

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF FOREST LAND AND WATER MANAGEMENT  
POLICY AND PROCEDURE MANUAL

CHAPTER 5122 Permits

SECTION 02 Public Easements

11/4/81

- 1.1 This section addresses the reservation and vacation of public easements on state land under AS 29.33.240, AS 38.04.050 and .055, AS 38.05.127, .315 and .330 and AS 19.10.010. It does not address negotiated pipeline right-of-way leases under AS 38.35. (See chapter 5120, section 3) Private easements are issued for a specific length of time, are conditioned on continued use, and are charged an annual fee based on the fee schedule adopted by the director. (See section 9 of this chapter.)

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- 2.1 Definitions pertaining to this section are found in AS 38.05.365 and 11 AAC 53.900.
- 2.2 An easement is one person's right to make use of another's land. It is a right to use for a specific purpose rather than a right to possess. An easement may be established for such uses as rights of way, airstrips, log transfer facilities, water pipelines, etc.
- 2.3 To vacate an easement means to void it and to extinguish the right to use the land.
- 2.4 The word "dedicate" is synonymous with "grant," "convey," or "reserve." Specific language is not needed to dedicate an area to public use. The designation of a public area on a plat is sufficient to dedicate it to public use.

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- 3.1 The management of public easements on state land is described in section 3 of this chapter.
- 3.2 Public easements may have been established by the federal government prior to conveying land to the state. Such easements may or may not be specifically identified in the patent to the state.
- 3.3 26 Stat 391, 43 USC Sec 945 and 38 Stat 305, 48 USC 304 both provide for general reservations to the United States of the right to construct railroads, ditches, canals, telegraph lines, etc. without compensation to the landowner. These reservations are found in virtually all patents to the state. The reservation is generally regarded as authorizing the federal government to construct such improvements to further some federal purpose pursuant to a Congressional Act. The federal government may assign the right to other parties.
- 3.4 The federal government granted public and private easements in response to specific needs or requests on state land prior to state selections. The state patent is usually granted "subject to" these grants, which are listed in the conveyance document.
- 3.5 14 Stat 253, 43 USC Sec 932 (1866) granted "the right of way for construction of highways over public lands, not reserved for public purposes." This statute is commonly referred to as Revised Statute (RS) 2477. The grant was accepted in two ways: (1) by public use of privately constructed roads and trails on unreserved federal lands for such periods of time and under such conditions as to prove the grant had been accepted or (2) by positive action of the territorial and state legislatures which dedicated tracts of land along section lines (chapter 19 SLA 1923 and AS 19.10.010). The application of RS 2477 in Alaska is found in attachment A.
- 3.6 The section line dedication can only be used for public purposes where the particular area has been surveyed according to the rectangular grid. Exterior boundary surveys are not part of this grid system. There are not section lines in these areas until further subdivisional surveys are carried out in a manner acceptable to the state. Before a section line easement can be used, the location of the section line must be surveyed.
- 3.7 The width of an easement established under R.S. 2477 by public use is defined by court action. Usually, the width is set as the distance from the farthest limit of the backslope to the farthest limit of the backslope on the opposite side. However, some courts have established the width as that commonly established for highways designed for that mode of transportation.

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- 3.8 44 L.D. 513 established the principle that the expenditure of public funds for publicly owned improvements is sufficient to reserve the lands for public purposes. Because ANCSA requires the federal government to convey all federal interests in lands to the Native corporations, 44 L.D. 513 reservations are not withheld in such conveyances of federal lands. However, it is the position of this division that such lands are subject to the continued use of the publicly financed improvements. State lands are subject to such reservations. (See attachment B for a copy of 44 L.D. 513.)
- 3.9 A series of public land orders and executive orders from 1942 through 1956 established and modified withdrawals of public lands in Alaska for highways, telephone lines, and pipelines. PLO 1613 and PL 86-512 provided for the acquisition of restored lands to adjacent claimants and landowners, subject to specified highway easements. The various methods for acquiring the restored lands are outlined in PLO 1613 and PL 86-512.
- 3.10 In addition to easements granted by the federal government, state action also creates public easements on state lands, principally in the following ways:
- A. By statute, as in AS 19.10.010
  - B. By regulations, as in 11 AAC 54.280 (repealed) and 11 AAC 53.300;
  - C. In response to an application received pursuant to AS 38.05.330;
  - D. To implement an agreement to which it is a party, usually pursued like C above;
  - E. During the platting process prior to land conveyance; or
  - F. Reservation in a deed or other conveyance.
- 3.11 It is the policy of this division that a public easement reserved or granted on state land is not a disposal of an interest in land. Therefore, it is not necessary to make a finding under AS 38.05.035(a)(14) or to serve notice on the public pursuant to AS 38.05.345. However, the district manager always has the discretion to notify the public of any action he believes merits attention.
- 3.12 The vacation of an easement is a disposal of a state interest where the easement crosses non-state land and, as such, requires a finding under AS 38.05.035(a)(14). However, notice under AS 38.05.345 is not necessary if notice to those persons who may be affected by the vacation of the easement is provided by the municipality. If the vacation is found to best serve the state's interest and alternate access is provided, the district manager notifies the municipality by certified letter that he concurs with the vacation and finds the vacation to best serve the state's interest.

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When the state is the underlying landowner, the vacation of an easement is not a disposal of an interest in land and it does not require a finding under AS 38.05.035(a)(14) or notice under AS 38.05.345. However, the requirement of due process requires notice to protect those persons who may be affected by the vacation of the easement. This requirement is met by 11 AAC 53.250.

3.13 Unless prohibited by AS 38.95.150, the centerline survey required in Item 4.1, J. may be waived by the district or area manager based on consideration of the following:

- A. The requirements of the local platting authority.
- B. The cost of monumentation necessary to tie into existing surveys.
- C. Other methods of describing the location of the easment, such as existing property lines, preliminary survey, description using angles and distances, etc.
- D. The likelihood of conflicts with existing or proposed land uses.

If the centerline survey is waived, a sketch map of the easement showing the approximate location of corner ties as the easement crosses survey lines is substituted at a minimum.

3.14 If a subdivision is in a municipality with platting authority, all public areas (including streets, roads, alleys, etc.) are dedicated to public use and title to such areas is vested in the municipality. In the unorganized and third class boroughs, DNR is the platting authority only for changes or vacations of plats. If an amended plat includes public areas, DNR accepts those dedications by approving the amended plat. DNR then holds and manages such areas for the public for the purposes for which they were dedicated.

3.15 It is the policy of the division to pass title to land within easement reservations in state subdivisions as follows:

- A. Paper Platted Subdivisions; Parcel property lines run to the centerline of the easement. Parcel owners will own the property to the centerline of the easement. However, all such lands are sold subject to that easement reservation.
- B. Surveyed Subdivisions Outside Municipalities or Boroughs; the subdivision is designed and surveyed with lot lines ending at the boundary of the easement. The underlying title to the easement is held by the state but management authority is transferred to the Homeowner's Association as outlined in Chapter 5116, Section 06.

C. Surveyed Subdivisions Inside of Municipalities (Including Boroughs);

1. The subdivision is designed and surveyed with lot lines ending at the boundary of the easement. Title to the specified easement and management authority is transferred to the municipality by dedication.
  2. If the municipality refuses title to the dedicated easement, the state retains title and transfers management authority to the homeowner's association as outlined chapter 5116, section 6.
- 3.16 Title to vacated easements and public areas is governed by AS 29.33.240 and 19.10.010.
- 3.17 The division's policy regarding the vacation of section line easements during subdivision is to vacate the easement only within lot lines of subdivided parcels, where alternate access to adjoining lands is provided by the subdivision design, or in areas where topography makes the section line impossible to utilize.
- 3.18 Generally, it is the policy of this division to charge no fee for a public easement except when requested to do so by the Board of Regents or other beneficiary of a trust.
- 3.19 In order to qualify for a public easement, the applicant must state that he does not require exclusive use of the easement and that he understands that the easement may subsequently be vacated through normal procedures.
- 3.20 Although the state reserves the right to grant access across leased lands, it is this division's policy to exercise this right only when there is no other way to solve an access problem. The district encourages the applicant for such an easement to work with the lessee to minimize loss of utility of the parcel. The state's commitment to the lessee may require the applicant to bear additional costs such as placing the easement along the perimeter of the leased parcel rather than directly across it or constructing the improvements in a certain manner.
- 3.21 Pursuant to AS 38.95.010, an easement can not be obtained on state land by adverse possession or prescription.
- 3.22 The state assumes no responsibility for maintenance of structures constructed within public easements on state lands, and it assumes no liability for injuries or damages attributable to construction within public easements. The state also makes no warranty that dedicated lands are suitable for the proposed use.

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3.23 An easement that is identified for "public access" without further use limitations (i.e. pedestrian, dog sled, snow-machine, etc.) may be used for any mode of transportation commonly employed for access purposes.

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- 4.1 The following procedures are used to dedicate a public easement requested under AS 38.05.330. If initiated by the district, the district manager signs the application.
- A. When the application is received at the district or area office it is reviewed to verify state ownership and that application is made on the proper form. If in the judgement of the reviewer the application is complete and accurate, and is accompanied by any required fee, it is considered proper and is accepted.
    - 1. The application is serialized by assignment of an ADL number.
    - 2. A case file is created which contains the original application and any pertinent closures or inclusions.
    - 3. The application is added to the district index files.
  - B. The Division of Technical Services (DTS) is informed of the application by submission of the appropriate title plant form. The application is added to the serial register and indicated on the status plant.
  - C. The land under application is researched to identify any restrictions resulting from title documents, area or management plans, classification, cooperative agreements, other land actions, or any surveys in progress. Surrounding land status is also checked to make sure the easement does not duplicate an existing or proposed dedication and to trouble shoot any potential problems involved with access during construction.
  - D. If the application involves university grant lands, preliminary approval, including determination of the fee, is obtained prior to the completion of the final finding.
  - E. Agency review is initiated as appropriate. The applicant is advised to contact the Department of Fish and Game if construction within the easement will effect an waterbody having anadromous fish.
  - F. The site of the easement and construction access is inspected if appropriate (See chapter 5800, Section 4). The volume of timber and materials to be removed is estimated and a decision is made regarding their disposition.
  - G. The public is notified of the proposal pursuant to AS 38.05.345 if the district manager so decides. (See chapter 5800, Section 6.)



- H. The district manager approves or denies the application. If the application is denied, a letter is prepared stating the reason for the denial and is sent to the applicant. If the application is approved, a one year land use permit is prepared, including the conditions that the permit will ripen into a dedicated easement upon submission of a description or as-built of a centerline location survey acceptable to the state. The disposal of timber and materials is also addressed at this time.
- I. The applicant signs the permit agreeing to the conditions therein, and returns it, and a bond or a time certificate of deposit if necessary to insure compliance with stipulations or to insure that the survey is submitted to the district for signature.
- J. When the signed permit and bond are returned by the applicant, it is signed by the district manager and the information is added to the district's tickler system.
- K. When the applicant submits the description or as-built centerline location survey, it is checked for accuracy and completeness. If satisfactory, the bond is returned to the applicant.
- L. The dedication document is completed by district contract administration, signed by the director, and added to records.
- M. A copy of the dedication is sent to the applicant and is added to the casefile, which is sent to the central office Contract Administration Unit for casefile maintenance.
- 4.2 The following outline explains the division's policies regarding section line easements:
- A. There is an easement 50 feet wide on each side of and adjacent to the section line if either of these criteria apply:
1. The land is currently state land.
  2. The land was state or territorial land at any time between March 26, 1951 and the present.
- The easement has a total width of 100 feet if land on both sides of the section line meet either criteria.
- B. There is an easement 33 feet wide on each side of and adjacent to the section line if any of these criteria apply:
1. The land was unreserved federal land at any time from April 6, 1923 through January 17, 1949 or from March 21, 1953 through March 27, 1975.

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2. The land was territorial land at any time between April 6, 1923 and January 17, 1949 inclusive.

The easement has a total width of 66 feet if land on both sides of the section line meet these criteria.

- C. There is no section line easement if either of the following criteria apply:

1. The land became unreserved federal land on or after January 18, 1949 and the land was subsequently reserved or disposed of on or before March 20, 1953.
2. The land was acquired by the territory on or after January 18, 1949 and the land was subsequently disposed of on or before March 25, 1951.

- 4.3 It is the policy of the Division of Forest, Land of Water Management to handle requests for right-of-way easements over land sold with the restriction under AS 38.05.321 in the following manner.

- A. The third party contacts the purchaser of the agricultural rights.
- B. The third party submits application to state with letter from agricultural rights purchaser stating no objection and a copy of the farm conservation plan showing the easement.
- C. If both parties agree, the state processes the right of way easement application as described in 4.1 above and sends a copy of the farm conservation plan to be modified to the Division of Agriculture for review.
- D. A land use permit is issued after the amended farm conservation plan is approved.
- E. If farmer and third party can't agree, the division does not dedicate the easement. Third party goes elsewhere or condemns the property.
- F. This procedure does not apply to use of section line easements, except that the purchaser is required to modify his farm conservation plan to reflect the use of a section line easement.

- 4.4 Procedures for noting RS 2477 and other trails on plats follow:

- A. If this division or another state agency finds evidence of an easement established under RS 2477 or other authority that is not noted on status, the district creates a casefile and assigns an ADL number. The casefile includes a record

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and copies (if possible) of documents supporting the existence of the easement. These may include current and historical maps indicating the location of the easement, budget documents or work reports showing the expenditure of public funds on construction or maintenance, bearings and distances of the centerline and cross sections, air photos, and affidavits of individuals attesting to the road's construction, maintenance and use.

- B. Based on this information, the district manager signs a statement of his opinion as to the validity of the easement. If he finds that an easement does exist, the finding and a map is transmitted to the Division of Technical Services with instructions to note the easement on status plats. In this case, the plats indicate where the easement is located on lands under other ownerships as well as under state ownership. If the district manager determines that an easement does not exist, the trail is considered in trespass on state land.
  - C. If a state agency determines that a trespass road or trail serves a public purpose, it may initiate proceedings to establish an easement. An application under AS 38.05.330 is submitted with supporting documents such as maps, air photos, affidavits of past use, bearings and distances of centerline, etc. The application is processed as in 4.1 above.
  - D. The district reviews the application for completeness and transmits the appropriate Title Plant form and map to the Division of Technical Services for notation on records. In this case, only those portions of the trail on state land are shown on records.
  - E. The easement itself may be established in various ways. On lands identified for retention in state ownership, a public right-of-way may be reserved. The easement may also be dedicated during the platting process.
  - F. A right-of-way easement which is no longer used or which is obsolete because of reservation or improvement of an alternate access easement is vacated. The district manager initiates the vacation proceedings by petitioning the local planning commission or by sending the petition to the chief of the state office Land Management Section.
- 4.5 The following procedures are used to vacate a public easement located within a first or second class borough or within a city in an unorganized or third class borough:
- A. A petition is received by the local planning commission from the owners of the majority of the land affected.

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- B. The planning commission schedules a hearing and notifies the district office, among others.
  - C. The district reviews the proposal for its effect on state land and resources, makes comments and sends it on to the Chief Cadastral Surveyor, DTS.
  - D. If the petition involves an easement on lands not owned by the state, the vacation is considered a disposal of a state interest, and requires a finding under AS 38.05.035(a)(14) and notice under AS 38.05.345. DTS is responsible for meeting these requirements. DTS sends its comments to the platting authority, including a copy of the finding if required.
  - E. If the petition is approved for the vacation of a section line, a plat to meet the standards of 11 AAC53 is required. The plat is then routed for signatures and filed in the appropriate recording district by DTS.
- 4.6 The following procedure is used when an easement is vacated on state land not as a result of a subdivision survey and withing a platting authority as described in AS 40.15.070.
- A. The petition may be initiated by a request to the district office or from DTS. If the request is initiated at the district level, the petition is drafted and sent to DTS for finalizing and signature. DTS forwards the petition to the platting authority.
  - B. The petition is received by the platting authority. A hearing is scheduled and a notice sent to the district office among others.
  - C. The district responds to the notice by making comments and forwarding them to the Chief Cadastral Surveyor, DTS.
  - D. Because the land belongs to the state, the vacation of the easement does not constitute a disposal of a state interest. A finding under AS 38.05.035(a)(14) and a notice under AS 38.05.345 is not required. However, DTS does submit comments to the platting authority as appropriate.
  - E. If the petition is approved by the platting authority, a plat of the vacation is prepared and routed for signature as appropriate.
- 4.7 The following procedure is used by the Department of Natural Resources for petitions to change or vacate plats where it is the platting authority:

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- A. A petition is received at the district office from owners of a majority of the land affected and is accompanied by the appropriate filing fee. The petition is date stamped and an ADL/LAS number is assigned to it. The district transmits the petition and any comments to Chief Cadastral Surveyor, DTS.
  - B. DTS reviews the petition for completeness and verifies state jurisdiction over the petition.
  - C. If the petition involves the vacation of an easement on land not under state ownership, it is considered a disposal of state interest and requires a decision under AS 29.33.220 and notice under AS 29.33.210. This is the responsibility of DTS.
  - D. A public hearing is scheduled, advertised, and held as set forth in AS 40.15.075 and 11 AAC 53.
  - E. The Chief Cadastral Surveyor reports findings and recommendations of the hearing to the Director, DTS.
  - F. The Director, DTS approves or disapproves the petition. If approved, a state platting resolution is prepared by DTS and signed by the Director, DTS. Notice of the decision is sent to the petitioner and others as appropriate.
  - G. Survey instructions are prepared upon the written request of the petitioner or his surveyor. This initiates the Alaska State Land Survey Platting Process.
- 4.8 Refer to 5114.01 - 4.5 and 4.6 for the procedures followed on floating easements in municipal selections.
- 4.9 Refer to Chapter 5114.01 - 4.7 for the procedure used by the Department of Natural Resources to indicate its non-objection to the vacation, release, modification or relocation of an easement for public access to or along navigable or public waters reserved in a patent issued under AS 29.18, as allowed by AS 38.05.127(d).
- 4.10 When an easement is granted to a district on behalf of the public, the easement form (#10-119) is amended as indicated below. The last paragraph before the signature block is amended by adding the phrase shown in boldface:

NOW THEREFORE, in accordance with the provisions of AS 38.05.330 and the rules and regulations promulgated thereunder and in accordance with the conditions heretofore set forth or attached hereto and made a part hereof, the permittee herein is hereby authorized to locate, construct,

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operate and maintain said right-of-way over and across the lands herein described, provided that nothing in this agreement obligates the \_\_\_\_\_ District, Division of Land and Water Management to actually construct, operate or maintain said right-of-way, it being the grantor's intent that said right-of-way be a public right-of-way to be constructed, operated and maintained by the public acting through whatever means or agency may be available and authorized.

When a public easement is granted in the name of DOTPF, a municipality, a utility company, or other entity, Form 10-119 is used without this amendment.

Attachment "A"

<p>Land that was territorial or state land at any time during the periods indicated by the bars has a section line easement.</p>	<p>Land that was federal unreserved land at any time during the periods indicated by the bars has a section line easement.</p>	
		<p>July 26, 1866 (43 USC 932 RS 2477; offer made by federal government)</p>
		<p>April 5, 1923</p>
<p>66' wide</p>	<p>66' wide</p>	<p>April 6, 1923 (Ch. 19 SLA 1923; offer accepted by territory)</p>
		<p>January 17, 1949</p>
		<p>January 18, 1949 (ACLA 1949 fails to include territory's acceptance)</p>
		<p>March 25, 1951</p>
<p>100' wide</p>		<p>March 26, 1951 (Ch. 123 SLA 1951 dedicates section line easements on territorial land)</p>
		<p>March 20, 1953</p>
	<p>66' wide</p>	<p>March 21, 1953 (amends Ch. 123 SLA 1951 to include acceptance of offer on federal land)</p>
		<p>March 27, 1975</p>
		<p>March 28, 1975 (PLO 5418 reserves all remaining vacant federal land)</p>
		<p>October 21, 1976 (RS 2477 repealed)</p>
		<p>Present</p>

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As indicated by what has already been said no amendment operating as a new selection can be made after March 4, 1916; and as to others which are claimed to go only to mere matter of form or to fall within the purview of the statute, R. S. Sec. 2372, as amended by act of February 24, 1909 (35 Stat., 645), they will of course have to be dealt with as they arise and as the Department shall be then advised upon the law and the facts of each particular instance.

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### ICEICLE CANAL COMPANY.

*Decided January 8, 1916.*

#### RIGHT OF WAY OVER INDIAN ALLOTMENT.

The Secretary of the Interior is without authority to approve an application under the act of March 3, 1891, for right of way over land covered by a trust patent on an Indian allotment made under section 4 of the act of February 8, 1887.

*JONES, First Assistant Secretary:*

I am in receipt of your [Commissioner of the General Land Office] letter of November 9, 1915 ("F" Waterville, 014534 M. N.), relative to the application of the Iceicle Canal Company, under the act of March 3, 1891 (26 Stat., 1095), and section 2 of the act of May 11, 1898 (30 Stat., 401), for right of way for a canal traversing lots 1 and 7 and the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 22, T. 24 N., R. 18 E., W. M. You recommend that the application be approved.

It appears that the above land was included in allotment application No. 9, Waterville series, filed June 30, 1900, by Sam Moise, a Wenatchee Indian, under section 4 of the act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794).

This application was approved by the Department June 1, 1907, trust patent being issued December 9, 1907.

The act of March 3, 1891, *supra*, in section 18, grants right of way—

through the public lands and reservations of the United States. \* \* \* provided that no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation.

Section 19 of the act of March 3, 1891, requires maps of the canals and reservoirs to be filed in the appropriate land office, and provides that—

Upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way.



Section 4 of the act of February 8, 1887, *supra*, under which the allotment here in question was made, authorized such allotment to an Indian—

not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or Executive order—

and who has made settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated.

Section 5 provides for the issuance of a trust patent which—

shall be of a legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever.

In the case of Fresno Water-Right Canal (35 L. D., 550), it was held that an application for a right of way, under the act of March 3, 1891, could be approved, where the lands sought were within an Indian reservation, notwithstanding they may have been allotted to individual Indians. The report of the case fails to disclose whether the allotments had been approved or passed to trust patent. At page 551, the Department said:

In returning the papers it is deemed but necessary to invite your attention to the fact that section 18 of the act of 1891, under which the right is sought, provides for the granting of a right of way for purposes similar to that desired by applicant, over the public lands and the reservations of the United States, and the fact that the lands sought to be traversed have been actually allotted does not, in my opinion, take them out of the scope of the act.

The above case, however, is distinguishable from that under consideration, due to the fact that it involved allotments within a technical Indian reservation, while the present case involves an allotment to an Indian who settled upon the public land.

The cases of the Coachella Valley Ice and Electric Company, and the Southern Sierra Power Company, cited by you, and which were made the subject of an opinion by the Assistant Attorney General of this Department, June 23, 1914, are not applicable. They involve applications for permits, under the act of February 15, 1901 (31 Stat., 790), and a right of way, under the act of March 4, 1911 (36 Stat., 1253), over the Morongo and Cabazon Indian reservations, California. The above reservations had been purchased for the Indians with funds belonging to the Indians, and a trust patent had been issued for the entire reservation to the Indian band, as a community. They were held to be reservations within the meaning of the acts of February 15, 1901, and March 4, 1911. Further, it was held that since, under the act of February 15, 1901, a mere revocable permit was issued, and that, under the act of March 4, 1911, the period of the easement could be limited, to expire with the ending of the trust period, the approval of the applications did not

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violate the government's obligations to the Indian bands under the trust patent.

In the present case, the act of March 3, 1891, grants a perpetual easement over either public lands or reservations of the United States. It is extremely doubtful that an allotment under section 4 of the act of February 8, 1887, upon the public domain, can be regarded as a reservation. By the approval of allotment and issuance of trust patent the Indian was given a written promise that the particular tract would be held in trust for him and that ultimately he should have a fee simple patent, and it is, therefore, very doubtful, to say the least, if land in such status can be considered to be public land of the United States, within the meaning of the act of March 3, 1891. The grant of a perpetual easement, under the act of March 3, 1891, conflicts with the Government's obligations to the Indian, as set forth in section 5 of the act of February 8, 1887, since it prevents the issuance of the fee patent "free of all charge or encumbrance whatsoever."

I am, accordingly, of the opinion that there is no authority under the act of March 3, 1891, for the approval of the application here involved.

Your letter discloses that the superintendent of the Colville school has assessed damages arising to the Indian because of the right of way desired, against the Icicle Canal Company, in the sum of one hundred dollars, which amount has been deposited, and is now held by the superintendent. The allottee, it appears, has agreed, in writing, to the granting of the right of way, in consideration of that amount. Proper approval by the Department will be given due consideration upon the presentation of the matter by the Commissioner of Indian Affairs, who has been furnished with a copy of this communication.

Your recommendation is, accordingly, not concurred in, and the papers are herewith returned.

## INSTRUCTIONS.

*January 13, 1916.*

## 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.