for the surface and subsurface estates of the lands described above shall contain the following reservations to the United States:
>
> 1. That Haines to Fairbanks pipeline right-of-way, F–010143, fifty (50) feet in width, and all appurtenances thereto, constructed by the United States through, over, or up on the land herein described and the right of the United States, its agents or employees, to maintain, operate, repair, or improve the same so long as needed or used for or by the United States.

On July 31, 1978, Doyon filed a Notice of Appeal. In its Statement of Reasons and Memorandum filed on Sept. 26, 1978, Doyon asserts several errors in the DIC including reservation of the Federal interest in the Haines-Fairbanks pipeline system right-of-way.

On Nov. 8, 1978, BLM filed an Answer which concedes the merit of Doyon's position regarding the 44 L.D. reservations. BLM states that the General Services Administration (GSA) claims a property interest in the entire pipeline right-of-way including the pump stations and the pipe itself.

On Dec. 15, 1978, BLM filed a supplemental answer agreeing with Doyon's contention "that the reservation of the [pipeline] right-of-way cannot be upheld on the basis of the 44 L.D. 513 notation alone." Further, BLM asserts that any interest can only be reserved in the United States pursuant to ANCSA under provision of § 3(e) or § 17(b). BLM again states that GSA claims some manner of property interest in the pipeline right-of-way and requests the Board act appropriately.

On Dec. 20, 1978, the Board issued an order naming GSA as a necessary party to this appeal and giving that agency 30 days within which to respond to briefings of the parties relating to the Haines-Fairbanks pipeline right-of-way (F–010143). The GSA did not make an

appearance in response to the Board's order.

On July 23, 1979, the Board ordered the issue of 44 L.D. 513 notation as it relates in this appeal of Haines-Fairbanks pipeline right-of-way, F–010143, to be segregated from the remaining issues, closed the record and set final briefing. In addition, specific inquiries were made to all parties relating to 44 L.D. 513 notation.

On Aug. 30, 1979, Doyon filed response and on Sept. 10, 1979, BLM filed response to Board's order of July 23, 1979.

On June 26, 1980, Stipulation was filed by BLM and Doyon in which it is agreed that "the Haines-to-Fairbanks Pipeline right-of-way, F–010143, shall not be reserved to the United States in the proposed conveyance of lands to Doyon, Limited."

Factual Background

Congress authorized construction of the Haines-Fairbanks petroleum products pipeline system by the Department of the Army on Sept. 28, 1951 (65 Stat. 336).

The United States and Canada entered into an agreement on June 30, 1953 (4 U.S.T. 2223 (1953); T.I.A.S. No. 2875) (U.S.-Canada Agreement), which authorized the construction of an oil pipeline system from Haines to Fairbanks, Alaska, passing through northwestern British Columbia and Yukon Territory. The purpose of the agreement was to maintain the pipeline system until such time as the Permanent Joint Board on Defense decided that there was no further need for the system.

On Jan. 20, 1953, the U.S. Army Corps of Engineers requested the District Land Office, Department of the Interior, that, pursuant to Departmental Instructions of Jan. 13, 1916 (44 L.D. 513), a notation be placed on the tract books of lands affected by the 50-foot right-of-way for linear pipeline from the border of Canada to Ladd Air Force Base, Alaska.

Land involved in this partial decision, *i.e.*, Sec. 34, T. 15 N., R. 19 E., C.R.M., was in the public domain at the time a 44 L.D. 513 notation for a 50-foot right-of-way was placed on the public land records by BLM on Jan. 22, 1953 (Fairbanks Serial 010143).

The Haines-Fairbanks products pipeline system was constructed during 1954–1955 and was fully operational by 1958. Construction and maintenance was thereafter performed by the U.S. Army Corps of Engineers for the Department of Defense.

In May of 1970, the Department of the Army determined that the pipeline system was no longer needed.

On June 17, 1971, the Assistant Secretary for the Department of Defense made the decision to declare the pipeline system excess.

The House Armed Services Committee approved this decision on Mar. 13, 1973.

On June 7, 1973, the Army through the Real Estate Division of the Alaska District, Corps of Engineers, filed a Preliminary Report of Excess concerning disposal of the system.

In August of 1973, the Army filed with BLM a notice of intention to relinquish the military withdrawal here in question.

On July 23, 1976, GSA determined the Haines-Fairbanks pipeline property, including the linear pipe, to be surplus after no need or authorized use of the entire pipeline system had been demonstrated by a Federal agency.

In October 1978, the U.S.–Canada Permanent Joint Board on Defense formally declared there was no further need for the pipeline system.

Decision

Negotiations between the governments of Canada and the United States culminated in an agreement on June 30, 1953, authorizing construction of the Haines-Fairbanks petroleum products pipeline system for the mutual defense of both countries. Federal interest in the pipeline system located on public lands in Alaska was protected either by withdrawals made by Public Land Order (PLO) [2] or under principles of *Instructions* by Department of the Interior in 44 L.D. 513.

This partial decision addresses the question of whether a Federal interest in the linear portion of the Haines-Fairbanks pipeline system, reserved in a DIC to Doyon under principles of Department of the Interior's *Instructions*, 44 L.D. 513, can be deleted from the conveyance document as a result of a stipulated agreement signed by Doyon and BLM?

By regulation 43 CFR 4.913(b), the Board must approve stipulations which require action or forbearance of action by the Department of the Interior. (*Appeal of Northway Natives, Inc.*, 4 ANCAB 247 (1980) [VLS 78–57].)

Approval of a stipulation by the Board is tantamount to a finding that there are no legal or factual impediments of record which would prevent resolution of the issues in the manner stipulated. In this appeal, the result stipulated is the deletion of a reservation of Federal interest from a decision to convey land pursuant to ANCSA.

While BLM and Doyon are in agreement that the DIC should contain no reservation of interest in the linear pipeline, the parties are in substantial disagreement as to the effect of a 44 L.D. interest as well as the circumstances under which a 44 L.D. 513 interest is terminated. The Board here rules on the ques-

[2] This Board considered the effect of a PLO (for a pump station facility) along the pipeline system on lands selected by a Native village corporation under ANCSA. (*Appeal of Tanacross, Inc.*, 4 ANCAB 173, 87 I.D. 123 (1980) [VLS 78–51].) The Board concluded that PLO withdrawals for the pump station facilities along the pipeline were "lands withdrawn or reserved for national defense purposes" and were therefore excepted from withdrawal for selection under provision of § 11 (a)(1) of ANCSA. Because the issue of this partial decision does not include any lands withdrawn by PLO, the Board's decision in *Appeal of Tanacross, Inc., supra*, is inapplicable.

tions of law raised in this appeal which would otherwise prevent the Board from approving the stipulation.

Both Doyon and BLM agree that the purpose of a 44 L.D. notation is to provide notice on public record of the Government improvement and to assure protection of the improvement by inserting a clause excepting the improvement in subsequent patents.

Doyon states that a 44 L.D. 513 interest causes neither a reservation nor a withdrawal of lands. Asserting that the pipeline has not been used for years, Doyon argues it has been actually abandoned as is evidenced by Notice of Intention to Relinquish filed by the Army, and as the right-of-way is inextricably related to the Federal improvement there can be no interest reserved.

Doyon stresses that the United States use and occupancy of the pipeline had terminated and any effect of 44 L.D. 513 ceased. Further, that the 44 L.D. 513 notation of Haines-Fairbanks pipeline was not for national defense purposes within exception of § 11(a)(1) of ANCSA since it was not a withdrawal by PLO.

BLM states that the principle underlying a 44 L.D. 513 *Instructions* is that the authorized construction of a Federal improvement by a Federal agency on public land *appropriates* the land used and occupied by the improvement.

While the BLM states that the appropriation exists only for so long as the improvements are used and occupied by the United States, BLM disagrees with Doyon's assertion of abandonment. BLM argues that a 44 L.D. improvement is a Federal interest in land which must be conveyed unless it comes within one of the exceptions of ANCSA. Concluding the pipeline reservation does not come within any of the exceptions, BLM states it must be conveyed.

To resolve these differences, it is useful to review the origin of 44 L.D. 513 *Instructions* and the result intended by the Department of the Interior.

Prior to 1915, when the Department issued the *Instructions* found in 44 L.D. 359, it found itself in a dilemma. The parameters of that dilemma are described in the case of *M. R. Hibbs*, 42 L.D. 408 (1913).

Hibbs had applied for land under the Act of June 11, 1906 (34 Stat. 233), which permitted homestead entry in a national forest in accordance with the general homestead laws. The Forest Service requested that a roadway crossing land applied for by Hibbs be reserved in his patent. The Department had previously ruled that such roadways could be reserved in patents issued pursuant to the homestead laws.

The entry laws under which Hibbs was entitled to obtain his patent no express provision for reservation of such a roadway nor did it authorize the insertion in patents of any conditions, restrictions or reservations not specifically provided for in existing laws.

The Department reconsidered its earlier ruling, and declared that it was without authority to insert any restrictions, limitations or reservations in a patent issued under homestead entry law unless specifically authorized to do so by statute. The underlying principle is that an agency cannot add restrictions to a patent unless authorized to do so by Congress when issuance of patent is mandatory upon an entryman's full compliance.

Since there was no provision in the statute allowing reservation of a roadway easement, no such reservation could be inserted in the patent. The Department added that since the easement could not be reserved, the alternative to assure protection of the Federal interest would be to exclude such affected land from entry.

The effect of the holding in *Hibbs, supra*,[3] was to preclude the Department from reserving a Federally-built improvement in a patent unless specifically allowed to do so by the statute under which entry is made and patent issued. The method used to protect such Federal improvements on public lands would be to exclude the affected land from entry.

The alternative—to exclude the improvement while conveying the land—resulted when the Department of the Interior issued *Instructions*, 44 L.D. 359, on Aug. 31, 1915. These Instructions were issued in response to a request by the Secretary of Agriculture to reserve telephone lines and right-of-way crossing lands within a national forest which had been entered under homestead laws. The Instructions were prefaced with a statement of the Department's problem of retaining the Federal interest in improvements constructed and maintained on lands open to entry under public land laws in view of prohibition to make such reservations as held in *Hibbs, supra*, as follows:

> The lands having been so devoted to a public purpose, pursuant to a law of Congress, subsequent disposition thereof will not, in the absence of an express conveyance by the United States, operate to pass title to the patentee to such telephone lines or the right of the United States to operate and maintain the same. On the other hand, 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.
>
> 44 L.D. 359.

This statement reflects the Department's position that Federal interest in an authorized improvement constructed and maintained on public lands could not be disposed of without specific intent to do so, and, that such improvement appropriated the affected land in such manner that it was unavailable for entry consistent with the holding in *Wilcox, infra.*

[3] In *Solicitor's Opinion,* M–36071, 60 I.D. 477 (May 16, 1951), the Department of the Interior reiterated its position that: "Where a statute places upon this Department the mandatory duty of conveying lands to persons who meet certain requirements prescribed in the legislation, the Department cannot impose upon such persons additional requirements or convey to them rights less than those provided for by Congress."

It was the Department's expressed purpose in these Instructions to formulate a means of assuring retention of Federal ownership in an improvement constructed on public lands without causing any change of public land status.

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 line and appurtenances and the right of the United States to maintain and operate the same so long as it shall be necessary. This may be accomplished by excepting the aforesaid property of the United States and the rights necessary and incident thereto from the conveyance. In other words, *instead of conveying the property subject to an easement, no conveyance should be made of the telephone line or rights appurtenant thereto.* [Italics added.]

You [Commissioner of the General Land Office] are accordingly advised as follows: in cases where telephone lines or like structures have been actually constructed upon the public lands of the United States, including national forest lands, and are being maintained and operated by the United States, and your office is furnished with appropriate maps or field notes by the Department of Agriculture so prepared as to enable you to definitely locate the constructed line, proper notation thereof should be made upon the tract books of your office and if the land be thereafter listed or disposed of under any applicable public-land law, you should insert in the register's final certificate and in the patent when issued the following exception:

"Excepting, however, from this conveyance that certain telephone line and all appurtenances thereto, constructed by the United States through, over, or upon the land herein described, and the right of the United States, its officers, agents, or employees to maintain, operate, repair, or improve the same so long as needed or used for or by the United States."

44 L.D. 359–360.

Instructions given on Jan. 15, 1916, in 44 L.D. 513, provided an elaboration of principles expressed in 44 L.D. 359, by extending this concept to protecting other types of Federal improvements made pursuant to authorized appropriation acts.

I am of the opinion that the same reasoning as adopted in the Department's instructions of August 31, 1915, to the Commissioner of the General Land Office, relative to telephone lines constructed under authority of similar appropriation acts applies to the other kinds of improvements mentioned in the above act of March 4, 1915; and that similar exceptions as to lands needed for such improvements may be inserted in the register's final certificate, and in the patent when issued. * * * [T]he case should be one of either actual construction, or in which the evidence shows that the construction has been provided for, and will be immediately undertaken.

44 L.D. 513, 515.

The Board concludes the intended purpose of the Department of the Interior's *Instructions*, 44 L.D. 359, and in 44 L.D. 513 was, first, to assure retention of Federal ownership in authorized improvements constructed and maintained on public lands by excepting such improvement from an ensuing patent; and second, to assure that the continued existence and use of the Federal improvement would not prohibit conveyance of public lands.

The Board disagrees with BLM's contention that an authorized improvement protected by a 44 L.D. 513 notation causes an appropriation of land within the meaning of cited authorities. Such appropriation would effectively change the public land status and thereby prohibit conveyance under ANCSA.

BLM cites several authorities to describe the manner and effect of appropriation caused by a Federal improvement on public lands under *Instructions* found in 44 L.D. 513.

The landmark case of *Wilcox* v. *Jackson*, 38 U.S. (3 Pet.) 498 (1839), is cited by BLM as precedent for the principle that authorized acts of use and occupation by the Federal Government appropriates the affected land so that the land is severed from the public domain and is not subject to entry under the general land laws.

The case involved an attempt to gain title to land located in Fort Dearborn, Illinois. The Fort had been established by Act of 1804, and had been intermittently occupied and vacated as a military post over a period of years. Jackson and his predecessors in interest had, by claims of possession and of rights under preemption laws, sought ownership of a portion of the original military site. Although Jackson's attempts of entry would have been otherwise allowable, they were denied because of the prior appropriation.

The court found, that as a result of the congressional acts establishing the Fort, and the factual events which occurred on the land, the land had been appropriated by the Federal Government, stating:

> Now this is an appropriation, for that is nothing more nor less than setting apart the thing for some particular use.

38 U.S. 512. And further:

> But as we go farther, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.

38 U.S. 513.

In *United States* v. *R. G. Crocker*, 60 I.D. 285 (1949), the Department of the Interior affirmed BLM's dismissal of a protest by the Forest Service against pending patents to mining claims. The Forest Service contended that the claims conflicted with an established administrative site. Appellant Crocker had filed application for mineral patent on land within a national forest which by statute were made available for mineral claims as though on public lands. Prior to the filing of these claims, the Forest Service had constructed structures and made improvements on a portion of an administrative site outside the limits of the mining claims. The Forest Service contended that any mining claim in conflict with the administrative site should be denied, though none of the land had been withdrawn from mineral location.

The Department found that the portion of the administrative site within the mining claim limits was unimproved and not exclusively and continuously occupied by Government structures or personnel. Since the issue in dispute involved only the unimproved portion of the Forest Service administrative site the Department held that the unimproved land was not withdrawn from mining location by virtue of any use by the Forest Service.

However, the Department left no doubt that had the mining claims been in conflict with portions of the administrative site on which Forest Service's improvements were located, the lands would have been so firmly appropriated as to preclude any mining location on land occupied by those structures.

The Forest Service also protested issuance of mining patents to Crocker because of a 44 L.D. 513 interest in existing telephone lines and a constructed roadway on lands covered by the mining claims. Rather than deny issuance of mining claim patent to Crocker, BLM held that these Federal improvements would be *excepted* from the patent, if issued, in accordance with *Instructions*, 44 L.D. 359 (1915).

In *United States* v. *Schaub*, 103 F. Supp. 873 (D.C. Alaska 1952), *aff'd*, 207 F.2d 325 (9th Cir. 1953), the court held that Forest Service had made such an appropriation of land by improvements and use of a gravel pit in a national forest as to preclude the filing of mining claims. Schaub had filed a mining claim, allowable as on public land generally in the national forest, on a gravel site which had been used intermittently by the Forest Service for road building purposes for some years prior to the filing. The court asserted such use by Forest Service was in furtherance of lawful obligations and that such use was itself notice of actual possession. The court found that even though the lands had not been withdrawn from entry, any mining claims would be invalid due to the proper appropriation caused by use and occupation by the Forest Service.

In *A. J. Katches*, A–29079 (1962), the Department held that prior construction of a lookout tower and road by the Forest Service, in a national forest, appropriated the lands and they were thereafter not subject to location under mining laws. The Department found only the extent of such appropriation would be subject to additional hearing.

In the case of *A. W. Schunk*, 16 IBLA 191 (1974), the Forest Service contested the validity of mining claims as being in conflict with a transmission line right-of-way permit issued to a private utility. The permit was issued under statutory provision which expressly stated that such permit could confer no interest in the land and did not close the land to operation of general land laws.

BLM found that Schunk's mining claims did conflict with the property covered by the transmission right-of-way and were therefore

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invalid, reciting such decision to be in accordance with principles contained under *Instructions*, 44 L.D. 513.

The Department found the terms of such permit to be nonexclusive and affirmed adherence to doctrine of appropriation of land by Government occupation and use which prevented operation of general land laws as in *Wilcox* v. *Jackson*, *supra*, and in *Schaub*, *supra*. While stating such doctrine formed the basis for 44 L.D. 513, the Department at the same time, asserted that Government improvements did not withdraw the land, rather such improvements were to be noted and excepted from the patent as in *Crocker*, *supra*.

The Department held that Schunk's mining claims could not be found invalid on basis of 44 L.D. 513, as the permit was issued to a private utility which could not be deemed use and occupation by the Government within the ambit of these Instructions. The Board did note that, in any event, the protection for the improvement could be no more than that noted in *Crocker*, *supra*, *i.e.*; the improvement to be noted and excepted from an ensuing patent while not affecting the land.

The above cases consistently hold that even in the absence of a formal land withdrawal an authorized use and occupancy, which has been factually established by structures or other physical improvements on public land by a Federal agency, appropriates the affected land in a manner tantamount with being an interest in the land itself. Such an appropriation precludes the right of entry or claim which would be otherwise allowable under the general public land law.

The only case in which the effect of a 44 L.D. 513 notation was an actual issue in dispute clearly holds to the contrary. *Crocker*, *supra*, states that an improvement classified under a 44 L.D. 513 notation does not appropriate an interest in the land, but rather is a procedure whereby the improvement is expected from ensuing patents.

The term "appropriation" as used in the cases cited by BLM has a meaning analogous with the terms "withdrawn" or "reserved" insofar as the result is to segregate the land from entry. The result of such "appropriation" in these cases is that the previous land status has effectively been altered and lands affected thereby are no longer available for entry or claim.

The effect of an improvement constructed pursuant to *Instructions*, 44 L.D. 513, is clearly distinguishable because, by the terms of the Instructions, the improvement cannot infringe upon the interest of land ownership otherwise available under applicable public laws. Any contrary result would be anthesis to the reason for formulation of *Instructions*, 44 L.D. 513, as described previously.

[1] Construction and maintenance of an authorized Federal improvement on public lands under principles of Department of the In-

terior *Instructions*, 44 L.D. 359 and 44 L.D. 513, does not cause an appropriation of land affected and thus does not affect the right of selection by a Native corporation under the provisions of ANCSA.

The requirement that an appropriate notation be placed on BLM's land status maps provides procedural notice of Federal ownership in the improvement. Neither the notation nor the improvement effects the status of the land.

[2] The Federal interest retained in an authorized improvement constructed and maintained under principles of *Instructions*, 44 L.D. 513, is limited to the improvement itself. The exception for the improvement is inserted in the patent for the purpose of giving public notice that the improvement is there; eliminating the improvement from the conveyance; and for assuring any attendant right of the Federal Government to go onto the land for purposes consistent with its ownership in the improvement.

Because the interest retained under *Instructions*, 44 L.D. 513, is limited to the improvement, it is only the improvement that can be excepted from the patent.

Therefore, aside from the question of whether the Board can accept the stipulation to delete the reservation in the DIC, the Board finds that the BLM erred in describing the interest in the DIC. The conveyance purports to "reserve" to the United States the "Haines to Fairbanks pipeline right-of-way, F–010143, fifty (50) feet in width." [4]

A Federal interest retained pursuant to *Instructions*, 44 L.D. 513, can only be excepted, rather than reserved, from the conveyance document; and the interest excepted is limited to the improvement and its appurtenances. The language of the DIC properly retains the right of the United States to go onto the land as necessary to perform all rights and obligations of ownership of the improvement. The record of this appeal shows that other sections of the Haines-Fairbanks pipeline have been excepted from patents in the manner consistent with this ruling.[5]

As to the question of whether the interest in the pipeline is an exception from the definition of "public lands" in § 3(e) of ANCSA, the Board concurs with BLM's conclusion that there is no basis for a § 3(e) determination. However, the Board disagrees with BLM's premise for this conclusion.

Sec. 3(e) defines public lands (available for selection by Native

[4] BLM regulations refer to the use of principles of *Instructions*, 44 L.D. 513, in 43 CFR, Subpart 2800, which is the General Right-of-Way section. The ruling that only the improvement can be excepted from ensuing patents does not conflict with this reference in the regulations.

[5] "Excepting however from this conveyance that certain pipeline and all appurtenance thereto, constructed by the United States through, over, or upon * * * and the right of the United States, its officers, agents, or employees to maintain, operate, repair or improve the same, so long as needed or used for or by the United States." (Doyon's Response to Order Closing Record (Haines to Fairbanks Right-of-way), dated 8–28–79, Exhibit A, p. 12, Patent No. 1229079 issued 10–11–62.)

Corporations) as "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation."

BLM states that the extended period of nonuse of this portion of the pipeline is sufficient to preclude making a § 3(e)(1) determination. Implicit in such argument is the premise that a 44 L.D. 513 interest is normally subject to a § 3(e) determination.

The Board has concluded that the effect of a Federal improvement constructed and maintained under *Instructions*, 44 L.D. 513, does not cause segregation of the land so as to prevent application of entry or claim under public land laws. It is the salient feature of the origin and purpose of *Instructions*, 44 L.D. 513, that the retained Federal interest be limited to the improvement itself which is to be excepted from the patent rather than be an interest in the land which would limit or restrict the patent. An improvement constructed by the Federal Government under a 44 L.D. 513 notation is not land and thus cannot be "land actually used" within the definition of § 3(e)(1).

[3] The Board finds that inasmuch as the Federal interest in an improvement constructed and maintained on public land pursuant to *Instructions*, 44 L.D. 513, does not effect a segregation of, nor is it an interest in, the land itself, but is limited to the improvement, it cannot be considered as a possible exception to being "public land" within the meaning of § 3(e)(1) of ANCSA.

The next question is whether the interest was excepted from withdrawal within the meaning of § 11(a)(1) of ANCSA, and therefore is not selectable under ANCSA.

The language of this section specifically excepts from withdrawal for selection by Native corporations, "lands withdrawn or reserved for national defense purposes."

In *Tanacross, Inc., supra*, the Board found that the pump stations for the pipeline, which had been withdrawn by PLO, came within the exception of § 11(a)(1) and therefore were not withdrawn for selection pursuant to ANCSA. Thus, the affected lands could not be selected, even though the Federal Government had excessed the pump stations. The Board ruled that at the time ANCSA withdrawals become effective, the PLO and the treaty establishing the national defense character of the PLO were in effect and that no auxiliary actions, such as procedures to excess, could defeat a PLO or change its character.

This Board, in *Paug-Vik, Inc., Ltd.*, 3 ANCAB 49. 56, 85 I.D. 229, 235 (1978). concluded that the terms "withdrawn or reserved" are used interchangeably for purpose of determining lands excluded from selection under § 11(a)(1) of ANCSA. It follows that if lands affected by a 44 L.D. 513 notation are neither withdrawn nor reserved, such lands do not come within the exception of § 11(a)(1).

[4] The Board therefore finds, in agreement with BLM and Doyon, that lands affected by construction and maintenance of a linear pipeline under principles of *Instructions*, 44 L.D. 513, are not "lands withdrawn or reserved for national defense purposes" within the meaning of exception to withdrawal of lands under § 11(a)(1) of ANCSA.

Having determined that a 44 L.D. 513 interest does not appropriate the land so as to bring it within the exceptions of either § 3(e)(1) or § 11(a)(1) of ANCSA, the question remains as to the means of terminating a 44 L.D. 513 interest.

Both Doyon and BLM agree, in general terms, that a 44 L.D. 513 interest fails under its own terms when the improvement ceases to be needed or used by the United States. Both agree that it is the fact of nonuse and lack of need that terminates the effectiveness of a 44 L.D. 513 interest, as opposed to the necessity for a formal revocation by the Secretary of the Interior to terminate the effectiveness of a PLO withdrawal.

The parties seriously disagree on the legal principles under which the pipeline interest should be terminated. Doyon argues actual abandonment, as evidenced especially by the decision to surplus the property by GSA in July of 1976. The BLM disagrees that a finding within the legal nuances of abandonment doctrine would be appropriate. BLM argues that the issue need not be resolved because of 44 L.D. 513 interest appropriates the land; all Federal interest in land must be conveyed within a § 11(a)(1) withdrawal unless such interest is excepted under other provisions of ANCSA; a 44 L.D. 513 interest does not fit within any of the exceptions; therefore it must be conveyed.

The Board does not accept BLM's argument, having ruled that a 44 L.D. 513 interest is not an interest in land. Since a 44 L.D. 513 interest is not an interest in land it is not conveyed under ANCSA, and must be excepted from patents issued under ANCSA unless it terminates by its own terms.

[5] The Board concurs with the parties and finds that a notation on the land records of a 44 L.D. 513 interest must be removed, and no reservation of such interest can be included on subsequent patents, when the subject improvement is no longer needed or used for or by the United States.

The Board concurs with BLM in that there is no necessity to rule on the doctrine of abandonment within the meaning of the cases cited. In this appeal, since BLM was signatory to a Stipulation (June 6, 1980) in which it was agreed that the Haines-Fairbanks pipeline right-of-way, F–010143, shall not be reserved to the United States in the proposed conveyance document, it is uncontested that the pipeline is no longer used for or by the United States. Therefore, no ruling is necessary on degree of evidence required to terminate a 44 L.D. 513 interest.

[6] The Board concludes that where the record is uncontested and supports a factual finding that the United States no longer uses or needs an improvement constructed pursuant to the principles of *Instructions*, 44 L.D. 513, the Board can accept a stipulation by the parties to remove the reservation of interest from a conveyance document.

The file record of this appeal documents various events which provide the basis for a factual determination as to whether all Federal interest in the linear pipeline has terminated pursuant to the *Instructions*, 44 L.D. 513.

The record discloses that in May 1970, the Army determined there was no further military requirement for supply through the Haines-Fairbanks pipeline system; the decision to excess the pipeline system was made in 1971; in 1973, the Army filed a Preliminary Report of Excess concerning disposal of the system; in 1976 the GSA determined the linear pipeline to be surplus; in 1978, the U.S.–Canada Permanent Joint Board on Defense, determined there is no further need for the Haines-Fairbanks pipeline.

Therefore, based on the file record of this appeal, the Board approves the Stipulation filed by BLM and Doyon on June 26, 1980, and Orders BLM to delete the reservation of the Haines-Fairbanks pipeline right-of-way, F–010143, from the DIC here appealed, and to make appropriate amendments to the land records involved.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

CENTRAL OIL AND GAS, INC.

2 IBSMA 308

Decided *October 23, 1980*

Cross appeals by Central Oil and Gas, Inc., and the Office of Surface Mining Reclamation and Enforcement, from a Mar. 11, 1980, decision of Administrative Law Judge Sheldon L. Shepherd sustaining seven violations and vacating the remaining violation in Notice of Violation No. 79–III–17–26 (Docket No. IN 9–21–R).

Affirmed in part; reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Generally—Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands

Where a surface coal mining operation affects previously mined lands, the fact that an alleged violation could have existed before the present operation does not relieve the permittee from responsibility for the violation.

2. Surface Mining Control and Reclamation Act of 1977: Roads: Generally

The exception clause in sec. 522(e)(4) of the Act is not intended to allow mining activity near the junction of a mine access or haul road with a public road;