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DEPARTMENT OF THE INTERIOR

WASHINGTON

July 8, 1930

The Commissioner of the
General Land Office.

Dear Mr. Commissioner:

Your letter of June 12, 1930 requests advise as to whether in issuing patents for public lands in Alaska not situated within National Forests, reservation should be made of rights of way for roads, trails, etc., constructed and operated by the Government.

Concerning the construction and maintenance of roads and trails in Alaska, the following is quoted from the circular of General Information Regarding The Territory of Alaska, edition of November, 1929:

"There are two Federal road and trail building agencies in the Territory - the Alaska Road Commission, operating under the War Department, and the Bureau of Public Roads, operating under the Department of Agriculture. The activities of the latter are limited to the national-forest areas. The Territorial Roads Commission allots a small part of its funds to cooperative projects within the national forests. Under a cooperative agreement authorized by law the Alaska Road Commission expends Territorial funds on miscellaneous public works, such as road and trail projects, shelter cabins, telephone lines, aviation fields, and flood protection, thus obviating the necessity of a Territorial construction organization.

"Since its organization in 1905, the Alaska Road Commission has constructed or maintained a system of roads and trails aggregating 10,941 miles and extending from open all the year round south coast parts to various parts of the Territory. This system comprises 1,589 miles of wagon road, 87 miles of tramway, 1,405 miles of sled road, 7,148 miles of permanent trail, and 712 miles of temporary flagged trail. About seven-eighths of the wagonroad mileage has a gravel surface and is suitable for light automobile traffic!!

The statutory provisions regarding the construction of roads, trails and bridges by the board of road commissioners are incorporated in sections 321 to 337, inclusive, of Title 48, United States Code,. Provision is made for a board of road commissioners, composed of an engineer officer of the United States Army to be detailed and appointed by the Secretary of War, and two other officers of that part of the Army stationed in the Territory, also designated by the Secretary of War. The board is given the power and is charged with the duty upon their own motion or upon petition to "locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of Alaska to any town, mining or other industrial camp or settlement, or between any such town, camps, or settlements therein, if in their judgment such roads or trails are needed

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and will be of permanent value for the development of Alaska." The board is directed to prepare maps, plans and specifications of every road or trail they may locate and lay out and as soon as the same has been constructed and completed, to examine it and make a full and detailed report to the Secretary of War as to whether it has been completed conformably to the maps, plans and specifications. The board is also charged with the duty of keeping in proper repair all roads and trails constructed under their supervision. The cost and expense of laying out, constructing and repairing such roads and trails is paid by the Secretary of the Treasury, through the authorized disbursing officer of the board designated by the Secretary of War, out of the road and trail portion of the Alaska fund. The Secretary of War is also authorized to receive from the Territory or other source such funds as may be contributed by them, to be expended in connection with funds appropriated by the United States for any authorized work.

No specific statutory direction is given that patents for lands upon which these roads or trails are constructed shall contain a reservation to the United States of right of way, as was the case in the act of March 12, 1914 (38 Stat. 305), providing for the construction of lines of railroad in Alaska by the Government, wherein it was directed that a reservation be expressed in all patents for lands taken up, entered or located in Alaska after March 12, 1914, reserving to the United States a right of way for the construction of railroads, telegraph and telephone lines. Nor does the necessity appear for such a reservation of right of way for roads, trails or bridges in advance of construction.

The construction of roads and trails by the road commission is by specific direction of Congress. The authority to lay out and construct same for the public benefit over and across the public lands is clearly granted. The authority to do this is not dependent upon the grant of right of way for the construction of highways over public lands, not reserved for public uses, under section 2477, Revised Statutes, but rests upon the the special statutes above referred to.

In the absence of specific statutory direction, there clearly would be no authority for the insertion of a reservation in patents generally of a right of way for such roads and trails in advance of their being laid out or constructed. The remaining question, therefore, is whether, in cases where roads and trails have been constructed or laid out by the road commission across public lands to which no prior valid right has attached under the public land laws, a reservation should be included in patents subsequently issued for the protection of these public works. It seems certain that under these facts the title of the subsequent patentee would be subservient to the right of the public to use the roads and trails and the right of the United States to maintain them, regardless of whether or not an exception or reservation is incorporated in the patent.

In its essential elements, the question involved is not materially different from that pertaining to roads and trails and other improvements necessary for the proper and economical administration, protection and development of the National Forests under the act of March 4, 1915 (38 Stat. 1100), with respect to which the Department has instructed your office that when lands subject thereto are thereafter disposed of under any of the public

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land laws, the final certificate and patent shall except such portion thereof as is so devoted to public purposes (44 L.D. 513). The instructions were restricted to instances of actual construction, or where construction has been provided for and will be immediately undertaken.

There are many rights of way existing by virtue of law, with respect to which no reservation or exception has been incorporated in patents issued under the public land laws for lands thereby affected. It has been the uniform practice of the Department to issue patents to lands over which rights of way have been acquired under section 2477, Revised Statutes, without a clause excepting such right of way, Douglas County, Washington (26 L.D. 446), and Charles C. Crane (47 L.D. 181). Numerous other instances might be cited.

The roads and trails constructed in Alaska by the Government agencies are devoted to public purposes, as are the roads constructed for the protection and development of national forests, and for the same reason an exception may be included in patents subsequently issued for lands traversed by such roads and trails, for the purpose of safeguarding the interests of the Government and of the public therein. However, the Secretary of War should furnish surveys and maps of such roads and trails in order to identify the lands to which such exception would apply.

Very truly yours,

/s/ John H. Edwards

Assistant Secretary

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