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MEMORANDUM

State of Alaska

TO:

Jack T. Bodine
Asst. Right-of-Way Director
Department of Highways

DATE September 25, 1968

FROM:

G. Kent Edwards
Attorney General

SUBJECT: Project S-0680 (12)
Fox North to Olnes
File No. 23-2506

By: Russell E. Mulder
Assistant Attorney General

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In your memorandum of July 24, 1968, you asked for an opinion on the following two questions:

1. What is its legal effect when an agreement for acquiring road building materials is entered into by the District Highway Engineer without being signed by the Commissioner of Highways?

2. What right does the claimant have to compensation for road building materials removed from an unpatented mining claim?

In regard to the first question, there is no doubt that under the provisions of AS 19.05.080 that persons other than the Commissioner can approve contracts for the purchase of road building materials. The only legal question which does arise, however, is whether there has been a proper delegation of authority, i.e. whether the proper officer has been given the specific power to make such approvals:

To resolve any question as to whether a certain officer or employee has the proper authority to legally bind the Department, the Commissioner should specifically designate a contracting officer of officers who will have the function of approving contracts.

The second question is one of some complexity and requires a greater degree of discussion.

The general rule as to what rights a locator has in his mining claim prior to patent is well established and well stated by the United States Supreme Court in the case of Wilber v. U. S. ex rel Krushnic, 1930, 50 S. Ct. 103, 280 U. S. 306, 74 L.Ed. 445. The court held that:

"When the location of a mining claim is perfected under law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term. . . ."

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Although the above quoted language seems to indicate that a locator can use his land and what is on it for any purpose, the doctrine has been limited or qualified to a degree. In the case of Teller v. U. S., 1901, 113 Fed. 280, 51 C.C.A. 230 it was held that:

" . . .but [possession] confers no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining." (Emphasis added)

It is, therefore, established that a locator cannot sell timber, gravel, sand, etc. as could an owner in fee simple of the land. It becomes apparent that if a locator cannot sell or otherwise use his claim property for other than mining purpose, he is not entitled to just compensation for its taking or conversion. If indeed compensation were due for the taking of materials, it would seem that the United States (as holder of the title) would be entitled to it.

The locator is not, however, without a legal remedy if a trespasser comes upon his land and takes timber or part of the land itself. It has been held that the owner of a mining claim may maintain a suit for damages against one who trespasses thereon and cuts standing timber, though patent has not been issued from the United States. Duffy v. Strandberg, 1915, 5 Alaska 353. Because the nature of the trespass is similar as to both the taking of timber and materials such as sand, gravel, etc., the rule set forth in the Duffy case would be applicable to the road building materials presently in question.

The court in the Duffy case stated the rule of damages to be used in trespass cases of this nature.

"There is only one safe rule by which the damage to a mining claim, as such, by reason of a timber trespass, can be ascertained, and that is by showing the value of the claim before the trespass, compared with its value after the trespass."

Thus, the locator has only the right to compensation from a trespasser to the extent that his land is injured and not for the fair market value of the timber or materials taken