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8 BUREAU OF LAND MANAGEMENT 8
TRANSPORTATION

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
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A-58-2044.10
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Lieberman 3-20
McPhillamey 3-24

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

MAR 2 8 1958

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor, Division of Public Lands

Subject: Authority to grant easements over public lands to the Territory of Alaska under act of November 9, 1921, as amended (23 U.S.C., sec. 17)

4-TPN

Your memorandum of January 6 concerns the effect on Section 17 of the 1921 Act, supra, of the Federal Highway Act of 1956 (70 Stat. 374) with respect to the grant of highway easements over public lands to the Territory of Alaska.

Section 17 of the 1921 Act has been cited as authority for appropriations of public lands in Alaska by the Bureau of Public Roads. United States v. Schaub, 103 F.S. 873, aff. 207 F. (2d) 325 (1952); letter dated October 14, 1930 of the General Land Office, approved by the Department on October 15, 1930, file 1385230 "F". As a matter of policy, in any case, the Department apparently would not object to the use of public lands by Federal agencies, even without the authority of the 1921 Act. This was held to be the general policy even as to appropriations of materials for road construction purposes by State or County officers. See opinion of September 21, 1933 (54 I.D. 294, 297). The withdrawal authority has been exercised to provide for use of public lands by Federal agencies under 43 CFR, Part 295. See for example withdrawals for the Bureau of Public Roads in Alaska, by Public Land Orders 1380 of January 14, 1957 (22 F.R. 400) and 1516 of September 27, 1957 (22 F.R. 7863). The Department also has recognized appropriations of public lands by Federal agencies without formal withdrawals. Instructions of January 13, 1916 (44 L.D. 513). The Department now has specific statutory authority for the appropriation of materials on public lands in Alaska by governmental bodies under the act of July 31, 1947, as amended (43 U.S.C., sec. 1185).

So far as we have been able to ascertain, however, it has never been determined that the 1921 Act authorizes transfers of rights-of-way to a territorial agency. As you point out in your memorandum, the regulations (43 CFR 244.54) have construed the 1921 Act as not authorizing transfers of easements to territories under that act. The Department, in effect, adopted a specific exception

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to the general rule of the regulations (43 CFR 244.13) which provides that the general right-of-way laws are applicable to Alaska. See Circular 1825 of June 24, 1952. We would consider the administrative interpretation of the 1921 Act, contained in Section 244.54 of the Department's Regulations, to be decisive, unless, of course, there is clear evidence in the 1956 Act of a Congressional intent to change the 1921 Act in a manner inconsistent with this Department's past interpretation of the 1921 Act. (See Crawford "Statutory Construction", 1940 ed., Secs. 219, 303-312).

The 1956 Act contains no express language which purports to amend the 1921 Act so as to extend the provision for transfers under the latter act to the Territory. The 1956 Act does not extend to Alaska all the provisions of the Federal-aid highway laws. Thus Sections 108 and 109 of the 1956 Act, dealing with the interstate highway system, would appear to be inapplicable to Alaska. Section 107 of the 1956 Act provides that the

> "* * *Territory of Alaska shall be entitled to share in funds herein or hereafter authorized for expenditure for projects on the Federal-aid primary and secondary highway systems, and extensions thereof within urban areas, under the Federal-Aid Road Act approved July 11, 1916 (39 Stat. 355), and acts amendatory thereof or supplementary thereto, upon the same terms and conditions as the several States and Hawaii and Puerto Rico* * *." (Underlining supplied)

It may be argued that the "terms and conditions" involved in sharing "funds" may be concerned with public land grants under Section 17 of the 1921 Act, supra, as well as matters bearing more directly on the fund provisions of the Federal aid highway laws. Grants of rights-of-way certainly may contribute substantially to the highway aid program. The transfer by Congress of the Alaska road construction and maintenance functions of this Department to the Department of Commerce under the 1956 Act did provide an organizational basis for extending to Alaska the benefits enjoyed by the States. It may be that if Congress had considered the matter specifically, the 1956 Act would have indicated clearly an intent to extend to Alaska all the provisions of the Federal aid highway laws, including the right-of-way transfer provisions of Section 17.

To find such an intent in the 1956 Act, however, seems greatly to strain the language of that act. Congress was concerned

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with extending to Alaska the fund provisions of the Federal Aid Highway Act rather than with the authority to transfer easements in public land to the Territory under Section 17. This seems clear from the absence of any mention of Section 17 in the 1956 Act and because of the specific reference to Hawaii and Puerto Rico to which the land transfer provisions of Section 17 do not appear to apply. See Policy and Procedure Memorandum 21-4.3, March 27, 1957, Subject: Right-Of-Way Procedures (Public Lands and Reservations), U.S. Department of Commerce, Bureau of Public Roads.

Its legislative history does not indicate that Section 107 of the 1956 Act was intended to have any effect on Section 17 of the 1921 Act. Section 107 was introduced into the legislation on May 7, 1956, as a proposed amendment to H.R. 10660, 84th Congress, offered by Senator Neuberger of Oregon. The following language, used by him, indicates his reasons for proposing the amendment:

> "4. The Territory of Alaska is still excluded from this Federal-aid highway legislation, in spite of the fact that this is our nearest land to the Soviet Union, and an expanded Federal highway program is cited by the administration as being crucial to national defense. Why should Hawaii and Puerto Rico be included and Alaska eliminated? Such discrimination makes neither rhyme nor reason.
>
> "Furthermore, residents of Alaska will pay the road and vehicle taxes included in title II of H.R. 10660, without sharing in the benefits made available by title I. This is the epitome of taxation not only without representation, but also without reciprocity. I plan to sponsor an amendment to bring Alaska within the provisions of the Federal-Aid Highway Act, but with some modification as to formula, so that Alaska's vast area will not make disproportionate the benefits thus conferred."

S. Rep. No. 1965, May 10, 1956, page 22. His statement does not indicate concern with the non-financial benefits in any highway law other than the Federal Aid Highway bill then under consideration.

Even if Congress would have desired to extend the right-of-way transfer provisions of Section 17 to Alaska, there is no assurance that the new statutory provision would have taken the same form as that now applicable to the States. The provisions in the 1956 Act which extended

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fund benefits to Alaska actually differ in some significant respects from those applicable to the States.

There is now pending in Congress, S. 3151, 85th Congress, a bill "To revise the Federal-aid highway laws of the United States." Section 318 of this bill, as introduced by Senator Case, would include the provisions of Section 17 of the 1921 Act. Even though the transfer is one to be made to the "State" highway department, or its nominee, the applicability of the provision to Alaska is made clear by Section 325 of the bill, paragraph "(q)" of which defines "State" as including Alaska. We understand that this bill is not intended to make any major substantive changes; and it may be that the drafters of the bill are of the opinion that Section 17 of the 1921 Act now authorizes rights-of-way transfers to the Territory of Alaska. This would be to us, however, a doubtful construction of the effect of the 1956 Act on the 1921 Act. Until Congress has adopted legislation such as S. 3151, therefore, we believe that the regulations (43 CFR 244.54) should not be revised in the proposed manner since there is no clear evidence that rights-of-way may be transferred to the Territory under the 1921 Act as supplemented by the 1956 Act.

Charles N. Soller

Associate Solicitor
For Public Lands

HLieberman:hbl
3/7/58

cc: Secretary's File
Docket Room
Divl of Public Lands Reading File
Mr. Lieberman
Mrs. LaFell

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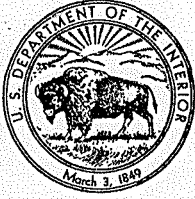

IN REPLY REFER TO:

5.04e:F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

JAN 6 - 1958

A-58-2044.10

Memorandum

To: Associate Solicitor, Division of Public Lands

From: Director, Bureau of Land Management

Subject: Applicability of Federal Aid Highway Act to Alaska

In view of the implications of Section 107, Act of June 29, 1956 (Public Law 627, 84th Congress, 70 Stat. 374, 377) we are seeking to determine the extent to which the present Federal Aid Highway Act may apply to Alaska.

Specifically, our question is this: May the Secretary of Commerce, acting through the Bureau of Public Roads, appropriate public lands in Alaska, and transfer them to the Territory for highway purposes, as he is authorized to do within the several States (42 Stat. 216; 23 USC 18)?

Present regulations (43 CFR Part 244.54) state that transfer of public lands to Territories are not authorized. However, we have been advised informally that the Bureau of Public Roads feels that Public Law 627 extended certain provisions of the Federal Aid Highway Act to Alaska, including those found in 23 USC 18.

If you find that the Federal Aid Highway Act now applies to Alaska, we will prepare suitable amendments to the regulations under 43 CFR Part 244.

As a matter of information which may be of value to you, we understand that the Bureau of Public Roads prepared a proposed bill, titled: "To revise the Federal Aid Highway Laws of the United States." This was commented upon last July by Assistant Secretary Ernst, at the request of the Bureau of the Budget. The file is available from Mrs. Virnston, in the Solicitor's Office, where it is listed as "Commerce #3."

S.3151

Edward Woozley
Director

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Hand Carried to Mr. Coote

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

FILE COPY
Surname:

August 28, 1956

Memorandum

To: Mr. R. K. Coote, Technical Review Staff 8-TPN

From: J. H. Tudor, Office of the Solicitor

Subject: Federal Highway Act of 1956.

In connection with your August 29 meeting with the ICWR committee, I am attaching copy of our memo of April 15, 1955 (M-36274) on Access to Through-Highways, and a memo of even date on the 1956 Highway Act.

It is our understanding that notwithstanding the provisions of Sec. 107 of the 1956 Act, the public land provisions of Section 17 of the 1921 Federal Highway Act (23 USC 18) do not apply to Alaska. Likewise the provisions of Section 109(d) of the 1956 Act relating to the Interstate System, do not apply to Alaska.

As indicated in our newest memo, and after your discussions, it may be necessary to expand our regulations, 43 CFR 244.54 and 244.55, to refer to the 1956 Act and to the surrender by this Bureau of the right of access to the Interstate highway. We will consider later whether in any future disposal of such public land, it will be necessary to note on the patent that the land is subject to the highway and to the control of access thereto.

In our 1955 memo (bottom, page 5) we called attention to a problem in land administration arising from the fact that a legal subdivision crossed by a throughway, is cut for all practical purposes into two separate parcels. This, however, is something for the Bureau to consider when the problem is presented in an actual situation.

If I can be of any help to you, please let me know.

J. H. Tudor

J. H. Tudor
Office of the Solicitor

JHTudor/pr
8/28/56

Attachments

Copy to: Secretary's file
Solicitor's Docket
Reading file, Div. Public Lands
Mr. Tudor
Mr. Lieberman
Branch of Lands

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AUG 28 1956

Lieberman 8-78

M-36366

8-TPN

RIGHT-OF-WAY PROVISIONS OF THE FEDERAL
AID HIGHWAY ACT OF NOVEMBER 9, 1954
AND THE FEDERAL AID HIGHWAY
ACT OF 1956

Rights-of-Way: Act of November 9, 1921

The Federal Aid Highway Act of 1956 did not repeal section 17 of the Federal Aid Highway Act of November 9, 1921. The Secretary of Commerce may file applications for rights-of-way under either Act.

Statutory Construction: Implied repeals

A general provision in a statute for the repeal of inconsistent statutes does not repeal a provision of an earlier statute if the two provisions have no "positive repugnancy".

Solicitor, opinion of

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H-56-2035.10
omit { Lieberman 8.28

AUG 28 1956

M-36366

Memorandum

To: Director, Bureau of Land Management

From: Acting Associate Solicitor, Division of Public Lands

Subject: Right-of-way provisions of the Federal Aid Highway Act of November 9, 1921 and the Federal Aid Highway Act of 1956

Your memorandum of August 6 asks whether the regulations contained in 43 CFR 244.54 and 244.55 need revision in view of the enactment of the Federal-Aid Highway Act of 1956 (70 Stat. 374, Public Law 627, 84th Congress), which became law on June 29, 1956.

The regulations your memorandum refers to implement section 17 of the Federal-Aid Highway Act of November 9, 1921 (23 U.S.C., sec. 18) which provides for the appropriation and transfer to State highway departments of lands or materials for rights-of-way or for road construction and maintenance purposes.

Nothing in the 1956 Act or its legislative history suggests any intent by Congress to repeal the 1921 Act in whole or in part or to bar the Secretary of Commerce from filing an application for a right-of-way under the 1921 Act. Earlier proposed legislation not enacted in contrast, contained an express provision for the repeal of the 1921 Act. See section 321 of S. 1072, 84th Congress. Repeals by implication, of course, are not favored. Solicitor's opinion M-36231 of October 4, 1944.

There is other evidence for the belief that at least part of section 17 of the 1921 Act was not intended to be affected by the 1956 Act. Neither the 1956 Act nor its legislative history refer to the transfer to the States of public land material sites. If there was any intent to repeal the material site provision of section 17 of the 1921 Act, presumably this would have been expressed in the 1956 Act. It does not appear that Congress considered this provision or gave any thought of its pertinence to the new legislation which it was enacting.

The 1956 Act contains a particular section providing for the repeal of other laws. The "blanket" repealer clause in section 122 of the 1956 Act repeals any statute which is "in any way inconsistent" with

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the 1956 Act. A general repeal clause in an Act, however, repeals nothing that would not have been equally repealed without the repeal clause. Hoague-Sprague Corp. v. Frank C. Meyer Co. Inc., 31 F. 2d 583, 585 (1929). Section 122 of the 1956 Act, therefore, must also be interpreted in the light of the reluctance of the Courts to find an implied repeal in the absence of "hostility" or "positive repugnancy" between the two statutes in question. State ex rel Lum v. Archibald, 45 N.W. 606 (1890); Henderson's Tobacco, 78 U.S. 562 (1870); and see Indritz, Post Civil War Ordinances etc., 42 Geo. L.J. 179, 185 (1954).

I find no way in which the two Acts may be said to be inconsistent or repugnant to each other. Both Section 109(d) of the 1956 Act and the 1921 Act authorize the transfer to the States of rights-of-way over public lands or reservations of the United States. The procedures provided by the 1921 Act are more formalized and less flexible, but both provisions have the same objective. The fact that there is a partial overlap between two statutes, however, does not necessarily work a "pro tanto" repeal of the earlier Act. Rosenberg v. United States, 346 U.S. 273, 294 (1953).

Section 109(d), however, relates only to rights-of-way on the Interstate System. It appears intended to make it clear that not only may rights-of-way be transferred for such highways but control of access to these highways may also be obtained.

The problem of access control for through-highways was considered by the Office of the Solicitor in the opinion M-36274, of April 15, 1955. In that opinion, the then Acting Assistant Solicitor, Branch of Land Management, found that "no special legislation is necessary to authorize the surrender to the States of the Government's right of access, if any."

Section 109(d), however, specifically provides a mechanism for arranging the transfer by the Government to states of rights-of-way and access control with respect to public land portions of the Interstate System of roads. The paragraph reads as follows:

> "Whenever rights-of-way, including control of access, on the Interstate System are required over public lands or reservations of the United States, the Secretary of Commerce may make such arrangements with the agency having jurisdiction over such lands as may be necessary to give the State or other person constructing the projects on such lands adequate rights-of-way and control of access thereto from adjoining

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lands, and any such agency is hereby directed to cooperate with the Secretary of Commerce in this connection."

Certainly this provision for access control is consistent with and indeed implements the statutory authority under the 1921 Act to transfer highway rights-of-way.

Since the 1921 Act does not appear to have been repealed by the 1956 Act, there is no legal bar to retention of 43 CFR 244.54 and 244.55. It may be desirable, however, to add some regulatory provisions referring to the new statutory authority under the 1956 Act to grant rights-of-way together with control by the State of access to throughways.

The 1956 Act clearly makes it a discretionary matter whether the Secretary of Commerce files applications for rights-of-way under either Act. His choice, of course, would be a matter of policy. If he decided to file all right-of-way applications for rights-of-way on the Interstate System only under the 1956 Act, sections 244.54 and 244.55 would become partly inoperative. Applications for material sites or for rights-of-way which are not on the Interstate System would still have to be filed under the 1921 Act and in accordance with those or similar regulations.

Robert H. McPhillamey

Acting Associate Solicitor
for Public Lands

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

AUG 28 1956

Memorandum

To: Director, Bureau of Land Management

Attention: Lands Staff Officer

From: Acting Associate Solicitor, Division of Public Lands

Subject: Right-of-way provisions of the Federal Aid Highway Act of November 9, 1921 and the Federal Aid Highway Act of 1956

Enclosed is my opinion on the above question in answer to your memorandum of August 6.

I am informed that the Department of Commerce will be interested some time in the near future in conferring with this Department's representatives on the action which should be taken to implement the 1956 Act. They may desire that patents issued for lands crossing or adjoining throughways contain a reservation putting the patentee on notice that his grant does not include any right of access to the throughway. At the same time it may be convenient to discuss the proposal, if we desire it as a matter of policy, that the Secretary of Commerce file all applications for rights-of-way on the Interstate System under the more flexible 1956 Act and any applicable regulations which may be issued under that Act. Our office would be glad to be represented at such a conference to give you any legal assistance you may require.

Robert H. McPhillamey

Acting Associate Solicitor
for Public Lands

Attachment

HLieberman:hbl
8/28/56

cc: Secretary's File
Docket Section
Div. of Public Lands Reading File
Mr. Coote
Mr. Lieberman
Mrs. LaFell

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

#56-2035.10

AUG 6 1956

Memorandum

To: Associate Solicitor, Public Land Management

From: Director

Subject: Federal Aid Highway Act

Section 17 of the Federal-Aid Highway Act, as amended (23 U.S.C. 18), prescribes specific procedures for the acquisition of rights-of-way and material sites on Federal lands for Federal-aid highways. Subsection 109(d) of the Federal-Aid Highway Act of 1956 makes reference to rights-of-way (including control of access) for the Interstate System. Section 122 of the latter Act deals with the relationship of the 1956 Act to previous Federal-Aid Highway acts.

PL627, 6-29-56 HR10660, 84 Cong

We would appreciate your early opinion as to the effect of the Federal-Aid Highway Act of 1956 on the matter of issuance of rights-of-way over the public lands. The immediate need is a determination whether the regulations contained in 43 CFR 244.54 and 244.55 need revision in view of the new legislation.

For the Director

E R Hochmuth

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Bradshaw

SOL: BLM
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M-36274

APR 15 1955

LIMITATION OF ACCESS TO THROUGH-HIGHWAYS
CROSSING PUBLIC LANDS.

8-T[illegible]

Rights-of-way: Revised Statutes sec. 2477.

A throughway or limited-access type of highway may be established across the public lands, under Rev. Stats. 2477 and the regulations, (43 CFR secs. 244.57 - 244.59). The United States as grantor does not have any special right of access to such highways, other or different from that accorded other abutting owners under state law. Persons subsequently acquiring the abutting lands from the United States likewise do not have any special right of access which the state need consider for the purpose of eliminating by purchase or otherwise.

Rights-of-way: Act of November 9, 1921 (Federal Aid Highway Act.)

A throughway or limited-access highway may be established on public lands under sec. 17 of the Federal Aid Highway Act, and the regulations (43 CFR sec. 244.54 - 244.56). The Secretary of the Interior probably could reserve a special right of access to such highway if necessary to his administration of the public lands as a condition of his certification of the land for disposition to the state for highway purposes. In the absence of a special reservation, the United States as owner of the abutting lands, is subject to the same limitations on access to the highways as other adjoining owners under state law; and persons subsequently deriving title from the United States are subject to the same limitations. The Secretary of the Interior may surrender to the state a reserved right of access prior to disposing of the abutting lands.

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UNITED STATES
DEPARTMENT OF THE INTERIOR
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WASHINGTON 25, D. C.

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M-36274

APR 15 1955

Memorandum

To: Director, Bureau of Land Management

From: Acting Assistant Solicitor
Branch of Land Management

Subject: Limitation of access to through-highways crossing public lands.

You have informally referred to me the attached correspondence from Mr. E. H. Brunner, Right-of-Way Engineer of the Idaho Highway Department, together with your proposed reply thereto and a proposed memorandum for the information of Bureau officials on the above subject.

Mr. Brunner writes that the State of Idaho in acquiring rights-of-way for the Interstate Highway System, so far as it crosses Federal lands in Idaho, would also like to acquire rights from the abutting government land in order to provide for a safer highway. For this purpose Mr. Brunner asked the Manager of the Land and Survey Office at Boise to add the following clause to a certification of right-of-way withdrawal of government land:

> "In the event Federal statutes are amended, giving the right to grant access rights along with rights-of-way, this withdrawal shall be considered as also granting all access rights, present and future, across the above listed subdivisions."

The manager properly indicated his lack of authority to sign the certification as requested and the matter has been referred to you. By "withdrawal" Mr. Brunner obviously means an appropriation and transfer of Federal land under section 17 of the Federal Aid Highway Act (see 43 CFR 244.54(a)(2).

The questions and problems posed by Mr. Brunner's letter and enclosures are common to the highway departments of other western states where highways must cross large stretches of public land. The problem is that in constructing a limited access highway whether as part of the interstate highway system or otherwise, the highway departments desire to acquire from the Government the right-of-way for such highway over and across the public lands; and to acquire

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also the right of access to such highway from the abutting Government land while it is in Government ownership so as to preclude the unrestricted exercise of such rights when title to the abutting lands has passed into private ownership thus avoiding the necessity of the states purchasing such rights from the Government's successors in interest. Mr. Brunner's suggested access clause is intended as a stop-gap measure pending the enactment of legislation authorizing the grant of access rights. The questions involved may be simply stated as follows:

1. May a freeway or limited-access type of highway be constructed over the public lands?

2. Does the United States (and its successors in interest) as owner of lands abutting such highway have special rights of access thereto?

3. If it does, is legislation necessary to authorize the Government to surrender to the states its access rights to such highway?

This memorandum will touch only briefly upon the Government's right of access to the ordinary, conventional or "land service" highway running across public lands. I will not discuss the situation where a conventional highway is converted under state authority into a limited acess highway, but my answer will be restricted to new freeways constructed on public lands administered by the Bureau of Land Management where no highway previously existed. My answers follow:

1. A limited-access highway may be constructed over public lands either under R.S. 2477 or under section 17 of the Federal Aid Highway Act of 1921 _infra_.

2. Except as hereinafter indicated with respect to Federal Aid Highways, the United States does not have any special right of access to such freeways other or different from that accorded to other abutting owners under state law.

3. As to such limited access highways no special legislation is necessary to authorize the surrender to the states of the Government's right of access, if any. Nor is the special access clause suggested by Mr. Brunner necessary pending enactment of such legislation.

An easement of access is defined as the right which an abutting owner has of ingress and egress to and from his premises other than the public easement in the street or roadway. _Chicago Railway Co. vs. Mil. El. Railway Co._ 70 NW 678. Thus owners of land abutting upon a

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highway have the right to use and enjoy the highway in common with other members of the public; and in addition they have an easement of access to their lands abutting upon the highway arising from ownership of such land contiguous to the highway which "easement of access" does not belong to the public generally. State Highway Board vs. Baxter 144 SE 796. These rights usually arise in connection with the ordinary, conventional or "land service" highway as distinguished from the "traffic service" or limited access highway.

The limited access highway has been developed in recent years by highway authorities to provide rapid transit for through traffic, uninterrupted and unendangered by vehicles or pedestrians from private roads and intersecting streets and highways, thereby providing a maximum of economy, efficiency and safety. Limited access highways, also designated as freeways, throughways, expressways, controlled access highways, etc., are so constructed or regulated that an abutting owner cannot directly enter the highway from his property or enter his property from the highway. Users of such highways gain access thereto at specified controlled access points which they may reach by a circuitous route or by a service road paralleling the main highway.

There are two statutes of concern to us in the administration of the public lands under which highway rights-of-way may be acquired. They are R.S. 2477 (43 U.S.C. sec. 932; 43 CFR secs. 244.57 - 244.59), and section 17 of the Federal Aid Highway Act of 1921(23 U.S.C. sec. 18; 43 CFR 244.54 - 244.56).

Section 2477 is an unequivocal grant of the right-of-way for highways over the public lands without any limitation as to the manner of their establishment. Smith vs. Mitchell (1899) 58 P. 667; the grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the state where the land is located. State v. Nolan (1920) 191 P. 150; Moulton v. Irish (1923) 218 P. 1053. The act did not specify nor define the extent of the grant contemplated over the public lands, the width of the right-of-way nor the nature and extent of the right thus conferred, both as against the Government and subsequent patentees, 21 L.D. 354. Whatever may be construed as a highway under state law is a highway under R.S. 2477, and the rights thereunder are interpreted by the courts in accordance with the state law. The lands over which the right-of-way is located may be patented to others subject to the easements and to whatever rights may flow to the state and to the public therefrom. Eugene McCarthy 14 L.D. 105.

Clearly, a limited access highway as established under state law, is within the purview of R.S. 2477. It is probable also that upon the establishment of such limited access highway, the United States as an abutting land owner would have no right of access to the

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highway different or greater than would any other land owner; and any successor in interest of the United States would likewise have no special right of access which it would be necessary for the state to acquire by purchase or otherwise.

Similarly the Federal Aid Highway Act does not define nor limit the nature or the extent of the right-of-way of public lands which may be appropriated under section 17 (except as to the provision in section 9 of that act (23 U.S.C. sec. 10) relating to the width of the right-of-way and adequacy of the wearing surface). A limited access highway is therefore within the purview of section 17. The Department has held that the right-of-way granted under this act is merely an easement; and consequently a subsequent patent would be subject to the highway easement.

Since freeways or limited access highways are of fairly recent origin, there has been little court-made law on the subject. It is generally recognized, however, that statutes providing for limited access to highways arise as an exercise of the state's police power for the promotion of public safety and of the general welfare. (3 Stanford Law Review, 1951, p. 303). Such statutes are in existence in several of the western states including Colorado, California, Oregon and Utah. It has been stated that where an ordinary or conventional road is built there may be an intent to serve abutting owners, but when a freeway is established the intent is just the opposite, and a resolution creating a freeway gives adequate notice that no new rights of access will arise unless they are specifically granted. (3 Stanford Law Review, 1951, pp. 298, 300, 308).

A freeway has been defined as a highway in respect of which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect of which such owners have only restricted or limited right or easement of access. Thus a highway commission's condemnation resolution for a limited access freeway did not create in the abutting owners property a new right of access to a freeway to be constructed where no highway, conventional or otherwise, had existed before. People vs. Thomas et al (Cal. 1952) 239 P. 2d 915. The easement of access applies to rights in existence prior to the establishment of the freeway and to claimed rights which had no previous existence, but which come into being, if at all, only by virtue of the new construction. The California courts have held that where a statute authorizing freeways provides for creation of a freeway on lands where a public way had not previously existed, it does not create rights of direct access in favor of abutting property which prior to the new construction had no such right of access. Schnider et ux v. State (Cal. 1952) 241. P. 2d 1.

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The precise question of the nature and extent of the Government's right of access to a new limited-access highway on public lands has not previously been raised before this Department, nor has it been considered by the Courts so far as I know. As already stated, neither R.S. 2477 nor the Federal Aid Highway Act contain any qualification as to the nature of the grant and of the rights thereunder. In the absence of express reservation in the right-of-way grant (or in the conditional certification of a sec. 17 highway), it would appear that the United States would retain no right of access unless such right was granted by State law since its position would be that of a land owner only. Such right after conveyance by the United States would be governed by the rule in Packer v. Bird (1890) 137 U.S. 661, 669, that whatever incidents or rights attach to property conveyed by the government will be determined by the laws of the states in which situated, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. It was held in the cited case that where a State law denies riparian rights to private land owners a grantee of the United States would acquire none with the grant. The right of access here involved would seem to be in like case.

In the circumstances therefore the state courts would undoubtedly consider the United States as a land owner in the same position as any other adjoining land owner, and the same rules of construction would be applied to it. It would follow that if under state law a private land owner has no right of access to a limited-access highway except as specifically provided, the United States likewise has no such easement from its lands. If the United States has no right of access, clearly persons subsequently deriving or claiming from or through the United States would have no such property rights in the highway which the state need consider or pay compensation for its elimination. The latter question, however, is one for the state courts when and if presented in a proper case. Suffice it to say that, in my view, the Government has no special rights of access to limited access highways newly established under either of the two cited statutes on public lands under the administration of the Bureau of Land Management.

A complication could arise however in the situation where the Secretary of Commerce determines that public lands are necessary for a limited access highway and the Secretary of the Interior as a condition to his certification of such lands wishes to reserve the right of access to or across the highway. If the Secretary of the Interior as a necessary incident to the management of the adjacent public lands found it necessary to retain the Government's right of access to or across the proposed highway it may be that he could make it a condition for his certification of the land for appropriation and transfer. The complication could arise when the abutting land is disposed of, if the Secretary did not voluntary surrender such right of access to the state,

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prior to the patenting of the land or the establishment of valid rights to the land. In the absence of such conditions, the Government and its successors would have no right of access to the highway except at the control points or as otherwise provided by state law.

Another problem in public land administration will undoubtedly arise from the practical effect which a limited access highway has of cutting a legal subdivision upon which it is located into two separate parcels because of the restriction upon the settler's or applicant's right to enter and cross the highway without difficulty to reach and utilize a parcel on the other side of the road.

I do not think it necessary to comment on the proposed legislation prepared by a special commission of state highway officials particularly section 6 relating to granting of access rights which Mr. Brunner submitted merely for your information. Further in view of the conclusion I have reached on the basic questions, I do not believe it is necessary to discuss the discretionary authority of the Secretary under section 7 of the Taylor Grazing Act and other laws to insert access limiting stipulations in patents or other disposals whose allowance is discretionary, as indicated in your proposed reply. Your reply should be drafted consistent with the views herein expressed.

E. R. Bradshaw

Acting Assistant Solicitor
Branch of Land Management

Approved: APR 18 1955

James A. Parriss Jr.

Associate Solicitor
Division of Public Lands

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

SEP 9 1954

8-TPN

Memorandum

To: Supervisor, Eastern States Office
Bureau of Land Management

From: Acting Assistant Solicitor
Branch of Land Management

Subject: Width of Federal Aid Highways

Your memorandum of August 30, signed by Mr. Hancock, suggests that a paragraph be added to 43 CFR 244.54(a)(1) to contain explanatory material about the width of highways under 23 U.S.C., sec. 18.

The proposed paragraph would not establish widths or limit them. It is merely a dissertation of the subject.

The memorandum does not explain why the regulation is needed or even desirable. I have some doubt that it would serve any purpose other than encouraging 400 ft. widths. It should be noted, of course, that the general sections on rights-of-way require that the width of the requested right-of-way be shown (43 CFR 244.6(6)).

If you believe that a regulation such as that should be adopted, the regulation should be prepared in the Bureau of Land Management and approved in this office. We will, of course, be happy to assist you in the legal phases of the drafting.

(Sgd.) James A. Lanigan
Acting Assistant Solicitor

JALanigan:hbl
9/9/54

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