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P.O. Box 1961

February 23, 1955

Honorable B. Frank Heintzleman
Governor of Alaska
Juneau, Alaska

My dear Governor Heintzleman:

Reference is made to our letter of August 20, 1954, and yours in reply dated September 30, 1954, both concerning an appeal of the Alaska Road Commission to the Governor of Alaska for relief from the decision of the Territorial Land Commissioner that the Alaska Road Commission pay to the Territory the sum of 3 cents per cubic yard for all sand and gravel extracted from Territorial school lands reserved to the Territory by the Act of March 4, 1915.

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We are pleased to advise that a copy of memorandum dated February 8, 1955, from the Acting Solicitor of the Department of the Interior to the Director, Office of Territories, contains an opinion in reference to this disputed subject which will undoubtedly serve as a future guide to administrative action in this and similar cases.

The language of the Acting Solicitor is clear and concise and without inference to more than one subject. He says, "roadbuilding or other materials in the reserved school sections may not be removed or disposed of * * * without first obtaining the consent of the proper agency of the Territory. As the Territory may refuse or give consent it follows that it may attach reasonable conditions to the consent if given".

The Territorial Land Commissioner has given his consent to the extraction of sand and gravel from reserved school sections by issuance of a proposed contract for the sale of materials which he requests be executed by the Commissioner of Roads for Alaska. The Territorial Land Commissioner has heretofore insisted that the law and its definitive regulations demand that he impose pecuniary payments upon the Alaska Road Commission, and that he is given no other choice in the matter. It would now appear that the opinion of the Acting Solicitor dissipates this assumption.

ABC

Legal opinion having been issued that action to impose payments for materials extracted from reserved school lands is discretionary and not obligatory as has been the Territorial opinion heretofore, the Alaska Road Commission now respectfully appeals to the Governor of Alaska for relief from pecuniary payments for materials extracted from reserved school sections by means of an administrative order by the Governor to that effect.

If it is subsequently determined by the Territory that the Alaska Road Commission must pay 3 cents per cubic yard for sand and gravel extracted from reserved school sections, I consider it my duty and responsibility to point out that such action by the Territory may jeopardize Federal appropriations relating to construction and maintenance activities of this Commission.

Sincerely yours,

A. F. Ghiglione
Commissioner of Roads
for Alaska

WBAdams:fbn

FEB 8 - 1955

M-36243

SCHOOL SECTIONS RESERVED BY THE ACT OF MARCH 4, 1915
(38 STAT. 1214; 48 U.S.C. 353) FOR THE TERRITORY OF ALASKA

Alaska: School land

Subject to the Territory's consent, the Bureau of Land Management may issue permits under the Act of July 31, 1947 (43 U.S.C. 1185) to the Alaska Road Commission authorizing it to remove roadbuilding material from school sections reserved for the Territory by the Act of March 4, 1915 (48 U.S.C. 353). The consent may be conditioned upon reasonable payment to the Territory. The Territory has no authority under the Act of 1915 to lease the reserved school sections to the Federal Government. Land reserved by the Act of 1915 may be withdrawn by public land order for the use of the Department of the Army. Applicability of the Act of June 14, 1926 (44 Stat. 741) as amended (43 U.S.C. 869) to school sections reserved by the Act of 1915 considered.

Materials Act

The Bureau of Land Management may issue permits to the Alaska Road Commission under the Materials Act authorizing the Commission to remove roadbuilding material from sections reserved for the Territory of Alaska by the Act of March 4, 1915 (48 U.S.C. 353), providing consent of the Territory is first obtained.

Accounts: Payments

Proceeds from leases for school sections reserved by the Act of March 4, 1915 (48 U.S.C. 353) issued under the Act of June 14, 1926, as amended (43 U.S.C. 869) should be deposited in the United States Treasury for payment annually to the Territory of Alaska.



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

FEB 8 - 1955

M-36243

Memorandum

To: Director, Office of Territories

From: Acting Solicitor

Subject: School sections reserved by the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353), for the Territory of Alaska

Reference is made to your memorandum of September 23 and attached correspondence raising the following questions:

1. May the Territory charge the Alaska Road Commission, a Federal agency under the jurisdiction of this Department, for road-building material removed by that Commission from school sections reserved for the Territory by the Act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353), the material to be used for the construction and maintenance of roads outside of those sections? The record shows that such material is being removed by that Commission under permits issued by the Bureau of Land Management, authorized by the Act of July 31, 1947 (61 Stat. 681; 43 U.S.C. 1185).

2. May the Territory, under authority of section 1 of the act of March 4, 1915, supra, lease lands in reserved school sections to the Federal Government for buildings and structures used for defense purposes and collect rental for such use? It appears that the Territory has leased such lands to an agency of the Department of the Army for those purposes.

I

With respect to question 1:

With certain exceptions not pertinent here, section 1 of the Act of March 4, 1915, supra, provides that when public lands in the Territory are surveyed, sections 16 and 36 of every township shall be reserved from sale or settlement, for the support of common schools of

the Territory and sections 33 in every township within a certain area shall be reserved for the support of the Territorial agricultural college and school of mines. The reservation made by the act does not attach to a school section until it has been surveyed and the plat of survey approved or accepted by the Bureau of Land Management. ^{1/} The reservations made by the act are not grants and title to the reserved sections remains in the United States, subject to the full control and disposition of Congress until the contemplated grant is effected. ^{2/} Hence the Territory cannot charge for the material by virtue of any ownership of such a section or of the material therein. However, section 1 of the act of July 31, 1947, *supra*, after authorizing the Secretary of the Interior to permit any Federal, State or Territorial agency, unit or subdivision, including municipalities, without charge, to remove material from public lands, provides in part:

"When the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under said sections only with the consent of such Federal department or agency or of such State, Territory, or local governmental unit."

The act clearly applies to Alaska, as section 3 thereof provides for the disposal of proceeds from the reserved school sections in Alaska.

One of the functions of the Territorial government is the establishment and maintenance of public schools in the Territory ^{3/}

^{1/} Section 1 of the act of March 4, 1915 (38 Stat. 1214; 48 U.S.C. 353). See John J. Corey, A-25892 (August 11, 1950); departmental decision of April 14, 1920 (D-38804)(796175); Cf. United States v. Morrison, 240 U.S. 192 (1916); State of New Mexico, 52 L.D. 679 (1929); State of Colorado, 49 L.D. 341 (1922); State of Montana, 38 L.D. 247, 250 (1909); F. A. Hyde & Co., 37 L.D. 164, 165 (1898); and Solicitor's Opinion M-36143 (July 22, 1952).

^{2/} See departmental ruling of July 16, 1946 (59 I.D. 280, 283) and footnotes 5 and 6; New Mexico v. Altman, 54 I.D. 8 (July 18, 1932); Byers v. State of Arizona, 52 L.D. 488 (September 10, 1928).

^{3/} Act of January 27, 1905 (33 Stat. 616), as amended (48 U.S.C. 41, 161169).

and as the proceeds from the reserved school sections obviously would aid in the performance of that function, it is clear that the Territory comes within the scope of the above-quoted provision of section 1 of the act of 1947. Consequently, roadbuilding or other materials in the reserved school sections may not be removed and disposed of under the act of 1947 without first obtaining the consent of the proper agency of the Territory. As the Territory may refuse or give consent, it follows that it may attach reasonable conditions to the consent, if given. In view of the purpose for which the surveyed school sections have been reserved, its consent may be conditioned upon the Federal agency entering into a separate agreement with the Territory which requires a reasonable payment to the Territory. However, in our opinion after the Territory has once given its consent to the issuance of a permit and the permit has been issued, the Territory may not attach other conditions so long as the permit remains in effect.

With respect to question 2:

II

A provision of the act of March 4, 1915, supra, reads as follows:

"Provided further, that the Territory may, by general law, provide for leasing said land in area not to exceed one section to any one person, association, or corporation, for not longer than ten years at any one time."

We find nothing in the act or in its legislative history to justify the conclusion that by the words "person, association, or corporation" Congress intended to include the Federal Government. It is hardly conceivable that by those words Congress intended that lands to which the United States still holds legal title may be leased by the Territory to the United States and that the Federal Government be restricted to leasing not to exceed one section. Therefore, we conclude

See Solicitor's Opinion M-36071 of May 16, 1951 (60 I.D. 477); Cf. Solicitor's Opinion of July 8, 1939 (57 I.D. 31, 33), wherein he held that power to grant or refuse a right of way permit, implied the authority to condition the permit upon payment of rental.

that the Territory has no authority under the provision quoted to lease to the Federal Government. It may be that under the language the Territory could issue a lease to a governmental corporation. That specific question will be considered when and if it arises.

III

We have also been asked whether the Secretary by the issuance of a public land order may withdraw such legal subdivisions of a section reserved to the Territory by the Act of March 4, 1915, supra, as might be needed by the Department of the Army. In our opinion, he may do so. As above stated, the reservation made by the Act of 1915 is not a grant but is merely a reservation in contemplation of a future grant and the legal title to the reserved school section remains in the United States. Hence the reservation is no legal obstacle to such a withdrawal ^{5/} particularly as the reservation is only "from sale or settlement". ^{6/}

IV

In closing, attention is called to the Act of June 14, 1926 (44 Stat. 741), as amended by the Act of June 4, 1954 (43 U.S.C. 869) which authorizes the Secretary of the Interior to sell or lease public lands for public purposes to Federal instrumentalities. The judicial interpretation of the term "public lands" as used in other acts has varied with the context and purpose of the statute in which it occurs and although those words ordinarily are used to designate such lands as are subject to sale or disposal under the general land laws, they are sometimes used in a larger and different sense. ^{7/} We think that might be true here, since the section 1(c) of the Act specifically excepts from the applicability of the Act, lands covered by certain enumerated kinds of withdrawals and provides for the disposal of other lands withdrawn in aid of a function of a Federal or Territorial agency with the consent of that agency.

^{5/} See Byers v. State of Arizona, 52 L.D. 488 (September 10, 1928); departmental ruling of July 16, 1946 (59 I.D. 280, 283); Assistant Attorney General's Opinion of October 19, 1905 (34 L.D. 186), which concerned lands withdrawn March 9, 1903, under the reclamation laws. The Federal Government still retains control and dominion over the reserved sections - see United States v. Elliott, 41 P. 720 (1895); Barkley v. United States, 19 P. 36 (1888; Washington); United States v. Bisel, 19 P. 251 (1888; Montana).

^{6/} Section 1 of Act of March 4, 1915 (48 U.S.C. 353).

^{7/} See Kindred v. Union Pac. Ry. Co., 225 U.S. 582 (1912); Newhall v. Sanger, 92 U.S. 761 (1875); Union Pac. Ry. Co. v. Karger, 169 P. 459 (1909); United States v. Blendauer, 128 P. 910 (1904); State of Utah, 53 I.D. 365, 368 (1931).

The pertinent portion of the section 1(c) provides that:

"Where the lands have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal department or agency, or of such State, Territory, or local governmental unit."

In view of the consent requirement, before a lease may be issued for a reserved school section, it would be necessary that the consent of the proper agency of the Territory to the issuance be obtained. As the Territory may refuse or grant its consent, the consent, if given, may be conditioned upon the Territory being assured of receiving the amount of the rental. ^{8/} The section 2(b) of the Act authorizes the Secretary to charge a "reasonable annual rental" and the regulations (43 CFR 254.8d) provides for such rental. The rental received by the Secretary under such a lease would be deposited in the United States Treasury for payment annually to the Territory pursuant to section 1 of the Act of March 4, 1915 (48 U.S.C. 353). When any specific questions arise over the applicability and effect of the Act of June 4, 1954, we shall be glad to consider them.

Of course, a permit, lease or withdrawal order cannot be issued for a reserved school section to the detriment of a lease issued by the Territory under the second provision of section 1 of the Act of March 4, 1915, supra.

Reuel Armstrong

Acting Solicitor

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^{8/} See footnote No. 4.