Betsy Bonnell at BLM faxed me these pages on October 17, 2007. I told her that early in my career it seemed that there was always an argument as to whether the allottee's use and occupancy preceded the public land order leading to the Omnibus QCD right of way conveyance. In later years it appeared that the BLM adjudicators just made all of the allotments subject to the roads noted in the Omnibus QCD.

The attached fax includes a couple pages from an August 23, 1982 Regional Solicitor's Opinion regarding Reservation of Omnibus Act rights of way in patents and in native allotment certificates. The other two pages is from a BLM guidebook regarding adjudication of Native Allotments.

The Solicitor's memo suggests that the Allotment would only be subject to the Omnibus Road if the use and occupancy for the allotment comes after the date of the QCD. As the easement interest was already out of federal ownership, it was not available to the allotee.

If use and occupancy did predate the QCD, then title recovery through the Aguilar procedures would be necessary.

H-2561-1 - NATIVE ALLOTMENTS
Regional Solicitor's Opinion, Reservation of Omnibus Act Rights-of-Way in Patents and in Native Allotment Certificates

United States Department of the Interior
OFFICE OF THE SOLICITOR
ALASKA REGION
510 L Street, Suite 100
Anchorage, Alaska 99501

IN REPLY REFER

COPY

August 23, 1982

MEMORANDUM

To: State Director
Bureau of Land Management
Alaska State Office

From: Attorney
Office of the Regional Solicitor
Alaska Region

Subject: Reservation of Omnibus Act Rights-of-Way in Patents and in Native Allotment Certificates (932)

By memorandum of July 28, 1982, you set out the BLM's view that patents and Native allotment certificates should be made subject to those rights-of-way transferred by Section 21 of the Alaska Omnibus Act, Public Law 86-70 (73 Stat. 141 at 145) and asked for suggestions and comments on the proper wording for such a conveyance provision.

With a few caveats, we agree with your stated view that patents and allotment certificates are subject to rights-of-way conveyed pursuant to the Alaska Omnibus Act. First, while the transfer of the roads was mandated by Section 21 of the Alaska Omnibus Act, the actual transfer was consummated by a quitclaim deed from the Secretary of Commerce dated June 30, 1959. Schedule A of that deed lists the particular roads transferred to the State of Alaska. The widths of the roads vary and are determined by reference to the applicable Departmental land orders (i.e., S.O. 2665 and PLO's 601, 757, and 1613).

Second, the general procedure we are agreeing with in this memorandum pertains only to patents and allotment certificates issued in those cases where the entries or use and occupancy commenced after the 1959 conveyance to the State. The general procedure does not apply to patents or allotment certificates based on entries or use and occupancy predating conveyance of the road. Those situations require a different treatment, as well as a careful factual analysis, and are not encompassed by this memorandum.

MODIFIED— THIS PROC. APPLIES ACROSS THE BOARD TO NATIVE ALLOTMENTS + PRIOR RIGHTS TO ROADS MUST BE VINDICATED WITH AQUILAR PROCEDURES DJG

H-2561-1 - NATIVE ALLOTMENTS

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It should also be noted that, while the Native Allotment Act of May 17, 1906 (34 Stat. 197) does not specifically provide that a Native allotment will be subject to such rights-of-way, if the Native Allottee's use and occupancy did not commence prior to the conveyance of the particular road involved, then that interest in land was already out of Federal ownership and was not available to the Allottee. Thus, we have a unique situation where an interest in the land has been previously conveyed and cannot be part of the Native allotment. Hence, where the use and occupancy started after the conveyance of the road, it would be appropriate to make the allotment certificate subject to the specific road which was conveyed pursuant to the Alaska Omnibus Act.

Accordingly, in those instances where the width of the Omnibus Act road can be determined, we recommend conveyance wording similar to the following:

> An easement for highway purposes, extending (number of feet) each side of the centerline, in the (road name as it appears in Sechdule A of the quitclaim deed) transferred to the State of Alaska by the quitclaim deed dated June 30, 1959, and executed by the Secretary of Commerce pursuant to the authority of the Alaska Omnibus Act, Public Law 86-70 (73 Stat. 141) as to (legal description or road location as to township, range and section as applicable).

Where the width of road cannot be ascertained, you can use the above language by deleting "extending (number of feet) each side of the centerline."

We believe this language sufficiently ties the road to its location and width at the time of the quitclaim deed of June 30, 1959. We certainly agree that any realignments, etc., cannot be recognized in a patent or allotment certificate unless they are covered by additional rights-of-way grants and are otherwise proper. In addition, the language set out above is consistent with that set out in a memorandum of October 16, 1979 from the Chief, Branch of ANCSA Adjudication to all ANCSA Section Chiefs. The only difference in the proposed language is a correction of the referenced date of the quitclaim deed from June 3, 1959 to June 30, 1959.

on December 1, 1960, as the allotment was a valid existing right at the time of grant issuance.

Adverse action against either the Trans Alaska Pipeline System or Northwest gas pipeline rights-of-way must be coordinated with the Branch of Pipeline Monitoring (983).

10. 44 L.D. 513s. If use and occupancy does not predate a notation of Federal appropriation of land under the provisions of 44 L.D. 513, the Government's interest will be reserved in the certificate of allotment and will be protected as long as there is continued Federal use. Check the field report for information as to whether the Government is still using the right-of-way. Another source to use is the ANCSA Sec. 17(b) easement file. If it can be determined that the Government no longer requires the right-of-way, or the use of a 44 L.D. 513 notation was inappropriate to begin with, the notation should be removed from the records prior to conveyance of the allotment. These situations require coordination with the appropriate district office. If use and occupancy predates the 44 L.D. 513 notation, the agency will be listed in the heading of the Native allotment approval decision, and the decision will state that the Government's authorization to use the land terminates when the decision becomes final.

11. Omnibus Act Roads. Omnibus Act roads were transferred to the State of Alaska by a quitclaim deed dated June 30, 1959, and are identified in Schedule A of the original deed by description and mileage. The Department's position is that the quitclaim deed transferred an easement interest and not the full fee. Therefore all allotments encompassing an Omnibus Act road must be made subject to an easement for the road. However, research is required to determine whether the applicant's use and occupancy predated the quitclaim deed, any withdrawal for the road, or public use of the road. If the applicant's use did predate, title recovery is required to obtain the easement back, as in other Aguilar-type situations. See modified Regional Solicitor's opinion dated August 23, 1982 (Appendix 33).

Omnibus Act road widths are derived basically from

Secretarial Order 2665, as amended (Appendix 21) and PLO 1613. However, PLO's 601 and 757 may have some impact.

The specific language to be used in making the Certificate subject to an Omnibus Act road is found in Illustrations 9 and 9a (Glossaries 24a and 28a). There is a wording variation for those Omnibus Act roads described in Public Land Order 1613. Note: Realignment of any Omnibus Act road is a new right-of-way grant and not subject to the Omnibus Act "rules".

Also note that the Omnibus Act quitclaim deed did pass full fee title to some sites (as opposed to an easement in the case of the road system). It is necessary to examine the appropriate schedule to determine what interest was transferred.

12. Roads and Trails.

a. General. An allotment may be made subject to traditional public access routes including roads and trails when approving under the 1906 act. First, determine whether use and occupancy predated the road or trail. It may be difficult to establish a specific date when the road or trail was first used. Sources that may be of help include a BLM historian, realty specialists, the ANCSA Sec. 17(b) easement case file, dated aerial photographs, State R.S. 2477 Trails System Maps, or Claus Naske's Alaska Road Commission Narrative.

Based on Degnan v Hodel, No. A87-252 Civ (D. Alas.) (1989), the Iditarod Trail cannot be reserved in the certificate of allotment based on the National Trails System Act. However, the certificate of allotment can be made subject to a public use trail based on use of the trail prior to and during the time of the applicant's use. This is true for any public use trail, not only the Iditarod. Care needs to be taken that the trail actually runs through the allotment.

Second, establish a width for each road or trail to which a certificate will be made subject. The maximum width