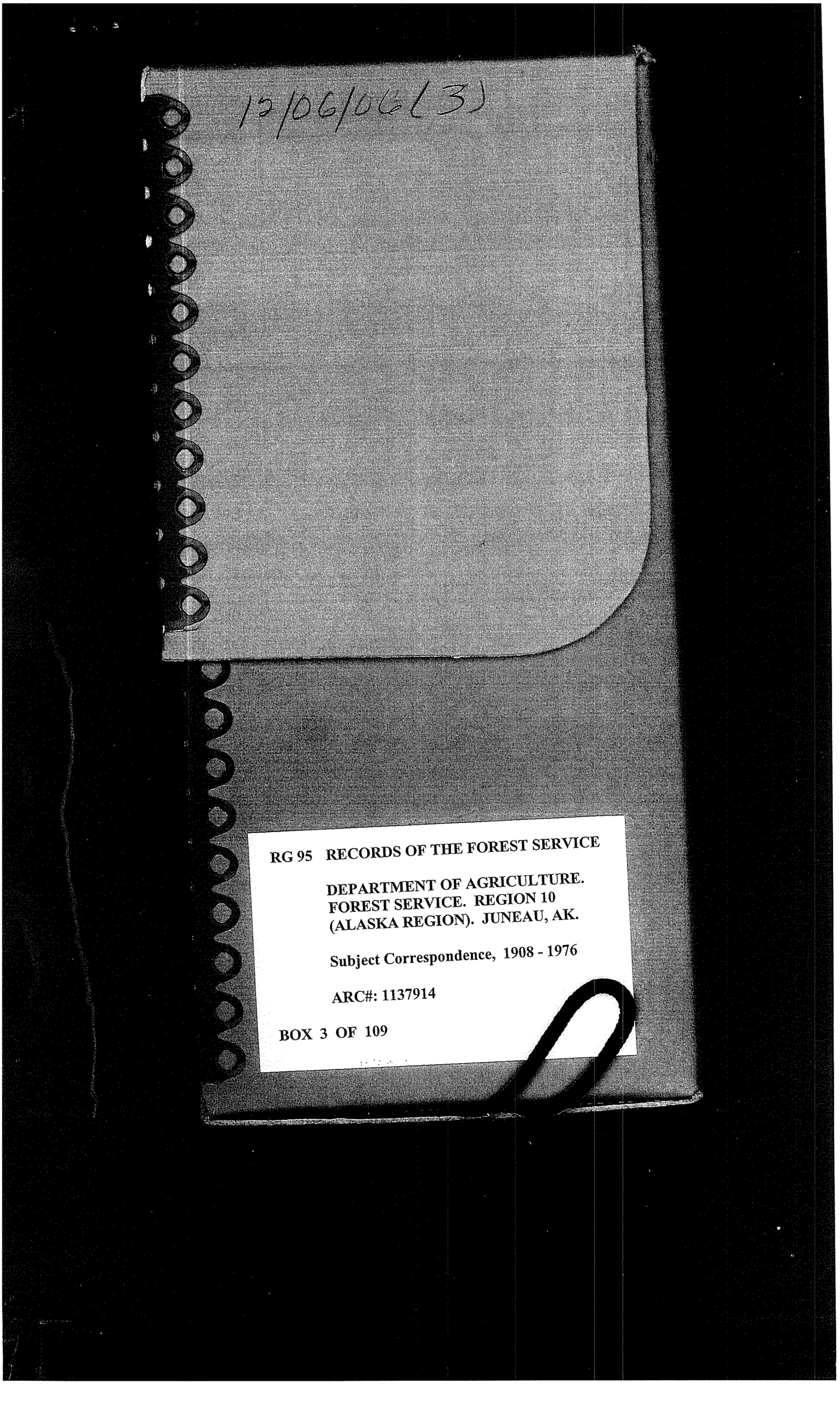
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RG 95 RECORDS OF THE FOREST SERVICE
DEPARTMENT OF AGRICULTURE.
FOREST SERVICE. REGION 10
(ALASKA REGION). JUNEAU, AK.
Subject Correspondence, 1908 - 1976
ARC#: 1137914
BOX 3 OF 109

R. 10

March 24, 1959

M-36554 MINING LOCATIONS ON FEDERAL AID RIGHTS-OF-WAY

Rights-of-way: Act of November 9, 1921--Mining Claims: Location

Consistent with the rule long sanctioned by the Courts and the Department that mining locations may be made over right-of-way easements, such locations may be made over highway rights-of-way acquired under the act of November 9, 1921, as amended, which grants an easement.

A material site under that act is more in the nature of a profit than an easement and is not subject to the same rule, because it confers the right to take and remove a part of the realty which is inconsistent with the rights inuring to the locator of a mining claim.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36554

March 24, 1959

Memorandum

To: Director, Bureau of Land Management

From: Solicitor

Subject: Mining locations on Federal Aid Rights-of-Way

In your memorandum of January 9, 1959, you ask whether the inclusion of land in a highway right-of-way granted under the Federal Highway Act of November 9, 1921 (42 Stat. 216; 23 U. S. C. sec. 18) now section 1 of the act of August 27, 1958 (72 Stat. 916; 23 U. S. C. sec. 317(a)(b) and (c)) withdraws it from location under the United States mining laws.

It appears that your question is prompted by the fact that the question as first propounded by the State Supervisor, Boise, Idaho, has been answered in the affirmative by an opinion of a Field Solicitor, dated May 15, 1958. That opinion appears to be based on the fact that the Department has held that a material site right-of-way provided for by the same law in identical terms is not subject to mining location. Sam D. Rawson, 61 I.D. 255.

The general rule is that mining locations may be made over right-of-way easements but the locator takes subject to the easement. See Amador Medeau Gold Mining Co. v. South Spring Hill Mining Co., 13 Saw. 523, 36 Fed. 668, 670; Welch v. Garret, (Ida.) 51 Pac. 405; Mary G. Arnett, 20 L.D. 131; Eugene McCarthy, 14 L.D. 105; 2 Lindley on Mines, 3rd ed. 531. The highway rights-of-way here are easements. 43 CFR 244.54(a)(2), note; Nevada Department of Highways, A-24151, September 17, 1945 (unreported).

The question then is: Do the decisions of the Department holding that material sites are not subject to mining location for

the materials covered by the material site profit[1] establish a new and different rule with respect to right-of-way easements than formerly obtained? The answer is that they do not. Those decisions are grounded on a different proposition, i.e. that two persons may not have valid co-existent rights to convert the same thing to possession. It is also probably true that the possessory title to the land held by a mining locator would bar the removal of any of it by a stranger to the mining title and hence that a prior appropriation of the right to take and remove a portion of the estate would prevent the valid location of a mining claim. The rule that an easement does not prevent the disposal subject thereto of the land and its application to disposals under the mining law is too well grounded to be overthrown by implication, especially when the later cases can be distinguished, as above.

(Sgd) Edmund T. Fritz
Acting Solicitor

1/ Nevada Department of Highways, supra, merely held "the appropriation and transfer* * *of materials for road purposes would* * *bar the subsequent initiation of a placer claim for similar materials* * *while it was outstanding. Rawson, supra, cited that case to support a conclusion that material rights are not subject to location at all, but the only issue there was whether cinders appropriated for road building were subject to location. However, the dictum in that case might well become a rule in a proper case. Since a mining location entitles a locator to the exclusive possession of the land for mining purposes it probably could not co-exist with a prior valid right to take anything from the land. Compare Filtrol Co. v. Brittan and Echart, 51 L.D. 649.

Interior--Duplicating Section, Washington, D. C.

47741

EUGENE T. MEYER

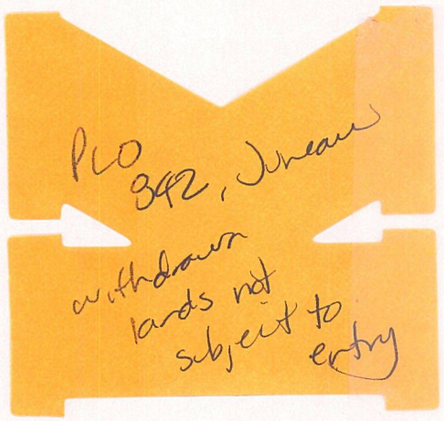
A-27729 Decided December 17, 1958

Homesteads (Ordinary): Settlement--Alaska: Homesteads

A notice of location of a homestead settlement on public lands in Alaska is properly rejected where the land involved is withdrawn from settlement, location, sale and entry, and reserved for classification.

Withdrawals and Reservations: Authority to Make

The act of June 25, 1910, authorizes the withdrawal and reservation of public lands in Alaska for purposes of classification.



UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

December 17, 1958

A-27729

Eugene T. Meyer : Juneau 010824 (formerly Anchorage 031136).

: Homestead settlement location rejected.

: Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Eugene T. Meyer has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated March 28, 1958, which affirmed the decision of the assistant manager of the Anchorage, Alaska, land office, dated October 24, 1955, rejecting his notice of location filed under the act of May 14, 1898, as amended (48 U. S. C., 1952 ed., sec. 371).

The notice of location was rejected for the reason that the land applied for was "withdrawn from settlement, location, sale, and entry, and reserved for classification" by paragraph 5 of Public Land Order No. 842 of June 19, 1952 (17 F. R. 5732), and that, therefore, the lands were not subject to settlement under the public land laws at the time the appellant filed his notice of settlement claim on August 24, 1955.

The facts stated above are not in dispute. The appellant contends that paragraph 5 of Public Land Order No. 842 "was and is a nullity, mere surplus verbiage which could not and cannot serve to segregate the land, nor to deprive the appellant of valuable rights, without violating due process of law." The appellant's argument is to the effect that the Bureau has no authority to classify lands in Alaska; that such authority is limited to lands in the continental United States; and, therefore, that a withdrawal for the purpose of "classification" of lands is a nullity.

The appellant's contention is without merit. Public Land Order No. 842 states that the order is made:

> "By virtue of the authority vested in the President by section 1 of the act of June 4, 1897 (30 Stat. 34, 36; 16 U. S. C. 475), and otherwise, and pursuant to Executive Order No. 10355 of May 26, 1952 * * *."

Executive Order No. 10355 (17 F. R. 4831) delegates to the Secretary of the Interior the authority vested in the President by

section 1 of the act of June 25, 1910 (43 U. S. C., 1952 ed., sec. 141), and the authority otherwise vested in him "to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made."

Section 1 of the act of June 25, 1910, supra, provides as follows:

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." (Emphasis supplied.)

Consequently, the appellant's contention is contradicted by an express act of Congress granting authority to withdraw public land in Alaska for classification purposes.

As the land involved was withdrawn from settlement at the time the appellant's location was made, the location conferred no rights upon him and the rejection of his notice of location was not a violation of due process of law. Arthur Halsted, A-27298 (May 21, 1956); William Palmer Lamb, A-27499 (November 13, 1957).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F. R. 6794), the decision of the Director, Bureau of Land Management, is affirmed.

(Sgd) Edmund T. Fritz
Deputy Solicitor

Interior--Duplicating Section, Washington, D. C.