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Lands-Exchanges
Lands-Rights of Way

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
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CLOSED FILES
1959-1963

OFFICE OF THE SECRETARY
LANDS - Rights-of-Way

Part 1 - Barry, 1959 to Aug. 15, 1961 - [redacted]

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RG 48, Sec Interior
E, 974, CCF, 1959-63
Lands-R-o-W

IN REPLY REFER TO:

5.04e:B

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

G-58-2083

INTERIOR DEPT.

JUL 9 - 1958

JUL 9 - 1958

SOLICITOR

Memorandum

To: Associate Solicitor, Division of Public Lands

From: Director

Subject: Rights-of-way for Government use appropriated under the principles of 44 L.D. 513

Attached are copies of the opinions on the above subject written to our Area Administrator, Area 4, by the Field Solicitor at Anchorage on February 14 and 24. The February 14 opinion deals generally with conflicts between appropriated rights-of-way and entries. The February 24 opinion deals with conflicts between appropriated rights-of-way and native settlements.

In view of the importance of these opinions in relation to current operations in Alaska, as discussed in the February 14 opinion, your early review of these opinions will be appreciated.

As you will note from the February 14 opinion, the issue of precedence of a Government appropriation over two homestead entries has been raised in the case of U.S. v. 180.31 acres of land, damages were awarded to the homesteaders under a declaration of taking filed on behalf of the Department of Defense. There is an indication that the judgment may be appealed.

We think that the crucial element of the case was or should have been whether the lands were appropriated by homestead entry before or after the time that the right-of-way was actually surveyed and staked out upon the ground. We do not think that the Field Solicitor's opinion contains sufficient information to allow analysis of this point. We have asked the Area Administrator to supply more detailed information, and we shall supply it to you upon receipt.

We question the Field Solicitor's conclusion that the Government may appropriate lands without compensation after they have been validly entered. We also wonder about the validity of an appropriation of lands accomplished merely by filing a map or plat

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without having first made a survey and staked out the site upon the ground as a means of reasonably verifying that Government construction is imminent.

Your attention is invited to the possible relationship to this matter of the provisions of the Act of July 24, 1947 (61 Stat. 418; 48 U.S.C. 321d), in which payments of damage are authorized upon the utilization of Government rights-of-way for certain purposes which have been reserved in patents issued for lands in Alaska.

In the opinion of February 24, at the bottom of page 3, we believe that the Field Solicitor may have erred in describing the native allotment procedures as involving two approvals. As we read 43 CFR Part 67, there is only one approval, namely approval of the allotment application, which must await the submission of proof of five years' use and occupancy. This may be unimportant, however, and we have no reason to question the Field Solicitor's general conclusion regarding conflicts between Government rights-of-way and native allotments. However, his conclusion that the appropriation of a Government right-of-way need not precede the allowance of a homestead entry does not seem on the surface to be consistent with his conclusion that such appropriation must precede the allowance of a native allotment under the Act of May 17, 1906 (34 Stat. 177; 48 U.S.C. 357).

Your views at an early date on these two opinions will be appreciated. Prompt reply is requested since current operating procedures of our offices in Alaska are concerned.

For the Director:

Irving Senzel

Attachments

Copy to: AA-4

IN REPLY REFER TO:

5.04e:B

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

G-58-2083.10
INTERIOR DEPT.
JUL 22 1958
SOLICITOR

JUL 22 1958

Memorandum

To: Associate Solicitor, Division of Public Lands

From: Director

Subject: Rights-of-way for Government use appropriated under the principles of 44 L. D. 513

As you know, we wrote you on July 9 requesting your views on the opinions of the Field Solicitor at Anchorage, Alaska, dated February 14 and 24, dealing with conflicts between appropriated Government rights-of-way, entries, and native settlements.

Since writing to you we have noted the Solicitor's opinion M-36493, of April 23, 1958, in which it was held that "in practice the Department has limited its authority to reserve from grants made by patent, road and other rights-of-way constructed with Federal funds to those cases where construction preceded the initiation of the right on which the patent is based."

As you realize, the opinion of the Field Solicitor dated February 14 held that the appropriation of a Government right-of-way need not precede the allowance of a homestead entry. The opinion appears to be inconsistent with past practice as described in Solicitor's opinion M-36493.

We have advised our Area Administrator at Juneau, Alaska, to follow the Solicitor's opinion M-36493 rather than the Field Solicitor's memorandum of February 14, pending the completion of your review of the Field Solicitor's opinion.

For the Director:

E. R. Hochmuth

RG 48, Sec. Interior
E. 974, CCF, 1959-63
Lands-R-o-W

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Juneau Region
Anchorage Field Office
P.O. Box 166
Anchorage, Alaska

September 30, 1958

Memorandum

To: Associate Solicitor, Public Lands
Attention: Robert H. McPhillamey, Assistant Solicitor, Branch of Lands

From: Field Solicitor, Anchorage

Subject: 44 L.D. Rights-of-way (Your reference G.-58-2083.10)

In view of your memorandum concerning the above subject, we have reviewed the authorities available to this office in an effort to ascertain the reasons for the apparent inconsistencies between the cases cited in your memorandum and those cited in our memoranda.

In this review we found additional land decisions in which it was held that where an entry of public lands has been allowed in accordance with the public land laws the lands embraced within such entry are not subject to a subsequent reservation or withdrawal by an agency of the United States.1/ There are also, however, land decisions which support the position that lands embraced within an allowed entry may be subsequently withdrawn by an agency of the Federal Government.2/

An examination of these cases indicates that this apparent inconsistency is justified on the basis of the nature of; and, the authority for the withdrawal or reservation effecting such allowed entries.

In the cases where it was held that public lands within allowed entries were not subject to a subsequent reservation or withdrawal by the United States it appears that such withdrawal or reservation usually encompassed many acres of land for a general public purpose and that such withdrawal or reservation was made by the executive branch of the Government pursuant to its implied power to withdraw or reserve lands and not in accordance with any specific statutory authority.3/

1/ Attorney General's Opinion, 1 L.D. 30; Mathias Ebert, 14 L.D. 589.
2/ Mary C. Sands, 34 L.D. 653; Opinion 34 L.D. 421; Instruction 34 L.D. 158; John L. Maney, 35 L.D. 250.
3/ See cases in Footnote 1.

The cases wherein it was held that lands within an allowed entry could subsequently be withdrawn or reserved by the United States, reveal that such withdrawals or reservations were made by virtue of specific statutory authority contained in Section 3 of the Federal Reclamation Act of June 17, 1902 (43 U.S.C. 416) and that in most instances the lands withdrawn or reserved were appropriated for a specific Governmental purpose or use.4/

The rationale used as a basis for the foregoing distinction between the two types of withdrawals or reservations, is set forth in the "Instructions" promulgated in 34 L.D. 158. In these Instructions it is stated that the withdrawals or reservations made for a specific purpose or use under the express authority of Section 3 of the Federal Reclamation Act "have the force of legislative withdrawals and are therefore effective to withdraw from other disposition all lands within the designated limits to which a right has not vested." On the other hand, such Instructions hold that a withdrawal made by an officer of the executive branch of the Government for a general public purpose in accordance with the inherent power to withdraw lands would not be effective to withdraw or reserve lands within an allowed entry because an officer of the executive branch "can make no withdrawal that would affect or impair entries made in pursuance of the general land laws except by special authority of Congress, which alone has the power to take away inchoate rights acquired by entries under the general land laws unless such power is specially conferred upon the executive branch of the Government as in the act of June 17, 1902."

The cases cited supra, in relation to withdrawals or reservations made under Section 3 of the Federal Reclamation Act also set forth the requirements necessary to obtain a vested right in lands embraced within an allowed entry so as to preclude a subsequent withdrawal or reservation by the United States. These requirements are ennunciated in the case of John J. Maney (35 L.D. 250) as follows:

> "* * *Such rights exist in a homestead claimant only after he has done everything that he is required by law to do in order to acquire title - that is to say, made entry, submitted final proof thereon, showing full compliance with the requirements of the homestead law in the matters or residence, cultivation and improvement, paid all the necessary fees and charges, and become entitled to a final certificate.* * *"

In citing the John J. Maney case we are aware of the fact that this case was modified by Circular No. 759, 48 L.D. 153, because of the decisions of the United States Supreme Court in Payne v. Central Pacific Railroad Company, 255 U.S. 228, and Payne v. New Mexico, 255 U.S. 367. A review of these two Supreme Court decisions reveals, however, that the principle of law, that an entryman does not acquire a vested right as against the United States to lands embraced within an allowed entry until he has fully complied with all of the requirements of the law, as stated in the Maney case, was not overruled but was specifically confirmed. In these cases the Supreme

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4/ See Footnote 2/.

Court merely held that the public land claimants in each case had fully complied with all of the requirements of the law under which they were obtaining the public land and that such land could not, therefore, be subsequently withdrawn by the United States. The Supreme Court in each case, however, affirmed the rule that no vested rights, as against the United States, could be acquired until there was full compliance with all of the requisites of the law under which the entry was allowed.

This rule of law, as stated in the Maney case and affirmed by the Supreme Court in Payne v. Central Pacific Railroad Company and Payne v. New Mexico, has also been affirmed by the Courts on many occasions.5/ It has also been specifically held that the mere allowance of an entry under the public land laws does not constitute or create a contractual right against the Government.6/

From the foregoing, it appears that the apparent inconsistencies between the cases cited in our memoranda are based on the distinction drawn between a withdrawal of public lands for a specific use or purpose in accordance with specific statutory authority and one made for a general public purpose without specific statutory authority. It also appears that when a withdrawal or reservation of public lands is made for a specific use or purpose, pursuant to a specific statute, that such a withdrawal or reservation will affect a valid appropriation of the lands embraced within an allowed public land entry unless the rights of the entryman are vested by reason of full compliance with the law under which the entry was allowed.

In Alaska most of the applications for 44 L.D. rights-of-way have been filed by the Bureau of Reclamation and the Corps of Engineers. The rights-of-way are to be used for a specific use or purpose and would seem to be appropriated pursuant to specific statutory authority provided by the Federal Reclamation Act of 1902, supra, or special acts of Congress providing for military installations in Alaska. It would therefore appear that such appropriations could be encompassed within the latter rule set forth above and that such appropriation

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5/ Wagstaff v. Collins, 97 Fed. 3; Petition of S.R.A. Inc., 18 N.W. (2d) 442; Martie v. Martie, 271 Pac.(2d) 385; Norton v. Evans, 82 Fed. 804; Cupples v. Harris, 11 So.(2d) 609; City of Miami v. Siroco, 188 So. 344; Brewer v. Hill, 152 So. 75, Cert. denied 292 U.S. 626; Gibbons v. Pickins et al., 175 So. 600; Bishop v. Jordon, 285 Pac. 1096; Cambell v. Wade, 132 U.S. 34; Shipley et al. v. Cowan et al., 91 U.S. 330; Bergstrom v. Alaska Cent. Ry. Co., 3 Alaska 428.

6/ Petition of S.R.A. Inc., 18 N.W. (2d) 442.

would be valid as to lands embraced within allowed entries if the entryman has not obtained a vested right by fully complying with all of the requisites of the law.

Although the application of the foregoing principle would seem to impose an undue hardship on an entryman, it is to be remembered that under the homestead law, after an entry has been allowed, the entryman has six months or even a year in which to establish his residence.7/ In many instances the request for the right-of-way appropriation is made prior to actual entry and establishment of residence by the entryman and in such instances it appears that an appropriation by the Government would be fully justified.

We would also like to call your attention to the fact that some of the right-of-way applications are for unsurveyed lands that are embraced within a homestead settlement claim, notice of which has been filed in the Land Office on Standard Form No. 4-1154 (Notice of Location or Settlement or Occupancy Claim in Alaska). In such cases, the rule seems to be well established, that a mere settler on unsurveyed lands has no right as against the Government, and that lands embraced within such settlement claims may be appropriated by the Government.8/ It is to be further noted that, in Alaska, settlement claims may be made on surveyed lands and that the foregoing rule has also been applied to settlement claims on surveyed lands, where only a notice of settlement has been filed in the Land Office, and no allowance of entry has been granted by the Land Office.9/

As suggested in your memorandum, in order to be fully consistent with the instructions in 44 L.D. and the regulations (43 CFR 205.13), it may be necessary for a Federal agency to stake the area to effectuate a valid appropriation of the land desired. If this is to be the interpretation given to the instructions in 44 L.D. 513, it would be our suggestion that 43 CFR 244 be amended to permit Federal agencies to obtain an easement for rights-of-way by having a map or plat depicting the right-of-way noted on the appropriate Land Office records as is provided by the regulations for private parties. If this change were made, we feel that it would eliminate many of the problems created by entries made immediately before the desired land can be staked as discussed in our previous memorandum. You indicated in your memorandum that this purpose may be accomplished by a temporary withdrawal in accordance with 43 CFR 295; however, we feel that a withdrawal of land for rights-of-way in Alaska is impractical because of the affect of such withdrawal. Such withdrawals create survey and

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7/ 43 CFR 65.15.

8/ United States v. Hanson, 167 Fed. 881; Sibley v. Jeffreys, 264 Pac. (2d) 831; Leslie A. Reinovsky, 41 L.D. 627.

9/ Emilio Torres, 17 L.D. 341 (See also 25 L.D. 212).

priority problems as evidenced by the need for Public Law 892, 84th Congress, 2d Session (70 Stat. 898), and such withdrawals may also separate a legal subdivision of land thus preventing an entry for the entire legal subdivision because the lands within such legal subdivision would be incontiguous by reason of the withdrawal.

In your memorandum in commenting on the possessory rights of natives in relation to the holding in the Tee-Hit-Ton case you made the following statement:

> "* * * There is nothing in the Tee-Hit-Ton case which indicates that the Supreme Court would also disavow the court's position in the second Miller case, United States v. 10.95 acres of Land in Juneau, 75 F.Supp. 841 (1948) that Indians may recover compensation based on actual occupancy recognized by the Act of May 17, 1884 (23 Stat. 26), as distinct from tribal claims of aboriginal title."

After reviewing the Tee-Hit-Ton case once again, it is our understanding that in such case the Supreme Court specifically considered the occupancy rights of the natives in Alaska protected by the act of May 17, 1884 (23 Stat. 24), and Section 27 of the act of June 6, 1900 (31 Stat. 321) and that the Court specifically held that such rights were not compensable. This conclusion appears to be substantiated by the following quotation from the opinion:

> "* * * The Petitioner contends that Congress has sufficiently 'recognized' its possessory rights in the land in question so as to make its interest compensable. Petitioner points specifically to two statutes to sustain this contention. The first is sec. 8 of the Organic Act for Alaska of May 17, 1884, 23 Stat. 24. The second is sec. 27 of the act of June 6, 1900, which was to provide for a civil government for Alaska, 31 Stat. 321, 330. The Court of Appeals in the Miller case, supra, felt that these acts constituted recognition of Indian ownership. 159 F.(2d) 997, 1002-1003, 11 Alaska 285, 294-296.
>
> "We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent /compensable/ rights in the lands of Alaska occupied by them by permission of Congress, * * *."

If our understanding of the Tee-Hit-Ton case is correct, it can be seen that the conclusion in the second Miller case, that Indians may recover compensation based on actual occupancy recognized by the act of May 17, 1884, has been overruled and that such rights may be extinguished by the United States without the payment of compensation.

In your memorandum you also indicate that the occupancy rights of natives recognized by the acts of May 17, 1884, March 3, 1891, and June 6, 1900 cannot be extinguished without specific Congressional authority. With this position we agree; however, it appears that such specific statutory authority is provided by the acts authorizing the Federal agencies to acquire the right-of-way. These acts authorize the acquisition of land by condemnation, as does the Second War Powers Act of March 27, 1942, and if a condemnation proceeding were initiated pursuant to one of these acts to acquire a right-of-way over lands in which native occupancy rights were recognized by the foregoing mentioned acts of 1884, 1891, and 1900, it appears, from our understanding of the Tee-Hit-Ton case, that the interest could be acquired without liability on the part of the United States. It would therefore seem that a 44 L.D. appropriation made in accordance with such authority and embracing such lands would also be valid and appropriate.

We wish to express our appreciation for the opportunity to comment on the issues raised in your memorandum.

For the Regional Solicitor

Eugene F. Wiles

Eugene F. Wiles, Field Solicitor
Juneau Region

IN REPLY REFER TO:

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

5.05d-2
Juneau 010024

D-59-2078.10

INTERIOR DEPT.
APR 10 1959
SOLICITOR

APR 9 - 1959

Memorandum

To: Assistant Solicitor, Division of Public Lands

From: Director

Subject: Right-of-way reservation 18 in patent for trade and manufacturing site, certificate Juneau 010024

Reservation 18 is for an easement extending 150 feet from the center line of the Haines Highway in accordance with the act of August 1, 1956 (70 Stat. 898; 48 U.S.C. 420-420c). The first section of the act makes the lands subject to disposal, subject to easements.

Rights-of-way are reserved to the United States in Alaska patents for railroads, telegraph and telephone lines under the act of March 12, 1914 (38 Stat. 305; 48 U.S.C. secs. 301-302, 303-308), and for roads, roadways, highways, tramways, trails, bridges and appurtenant structures constructed or to be constructed by the United States or the State of Alaska under the act of July 24, 1947 (61 Stat. 418; 48 U.S.C. 321d). Except for pipelines mentioned in the act of August 1, 1956, highways and telephone lines are reserved in the patents by prior laws and the additional easement appears to be superfluous.

In view of the above, your opinion is requested as to whether or not the patent should contain the easement for highway purposes under the 1956 act. Should you decide the right-of-way is necessary in the patent, there is attached an Alaska patent Form 4-1212 with the additional reservation submitted for your approval.

Charles P. Mead

Acting Director

Attachments 2

RG 48, Sec Interior
E. 974, CCF, 1959-63
lands - R-O-W

FILE COPY
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SOL:DPL

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

"PEK"

In reply refer to:
I-59-2242.10

OCT - 9 1959

Lands - Rights of Ways

Memorandum

To: Director, Bureau of Land Management

From: Assistant Solicitor, Branch of Lands

Subject: Reservations in small tract patents for roads in Alaska

Your inquiries pertaining to the above subject ask whether subject patents should carry the provision for street and road purposes and for public utilities, as required by authority of 43 CFR 257.17(b), as well as a right-of-way reservation imposed by mandatory provisions of the act of July 24, 1947 (61 Stat. 418; 48 U. S. C., sec. 321(d), and in addition include a fifty foot easement on either side of the center line of the South Sitka Highway, in the case of Juneau 010549.

The act of July 24, 1947, supra, is a general authorization for a right-of-way for certain specified purposes, which reads, in part as follows:

> " * * * for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States * * *."

The provisions of the act make mandatory a general reservation for a right-of-way but do not provide for a definite width or determination, as for a certain distance measured from a highway center line, in establishing the boundaries of the right-of-way.

The regulation under 43 CFR 257.17(b), states as follows:

> "The classification order may provide for rights-of-way over each tract for street and road purposes and for public utilities. If the classification order does not so provide, the right-of-way will be 50 feet along the boundaries of the tract."

+ Lands - Rights of Ways - Small Tracts

+ Tpn - Fac - Highway

RG48, Sec Interior
E.974, CCF, 1959-63
Lands-R-o-W

Since the scope of the regulation is limited to rights-of-way along the boundaries of a tract, the regulation clearly does not refer to existing highways, but only to access roads as contemplated for the convenience of small tract owners. As a right-of-way contained in a patent is governed by the Classification Order, the order should contain a reservation for a particular right-of-way where one of a specific width is desired for access road purposes, in addition to the general reservation under the act of July 24, 1947.

It is apparent that there could be an overlapping of rights-of-way over a tract of land as where a right-of-way generally provided for under the act of 1947, supra, and specifically referred to in a reservation designating a certain width, could intersect or cross an access boundary road reserved under authority of 43 CFR 257.17(b).

Each authority has a separate and distinct application and should be included to authorize separate reservations in the Final Certificate and patent, as well as the Classification Order.

Since the plat of survey No. 3302 shows the center-line of the South Sitka highway as crossing Lot 14, the small tract involved, no separate reservation of this highway need be made as the plat of survey is as much a part of the patent as though incorporated therein.

The attached documentation, including the Certificate in file Juneau 010549 is returned for your files.

J. H. Tudor

J. H. Tudor
Assistant Solicitor
Branch of Lands

Attachments

Copy to: Secretary's Office
Docket Section
Mr. Katen
Division of Public Lands Reading File

PEKaten:pr:gb
10/5/59

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

In reply refer to:
D-59-2078.10

OCT 16 1959

Lands - Rights of Way

Memorandum

To: Director, Bureau of Land Management

From: Assistant Solicitor, Branch of Lands

Subject: Right-of-way reservation 18 in patent for trade and manufacturing site, Certificate Juneau 010024

Reference is made to your memorandum of April 9, 1959, requesting an opinion on the question of whether subject patent should contain reservation of an easement for highway purposes under the act of August 1, 1956 (70 Stat. 898; 48 U.S.C. 420-420c) in view of the fact that the patent contains a reservation for highway purposes under the act of July 24, 1947 (61 Stat. 418; 48 U.S.C. 321d). The Certificate attached, which accompanies the patent form, contains a reservation No. 14 for highways under the Act of July 24, 1947, supra, and in No. 18 an easement to be inserted as follows:

> "Patent to contain an easement extending 150' from the center line of the Haines Highway in accordance with the act of August 1, 1956 (70 Stat. 898; 48 U.S.C. 420-420c)."

The act of July 24, 1947, supra, is a general authority which provides for a reservation of a right-of-way for highways and appurtenant structures, on certain lands in Alaska, which reads, in part, as follows:

> "In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds by the United States hereafter conveying any lands to which it may have reacquired title in * * * not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent, or deed, a right-of-way thereon for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or of any State created out of the Territory of Alaska * * *." (Emphasis added.)

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Lands - R-o-W

The 1947 Act, supra, is mandatory in terms and requires that the reservation of the right-of-way shall be specifically expressed in all patents thereafter issued for lands in Alaska.

The Act of August 1, 1956, supra, is narrower in scope and relates to easements not necessarily limited to highway purposes, as is contemplated in the 1947 Act. The 1956 Act provides in part:

> "Upon the revocation of a withdrawal for highways * * * in Alaska, the lands involved shall be subject to disposal only under laws specified by the Secretary of the Interior, subject to easements as established by the Secretary * * * *." (Emphasis added).

In Public Land Order 1613 of April 7, 1958 (23 F.R. 2376), the Secretary established an easement extending 150 feet on each side of the center line of the Haines Highway for highway purposes, including appurtenant protective, scenic, and service areas, over and across certain lands, including the lands in question. The easement as established is separate and distinct from the reservation made by the 1947 Act, and should be separately expressed in the patent.

It is suggested that a semi-colon be placed after the citation of the 1914 Act as printed on the patent form and the following be added:

> " ; and also subject to the easement of 150 feet on each side of the center line of the Haines Highway, as established by Public Land Order 1613 (23 F.R. 2376), pursuant to the Act of August 1, 1956 (70 Stat. 898; 48 U.S.C. sec. 420-420c), for highway purposes, including appurtenant protective, scenic and service areas."

The final certificate should be amended and the patent issued consistent with this opinion. Your enclosures are attached.

J. H. Tudor

J. H. Tudor
Assistant Solicitor
Branch of Lands

Attachments

Copy to: Secretary's files - Docket Section - Mr. Katen
, DPL Reading file -- Branch of Lands
PEKaten: JHTudor: jtd 10/16/59

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Juneau Region
P. O. Box 1751
Juneau, Alaska

K-29-2101-10

INTERIOR DEPT.
NOV 16 1959
SOLICITOR

November 12, 1959

Air Mail

Memorandum

To: Associate Solicitor--Public Lands

From: Regional Solicitor, Juneau Region

Subject: Insertion of reservation of rights-of-way for roads, etc., in patents and deeds

Title 48 U.S.C. section 321d provides for a reservation of a right-of-way for roads, roadways, etc., to be inserted in patents issued for lands in Alaska. Question has arisen as to the necessity for this insertion after the passage of the "Alaska Omnibus Act" (P. L. 86-70, 86th Congress, H. R. 7120, June 25, 1959). Section 21(d) of this Act reads as follows:

"Effective July 1, 1959, the following provisions of law are repealed:

* *

"(7) The Act of June 30, 1932 (47 Stat. 446), as amended (48 U.S.C. 321(a) and the following)."

It is our interpretation that this provision of the Act repeals all of section 321 of Title 48. We would appreciate having your advice as to whether you concur in this interpretation.

C. E. Rogers, Jr.

C. E. Rogers, Jr.
Regional Solicitor

RG 48, Sec. Interior
E. 974, CCF, 1959-63
Lands - R-O-W

FILE COPY
Surname:

SOL:DPLM
In reply refer to:
K-59-2101.10
Wolph 12/22

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

"WRW

DEC 23 1959

DEC 23 1959

Memorandum

To: Regional Solicitor, Juneau Region

From: Associate Solicitor, Division of Public Lands

Subject: Insertion of reservations of rights-of-way for roads, roadways, etc., in patents or deeds of land in Alaska

Lands Rights of Way

In a memorandum of November 12, you indicate that a question has arisen as to the present authority for inserting in patents or deeds of land in Alaska the reservations of rights-of-way for roads, roadways, etc., that have in the past been inserted as provided by section 321(d) of Title 48 of the United States Code. You ask whether we concur with your interpretation that all of section 321 of Title 48 has been repealed by section 21(d)(7) of the Alaska Omnibus Act (73 Stat. 141).

Section 21(d)(7) of the Alaska Omnibus Act provides as follows:

"Effective July 1, 1959, the following provisions of law are repealed:

* * * * * * * * *

"(7) The act of June 30, 1932 (47 Stat. 446), as amended (48 U. S. C. 321(a) and the following)."

Apparently, the question is whether section 321(d) of Title 48 is considered to be an amendment of the act of June 30, 1932, since it was merely added thereto as a new section by an act of July 24, 1947 (61 Stat. 418). However, Congress in adding this new section expressly designated it as an amendment of the act of June 30, 1932. See 61 Stat. 418. Also, the House Committee on Interior and Insular Affairs, in compliance with clause 3 of rule XIII of the rules of the House of Representatives, indicated in its report on the Alaska Omnibus bill that its passage would repeal section 321(d) of Title 48 as well as sections 321(a), (b), and (c). See House Report No. 369, 86th Cong., 1st Sess., pages 37, 51-52.

Therefore, we agree with your interpretation that all of section 321 of Title 48 has been repealed by section 21(d)(7) of the Alaska Omnibus Act.

Copy to: Secretary's Office
Docket Section
Div. of Public Lands
Patents Section, BIM

WRWolph:dvw 12/22/59

C. R. Bradshaw

C. R. Bradshaw
Associate Solicitor
Division of Public Lands

RG48, Sec. Interior
E.974, CCF, 1959-63
Lands-R-o-W

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Surname:

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

In reply refer to: K-59-210 1.10

Wolph 3/8/60
Fillon 3-8-60

MAR - 9 1960

Lands - Rights of Way

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor, Division of Public Lands

Subject: Insertion of reservations of rights-of-way for roads, roadways, etc., in patents or deeds of land in Alaska.

Attached is a copy of our memorandum of December 23, 1959, to the Regional Solicitor, Juneau Region, in which we concurred with the Regional Solicitor's interpretation that all of section 321 of Title 48 of the United States Code has been repealed by section 21(d)(7) of the Alaska Omnibus Act (73 Stat. 141).

The land offices in Alaska should be advised of this ruling as well as the patents section of the Bureau. Also the reservation #14 of rights-of-way for roads, roadways, etc. formerly authorized by section 321(d) of Title 48 should be deleted from the final certificate forms.

C. R. Bradshaw

C.R.Bradshaw
Associate Solicitor
Division of Public Lands

Attachment

WRWolph/pr
3/8/60

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

RG 48, Sec, Interior
E. 974, CCF, 1959-63
Lands - R-O-W

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Juneau Region
Anchorage Field Office
P.O. Box 166
Anchorage, Alaska

NOTED
J.J.McH.

NOTED
C.B.C.

NOTED
J.H.T

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INTERIOR DEPT.
MAR 17 1960
SOLICITOR

March 15, 1960

LANDS-
R/s of Way

Memorandum

To: Associate Solicitor, Division of Public Lands

From: Acting Regional Solicitor, Juneau Region

Subject: Opinions of District Court, Third Division, Alaska concerning rights-of-way

Attached hereto for your information are copies of two opinions which were recently issued by the Judge of the U.S. Court for the District of Alaska, Third Division.

Eugene F. Wiles
Eugene F. Wiles
Acting Regional Solicitor

Attachments

Alaska District Court

RG48, Sec. Interior
E.974, CCF, 1959-63
Lands-R-O-W

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

THIRD DIVISION

DANIEL WEBSTER DENTON,

Plaintiff,

-vs-

WILLIAM L. HAMERLY,

Defendant.

MEMORANDUM OPINION

Civil No. A-15,394

John Savage, of Robison and McCaskey, Attorney for Plaintiff.
David H. Thorsness, of Hughes and Thorsness, Attorney for Defendant.

This matter was tried before the Court without a jury and is an action to have a certain roadway across defendant's property declared a public highway within the meaning of Title 43 U. S. C. A. 932, which provides as follows:

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

Also, for actual damages in the sum of $400.00, damages for ". . . mental anguish resulting from the wrongful assault with a dangerous weapon in the amount of Five Hundred ($500.00) Dollars," and for punitive damages in the sum of $800.00.

Although the federal statute appears to have created an existing right-of-way for highway purposes over all public lands in existence at the time it was passed (1866), the courts have held that this act is merely an offer by the United States to dedicate any unreserved public lands for the construction of highways, and that the offer must be accepted to become effective. Lovelace vs. Nightower, 168 P. 2d. 864 (N. M. 1946). The courts have also held that the acceptance of the offer of dedication becomes effective upon construction of a highway or the establishment thereof by public users, Bishop vs. Hawley, 238 Pac. 284 (Wyo. 1925), or by some positive action of the proper authorities manifesting an intent to accept the offer, Costain vs. Turner County, S. D., 36 N. W. 2d 382 (S. D. 1949).

The courts have also held that the period in which the offer of the United States to dedicate the land for highway purposes in accordance with this act ended when a patent covering the land in question was issued, Ball vs. Stephens, 158 P. 2d 207 (Cal. 1945), and that the effective period for acceptance of the dedication also ended when the lands were entered for homestead purposes. Leach vs. Manhart, 77 P. 2d 652 (Colo. 1938); Korf vs. Itten, 169 Pac. 148 (Colo. 1917); and P. M. Ry. Co. vs. Gordon, 2 N. W. 648 (Mich. 1879); Atchison Ry. Co. vs. Richter, 148 Pac. 478 (N. M. 1915).

Although under the provisions of this act a public highway cannot be created over land upon which entry has been made during the period of such entry, 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. This follows from the intention of Congress in passing this act, acceptance by use being the applicable criterion. Thus, if the public had obtained an easement as against an entryman, when his entry was closed out the right of the public would continue.

The testimony discloses that numerous applicants had filed for homesteads on portions of the land in question, and while we do not have any documentary evidence, the testimony in summation, but for the reject of the application for the second homestead entry of the defendant, marked Plaintiff's Exhibit No. 4, is determined from the testimony as follows:

That one Murphy properly filed and entered the land in question in 1938, and that after his death in 1939, that entry was closed out by the Bureau of Land Management in June 1942; that the land lay vacant from that time until August of 1942 when one John King properly filed and entered; that the parties have stipulated that, although King operated a pig farm upon the property until 1946, no title to the land was ever acquired by him;

That on March 3d, 1948, the defendant, William L. Hamerly, filed and entered as a homestead entryman. As indicated by Plaintiff's Exhibit 4, a decision of the local Anchorage Land Office, dated April 20, 1956, the Bureau of Land Management denied and closed out this first Hamerly entry in November 1955 for failure to meet the statutory requirement for cultivation. As permitted by the act of September 5, 1914, Hamerly made application for a second homestead entry on January 11, 1956. This second entry was denied and closed out by the decision of April 20, 1956. The period for appeal from that decision expired on May 23d of that year with no action having been taken by Hamerly to appeal the Land Office decision. In June of the same year, Hamerly filed a homesite entry to protect the house which he had built on the property, and some two years later, on April 1, 1958, he was issued a homesite patent for the five (5) acres surrounding his house. It is this patent under which he presently holds.

Thus, from 1928 until Hamerly's homesite patent was issued in 1958, there were four (4) gaps in the possession of the property in question. They were:

1. From June to August 1942;
2. From sometime in 1946 until March 3, 1948;
3. From November 1955 until January 1956;
4. From April 1956 until June of the same year.

With the consent of the parties, the land and premises here in question were viewed by the Court.

The evidence and exhibits disclose that Nash Road turns off to the right of the main Seward Highway proceeding toward Anchorage, Alaska from Seward, Alaska, crosses the railroad track, meanders to a stream known as Salmon Creek, and then veers to the right going on to the other side of Resurrection Bay, and is, at the present time, a widely traveled and used road built out of gravel and materials that have been hauled in. The homesite of the defendant Hamerly, as

evidenced by Plaintiff's Exhibit 3, consists of about five (5) acres, more or less, and is reached by the road in controversy which turns off Nash Road to the left after Nash Road crosses Salmon Creek. Approximately 660 feet beyond the road here in controversy, there is a small mountainous ridge with rocks, vegetation, and spruce trees interspersed by protruding rocks. The ridge and natural topography of the area preclude usage of that portion of the land as a road. Therefore, the road heretofore used by the applicants and others is a natural route of egress and ingress to the area which extends back up into the mountains for some five or six miles.

Many witnesses were called on the part of the plaintiff and a review of some of these witnesses discloses that the road here in question was used by many people over the years for sundry reasons and purposes. The road at the time the Court inspected the premises revealed considerable use by heavy equipment so that the tracks are indelibly determined upon the ground, as evidenced by Defendant's Exhibits B5, B8, B9 and B21. The witness Leshner, who was born in Seward in 1920, testified that he bicycled up that road in the years 1933 to 1936, later picked blueberries and drove a Model-T up it. He also saw others use the road and testified that it had been used as a "cat" road. Jack Werner, who had been in Seward since 1940, used the road in 1941 and went over a portion of the property in that area with intent to homestead the same. He further testified that he frequently had seen people upon the property. Fred Kielcheski, who was a former fire chief in the City of Seward and had lived there for 35 years, said he first went up the road to visit Murphy in 1929 and testified that the road was well used, and that in his opinion, it was a "wagon" type of road. He also testified that he saw trucks use it daily during World War II in 1943, at which time a piggery had been established on property beyond that owned by the defendant. One Wesley Martin, who lived in Seward from 1940 to 1944, testified that he once went to the piggery to buy a horse and at that time saw no fence or gate at the mouth of the road where it turns off from Nash Road, and that

the road up to the piggery was well used and defined. One Kenneth Mee, who lived in Seward in 1952, said that he went out in the fall of 1953 and 1954 and went up the "cat" road until he came upon the pig pen. One Scott MacCleary said he used the road to pick berries and saw no gate or fence at the mouth of the road. David Fleming, who lived in Seward in 1936, said he hunted up in that area before the piggery was ever established and that there were many roads leading off from Nash Road, among which was this road in question, and he and others used it to haul down to the beach poles upon which their boats were placed during the winter time. He likewise saw no gate and said that the trail road was about in the same condition then as Nash Road. Another, Martin Goressen, who lived in Seward from 1941 to 1944 and then returned in 1947, testified that the road had been used by him during these years and in 1954 he hunted in his pick-up beyond the piggery at which time he got stuck.

I find that no applicant objected to the use of the road in question by the public except the defendant after he filed for a homesite in 1956. I further find that there never was a gate precluding the public from entering or leaving the premises here in question until after the defendant filed for his homesite, which was after June 1956, except for a gate that was used by King at the time he was in possession of the land after he had constructed his piggery. Therefore, the public has been free to use the road without barrier since prior to 1929 when Murphy made his first entry and application.

I find that there is substantial evidence that this road was used by the public of such a general type and nature as to establish a public highway within the meaning of Title 43 U. S. C. A. 932. Therefore, I find that the defendant, at the time he filed upon this property in question for his homesite, took it subject to the public use established prior to that time. I further find, as specifically evidenced by Defendant's Exhibits B6, B7, B8 and B9, that this highway was established at least 75 feet toward the stream from the closest corner of the defendant's house.

The plaintiff testified that it had cost him some $1,000.00 to construct a circuitous road to get into his homestead from the rear. I find, however, that he has not been damaged to that extent for the reason that this circuitous road is of benefit to him in the event of high water, which inundates the road in front of the defendant's home periodically, as evidenced by Defendant's Exhibits B14, B15 and B16. I therefore find that the plaintiff has been damaged in the sum of $250.00 as the result of the unlawful actions of the defendant. I further find that the plaintiff is entitled to the sum of $100.00 for the wrongful assault made by the defendant upon the plaintiff with a dangerous weapon. I further find that the plaintiff is entitled to punitive damages in the sum of $1.00 and that the plaintiff is entitled to attorney's fees in the sum of $250.00 and costs which are to be determined by the Clerk of the Court in conformance with the practice of the Court.

Because of the imminency of the transition of this Court's jurisdiction to the new state and federal courts, this opinion shall constitute Findings of Fact and Conclusions of Law, and counsel for the plaintiff is hereby directed to submit judgment accordingly.

DATED at Anchorage, Alaska, this _____ day of February 1960.

J. L. McCarrey, Jr.
U. S. District Judge

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

THIRD DIVISION

EARL D. HILLSTRAND and
MARY JANE HILLSTRAND,

Plaintiff,

v.

STATE OF ALASKA: DEPARTMENT OF PUBLIC WORKS, STATE OF ALASKA; RICHARD DOWNING, COMMISSIONER OF THE DEPARTMENT OF PUBLIC WORKS, STATE OF ALASKA; LEE HUBBARD, DIRECTOR OF HIGHWAYS, DEPARTMENT OF PUBLIC WORKS, STATE OF ALASKA; M. B. CONTRACTING CO.

Defendants.

CIVIL NO. A-16205

CONSOLIDATED

JOHN C. ZAK,

Plaintiff,

v.

UNITED STATES OF AMERICA; THE BUREAU OF PUBLIC ROADS OF THE U. S. DEPARTMENT OF COMMERCE OF THE UNITED STATES OF AMERICA; E. H. SWICK, Regional Director of the Bureau of Public Roads of the United States Department of Commerce; STATE OF ALASKA; DEPARTMENT OF WORKS OF THE STATE OF ALASKA; RICHARD DOWNING, Commissioner of Public Works of the State of Alaska,

Defendants.

CIVIL NO. A-16247

O P I N I O N

Plummer and Delaney, Anchorage, Alaska, for plaintiff Earl D. Hillstrand and Mary Jane Hillstrand.
Irvine and Clark Anchorage, Alaska, for plaintiff John C. Zak
Warren C. Colver, Assistant Attorney General, Anchorage, Alaska, for defendant State of Alaska.
Merrell L Anderson, Assistant United States Attorney, Anchorage, Alaska, for defendant United States of America.

These two cases have been consolidated for the purpose of a jurisdictional determination on a question of law common to both. The State of Alaska has filed a motion for summary judgment, whereby they request the Court to dismiss the claims for relief filed by the plaintiffs for the reason that 48 U.S.C. 321 (d) gives the State the right to enter upon the property in question for the purpose of changing present existing roadways and making improvements thereon, without the necessity of paying compensation to the landowners.

The facts in this case are that Plaintiff Hillstrand pre-

Hillstrand is the owner of record of a certain piece of property more particularly described as:

> Northwest One-quarter of the Southwest One-quarter of Section Fourteen, Township Six South, Range Fourteen West, Seward Meridian,

in the Homer Recording Precinct. Plaintiff Zak is presently the owner of the following described property:

> From the one-quarter ($\frac{1}{4}$) section corner common to Section One (1) and Section Twelve (12), Township Seventeen North (T17N), Range Two West (R2W), Seward Meridian, thence South 305 feet to the point of beginning; thence South 182.7 feet to Wasilla-Big Lake Road right-of-way; thence South 78°31' West 673.2 feet along Wasilla-Big Lake Road right-of-way; thence North a distance of 316.7 feet to South edge of Zak Lake; thence Easterly along shore of Lake Zak 660 feet to point of beginning. Said tract contains 3.8 acres.

Defendant State of Alaska, purporting to act under the authority of Act of Congress of July 24, 1947, 61 Stat. 418; 48 U.S.C. 321(d); 41-1 4 ACLA 1949, proposes to enter upon plaintiff Hillstrand's land and thereon relocate a certain highway, known as the Sterling Highway, and in so doing contends that it needs only to compensate the owner of the property for "the value of crops and for adjustment of improvements located on the right-of way area." See letter dated June 1, 1958 from E H. Swick, Regional Engineer, to Earl A. Hillstrand. Purporting to act under the same authority, the State of Alaska, in improving the "Big Lake-Wasilla Road", has entered upon plaintiff Zak's land and "widened and improved the roadway, including necessary cutting and filling for the roadbed," see Memorandum of Facts submitted by the Attorney General Dec. 3, 1959, and in so doing has allegedly dug and removed earth from Zak's property to his damage. In both suits the plaintiffs pray for damages for the injury already done, and in No. A 16 205, as the relocation is not yet completed, the plaintiff asks for an order restraining the State from proceeding further with the work already commenced until such time as appropriate condemnation proceedings, as provided for in Sections 57-7-1 et. seq., ACLA 1949, are instituted.

The following excerpts from a letter to the Speaker of the House of Representatives from Oscar Chapman, Acting Secretary of the Interior, dated January 13, 1947, and included in the "Explanation of the Bill," printed in U.S. Code Cong. Serv., 1st Session (1947) 1352, 1353, set out clearly what the intent of Congress in enacting 48 U.S.C. 321(d) was:

"The purpose of the enclosed draft is to provide for the reservation by the United States in patents or deeds to land in Alaska of rights-of-way for trails, roads, highways, tramways, bridges and appurtenant structures constructed or to be constructed by the authority of the United States or of any future State created in Alaska. Such legislation is desirable to facilitate the work of the Alaska Public Road Commission.

"The greater part of the area on which the operations of the Alaska Road Commission are conducted is public domain land outside of national forests, and the location of rights-of-way on such land presents no serious problem. However, for the proper location of roads and in the interest of public service, it is necessary in some instances to cross lands to which title has passed from the United States. These instances are becoming more numerous as the population of the Territory increases, and obtaining rights-of-way over such lands has in a number of cases presented difficulties requiring court action and the expenditure of Federal funds.

"The proposed legislation is similar to the provision of the act of August 30, 1890 (26 Stat. 391, 43 U.S.C. sec. 945), which reserves rights-of-way for ditches and canals constructed by the authority of the United States, west of the one hundredth meridian. A similar provision is also found in the act of March 12, 1914 (38 Stat. 305, 48 U.S.C. sec. 305), by which rights-of-way for railroads were reserved to the United States in all patents for lands thereafter taken up in the Territory of Alaska. The proposed bill would be applicable to both public domain and acquired lands of the United States. The proposed bill, moreover, would authorize the head of the agency utilizing such reserved right-of-way to make payment for the full value of the crops and improvements thereon."

It is clear that Congress, in 1947, was concerned that the same persons who were acquiring land under the liberal provisions of the Homestead Laws would be in a position to demand compensation from the Government if, at a later date, the Government should deem it necessary to use a portion of the same land for highway purposes. As the future position of highways over the public lands could not be predicted with any accuracy, Congress rather logically concluded that it would insert an appropriate reservation in every patent thereafter issued to Alaska homesteaders. The magnitude of the cloud which this bit of legislation placed upon titles to land in Alaska was appreciated, however, by the 86th Congress and, therefore, 48 U.S.C. Sec. 321(d) was repealed in the Alaska Omnibus Act, 73 Stat. 141 (Sec. 21(d)(7)).

As noted in the Chapman letter, parts of which have been set out supra, the reservation in 48 U.S.C. 321(d) was similar to two prior Acts of Congress, the Act of August 30, 1890, reserving rights-of-way for ditches and canals and the Act of March 12, 1914, reserving rights-of-way for railroads.

There appears to be very little case law interpreting any of these three statutes, the only case directly in point being

Ide v. United States, 263 U.S. 497. That case involved the right of the United States to straighten, widen, and deepen a ravine to be used as a ditch for collecting seepage from an irrigation project. The owner of the land challenged the right of the United States to make the changes in the ravine, contending that the changes would involve trespass on his land. In applying the reservation in the Act of August 30, 1890 to the ravine in question, the Supreme Court of the United States had occasion to discuss the history and the intent of the act. At pages 502-503 of the opinion it is said that:

> "At an early stage of the investigations, Congress became solicitous lest continued disposal of lands in that region under the land laws might render it difficult and costly to obtain necessary rights-of-way for canals and ditches when the work was undertaken. To avoid such embarrassment, Congress at first withdrew great bodies of land from disposal under the land laws . . . That action proved unsatisfactory and, by the Act of August 30, 1890, Congress repealed the withdrawal, restored the lands to disposal under the land laws and gave the direction that in all patents there should be a reservation of rights-of-way, etc. Of course the direction must be interpreted in the light of circumstances which prompted it, and when this is done, the conclusion is unavoidable that the direction is intended to include canals and ditches constructed after patent issues, quite as much as those constructed before. All courts in which this question has arisen have taken this view. Green v. Willhite, 160 Fed. 755; United States v. Van Horn, 197 Fed. 611; Green v. Willhite, 14 Idaho 238, 93 Pac. 971.
>
> "A contention is made that the statute and the reservation in the patents are confined to ditches constructed while the State owned the land, but it is not claimed that the Supreme Court of the State has so decided, and as we read the statute and reservation, they refute the contention . . . . We conclude that the plaintiff has a lawfully reserved right-of-way over the tracts of the defendants for such ditches as may be needed to effect the irrigation of the lands which the project is intended to reclaim, and that the defendants were appraised of this right by the patents which passed the tracts to them. In short, they received and hold the title subject to the existence of that right.
>
> "Assuming that there is the ravine crossing these tracts, no natural stream or flow of water is susceptible of effective appropriation. The plaintiff undoubtedly has the right to make any needed changes in the ravine and use it as a ditch in irrigating project lands."

Defendant State of Alaska, in the instant case, argues that Ide v. United States, supra, is clear authority for its acts upon the Zak and Hillstrand properties. Thus, at page 9 of the State's "Further Memorandum of Points and Authorities in Support of Motion for Summary Judgment," in the Hillstrand case file, the State argues, after quoting from the Ide opinion, "it appears evident that if property can be utilized for a change of a ravine after the issuance of patent, under a similar reservation of a right-of-way, the State

could make any need changes in the width or site of a right-of-way crossing land subject to such a reservation." I am unable to agree with the State that the Ide case is authority for making more than one election under the statutory reservations. Indeed, I find no case, nor has the State cited any, in which the Sovreign, after once exercising its right under any of the reservations found in the three Acts of Congress, has been permitted to avail itself a second time of such reservations.

Finding no other helpful cases construing the Federal reservations, we must turn to the law of private easements. "Blanket" or "floating" easements are relatively common phenomena; however, their interpretation appears to have been controlled by that policy of the law which favors making all encumbrances affecting real property as specific and definite as possible so that the interests of the various owners or claimants of the land can be accurately ascertained. Thus, in In Re Oakleaf Coal Company, 225 Fed. 126, 129 (D. C. Ala. 1915), involving a deed reserving to the grantor the right "to build railroads through said land in order to reach other lands beyond and above," the Court said:

> "The right-of-way is not defined in the grant but has been actually located on the ground, with the acquiescence of the respondent, and this as effectually serves to define the grant as would a description in the deed. The grant, so defined, ceases to be uncertain, and no use of the right-of-way, other than one that is reasonable and necessary to develop the lands covered by the reservation, would be permitted."

This rule is fully supported by the law. See particularly Youngstown Steel Products Company v. Los Angeles, 240 P.2nd 977 (Calif. 1952) ("Once the location of an easement has been firmly established, whether by express terms of the grant or by use and acquiescence, it cannot be substantially changed without the consent of both parties, and the grantor has no right either to hinder the grantee in his use of the way or to compel him to accept another location, even though a new location may be just as convenient." p. 979); Capital Electric Power Association v. Hinson, 84 So. 2nd 409, (Miss. 1956) ("The general rule is that where the grant is in general terms, the exercise of the right, with the acquiescence of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed . . . This rule . . . applies to the course, manner, extent, and length." p. 413); Woods Irrigation Company v. Klein,

233 F.2nd 48 (Calif. 1951) ("Therefore, the ditches necessary . . . once located, cannot be relocated. Any other rule would make the burden imposed by the easement a matter of perpetual speculation and subject the servient owners to continual uncertainty as to their rights to the use and enjoyment of their land." p. 50).

It, therefore, appears that there is little or no authority to support the State's position in its request for summary judgment, aside from some general statements of law to the effect that reservations in deeds are to be construed most strongly against the grantee when the grantor is a sovreign, Shively v. Bowlby, 152 U.S. 1, 10 (1894).

Counsel for the State has argued that it was the legislative intent to permit the State or the Federal Government to move quickly in establishing new roads and to do so without incurring the expenses which the law requires in ordinary condemnation proceedings. That is, that the statute promotes the greatest good for the greatest number.

Our Constitution, while considering the welfare of all individuals generally, nevertheless provides that there are certain inalienable rights which must be protected and it has been the protection of these small individual rights which has distinguished this nation over all other nations.

While I agree that the original reservation and election provided for in 48 U.S.C. 321(d) is without limitation as to initial choice on the part of either the Federal Government or the State of Alaska, I find that, once the right-of-way has been selected and defined, later improvements, necessitating the utilization of land upon which the road is not already located, can only be accomplished pursuant to the condemnation and compensation provisions of Section 57-7-1, et seq. ACLA 1949.

As Ide v. United States, supra, at 502, makes clear that the wording of the 1890 statute covered rights-of-way already established at the time of its passage, I so find as to the 1947 statute, and, therefore, in the light of what already has been set out supra, I hereby deny the State's motion for summary judgment in No. A-16,205 for the reason that the State's predecessor, the United States, had already established a road across what is now the Hillstrand property at the time the 1947 reservation was authorized.

Turning to the Zak case, the file discloses that the Big-Lake-Wasilla Road was constructed in 1949, at which time the land over which it ran was still part of the public domain. See "Memorandum of Fact", filed by the Attorney General in case file No. A-16,247, December 3, 1959. Interpreting the construction at that time as constituting the single election to which the State is entitled, I find that, once Zak had filed his Homestead application any changes by the State to the right-of-way already selected and defined would likewise have to be condemned and compensated for under the provisions of 57-7-1, et. seq. ACLA 1949. Therefore, I hereby deny the motion for summary judgment on the part of the State of Alaska in case No. A-16,247.

The decision of other questions of law, including that of whether in fact plaintiff Hillstrand's predecessor in title, Meredith J. Steele, had "taken up, entered or located" upon the property in question before the date of the 1947 Act, not being essential to this opinion, is left for later determination.

DATED at Anchorage, Alaska this 19th day of February, 1960.

J. L. McCarrey, Jr.
U. S. District Judge

USE ANCHORAGE ADDRESS FOR:

DIVISION OF AVIATION
GLOVER BLDG., ROOM 202
ANCHORAGE, ALASKA

DIVISION OF AIR TERMINALS
P.O. BOX 6-243
ANCHORAGE, ALASKA

STATE OF ALASKA

DEPARTMENT OF PUBLIC WORKS

P.O. BOX 1361
JUNEAU, ALASKA

RICHARD A. DOWNING - COMMISSIONER

USE JUNEAU ADDRESS FOR:

DIVISION OF HIGHWAYS

DIVISION OF BUILDINGS

DIVISION OF COMMUNICATIONS

DIVISION OF WATER & HARBORS

DIVISION OF PROPERTY & SUPPLY

DIVISION OF EQUIPMENT OPERATION

SOUTHEASTERN REGION

eply to: P. O. Box 1841
Juneau, Alaska

February 16, 1961

2-06-00

RE: Senator Gruening

The Honorable Ernest Gruening
United States Senate
Washington 25, D. C.

Attention: Mr. George Sundborg

Dear Senator Gruening:

Reference: S-0512(1), O'Malley Road

I have your letter of February 8 on the complaint of Mrs. Lars M. Nelson relative to right of way widths on Alaska Project S-0512(1), O'Malley Road. This lady is quite mistaken and uninformed on this entire matter and I am happy to have the opportunity to present the facts of this case.

The O'Malley Road project is one that was conceived and programmed by the Bureau of Public Roads in May, 1959 well in advance of the existence of our Division of Highways. They also had substantially completed the design of the project and had requested our newly formed Right of Way Section to acquire the necessary land. During their period of organization our Highway Division found the recommended right of way width appeared somewhat excessive in view of the property damage involved. As witnessed by the attached copy of a letter from Mr. Roser to the Bureau of Public Roads, a request was made to reduce the right of way width to 150 feet except at a few points where more was needed to accommodate construction slopes. Please also note that at some places Mr. Roser requested less than 150 feet in order to miss improvements and further reduce property damage. The Bureau subsequently approved this request and we have endeavored to acquire the right of way on that basis.

Mrs. Nelson's statement that more land is being taken than is needed is, therefore, quite erroneous. Actually it appears to me that the Bureau of Public Roads and our highway people have gone out of their way to be fair and equitable to all property owners along O'Malley Road. As Mrs. Nelson pointed out, this road traverses rolling terrain and I am sure both the Federal and State engineers had some misgivings on future improvement of that road should traffic volumes ever become large enough to warrant four lanes. Such is a distinct possibility should the Anchorage area continue to grow and develop.

It is realized many property owners may be adversely affected under the terms of the 1947 Homestead Law wherein highway rights of way were reserved from patents. The matter of a second taking under the provisions of this law are now in the courts for a legal determination. Until such is rendered our people have no choice but to work under its provisions.

Even with this, however, improvements affected by the project will be purchased or resultant damage paid when it is appropriate. I believe you should know this particular project follows an existing section line road, therefore owners are not having their property chopped up in small severed tracts. They are merely losing a narrow strip adjacent to an existing section line road and in all probability this does not constitute a second taking on the part of the State. We believe the proposed improvement will very shortly serve to greatly enhance the value of the property the same as it has in other areas of the United States.

I am taking the liberty of sending a copy of this letter to Mrs. Nelson as I am sure she is unaware of the efforts which have been put forth to alleviate damage or to hold our taking to a minimum.

If I can be of further service in this regard, please advise.

Very truly yours,

RICHARD A. DOWNING
Commissioner

Attachment/1 (Ltr. Roser 4/7/60)

cc: William J. Niemi
Bureau of Public Roads

T. D. Sherard
Division of Highways

Mrs. Lars M. Nelson
Box 4067
Spenard, Alaska

February 21, 1961

Mrs. Lars M. Nelson
P. O. Box 4067
Spenard, Alaska

Dear Mrs. Nelson:

This refers to your letter of February 16th replying to a letter sent you February 8th by my administrative assistant, George Sundborg, while I was away from Washington on official business of the Senate.

In the same mail which brought your new letter I received one from Richard A. Downing, Commissioner of the Department of Public Works of the State of Alaska. His letter also was dated February 16th. I notice that a copy was sent to you.

I hope this may explain to your satisfaction the State's policy on the taking of land for a right-of-way along O'Malley Road. If it does not and if you feel that there might still be the need of federal legislation in this connection, I would be pleased to hear from you again.

Please be assured that I am very much interested in seeing that citizens of our state are treated with justice by government officials on all levels.

Cordially yours,

ERNEST GRUENING

RG 48, Sec. Interior
E. 974, CCF, 1959-63
Lands - R-O-W