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ACQUISITION OF PIPELINE RIGHT-OF-WAY
ACROSS HOMESTEAD ENTRIES IN ALASKA

Rights-of-way: Act of February 25, 1920--Homesteads: Generally--Statutory Construction: Generally--Statutory Construction: Legislative History.

The Act of March 3, 1873 (17 Stat. 602; as amended 43 U.S.C. sec. 174), authorizing settlers under the homestead or other settlement laws to transfer portions of their claims for certain stated purposes does not provide for the granting of easements and has no effect on the right of the settler to grant them. Its sole purpose is to authorize the transfer of land.

Homesteads: Generally-Rights-of-way: Act of February 25, 1920

The grant of an easement does not transfer the title nor the right of possession to land but merely grants a right to use the land for a specified purpose or for specified purposes. To transfer or alienate land means to pass the title and with it the right of transfer of land, does not prohibit the granting of an easement.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36601 June 8, 1960

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor, Division of Public Lands

Subject: Acquisition of pipeline right-of-way across homestead entries in Alaska

The Regional Solicitor, Anchorage Region informs me that the Kensi Pipe Line Company which desires to construct an oil pipeline from the oil field on Kensi Peninsula to a proposed terminal at Nikiski, on Cook Inlet, is encountering difficulty in obtaining the right to cross unpatented homestead entries along the proposed route for the pipeline. He advises that the Company has applied to the local office of the Bureau of Land Management for a right-of-way for the pipeline subject to valid existing rights and he encloses a form of a covenant not to sue which it is proposed to have the entrymen sign to enable construction of the line across the entries, which the Company proposes to enter into with the entryman in lieu of obtaining a grant of a right-of-way, either a fee or an easement, and asks that we inform you whether such a covenant by the entrymen would be in violation of the nonalienation provisions of the homestead law (48 U.S.C. sec. 371), in order that you may appropriately inform the entrymen.

The Alaska homestead law, supra, provides that an entryman, prior to obtaining or earning title, may not alienate any portion of his entry except for church, seminary, or school purposes not over five acres and for the right-of-way for railroads to the extent of 100 feet in width on either side of the centerline of said railroad. This provision is comparable to the nonalienation provisions of the general homestead law, 43 U.S.C. sec. 162 and 164, as modified by sec. 174, except that sec. 174 includes authority for other kinds of rights-of-way. That section provides that a "settler" may transfer, by warranty against his own acts, any portion of his claim" for any of the purposes designated in the section. It's clear intent is to permit of the conveyance of the fee to a part, or parts, of the homestead or other tract claimed by the settler.

Section 174 is material here, not because it applies to Alaska which, in view of the provision in the special legislation in 48. U.S.C. applicable only to Alaska it does not, but because it is deemed to be the limit to which Congress saw fit to go in permitting

settlers to grant rights to others in the land within their claims. It is necessary then to determine the scope and meaning of the legislation. This we can best do by considering the conditions which prompted legislation. So far as it pertains to grants for churches and schools the answer seems obvious. They are considered highly desirable if not essential adjuncts of all communities. In 1873 when the law was enacted there were many large areas consisting entirely of public lands which Congress desired to have settled upon. There was usually no privately owned land available for churches and schools, yet any substantial settlement of the public lands would create a need for them. Title to the land was ordinarily required in order to promote their construction.

The situation with respect to the construction of railroads, the third and last item in the original act, is well expressed in Minidoka and Southwestern Railroad Co. v. United States, 235 U.S. 211. There the Court, after reciting that pursuant to its consistent policy of encouraging the building of railroads Congress had authorized the granting of rights-of-way across public land (then deemed by the Court to be grants of the fee), pointed out that where proposed rights-of-way crossed the land of settlers, they could not

> "make deeds to rights-of-way, not only because they had no title, but also because they were prohibited from alienating such land before final proofs."

It was also said that

> "*** the company could not build without an assured title to its right-of-way."

Later in the decision:

> "Under this act the appellant could have constructed its road along the strip conveyed to it by the homesteaders * * *." (emphasis added)

The remainder of the decision disposes of the issue in the case which was whether the law applies to reclamation homestead entries. The Court clearly and conclusively construes the act as one authorizing the sale of land, which as pointed out, appeared to Congress to be necessary for the accomplishment of the designated purposes. In a word Congress believed that authority to convey title was needed and it granted that authority. Neither that act nor the Alaska homestead act mentions easements and neither includes them by inference unless the granting of an easement is an alienation of land or "any portion" of the land.

Note first that the prohibition is against the alienation of the land. The word "alienate" means to convey, to transfer the title to property, Black, Law Dictionary. It has a technical legal

meaning and it has been said that anything short of a conveyance of the title is not an alienation. 11 Barb. (N.Y.) 630. It means to part with the ownership. Burbank v. Rockingham Mut. Fire Ins. Co., 24 N.H. 550, 558; 57 Am. Dec. 300. It means the transfer of the property and the possession of the land. Dickson v. New York Biscuit Co., 71 N. E. 1058, 1063. An easement is not the complete ownership of land but is a right to one or more particular uses of the land. Farmers Dreinage District of Ray County v. Sinclair Refining Co., (Mo.) 255 S.W.2d 745, 748. It is a non-possessory interest in land. Beetschen v. Shell Pipe Line Corp., (Mo.) 253 S.W.2d 785, 785. It is a "right of use". Rusk v. Grande, (Mich.) 52 N.W.2d 548, 550. It does not carry with it title to or right of possession to realty itself. Alvin V. Johnson, (Minn.), 63 N.W. 2d 22, 27. It is distinguished from a fee. State v. Begay, (N.M.) 334 P. 2d 608, 610. It is an incorporeal heraditement. Cookston v. Box, (Ohio), 146 N.E. 2d 171, 174; Alvin v. Johnson, supra.

The courts have said that the grant by a homestead entryman of an easement is not an alienation of the land. United States v. Turner, 54 Fed. 228. That case involved a "rail log road" and the 1873 act was not invoked nor considered. It is, therefore, unnecessary to consider whether it would have applied although conceivably a logging railroad may not have been within the contemplation of the act. See to the same effect, Methow Cattle Co. v. Williams et ux, (Wash.), 117 P. 239, relating to a right of way for a ditch for power generation purposes. The court pointed out that the grant did not violate the 1873 act because the grant of the right of way was not an alienation of the land. The Department has also said that the grant of an easement is not an alienation of land. Lawson, et al. v. Reynolds, 28 L.D. 155. This is consistent with the present practice. Thus:

> "All persons entering or otherwise appropriating a tract of public land, to part of which a right of way has attached under the regulations in this part, take the land subject to such right of way and without deduction of the area included in the right of way." (emphasis added) 43 CFR 244.7(b).

I conclude that a homestead entryman in Alaska may grant a right of way easement without violating the provisions of the homestead law against the transfer of any portion of the land except for purposes designated in the act. I also conclude that such an entryman can execute a covenant not to sue one who holds a grant of an oil pipeline right of way, subject to valid existing rights from the United States on account of the construction of such right of way

across his entry without violating the law prohibiting any transfer of the land. But the homestead entryman may neither sell a strip of land for such right of way purposes nor agree if and when he obtains title to sell such a strip.

(Sgd) C. R. Bradshaw

C. R. Bradshaw
Associate Solicitor for Public Lands

Approved: June 8, 1960

(Sgd) Edmund T. Fritz

Edmund T. Fritz
Deputy Solicitor