OPTIONAL FORM NO. 10

UNITED STATES GOVERNMENT -Forest Service
Juneau, Alaska

Memorandum

5460

TO : M. B. Bruce, Assistant Regional Forester DATE: June 19, 1961

FROM : S. R. Johnson, Section Head, Land and Uses

SUBJECT: Rights-of-Way Acquired

In regard to your request to check all possibilities for needed rights-of-ways, especially in connection with State selections, I have done the following:

1. Reviewed the transportation plan and listed all possible needs by forests. Requested forest supervisors to list their needs by memorandum of May 9. All forests have replied as follows:

Chugach - Only needs are in the Portage area. Surveys are being made for determination of best routes. Will be completed this summer, which should be soon enough to have recorded. Possibly under 44 LD 513.

South Tongass - Listed only Whipple Creek #5152, which we will attempt to have entered under 44 LD 513.

North Tongass - Listed two Forest Highways, thirteen Forest Development Roads and eight Trails, as shown on the attached list. Some of these are existing and may be handled under 44 LD 513, or may cross private (two trails), two to three may be either all within national forest or all within Public Domain (Dewey Lake Trail). Six items are within areas that are not believed will be selected for some time.

As soon as I have reviewed these I will take the necessary steps to have rights-of-ways secured or recorded.

Attachment

S R Johnson

5460 February 8, 1961

Mr. Phil R. Holdsworth, Commissioner
Department of Natural Resources
Box 1391
Juneau, Alaska

Dear Mr. Holdsworth:

We have reviewed the suggestion in your letter of December 9, concerning right-of-way permits with a great deal of interest. Inasmuch as we have had informal discussions on this matter and you were out of town for a considerable period, we have delayed our answer. Also, there was the matter of securing copies of the Right-of-Way Permit form DL-72 which we received a few days ago. We hope the delay has not inconvenienced you.

Your proposals appear logical and should provide a simplified system of applying for and securing needed rights-of-way.

However, before discussing this further we would like to submit the proposed Right-of-Way Application, form DL-75 as well as Right-of-Way Permit, form DL-72 to our Regional Attorney for review. After we have his comments or suggestions we will contact you for further discussion on this matter.

Sincerely yours,

P. D. HANSON
Regional Forester

By M. E. BRUCE

SRJohnson:mn

61

FILE COPY

Bruce Thomson

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
BOX 1391
JUNEAU

December 9, 1960

Mr. P. D. Hansen
Regional Forester
U. S. Forest Service
Department of Agriculture
Box 1631
Juneau, Alaska

Dear Sir:

Recently the problem of your agency securing rights of way across public domain lands reserved by PLO 842 has been called to our attention. Since these lands have been eliminated from the Tongass National Forest, generally in a strip along the coast, it has created in these areas a problem of access. We realize that in order to properly manage timber sales in areas lying back of this strip, suitable road rights of way must be protected.

We would suggest that the State of Alaska through its selection program acquire title to the lands included within PLO 842. As the agency that will succeed the Bureau of Land Management in the administration of these lands, we wish to cooperate with your agency to insure the necessary access to the National Forest. We would, therefore, suggest that you submit to the Division of Lands applications for rights of way you anticipate needing, utilizing form DL-75, copy of which is attached. The Division of Lands would then make note of these, and upon receiving title to the land involved would note their land office records accordingly. Thus without waiting, action can be initiated to insure the rights of way you desire prior to any land disposals by the State.

If you are in agreement with this procedure, we would be glad to discuss the matter with you in more detail and will furnish you with the necessary supply of forms.

Sincerely yours,

Phil R. Holdsworth

Phil R. Holdsworth
Commissioner

PRH'cm
enc.
cc - Division of Lands

RECEIVED
DEC 12 1960
FOREST SERVICE
JUNEAU, ALASKA
RESOURCE MGMNT

Memorandum

U. S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
WASHINGTON 25, D. C.

5-10

File No. 5460

To : Regional Foresters

Date: June 27, 1960

From : A. G. Lindh, Director, Division of Land Adjustments

Subject: Rights-of-Way Acquired. General Counsel's Opinion No. 88

Reference is made to our June 9, attached 1960 memorandum designated Rights-of-Way Acquired.

In the application of General Counsel's Opinion No. 88 to right-of-way cases, please observe the following rules:

1. Hereafter deeds containing the type of reservation in question should not be accepted.

2. No action will be required where the deed conveying the right-of-way was recorded and the title to the easement was approved by the Attorney General or by the regional attorney or attorney in charge, as the particular case required, prior to date of receipt of this memorandum.

3. Where the deed conveying the right-of-way has been recorded, or accepted for record by the Forest Service, the case may be submitted for title approval by the Attorney General or for approval by the OGC field office, as the particular case may require, provided (1) a correction deed in acceptable form is executed and recorded, or (2) the grantor is advised in writing that the reservation is considered invalid, or (3) the title folder is amended to show that the grantor's use of the road under the purported reservation in the deed to the United States will not exceed the use of said road allowed grantor as an adjacent landowner and member of the traveling public.

If you have any questions we will be glad to have them before the material is placed in the Handbook.

A G Lindh

9 copies rec'd
Copies sent: Engineering (1)
6/28/60 Chugach (2)
N. Tongass (2)
S. (2)

Memorandum

U. S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
WASHINGTON 25, D. C.

File No. 5460

To : Regional Foresters

Date: June 27, 1960

From : A. G. Lindh, Director, Division of Land Adjustments

Subject: Rights-of-Way Acquired. General Counsel's Opinion No. 88

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If you have any questions we will be glad to have them before the material is placed in the Handbook.

A G Lindh

4072

Memorandum

U. S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

WASHINGTON, D. C.

R-10
Harrison

File No. 5460

To : Regional Foresters

Date: June 9, 1960

From : A. G. Lindh, Director, Division of Land Adjustments

Subject: Rights-of-Way Acquired

I have had some discussion with Regions 1 and 6 regarding Opinion 88 of the Office of the General Counsel. It has been distributed to the field offices of General Counsel. It has not heretofore been distributed to the regions. Since it is of considerable importance in our rights-of-way acquisition program, copies are enclosed for your use.

You may give a copy of the opinion to the representative of any landowner who wants to make a reservation now determined to be invalid or to any other who may want to have included such a reservation in easements in the future.

While the opinion makes it clear that a reservation by a grantor to use a road to be constructed on an easement solely at the expense of the Government is invalid, the opinion goes no further.

As a possible substitute for reserving language, it is possible to design language which in effect agrees between grantor and grantee that the grantor can use the Government road in the future, provided it meets the terms and conditions of use that would be imposed upon any other hauler of non-Federal products. Some such language as the following would give him such record rights:

> "The Grantor, its successors and assigns, shall, to the extent permitted by Federal law and regulations, have the right to use, maintain, patrol and reconstruct said road in such a manner as not unreasonably to interfere with the use of said road by the Government or its authorized users or cause substantial injury thereto; provided, that during periods when Grantor, its successors or assigns, uses said road, its use will be subject to such reasonable charges, terms and regulations as the Government may impose upon or require of haulers of forest or other products including performance of its share of road maintenance and resurfacing on the portion so used, or contributions to the cost of said maintenance and resurfacing, so that its proportionate share (based on the ratio that its hauling in MBF or other product units bears to the total MBF or other products hauled during said period of use) of the cost of maintaining and resurfacing the road to the extent necessary to restore the road to the condition existing at the start of the use will be paid or performed."

Copies made and sent: Engineering
6/17/60 BJB
Chugach
N. Tongass
S. Tongass

3975

(over)

If you develop a modification or variation of this language which you think better meets the needs in an individual case, it is requested that you have the language reviewed and approved by this office in advance of execution of an easement including it.

Attachment

3975

UNITED STATES DEPARTMENT OF AGRICULTURE
Office of the General Counsel
Washington 25, D. C.

OP. GEN. COUN. NO. 88

April 18, 1960

Syllabus:

Easements - Right-of-Way

A reservation by the grantor in a deed granting to the United States an easement for a right-of-way of a right to use a road constructed on the right of way by the United States is not valid. Any use other than what could be exercised by the grantor as owner of the servient estate under State law must be pursuant to Federal laws and regulations as if no reservation had been expressly set forth in the deed.

The grant of the easement would not fail by reason of the invalidity of the purported reservation.

OPINION FOR R. E. McARDLE
Chief, Forest Service

Dear Mr. McArdle:

Reference is made to Mr. Lindh's memorandum of October 23, 1959, concerning the acquisition of rights-of-way and the effect of reservations in easement deeds for such. The memorandum refers to the Starkweather right-of-way on the Lobster Creek Road No. 343, in Curry County, Oregon, acquired by deed under the provisions of the Federal Highway Act (23 U.S.C.) for use in connection with the administration of the national forests, and to the need for a determination of property rights, if any, reserved in that case. It calls for consideration of the following specific questions:

1. Do you consider the reservation by the grantors of the right to use the road when constructed by the United States valid as to use other than what could be exercised by the grantors under State law if no reservation had been set forth in the deed to the United States?

2. If the reservation in the deed is valid, could the grantors convey rights of use in the road constructed by the United States to third parties?

3. Since the reservation does not subject the use of the road to the Secretary of Agriculture's Rules and Regulations, would the grantors, their heirs and assigns, be permitted to use the road without regard to said Rules and Regulations?

A related question is whether, if the answer to (1) is in the negative, then by reason of the invalidity of the purported reservation would the grant of the easement itself fail?

It must be borne in mind that we are concerned here with a land title question presented in a deed of conveyance to the United States. This is quite different from what the case would be if we were concerned only with what could be done by expressed or implied contract between parties who were under no disability and free to carry out the things agreed upon. We are concerned with the type of easement that is referred to as a "raw land" easement, that is, one for a right-of-way on which a road does not exist but will be constructed by the United States subsequent to the grant of the easement to it. The deed does not expressly grant an exclusive easement but does expressly reserve to the grantor a right to use the road thereafter to be constructed by the United States.

Referring to the questions in the order stated, it is our opinion, for the reasons stated below, that:

(1) The reservation is not valid. Any use other than what could be exercised by the grantor as owner of the servient estate under State law must be pursuant to Federal laws and regulations as if no reservation had been expressly set forth in the deed.

(2) If the reservation were valid, by its terms the right of use thereunder in the road constructed by the United States could be conveyed by the grantor to third parties.

(3) If the reservation were valid, the grantor, his heirs and assigns could use the road constructed by the United States subject only to rules and regulations issued by the Secretary of Agriculture and in effect on the date of his conveyance to the United States.

The grant of the easement would not fail by reason of the invalidity of the purported reservation. The general rule may be stated thus, if a reservation is void, either for repugnancy or because it is contrary to law, the result is to leave the conveyance absolute. Thompson on Real Property § 3471; Van Orman v. Van Orman (1942 Ind.) 41 N.E. 2d 693, 698, Tennant v. John Tennant Memorial Home (1914 Cal.), 140 P. 242.

Idaho), 215 P. 2d 297; Stevens v. Bird-Jex Co. (1933 Utah), 18 P. 2d 292; Bina v. Bina (1931 Iowa), 239 N.W. 68, 78 A.L.R. 1216.

All the above cases deal with roads that were in existence at the time that the easement was created. We have found at least one case which deals with a raw land easement where the road was constructed by the owner of the easement. This is the case of Herman v. Roberts (1890 N.Y.), 23 N.E. 442. In this case the defendant, the owner of the servient estate, had injured the road bed by drawing heavy loads over it. The court granted an injunction to plaintiff, the owner of the dominant estate, to prevent defendant from thus injuring the road bed. However, the court specifically limited the injunction and indicated that defendant could use the road so long as he did not interfere with plaintiff's rights.

We have found two other cases that may involve raw land easements. One is Campbell v. Kuhlmann (1890), 39 Mo. App. 628. The court there stated that the grant of a right of way which is not exclusive in its terms and which can be reasonably enjoyed without being exclusive leaves in the grantor and his assign the right of user in common with the grantee.

The other case is Holbrook v. Hammond (1946 Kentucky), 192 S.W. 2d 746. In this case plaintiff, the owner of the servient estate, crossed the road and also used it longitudinally. An injunction was granted preventing defendant from interfering with plaintiff's crossing of the road. Defendant's request for an injunction preventing plaintiff from using the road was denied.

Of further interest in connection with the raw land easement problem is the case of Van Natta v. Nys, supra. While this case involved an already existing road, it also involved a road which plaintiff, the owner of the dominant estate, had improved. The court in this case gave the owner of the servient tenement and his assigns the right to use the road, quoting Tiffany and Corpus Juris Secundum at page 170. At page 173, the court says that the owner of a servient estate:

> ". . . may also use the way if his use does not unreasonably interfere with the rights of the easement owner. Therefore, the issue which this case presents is this: Does the use of a way by the owner of the servient tenement to such an extent that it contributes to the way's deterioration, but leaves it intact for use by the owner of the dominant tenement, interfere with the rights of the latter to such a degree that an injunction should issue upon the application of the owner of the dominant tenement."

The answer of the court on page 176 is:

> "If the defendant's use of the road contributes to its depreciation, the appropriate remedy for the plaintiff is a decree requiring the defendant to bear a proportionate share of the expense of maintaining the road."

Attention is also called to the case of City of Pasadena v. California-Michigan Land & W. Co. (1941 Cal.), 110 P. 2d 983, a pipeline case. The court there stated at page 985:

> "The general rule is clearly established that, despite the granting of an easement, the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement. (Citations omitted.) It is not necessary for him to make any reservation to protect his interest in the land, for what he does not convey, he still retains."

In this case, however, the servient owner was not claiming any right to use the pipeline placed on the easement by the grantee.

In line with the above authorities we believe that the grantor of a raw land easement for a road has a right, without an express reservation thereof, to use the surface of the right-of-way and the road constructed thereon by the grantee if such use does not interfere with use by the grantee. Herman v. Roberts, supra. We do not find in the common law, however, support for a conclusion that by means of a reservation in an easement deed the grantor thereby becomes vested with any greater right to the use of a road subsequently constructed by the grantee than would have been the case without such a reservation.

Even if it be assumed that between private parties the grantor of an easement for a road may, by a reservation in the deed, have a right by implied grant or otherwise to use the road subsequently constructed by the grantee, there nevertheless are restrictions and limitations imposed upon Government officials that would in our opinion preclude the enforcement of such a right where the United States is the grantee. The Constitution, Article IV, Section 3, Clause 2, provides that Congress shall have the power to dispose of and make all needful rules and regulations respecting the property belonging to the United States. It prescribes the terms and conditions under which its property may be used or disposed of. Administrative officials of the Government have no authority to dispose of its property, in this case the road constructed by it, agree to dispose of it, or agree to a condition that prevents full enjoyment by the United States of the benefits it has purchased or otherwise obtained therein except as authorized by Congress. United States v. California, 332 U.S. 40 (1947); United States v.

County of Allegheny, 322 U.S. 174 (1944); United States v. San Francisco, 310 U.S. 16 (1940); Dale v. Lannon, (1955 N.M.) 279 P. 2d 624; 41 Ops. Atty Gen. No. 39; 39 id. 373; 20 id. 93; 16 id. 152; 4 id. 480.

In line with the view that the estate or interest brought into being by a reservation is created by carving out and taking back a part of the estate or interest granted, and the further view that where it purports to vest rights in the grantor to use improvements subsequently constructed by the grantee its validity must rest upon its force as a grant from or contract with the grantee, the validity of such rights must rest, where the United States is the grantee, upon express statutory authority. We find no such authority where the purported reservation pertains to improvements constructed by the United States subsequent to the grant.

If the agreement pursuant to which the easement is granted contemplates as part of the consideration therefor a vested right of use by the grantor in the road to be constructed by the United States, then it is unauthorized. In the acquisition of an easement or other interest in land by the United States any consideration to be granted or paid, except it be specifically authorized by statute, must be appropriated therefor and available for obligation at the time the deed is executed, or if a prior contract of purchase is entered into it must be available for obligation at that time. 41 U.S.C. 11; 23 U.S.C. 203; 31 U.S.C. 627, 665; Leiter v. United States, 271 U.S. 204 (1926); 28 Comp. Gen. 553; 4 id. 371. In the absence of specific statutory authority, the consideration cannot properly take the form of services rendered by the United States (as by constructing the road) or permitted use of United States property (as use of the road it constructs).

If as a condition to the granting of an easement to the United States the grantor insists that he shall have a right to use the road to be constructed by the United States, necessitating the Government's constructing the road to a higher standard or greater capacity than required to meet its needs, such additional construction and the agreement on which it is based would clearly be unauthorized. To conclude otherwise would be to overlook the limitations against the availability of appropriated funds. Such funds are not available, in the absence of statutory authority, to construct a road to a capacity in excess of that needed by the Government, including use permitted by it to the public in general under applicable rules and regulations. 31 U.S.C. 628; 40 U.S.C. 259, 263; 41 U.S.C. 12, 14.

As we have indicated above, in granting an easement for a road the grantor has under the common law a right to use the servient estate to the extent that it does not interfere with use thereof by the grantee. In the determination of what constitutes interference,

when the United States is the grantee, we consider the grantor bound by the principles applicable to lands held or administered by the Government. Florida State Turnpike Authority v. Anhoco Corporation (1955 Fla.), 107 So. 2d 51. Generally, the United States holds its property for public purposes. Van Brooklin v. Tennessee, 117 U.S. 151 (1886). In the administration thereof its officials must be guided not only by applicable constitutional and statutory provisions but by rules and regulations issued for that purpose. Only within such limitations can the officials permit one member of the public to enjoy a right not enjoyed by the public in general. Florida State Turnpike Authority v. Anhoco Corporation, supra; Holland v. Grant County (1956 Ore.) 298 P. 2d 832.

Sincerely yours,

/s/ Edward M. Shulman

Deputy General Counsel

EMKlutz:RLTremain:DL
3-17-60

In order to bring the specific problem into proper perspective it may be well first to consider under the principles of common law the nature of a reservation and whether a grantor can reserve something that did not exist until after the grant. We must keep in mind that the easement conveyed to the United States was created by the grant, not by reservation, and that the grantor is not reserving an interest in that conveyed but is reserving a right of use in a road to be thereafter constructed by the United States.

A reservation has been defined as "a clause by which the grantor secures to himself a new thing 'issuing out of' the thing granted, and not in esse before." Tiffany on Real Property, Abridged Edition, 1940, page 677, citing among other authorities, Co. Litt. 47A. We believe that it is precisely the purpose of a reservation to create an estate which was not "in esse" or did not exist as such before the reservation was made.

Accepting these views with respect to a reservation the proper application thereof to the facts remains for consideration.

As we view the situation growing out of an express reservation in the grant of a raw land easement to the United States for a road subsequently constructed on the right-of-way by the grantee there are two separate and distinct things created or brought into being which were non-existent prior to the grant. The first is the easement itself, which is a separate ownership of an interest in land that was brought into being concurrently with and by the grant. The deed to the United States creates and conveys the easement for the purposes stated therein. This has not been questioned. The second is a reservation by the grantor of the right to use the road to be thereafter constructed by the United States on the easement granted. The validity of this reservation is questioned. The "reserved" interest or right thus brought into existence is not carved from that which is conveyed, as the word "reservation," given its ordinary meaning, would require. It purports to relate to an improvement which the grantee may thereafter construct on the estate granted. The reservation in order to be effective, however, must refer to something conveyed, for if the reservation clause purports to reserve rights not embraced in the granting words it is void because of nothing on which to operate. In re Wisconsin Cent. Ry. Co., 68 F. Supp. 320 (D. Minn.) (1946); Oliver v. Johnson (1941 Ore.) 113 P. 2d 430; Kesterson et al. v. California-Oregon Power Co., (1924 Ore.), 221 P. 826, reversed on other ground (1924 Ore.) 228 P. 1092; Adams v. Morse, 51 Me. 497 (1863); Hurd v. Curtis, 48 Mass. 94, 110 (1843). A reservation does not create title or enlarge vested rights of the grantor. It merely carves out the specified interest from the operation of the grant and leaves it vested in the grantor to whom it belonged prior to and at the time of the execution of the

deed. Leidig v. Hoopes (1955 Okla.), 288 P. 2d 402; Ogle v. Barker (1946 Ind.), 68 N.E. 2d 550. Recognition, therefore, of the principle that by a reservation in a deed the grantor reserves something that theretofore did not exist should not be confused with the question whether the reservation reaches beyond the estate or interest the deed conveys and attaches to or creates a vested interest in improvements placedupon the granted estate, improvements not in being at the time of the reservation, but brought into being by the grantee subsequent to the grant. To hold that the reservation does not exhaust its force upon the estate or interest granted by the deed in which it appears would purport to place in the grantor an indefinite and to some extent an unlimited right, but nevertheless a vested right, in improvements he never owned.

Certain common law rights of the grantor of an easement for a road are well recognized. According to 28 C.J.S., Easements, paragraph 91b:

> "Unless he expressly agrees to the contrary, an owner of land burdened with a right of way may use his land in any manner which does not materially impair or unreasonably interfere with its use as a way."

The same is set forth in 17A Am. Jur., Easements, section 121:

> "The owner of the land has the right to use the way for any purpose whatever, provided he does not interfere with the right of passage resting in the owner of the easement. Hence, the grant of a right of way, which is not exclusive in its terms and which can be reasonably enjoyed without being exclusive, leaves in the grantor and his assigns the right of user in common with the grantee."

Tiffany on Real Property, Third Edition, section 811, agrees:

> "The owner of land subject to a right of way may himself use the same way, provided this does not unreasonably interfere with the exercise of the other's easement. And he may also grant to another or others a similar right of way, subject to the same proviso, and provided further, the prior grant was not intended to be exclusive."

Some of the road cases cited in support of this proposition are the following: Armiger v. Lewin (1958 Md.), 141 A. 2d 151; Van Natta v. Nys (1954 Ore.) 278 P. 2d 163, reh. d. 279 P. 2d 657; Kurz v. Blume (1950 Ill.), 95 N.E. 2d 338, 25 A.L.R. 2d 1258; Cusic v. Givens (1950

COPY

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Record Group No. 95 Records of the Forest Service
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Additional Information
Dept of Agriculture. Forest Service
Region 10 (Alaska Region). Juneau, AK
Decimal Correspondence, 1908-1976

File: 5460 Rights-of-way Acquired

5862

COPY

U
COOPERATION
Bureau of Public Roads

June 27, 1944

Commissioner
Public Roads Administration
Washington 25, D. C.

Dear Mr. MacDonald:

I am sorry that reply to your letter B-3 of May 29 has been delayed, partly by absence from Washington and partly by other urgent demands which made it difficult for me to give it the careful consideration it merits.

Obviously all agencies of the federal government should cooperate in the fruition of the program of Interregional Highways transmitted to the Congress by the message from the President, January 12, 1944. The fact that about 530 miles of the proposed system will consist of routes selected along the lines of existing forest highways makes the program one of especial interest to the Forest Service.

To the degree that the national forests are traversed by the highways they should contribute in full measure to the utility and beauty of those highways; but it seems to me unwise to adopt any principle or rule that all national forest lands within 200 feet of the center line of Class 1 and Class 2 highways or 100 feet from the center line of Class 3 highways hereafter would be totally withdrawn from any structural occupancy.

In the main such a principle or rule is highly desirable but it seems to me there are certain to be occasional cases where so rigid a limitation would minimize the public service and value of the national forest and the highway itself. In my opinion the situation can best be met as to the Interregional Highway by giving to national forest lands within 200 feet of the center line of Class 1 and Class 2 forest highways and 100 feet from the center line of Class 3 forest highways a designation as follows:

> Set-back line for special treatment - not to be occupied or used except under authority of the Chief of the Forest Service.

Instructions to this end will be issued. I feel that it will fully meet the necessities of the system and am confident you will agree.

Sincerely,

/s/ Lyle F. Watts

LYLE F. WATTS, Chief

5862

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

ADDRESS REPLY TO
CHIEF, FOREST SERVICE
AND REFER TO

WASHINGTON

U
SUPERVISION
Policy
Roadside Zones

E
ROADS & TRAILS
Rights of Way

January 25, 1945

Permanent

Circular No. U-98

Filed

Regional Forester
All Regions

Dear Sir:

By letter of May 29, 1944, the Commissioner, Public Roads Administration proposed to the Forest Service a new dedication of national forest lands marginal to units of the interregional highway system. This office replied to that letter under date of June 27, which is quoted on the reverse hereof. It was not sent you earlier because of the possibility that the Public Roads Administration might request further consideration. Since no such request has been received, the letter of June 27 can be regarded as a statement of present policy. Pursuant to that letter, all previous instructions on this subject are rescinded and in their place there is hereby established a rule as follows:

> All national forest lands within 200 feet of the center line of Class 1 and Class 2 forest highways and 100 feet from the center line of Class 3 forest highways shall be given a designation as follows:
>
> Set-back line for special treatment--not to be occupied or used except under authority of the Chief.

← This clause is now stamped on all sheets of RRA Road Plans for the Tornigon Area Road. Reg. For. is substituted for Chief.
6/28/49 wac

Very sincerely yours,

LYLE F. WATTS, Chief

By: P. E. McArdle

(over)

X copy filed in TRW folder

FOREST SERVICE JUNEAU, ALASKA

Chief, U. S. Forest Service, Washington, D. C. January 6, 1950

B. Frank Heintzleman, Regional Forester

U
SUPERVISION
Policy
Roadside Zones

In reply to Mr. Sieker's memorandum of December 6, 1949.

A great storm of protest has followed the withdrawal of extra wide rights-of-way for roads over the public domain in interior Alaska. The storm rages particularly over widths greater than 100 feet on each side of the center line. Homesteaders have protested because of the length of side roads they are compelled to construct, maintain, and keep clear of snow, fear that other parties will be given leases on right-of-way lands between the homesteaders line and the developed road, distance from the developed road of gas stations, etc. which homesteaders have or might want to construct, possible unkempt condition and brush and forest fire hazard on this strip of "no-man's land" infront of the settlers home if the Federal Government doesn't get the funds to improve or police it.

The Alaska miners are also opposing the use of extra wide strips in the placer country as such withdrawals may include much placer ground of narrow valleys.

We are informed that if, as a result of heavy protests, some extra wide withdrawals are later reduced in width, it may be necessary to ask Congress for special legislation to permit adjoining owners of patented land who have already acquired their full acreage, to take up the additional lands in front of their homes and business establishments.

I recommend the following for the National Forests in Alaska; in all cases the widths mentioned are <u>set back distances from the road center line</u>:

<u>KENAI DIVISION</u>

The National Forest section of the Kenai Peninsula Highway between Anchorage and Homer, including the branch to Seward - one mile 100 feet on each side of the center line (this is the right-of-way width used on the sections of this highway which cross open public lands to the north and west of the Forest Boundary).

Development roads - 50 feet

U
SUPERVISION, R-10
ROW and Easements
Policy

Juneau, Alaska
February 2, 1950

Mr. C. C. Carlson
Attorney in Charge
Office of the Solicitor
U.S. Department of Agriculture
901 U.S. National Bank Building
Portland 4, Oregon

Dear Mr. Carlson:

We will be pleased if you will consider the subject stated below and give us your comments.

What authority does the Forest Service have for regulating the use and occupancy of a highway right-of-way crossing private land for which the Government has obtained an easement? We have in mind a case where the Ketchikan Public Utilities Company will locate a transmission and telephone line across private land and within an area for which the Forest Service has obtained an easement of specified width for highway purposes but actually occupying only a portion of the area for highway use. We have other cases where individuals will use a portion of the right-of-way, for domestic water and sewer systems.

The enclosed Exhibit "A" is the form of right-of-way agreement now in use by the Forest Service in Region 10. Exhibit "B" is the form of right-of-way deed used by the Bureau of Public Roads in Alaska.

Very truly yours,

B. FRANK HEINTZLEMAN
Regional Forester

By: CHAS. G. BURDICK

Enclosures (2)
WAG:edy

RIGHT-OF-WAY AGREEMENT FOR FOREST ROAD

This agreement, made this _____ day of _____ in the year of 19__, by and between _____ of the _____ Recording District of the _____ Judicial Division, Territory of Alaska, a corporation organized and existing under the laws of the _____ of _____ with a place of business _____, hereinafter called the grantor, and the United States of America, hereinafter called the grantee:

Witnesseth that the said grantor, for and in consideration of the benefits to be derived from the hereinafter described road to be constructed by the grantee, the benefits whereof are hereby acknowledged, hereby grants, bargains, and conveys unto the grantee a perpetual right-of-way over and across the following described lands of the grantor:

_____

_____

together with all the rights and privileges necessary for the accomplishment of the purpose hereinafter set out; said right-of-way to have a width of _____ feet, extending _____ feet on each side of the center line of the road to be constructed thereon, and to be located and defined as follows:

_____

_____

_____

said right-of-way to be used by the grantee for the construction and maintenance of a Forest road together with the right to construct and maintain on the said right-of-way a telephone line.

U-507m-R-10
(Rev. 3/18/49)

The herein described right-of-way is granted and conveyed upon the condition that it shall not be assigned to any person or persons except the Territory of Alaska or the Territorial Board of Road Commissioners of Alaska and then for the purpose of constructing and maintaining a public road, and upon the further condition that should said right-of-way be abandoned by said grantee and not transferred to the Territory of Alaska or the Territorial Board of Road Commissioners of Alaska, or if so transferred, if it be abandoned by said transferee, then said right-of-way, together with all the rights and privileges appurtenant thereto, shall thereupon terminate and revert to the grantor, his heirs or assigns.

In testimony whereof, witness the following signature:

_____
(Owner)

Witness:

_____

_____

_____)
) ss
_____)

This is to certify that on this _____ day of _____, 19___, before me, _____, a Notary Public, duly commissioned and sworn, personally appeared _____, personally known to me, and personally known by me to be the individual___ who in my presence signed the within and foregoing instrument, and _____ acknowledged to me that _____ freely and voluntarily signed the same for the uses and purposes herein mentioned.

WITNESS my hand and official seal this _____ day of _____, 19___.

_____
Notary Public
My Commission expires _____

RULES AND REGULATIONS
FOR ADMINISTERING FOREST HIGHWAYS

BASIS

Applicable portions of the Federal Highway Act, approved November 9, 1921, especially section 23 of the said act (42 Stat. 218; 23 U.S.C. 23), as amended and supplemented, and section 6 of the act approved September 5, 1940 (54 Stat. 869; 23 U.S.C. 23b).

REGULATION 1. DEFINITIONS

For the purpose of these regulations the following terms, respectively, shall mean:

Sec. 1. *Secretary.* The Secretary of Agriculture of the United States.

Sec. 2. *Administrator.* The Federal Works Administrator of the United States.

Sec. 3. *Commissioner.* The Commissioner of Public Roads, Public Roads Administration, Federal Works Agency.

Sec. 4. *Forester.* The Chief of the Forest Service of the Department of Agriculture.

Sec. 5. *State.* Any State, Territory, or insular possession eligible to receive forest highway funds.

Sec. 6. *State Highway Department.* As defined in the Federal Highway Act.

Sec. 7. *County Authorities.* The commissioners, supervisors, or other officials charged by law with the selection of roads in a county, road district, or town, and with the expenditure of funds for road building and maintenance.

Sec. 8. *Division Engineer.* The division engineer of the Public Roads Administration.

Sec. 9. *Regional Forester.* The regional forester of the Forest Service.

Sec. 10. *Forest Roads.* Roads wholly or partly within, adjoining or adjacent to and serving the national forests.

Sec. 11. *Forest Highways.* Those forest roads of primary importance to the State, counties or communities and which are selected and designated by the Secretary and the Administrator as constituent parts of a forest highway system.

Sec. 12. *Forest Highway Fund.* Any authorization or appropriation made for forest highways.

Sec. 13. *Construction.* Reconstruction and improvement of roads as well as original construction.

Sec. 14. *Highway Planning Survey.* The nation-wide cooperative survey of highways and highway transportation by the highway departments of the States and the Public Roads Administration.

Sec. 15. *Maintenance.* The preserving and keeping, through constant attention, of each roadway and roadside structure and facility as nearly as possible in its original condition as constructed, or as subsequently improved, to provide satisfactory and safe highway service.

REGULATION 2. APPORTIONMENT

Sec. 1. From such information, investigations, and sources as the Forester shall deem most accurate he shall prepare a tabulation showing the areas and value of the national forest land in each State, including the value of forage and timber. This tabulation, when approved by the Secretary, shall serve as the basis of apportionment for the forest highway fund.

Sec. 2. On or before January 1 of each year the Secretary shall apportion among the several States, Alaska and Puerto Rico the forest highway fund authorized for the next succeeding fiscal year as follows: One-half in the ratio that the area of national forest land in any State bears to the total area of such land in all States, and one-half in the ratio that the value of national forest land in any State bears to the total value of such land in all States, subject to any modifications that future legislation may require.

Sec. 3. Ten percent not exceeding $100,000 of the amount so apportioned to each State shall be held as a reserve and the balance shall be made available immediately after apportionment for the forest highway work program. Allotments will be made from this reserve for administration and, in special cases, to programmed projects. Any balances in the reserve will be entirely released for programming not later than the date of the apportionment of the succeeding fiscal year authorization. At the beginning of the fiscal year for which the funds are authorized, allotments will be made from the reserve to cover the administrative requirements of the Public Roads Administration and the Forest Service.

REGULATION 3. THE FOREST HIGHWAY SYSTEM

Sec. 1. Forest Highways shall be determined by the Secretary and the Administrator and shall be classified as follows:

Class (1) All forest highways on the Federal-aid highway system.

Class (2) All forest highways which are on an approved primary State highway and not in class (1).

Class (3) All forest highways on the secondary or feeder roads system and any other forest road, of primary importance to the counties or communities, when designated as a forest highway.

Sec. 2. The forest highway system previously approved by the Secretary may be increased or decreased in mileage by addition or deletion of sections from time to time, in accordance with the following procedure:

The division engineer shall request from each State highway department a map showing the roads within or adjacent to the national forests which the State Highway Planning Survey shows to be of primary importance to the States, counties, or communities and which, therefore, may be proposed for inclusion in the forest highway system. The division engineer will furnish a copy of this map to the regional forester for his comments and suggestions. Subsequently the division engineer will arrange a conference with the State highway department and the regional forester to agree on recommendations of routes to be included in the forest highway system. A map of the routes selected at this conference shall be submitted by the Commissioner and the Forester, with their recommendations, to the Secretary and to the Administrator for final action.

REGULATION 4. SELECTION OF FOREST HIGHWAY PROGRAM

Sec. 1. After each authorization of appropriations by Congress for forest highways the division engineer shall request each State highway department to submit to him and to the regional forester a map and a corresponding list of forest highway projects proposed for the fiscal period covered by such authorization, including its recommendations on all projects proposed to it by counties, communities, or other agencies.

The regional forester may call upon the division engineer for any necessary investigations to supply him accurate and full

information on any projects proposed by the State or county.

Sec. 2. Projects included in the forest highway programs shall be based upon the following considerations:

(1) Provision for the maintenance of roads existing or under construction.
(2) The completion of necessary surveys.
(3) Findings of the highway planning survey.
(4) Benefit to forest development, protection, and administration, as indicated by the transportation plan of the Forest Service.
(5) Construction correlation with military requirements and with adjacent Federal and State road programs.
(6) The economy of continuity of operations and ability of cooperators to maintain adequately the improvement.

Sec. 3. Within sixty days following the receipt of the maps and lists required by Section 1, the division engineer shall arrange for a joint conference with the State highway department and the regional forester for consideration of a program for the fiscal period of the authorization. A joint report of this conference shall be filed by the division engineer with the Commissioner and by the regional forester with the Forester.

Sec. 4. Following the joint conference report the Commissioner and the Forester each year shall prepare a Forest highway work program for the ensuing fiscal year, and following the Secretary's apportionment, as provided in Regulation 2, the Commissioner shall submit such work program to the Administrator and the Secretary for their approval.

Sec. 5. The approved forest highway work program may be modified on recommendation of the Commissioner and the Forester with the approval of the Administrator and the Secretary.

REGULATION 5. COOPERATIVE AGREEMENTS

Sec. 1. A cooperative agreement for any project which involves financial contributions for construction or maintenance from cooperators shall be approved prior to beginning work thereon.

Sec. 2. Negotiations for cooperative agreements shall be conducted by the division engineer and the detailed provisions shall be agreed upon by him and the cooperator. All cooperative agreements shall be prepared on forms furnished by the Commissioner for execution by him and the cooperator.

Sec. 3. No work under a cooperative agreement involving forest highway funds shall be advertised, no contracts let, nor any construction started without the prior approval of the division engineer.

REGULATION 6. SURVEYS

Sec. 1. A location survey, plans, specifications and estimate of cost for projects to be included for construction in any present or future forest highway work program, under allotments set up as provided hereinafter in Regulation 9, shall be made by the division engineer as soon as practicable, unless otherwise specifically directed by the Commissioner. Roads that ultimately may become a part of the forest highway system may be programmed for preliminary location survey and corresponding estimate of cost in the same manner as location surveys are programmed for adopted forest highways.

Sec. 2. Before the completion of a survey, the regional forester shall be notified in writing so that he shall have opportunity to examine the surveyed line or the location map and to indicate any details of location desirable for the protection or development of the national forests.

REGULATION 7. CONSTRUCTION

Sec. 1. No construction shall be undertaken upon any designated part of the forest highway system by any Federal agency until a survey and cost estimate have been made by the division engineer and approved by the State highway department and the Commissioner, unless otherwise specifically authorized by the Commissioner; but the Forest Service may make temporary repairs on forest highways or construct timber utilization roads on the forest highway system following as closely as practicable reconnaissance surveys made by the Commissioner at the request of the Forest Service.

Sec. 2. Upon approval by the Commissioner, the division engineer may begin construction of projects carried in the approved forest highway work program.

Sec. 3. Expenditures authorized in the work program for any construction project may be increased or decreased by the Commissioner by not to exceed 25 percent by transfer between projects or from any unprogrammed balance or from the reserve. Any construction project substantially deviating, in the opinion of the Commissioner, from the project as approved in the forest highway work program or on

which the cost will exceed by more than 25 percent the expenditure authorized therein, shall be reprogrammed.

Sec. 4. Unless otherwise authorized by the Commissioner all construction of forest highways will be by the contract method and he shall accept or reject proposals from bidders on any forest highway construction projects and execute any necessary contracts and supporting bonds therefor. If it is impractical to construct a project or any part thereof by the contract method, the Commissioner may proceed as authorized by paragraph (d), Section 23, of the Federal Highway Act.

Sec. 5. Construction work on projects shall not be considered complete until the project has been inspected and approved by the division engineer and by the State highway department or cooperating agency, as the case may be, nor until the regional forester has approved the clearing and disposal of refuse.

REGULATION 8. MAINTENANCE

Sec. 1. All maintenance work on all programmed forest highway projects during construction and after completion shall be performed by the Public Roads Administration unless otherwise directed by the Commissioner or specified by cooperative agreement with the State or local authority.

REGULATION 9. RECORDS AND ACCOUNTING

Sec. 1. Following each forest highway appropriation, lump sum allotments shall be set up by the Secretary to the Public Roads Administration and the Forest Service to cover the estimated requirements of each agency based on the approved work program. These cash allotments shall be available for disbursement on vouchers approved by authorized officers of the appropriate agency for:

(1) Authorized expenditures for survey and construction on all forest highway projects in the approved work program.
(2) Current costs of maintenance as estimated by the division engineer on all forest highway projects to be maintained by the Public Roads Administration in accordance with the approved program.
(3) Administrative expenses.

Sec. 2. Each equipment depot under the jurisdiction of the Public Roads Administration shall be operated on a self-sustaining

basis. Work done for other agencies will be on actual cost basis including overhead. Projects on which equipment is used will be charged with the cost of such equipment on a depreciation or appropriate rental basis. The purchase of equipment and operation of these equipment depots will be paid from available forest highway cash and such expenditures will be carried initially in a suspense account. Periodically equipment charges will be transferred to the proper projects.

Sec. 3. Cooperative funds contributed by cooperator shall be deposited in the United States Treasury to the credit of the Forest Service Cooperative Fund authorized by the Act of June 30, 1914 (16 U.S.C., Sec. 498), which deposits will be made available for expenditure by the agency concerned from the appropriation "Cooperative Work, Forest Service, Trust Fund" (Act of June 26, 1934, 31 U.S.C., Sec. 725s), and shall be audited, disbursed, and recorded in the same manner as funds under the Federal Highway Act. Cooperative expenditures made by cooperators shall be audited and disbursed as provided in the cooperative agreement.

Sec. 4. The Commissioner shall keep all records which he deems necessary of survey, construction, and maintenance costs for projects under his supervision and will furnish the Forester and any cooperating agency with a copy of a final report showing the accomplishments and expenditures on each project completed.

REGULATION 10. COMMISSIONER'S REPORT

Sec. 1. Not later than September 15 each year the Commissioner shall submit to the Administrator and to the Secretary a report covering the operations on the forest highway system for the preceding fiscal year, showing the current status of surveys, construction and maintenance and with such recommendations as he shall consider desirable. This report shall contain sufficient data upon which to base the report to Congress on forest highway work required by Section 19 of the Federal Highway Act.

REGULATION 11. APPLICATION OF REGULATIONS

Sec. 1. These regulations shall take effect upon approval and shall supersede the rules and regulations approved by the

Secretary of Agriculture for administering forest roads and trails on March 11, 1922, as amended.

APPROVED:

Date April 17, 1945

Claude R. Wickard
Secretary of Agriculture

Date May 10, 1945

Philip B. Fleming
Federal Works Administrator

P-2345

ALASKA ROAD COMMISSION
Juneau, Alaska

September 29, 1949

A.R.C. MEMORANDUM NO. 43

SUBJECT: Re-classification of Through Route

The road now under construction extending from Anchorage to Seward, being one of the most important roads in Alaska, is hereby re-classified as a Through Route.

This replaces the previous classification of this road as a Feeder or Secondary Route.

John R. Noyes.

John R. Noyes
Commissioner of
Roads for Alaska

CC: Governor Gruening
Mr. Stoddart, Bureau of Public Roads
Division of Territories & Island Possessions

(15)

COPY

National Archives and Records Administration
Pacific Alaska Region
654 West 3rd Avenue
Anchorage, Alaska 99501-2145
Record Group No. 95 Records of the Forest Service
Box No. / Location 2 of 71 12/02/09 (4)
Additional Information
Dept of Agriculture, Forest Service
Region 10 (Alaska Region), Juneau, AK
Decimal Correspondence, 1908-1976
File: 5460 Rights-of-way Acquired