



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

In reply refer to:

A-58-2044-10

FILE COPY

Surname:

Lieberman J. W.
McKinnley 3-24

MAR 28 1958

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor, Division of Public Lands

Subject: Authority to grant easements over public lands to the Territory of Alaska under act of November 9, 1921, as amended (23 U.S.C., sec. 17)

g-T-PN

Your memorandum of January 6 concerns the effect on Section 17 of the 1921 Act, supra, of the Federal Highway Act of 1956 (70 Stat. 374) with respect to the grant of highway easements over public lands to the Territory of Alaska.

Section 17 of the 1921 Act has been cited as authority for appropriations of public lands in Alaska by the Bureau of Public Roads. United States v. Schaub, 103 F.S. 873, aff. 207 F. (2d) 325 (1952); letter dated October 14, 1930 of the General Land Office, approved by the Department on October 15, 1930, file 1385230 "F". As a matter of policy, in any case, the Department apparently would not object to the use of public lands by Federal agencies, even without the authority of the 1921 Act. This was held to be the general policy even as to appropriations of materials for road construction purposes by State or County officers. See opinion of September 21, 1933 (54 I.D. 294, 297). The withdrawal authority has been exercised to provide for use of public lands by Federal agencies under 43 CFR, Part 295. See for example withdrawals for the Bureau of Public Roads in Alaska, by Public Land Orders 1380 of January 14, 1957 (22 F.R. 400) and 1516 of September 27, 1957 (22 F.R. 7863). The Department also has recognized appropriations of public lands by Federal agencies without formal withdrawals. Instructions of January 13, 1916 (44 L.D. 513). The Department now has specific statutory authority for the appropriation of materials on public lands in Alaska by governmental bodies under the act of July 31, 1947, as amended (43 U.S.C., sec. 1185).

So far as we have been able to ascertain, however, it has never been determined that the 1921 Act authorizes transfers of rights-of-way to a territorial agency. As you point out in your memorandum, the regulations (43 CFR 244.54) have construed the 1921 Act as not authorizing transfers of easements to territories under that act. The Department, in effect, adopted a specific exception

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to the general rule of the regulations (43 CFR 244.13) which provides that the general right-of-way laws are applicable to Alaska. See Circular 1825 of June 24, 1952. We would consider the administrative interpretation of the 1921 Act, contained in Section 244.54 of the Department's Regulations, to be decisive, unless, of course, there is clear evidence in the 1956 Act of a Congressional intent to change the 1921 Act in a manner inconsistent with this Department's past interpretation of the 1921 Act. (See Crawford "Statutory Construction", 1940 ed., Secs. 219, 303-312).

The 1956 Act contains no express language which purports to amend the 1921 Act so as to extend the provision for transfers under the latter act to the Territory. The 1956 Act does not extend to Alaska all the provisions of the Federal-aid highway laws. Thus Sections 108 and 109 of the 1956 Act, dealing with the interstate highway system, would appear to be inapplicable to Alaska. Section 107 of the 1956 Act provides that the

"* * * Territory of Alaska shall be entitled to share in funds herein or hereafter authorized for expenditure for projects on the Federal-aid primary and secondary highway systems, and extensions thereof within urban areas, under the Federal-Aid Road Act approved July 11, 1916 (39 Stat. 355), and acts amendatory thereof or supplementary thereto, upon the same terms and conditions as the several States and Hawaii and Puerto Rico* * *." (Underlining supplied)

It may be argued that the "terms and conditions" involved in sharing "funds" may be concerned with public land grants under Section 17 of the 1921 Act, *supra*, as well as matters bearing more directly on the fund provisions of the Federal aid highway laws. Grants of rights-of-way certainly may contribute substantially to the highway aid program. The transfer by Congress of the Alaska road construction and maintenance functions of this Department to the Department of Commerce under the 1956 Act did provide an organizational basis for extending to Alaska the benefits enjoyed by the States. It may be that if Congress had considered the matter specifically, the 1956 Act would have indicated clearly an intent to extend to Alaska all the provisions of the Federal aid highway laws, including the right-of-way transfer provisions of Section 17.

To find such an intent in the 1956 Act, however, seems greatly to strain the language of that act. Congress was concerned

with extending to Alaska the fund provisions of the Federal Aid Highway Act rather than with the authority to transfer easements in public land to the Territory under Section 17. This seems clear from the absence of any mention of Section 17 in the 1956 Act and because of the specific reference to Hawaii and Puerto Rico to which the land transfer provisions of Section 17 do not appear to apply. See Policy and Procedure Memorandum 21-4.3, March 27, 1957, Subject: Right-Of-Way Procedures (Public Lands and Reservations), U.S. Department of Commerce, Bureau of Public Roads.

Its legislative history does not indicate that Section 107 of the 1956 Act was intended to have any effect on Section 17 of the 1921 Act. Section 107 was introduced into the legislation on May 7, 1956, as a proposed amendment to H.R. 10660, 84th Congress, offered by Senator Neuberger of Oregon. The following language, used by him, indicates his reasons for proposing the amendment:

"4. The Territory of Alaska is still excluded from this Federal-aid highway legislation, in spite of the fact that this is our nearest land to the Soviet Union, and an expanded Federal highway program is cited by the administration as being crucial to national defense. Why should Hawaii and Puerto Rico be included and Alaska eliminated? Such discrimination makes neither rhyme nor reason.

"Furthermore, residents of Alaska will pay the road and vehicle taxes included in title II of H.R. 10660, without sharing in the benefits made available by title I. This is the epitome of taxation not only without representation, but also without reciprocity. I plan to sponsor an amendment to bring Alaska within the provisions of the Federal-Aid Highway Act, but with some modification as to formula, so that Alaska's vast area will not make disproportionate the benefits thus conferred."

S. Rep. No. 1965, May 10, 1956, page 22. His statement does not indicate concern with the non-financial benefits in any highway law other than the Federal Aid Highway bill then under consideration.

Even if Congress would have desired to extend the right-of-way transfer provisions of Section 17 to Alaska, there is no assurance that the new statutory provision would have taken the same form as that now applicable to the States. The provisions in the 1956 Act which extended

fund benefits to Alaska actually differ in some significant respects from those applicable to the States.

There is now pending in Congress, S. 3151, 85th Congress, a bill "To revise the Federal-aid highway laws of the United States." Section 318 of this bill, as introduced by Senator Case, would include the provisions of Section 17 of the 1921 Act. Even though the transfer is one to be made to the "State" highway department, or its nominee, the applicability of the provision to Alaska is made clear by Section 325 of the bill, paragraph "(g)" of which defines "State" as including Alaska. We understand that this bill is not intended to make any major substantive changes; and it may be that the drafters of the bill are of the opinion that Section 17 of the 1921 Act now authorizes rights-of-way transfers to the Territory of Alaska. This would be to us, however, a doubtful construction of the effect of the 1956 Act on the 1921 Act. Until Congress has adopted legislation such as S. 3151, therefore, we believe that the regulations (43 CFR 244.54) should not be revised in the proposed manner since there is no clear evidence that rights-of-way may be transferred to the Territory under the 1921 Act as supplemented by the 1956 Act.

Charles W. Sollen

Associate Solicitor
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cc: Secretary's File
Docket Room
Divl of Public Lands Reading File
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