Juneau Region
Anchorage Field Office
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February 14, 1958

Memorandum

To: J. M. Honeywell, Area Administrator
Bureau of Land Management, Juneau

From: Eugene F. Wiles, Field Solicitor, Anchorage

Subject: 44 L.D. Rights-of-way

Bob Jenks, Land Office Manager, Fairbanks; Mr. James B. Hamlin, Eklutna Project Superintendent, Bureau of Reclamation; Mr. J. A. Wright, Real Estate Officer, Alaska District, Corps of Engineers; and Mr. E. H. Swick, Regional Engineer, Bureau of Public Roads, have each independently submitted to us similar problems concerning the acquisition of rights-of-way across public lands by Federal agencies.

The problem presented for our consideration by the Bureau of Reclamation concerns the notation of a right-of-way on the records of the Anchorage Land Office and the affect to be given such notation by the Land Office after the right-of-way has been filed by a Federal Agency. For the past several years the Bureau of Reclamation has been planning to relocate the existing Eklutna to Palmer electric transmission line. In planning for this relocation, the Bureau of Reclamation surveyed the prospective route for the power line and made an official plat of the right-of-way evidencing, in detail the area to be crossed by the power line. Accordingly, after the right-of-way plat was prepared, a copy of it was sent to the Anchorage Land Office along with a request that the records of that office be noted to show the existence of the right-of-way across the public domain lands administered by the Bureau of Land Management. The reasons that the Bureau of Reclamation made the request that the Land Office records be noted to evidence the right-of-way were twofold: First, to place all persons who wish to settle on or who are settling on public lands on official notice of the legal existence of the right-of-way across such lands; and, second, to place the personnel of the Land Office on notice of the existence of the right-of-way so that it would be certain that the Land Office would insert a right-of-way exception in all patents that might issue to those persons who are settling on the public domain.

A True Copy

After sending the right-of-way plat to the Land Office, the Bureau of Reclamation was advised by the Land Office that in the case of entered but unpatented public lands that it was not the practice of the Land Office to note the right-of-way on the serial register sheets and in the files and, accordingly, that no exception would be made in any patent that might issue to those persons who had settled on the right-of-way lands prior to the date that the right-of-way was requested to be noted on the records of the Land Office. The Land Office further advised the Bureau of Reclamation that whether or not the land was settled upon before or after the notation of the right-of-way on the records, that it was wholly without authority to insert a right-of-way exception for that particular right-of-way in any patent that may issue from the Land Office.

After receiving the foregoing information from the Land Office, the Bureau of Reclamation has now sought our advice as to whether or not it should obtain the execution of and pay for an easement from a homesteader who had settled on the public domain prior to the notation of the right-of-way on the Land Office records, it appearing that no patent had or has issued to the homesteader.

Factual situations similar to the problem now under our consideration for the Bureau of Reclamation have been presented to us on numerous occasions by both the Corps of Engineers and the Bureau of Public Roads. The factual situations that have caused the queries from those two Federal agencies have been presented by those agencies to us in the following manner.

New roads or the clearing of new trails in Alaska give a greatly increased value to lands over which or near which they will pass. One reason for the increased value of such lands is that access is afforded to theretofore inaccessible lands. This new access give the people the means of reaching, settling on, and acquiring public domain lands that were theretofore unavailable for settlement and acquisition from a practical standpoint. For this reason, the acquisition of these new lands along the route of new roads and trails becomes highly competitive. Thus, persons who wish to acquire new properties will closely watch the movement of survey crews employed by these Federal agencies. When these crews appear to be in the process of surveying the route of a new road or trail, those persons will immediately make filings in the Land Office claiming prior right to the acquisition of the acreage over which the survey crews are working. After these Federal agencies complete

their right-of-way survey, prepare plats of the right-of-way and file those plats in the Land Office, the agencies find that all or a portion of the right-of-way land has been previously filed for by private persons. Because the filings by private persons are prior in time to the filing of the right-of-way plats, the Land Offices treat the private filings as prior in right to the Government right-of-way and, in accordance with the present practice, the Land Office does not make note of the Federal right-of-way on the serial register sheets and in the case files connected with entered but unpatented lands. Also, in accordance with the present practice the Land Office does not insert a specific exception pertaining to the right-of-way in the patents that may thereafter issue.

A specific example of the problem faced by the Corps of Engineers and the Bureau of Public Roads is illustrated by a recent case concerning the Corps of Engineers. In this instance the Corps of Engineers surveyed a right-of-way across theretofore inaccessible public lands. While the Corps of Engineers was in the process of surveying and preparing plats of the right-of-way, two persons filed homestead entries and began to settle on the land surveyed for the right-of-way. Thereafter, the Corps of Engineers filed a plat of the right-of-way in the Land Office and requested that the records of the Land Office be noted accordingly. Upon examination, the Land Office found that the right-of-way was to cross the homestead entries made by the two persons. Acting in accordance with the present practice, the Fairbanks Land Office did not note the right-of-way on the serial register sheets and did not make note of the right-of-way in the case file pertaining to the homestead applications. Subsequently, the Corps of Engineers attempted to gain access to the right-of-way. This right to access was denied by the homesteaders; therefore, in order to expedite construction, and to acquire a judicially protected right of access to the property the Government filed a Declaration of Taking. 1/

When trial was had on the issue of whether or not the settlers were entitled to compensation for the Government's use of the lands for right-of-way purposes, the court found that the homesteaders were entitled to compensation and, accordingly, approved a jury award of $4,150.00 against the Government for the taking of approximately 10 acres of right-of-way lands. 2/

1/ See 40 U.S.C.A. 258a et seq.

2/ U.S. v. 180.31 acres of land, Fourth Judicial Division, Alaska, Civil No. A-9444. Judgment dated January 20, 1958.

In this case the Corps of Engineers has requested that an appeal be filed because they do not feel that mere entry upon the public lands would afford the entryman, prior to patent, such a right as would entitle him to compensation for the use of the right-of-way by the Government. The Corps also feels that when they submit their application for a right-of-way over public lands, with a plat depicting such right-of-way, that the Land Office in instances where the public lands have been entered should note such right-of-way on the serial register sheets and in the pertinent case file, and insert this right-of-way exception in any patent that is subsequently issued embracing the lands covered by the right-of-way. They feel that if this action were taken their rights and interest in the right-of-way would be afforded greater protection and would be easier to establish in court. These same views have also been expressed by the Bureau of Public Roads.

In view of the above problems concerning the acquisition and protection of their rights-of-way, the Bureau of Reclamation, the Corps of Engineers, and the Bureau of Public Roads have each asked us if it would be proper upon their filing an application for a right-of-way over public lands,3/ with a plat depicting such right-of-way, whether such land be vacant or entered, for the Land Office to note such right-of-way upon the appropriate records and insert a right-of-way exception in any patent that is subsequently issued embracing the lands covered by such right-of-way. They have also requested our opinion as to whether or not such action would protect the Government's interest in such lands.

The following is the result of our study concerning the questions presented by the Bureau of Reclamation, Corps of Engineers and the Bureau of Public Roads for your information and consideration.

The methods and procedures to be followed by all persons, including the Federal Government, who wish to obtain a right-of-way across public land are outlined in Part 244 of 43 CFR. Insofar as we have been able to determine, a footnote to Part 244 of 43 CFR sets forth the procedure to be followed in the acquisition of a right-of-way across public land by a Federal agency. This footnote is found at the beginning of the general right-of-way regulations and reads as follows:

NOT IN BOOK

3/As used in this memorandum, the phrases, "public land", "Federal land"; and, "the public domain", are used synonymously to mean all land under the jurisdiction of any agency of the Federal Govt., including the Bureau of Land Management. For various definitions accorded to those terms by the Department, see: 1 L.D. 393; 6 L.D. 239; 6 L.D.516;10 L.D.365;31 L.D. 288; 46L.D.55;46L.D. 109; 49 L.D.549;53 L.D.365; 53 L.D.453; 60I.D.129; 66 I.D.314; 60 I.D. 491;60 I.D.299; BLM Glossary of Public-Land Terms, Page 38.

UNRESERVED, OR WITHDRAWN, OR RESERVED PUBLIC DOMAIN LANDS.

"1/ This part does not apply to the obtaining of rights-of-way by Federal agencies over unreserved, or withdrawn, or reserved public domain lands. Such rights-of-way may be appropriated under the principles of the Instructions of January 13, 1916 (44 L.D. 513), with consent of the agency having jurisdiction or control over the land."

Thus, the foregoing footnote to the general right-of-way regulations states that the procedure to be followed in acquiring a right-of-way across public lands by a Federal agency is controlled in the manner by which it acquires and protects its right-of-way over all Government land, including withdrawn acreage, by the principles contained in the Instructions issued by the Secretary of Interior on January 13, 1916 as they are set forth in 44 L.D. 513. Hence, in order to answer the question asked us by the Bureau of Reclamation and the other Federal agencies, we must carefully review and analyze those Instructions.

The Instructions of 44 L.D. 513 arose as an explanation of earlier regulation issued by the Secretary. This earlier regulation is found in 44 L.D. 359. Inasmuch as the Instructions in 44 L.D. 513 make direct reference to and rely on the factual background connected with the earlier regulation of 44 L.D. 359, we believe that it is essential for us to analyze both sets of Instructions in light of each other before we can clearly portray the principles which control the procedure to be followed in the acquisition of rights-of-way over open or withdrawn public land by Federal agencies.

The first set of Instructions in 44 L.D. 359 dealt with a problem presented to the Secretary of Interior by the Department of Agriculture. It appears from the facts set forth in 44 L.D. 359, that the Department of Agriculture had received a general Congressional appropriation for the construction of telephone lines. Pursuant to the authority of this appropriation the Department of Agriculture had gone onto public land and constructed a telephone line. This line was surveyed and built over public lands which had been previously settled upon by homesteaders who were attempting to acquire patents to their claims under the public land laws.4/

4/ The homesteaders were settling on this land and proceeding to acquire title thereto from the United States under the Homestead Law of June 11, 1905, 34 Stat. 233, 16 U.S.C. 506 et seq. This act provided for the opening of agriculture acreage in National Forests to homesteading. After the land was opened to settlement, the homesteader proceeded to patent in the same manner as other settlers homesteading under other homestead laws.

Because the line was surveyed and built after the lands had been entered by homesteaders, the Department of Agriculture forwarded a plat depicting the right-of-way to the Secretary of Interior and requested that such right-of-way be noted on the appropriate Land Office records and that an exception protecting the telephone line be set forth in each patent that might subsequently issue from the Land Office to the homesteaders.

After considering the Department of Agriculture's request, the Secretary issued the Instructions of 44 L.D. 359. In these instructions the Secretary of the Interior, in setting forth the procedures to be followed in such matters, stated in pertinent part as follows:

> "The Secretary of Agriculture has forwarded to this Department copies of tracings and field notes of constructed Forest Service telephone lines crossing lands within national forests and listed and entered under the homestead law of June 11, 1906 (34 Stat. 233), requesting that reservations of rights of way covering said lines be inserted in patents when issued. (Emphasis added)
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> "In the case of M. R. Hibbs (42 L.D.,408), the Department held that it is without authority to insert in patents issued reservations of easements where not specifically authorized by law. The present cases involve telephone lines constructed over public lands of the United States under the authority of the appropriate acts of May 26, 1910 (36 Stat., 431), and March 4, 1911 (36 Stat. 1253), making appropriations -
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> to be expended as the Secretary of Agriculture may direct for the construction and maintenance of ... telephone lines ... necessary for the proper and economical administration, protection, and development of the national forests.

"The lands having been so devoted to a public purpose, pursuant to a law of Congress, subsequent disposition thereof will not, in the absence of an express conveyance by the United States, operate to pass title to the patentee to such telephone lines or the right of the United States to operate and maintain the same. On the other hand, under the circumstances of these cases, it seems unnecessary and inadvisable to reserve from disposition and eliminate from the

entries and patents definite tracts or areas of land for the protection of such lines. It is believed that the solution of the matter is to convey all of the lands included within the area described in any such homestead entry, and all rights appurtenant thereto, except the property of the United States, namely, telephone line and appurtenances and the right of the United States to maintain and operate the same so long as it shall be necessary. This may be accomplished by excepting the aforesaid property of the United States and the rights necessary and incident thereto from the conveyance. In other words, instead of conveying the property subject to an easement, no conveyance should be made of the telephone line or rights appurtenant thereto.

"You [Commissioner of the General Land Office] are accordingly advised as follows: In cases where telephone lines or like structures have been actually constructed upon the public lands of the United States, including national forest lands, and are being maintained and operated by the United States, and your office is furnished with appropriate maps or field notes by the Department of Agriculture so prepared as to enable you to definitely locate the constructed line, proper notation thereof should be made upon the tract books of your office and if the land be thereafter listed or disposed of under any applicable public-land law, you should insert in the register's final certificate and in the patent when issued the following exception:

> "Excepting, however, from this conveyance that certain telephone line and all appurtenances thereto, constructed by the United States through, over or upon the land herein described, and the right of the United States, its officers, agents, or employees to maintain, operate, repair, or improve the same so long as needed or used for or by the United States.

"The papers transmitted by the Secretary of Agriculture are herewith inclosed."

Thus, by the foregoing Instructions to the Land Office, the Secretary of Interior stated the rule that where an act of Congress makes a general appropriation of funds to a Department of the Government for the construction of facilities, and that Department of the Government does actually construct the facilities pursuant to the authority of the appropriation, and thereafter files the appropriate maps depicting such facilities in the Land Office, the

Government is entitled to have that facility protected by having the Land Office note the appropriate Land Office records and insert a specific exception in regards to such facilities in all patents that will issue from the Land Office to the entryman on lands crossed by the facility. It is also evident from the foregoing instruction that the Secretary predicated his conclusion on the premise that the act of Congress in appropriating the funds for the construction of the facility was equivalent to any other Congressional enactment which might specifically order and direct the Land Office to insert reservations in patents, and that the exception was therefore expressly authorized by law.5/

Several months after the Instructions of 44 L.D. 359 issued to the Land Office, the Department of Agriculture again wrote to the Secretary of Interior to make additional inquiry concerning the establishing of rights-of-way across the public domain. In this second letter to the Secretary of Interior, the Department of Agriculture stated that Congress had recently appropriated monies to the Department of Agriculture for the use of that agency in the construction of roads and trails. In this second communication to the Secretary, the Department of Agriculture set forth the following matter in regards to the new Congressional appropriation:

5/This method of protecting the Government's interest by inserting a specific exception in each patent crossed by the right-of-way is in accord with the decisions that hold that once a patent issues without any mention therein of any use such as a right-of-way, a condition subsequent will not be implied and, therefore, after title has passed from the Government, the Government cannot thereafter annex any additional conditions to the title that would add additional burdens to or limit the patentee's use of the land. Morgan v. Rogers, 79 F. 577, Writ of Error Dismissed, 173 U.S. 702; Fordyce & McKee v. Woman's Christian Nat. Library Assn., 79 Ark. 550, 96 S.W. 155, 7 LRA (NS) 485. This method of inserting specific right-of-way exceptions in patents also found recent approval where theSolicitor in 61 I.D. 461 at Page 404 stated in regards thereto as follows: "... it is settled in the Department that where roads, trails, bridges or other improvements have been made on public lands and are being maintained under authority of law and the lands are thereafter disposed of, the patent may except the portion of the land that is devoted to such improvements. Instructions of January 13, 1916, 44 L.D. 513."

"This act provides for the construction of such improvements of the foregoing class as may be necessary for the purpose already enumerated, and provides as well for the maintenance of those which are already constructed. The expenditure of money from this subappropriation, in accordance with its provisions, would appear to me directly to result in devoting to public purposes the land upon which such money is expended. This expenditure may be either for construction or maintenance. One of the first and most desirable things, either for construction or maintenance, is definite location by means of survey. I see no reason why the expense of such survey should not be charged against the subappropriation quoted, and it would appear to me that such expenditure would in itself be sufficient to devote the land to public purposes as being 'necessary for the purpose of proper and economical administration, protection, and development of the National Forests.'

"I shall appreciate it if you will advise me whether in the case of such expenditure and the subsequent listing of the land, your Department, has authority to include such an exception in the Final Certificate and patent, provided at the time of listing you are furnished with evidence of the fact that a certain part of the land has been so devoted to public purposes, accompanied by the necessary tracings showing the location and extent of such appropriation."

Thus, in this second letter, the Secretary was asked two questions by the Department of Agriculture. Those two questions were: (1) Would the Secretary of Interior extend the principles set forth in 44 L.D. 359 to cover rights-of-way for roads and trails as well as telephone lines; and, (2) in the event that the Department of Agriculture merely furnished the Land Office with evidence of the fact that the Department of Agriculture road building appropriation had been charged with the cost of surveying a right-of-way would the Secretary of the Interior modify the principles set forth in 44 L.D. 359 so that the Land Office would place an exception in all patents subsequently issued as to the lands embraced within such right-of-way even though the contemplated facilities had not at that time been placed on the land. This last question from the Department of Agriculture was predicated on the basis that the evidence of charging the cost of the survey against the appropriation would be sufficient to appropriate the lands required for

the right-of-way to a public purpose so that the Land Office would be authorized to place an exception in any patents that would subsequently issue to entryman occupying the lands embraced within the right-of-way.

The Secretary of the Interior answered these questions of the Department of Agriculture in the following manner:

> "I am in receipt of your letter of November 4, 1915, referring to the instructions of this Department, dated August 31, 1915 (44 L.D. 359), to the Commissioner of the General Land Office concerning constructed Forest Service telephone lines crossing lands within National Forests and listed and entered under the homestead law of June 11, 1906...
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> "I am of the opinion that the same reasoning as adopted in the Department's instructions of August 31, 1915, to the Commissioners of the General Land Office, relative to telephone lines constructed under authority of similar appropriation acts applies to the other kinds of improvements mentioned in the above act of March 1, 1915; and that similar exceptions as to lands needed for such improvements may be inserted in the patent when issued. Your communication, however, would appear to take the view that a mere preliminary survey is sufficient as a devotion of the land to the public use indicated. Without expressing a definite opinion at this time, I would incline to the view that a mere preliminary survey, which might or might not be later followed by construction, is not an appropriation of the land to the public use. It would seem that some action indicating upon the ground itself that the tract has been devoted to the public use, is necessary--such as staking the area to be retained by the United States, accompanied by a setting aside of a sufficient part of the appropriation for construction. In other words, the case should be one of either actual construction, or in which the evidence shows that the construction has been provided for, and will be immediately undertaken." (Emphasis added)

Hence, the Secretary of the Interior answered the first question asked by the Department of Agriculture by advising it that the principles set forth in 44 L.D. 359 would not only extend to telephone lines, but would also extend to road and trail rights-of-way appropriated by the Department of Agriculture pursuant to a Congressional appropriation over entered public lands.

As can be seen from the foregoing quotation in answering the second question, the Secretary of Interior stated that the Department of Agriculture need not submit evidence that the roads or trails had been actually constructed but that it need merely submit to the Land Office a map or plat depicting the right-of-way accompanied by evidence that the construction of the road or trail had been provided for by appropriation and that such construction would be immediately undertaken, and that in those circumstances the Land Office should note such rights-of-way on the appropriate Land Office records and insert a specific exception as to the lands embraced within such rights-of-way in all patents that might subsequently issue to the entryman across whose entry the right-of-way traversed even though the facilities had not been constructed.

In summary, the conclusions reached by the Secretary of the Interior in his instructions set forth in 44 L.D. 359 and 44 L.D. 513 may be stated as follows:

(1) That the public lands of the United States, whether entered or vacant, may be appropriated by the United States for public use as rights-of-way for roads and trails as well as for telephone lines.

(2) That such an appropriation for public use may be effectuated by actual construction of the facility on the public lands or by having a map or plat depicting the right-of-way noted on the appropriate Land Office records and submitting to the Land Office evidence which shows that the construction has been provided for by Congressional appropriation and that such construction will be immediately undertaken.

(3) That when public lands, whether vacant or entered, have been appropriated for right-of-way purposes by either of the above mentioned procedures in accordance with a law passed by Congress, which provides monies for the purposes for which such lands were appropriated, the Government agency making the appropriation is entitled to have a plat or map depicting the lands so appropriated for right-of-way purposes noted on the appropriate Land Office records and a specific exception concerning such right-of-way set forth in all patents that subsequently issue to an entryman for lands embracing such right-of-way because the law providing monies for the purposes of the appropriation is express authority for the reservation in the patent for lands appropriated by the Federal Government pursuant to such law.

The Secretary's first two conclusions, as set forth above, that the public lands of the United States, whether entered or vacant, may be appropriated by the United States for public use, and that such appropriation may be effectuated by actual construction on the public lands or by having a map or plat depicting the right-of-way noted on the appropriate Land Office records and submitting to the Land Office evidence which shows that the construction has been provided for by Congressional appropriation and that such construction will be immediately undertaken, are in accord with the court rulings which hold that the Federal Government has absolute authority to set aside any part of the public land for its own use regardless of whether or not it has been entered by private persons under the public land laws prior to the Government's appropriation 6/and that such an appropriation need not be by formal order or proclamation, but may be accomplished by occupation by the Government 7/ or by the mere planning to construct on public land pursuant to Congressional authority.8/

6/ Frisby v. Whitney, 76 U.S 187; The Yosemite Valley Case, 82 U.S. 77, 87; U.S. v. Hanson, 167 U.S. 881; U.S. v. Midwest Oil Company, 236 U.S. 459, 474.

7/ See Wilcox v. Jackson, 38 U.S. 498 in which the court held that the Federal Government's occupation of land for a military site pursuant to a general Congressional appropriation of funds for such purposes effected a valid appropriation of occupied public land; and, that a settler on the land prior to the appropriation was without rights and could not obtain a valid title to his claim. In so holding the court stated "...that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public land; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

8/Lyders v. Ickes, 84 F. (2d) 232 (36 F.(2d) 108, 59 F.(2d) 877). In this case it appeared that an act of Congress had provided authorization for development of harbor facilities. Pursuant thereto the Army Engineers made paper plans for the harbor facilities. During the time that the plans for the improvements were being made, a settler filed Valentine Scrip for the area to be embraced by the port development. It appeared that the filing was not only prior in time to the order of withdrawal but that it was also prior in time to a request from the Engineers to the Land Office that the records of the Land Office be noted to evidence the Government's right to the port area. The court upheld the decision of the Secretary which held that the acts of the Government in merely planning to improve the harbor constituted a valid Government appropriation of the public land and that the land was not open to entry or filing.

It has also been held that when the Government does appropriate public lands which have been settled upon by persons under the public land laws that the Government does not have to compensate the settler for the lands so appropriated.9/

No Compensation

The foregoing principles concerning the right of the Federal Government to go onto the public land and place it to public or Government use regardless of whether or not it has been entered upon by settlers attempting to acquire title from the Government under the public land laws, was set forth at length by the court in U.S. v. Pickett, 205 Fed. 134. In that case the court had under consideration the question of whether the Federal Government could exercise jurisdiction over a valid but unpatented mining claim. The court held that the Federal Government could exercise such jurisdiction. In its decision the court discussed other judicial expressions of this same subject and stated in regards thereto as follows:

"'. . . It was said by this court, as early as 1839, in Wilcox v. Jackson, 13 Pet. 498, 516 (10 L.Ed.264), that, 'with the exception of a few cases, nothing but the patent passes a perfect and consummate title.' So, in Frisbie v. Whitney, 9 Wall. 187, 193 (19 L.Ed. 668), 'there is nothing in the essential nature of these acts' (entering upon lands for the purpose of pre-emption) 'to confer a vested right, or, indeed, any kind of claim, to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right.' In this case, the following extract from an opinion of Attorney General Bates was quoted with approval: 'A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it.' It may, however, give, under our national land system, a privilege of pre-emption. But this is only a privilege conferred on the settler to purchase lands in preference to others. His settlement protects him from intrusion or purchase by others, but confers no right against the Government.' A number of authorities were cited to the same effect. It was held that it was within the power of Congress to withdraw land which had been pre-empted from entry or sale, though this might defeat the imperfect right of the settler. In the Yosemite Valley Case, 15 Wall. 77 (21 L. Ed. 82), the construction given to the pre-emption law in Frisbie v. Whitney was approved, the court observing (15 Wall. Page 88 /21 L.ED.82/:

9/ Russian-American Packing Company v. U.S., 199 U.S. 570; Gibson v. Hutchings, 12 La. Ann. 548, 68 Am. Dec. 772; Smith v. Arthur, 7 Wash. 60, 34 Pac. 433.

'It is the only construction which preserves a wise control in the Government over the public lands and prevents a general spoliation of them under the pretense of intended pre-emption and settlement. The settler, being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained that he was possessed by his settlement of an interest beyond the control of the Government, a convenient protection for any trespass and waste in the destruction of timber or removal of ores, which he might think proper to commit during his occupation of the premises.'

"In Wilcox v. M'Connel, 38 U.S. (13 Pet.) 498, 515 (10 L.Ed.264), the question before the Supreme Court of the United States was whether a person holding a register's certificate, without a patent, could recover the land as against the United States. The court said:

"'We think it unnecessary to go into a detailed examination of the various acts of Congress, for the purpose of showing what we consider to be true, in regard to the public lands, that with the exception of a few cases nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is where an act of Congress grants land, as is sometimes done, in words of present grant. But we need not go into these exceptions. The general rule is what we have stated; and it applies as well to pre-emptions as to other purchases of public lands. Thus, it will appear by the very act of 1836, which we have been examining, that patents are to issue in pre-emption cases. This, then, being the case, and this suit having been in effect against the United States, to hold that the party could recover as against them, would be to hold that a party having an inchoate and imperfect title could recover against the one in whom resided the perfect title. This, as a general, proposition of law, unquestionably cannot be maintained.'

"The Government has frequently exercised the right to withdraw from sale lands previously opened to sale, even where parties of the requisite qualifications have acquired title to tracts of a specific amount by occupation and improvement; and the Supreme Court of the United States has always held that occupation and improvement of the tracts do not confer upon the settler any right in the land occupied as against the United States. Campbell v. Wade, 132 U. S. 34, 37, 10 Sup. Ct. 9, 33 L.ED. 240; Frisbie v. Whitney, 9 Wall. 187, 19 L.Ed. 668."

In the foregoing decision the court sets forth the general principles in regard to the control that the Federal Government exercises over the public land. (In this regard, the court states that the Government can appropriate any part of the public land regardless of whether or not it has been entered upon by persons who are attempting to acquire title thereto under the public land laws.

These principles relative to the rights that are held by persons settling upon the public domain under the public land laws, are more fully explained in the Yosemite Valley Case (82 U.S. 77). In the Yosemite Valley Case, the court set forth in detail the reason for the Federal dominance over the public lands. The court also defined what rights are obtained by a settler under the public land laws and at what point the settler is considered as obtaining a right to patent which might be superior to the right of the Government to appropriate his claim to another use. The court stated the following:

"The simple question presented for determination is whether a party, by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. If such be the effect of mere settlement, with a view to pre-emption, upon the power of Congress to grant the lands occupied to another party, it must operate equally to deprive Congress of the power to reserve such lands from sale for public uses of the United States, though needed for arsenals, fortifications, lighthouses, hospitals, custom-houses, court-houses, or for any other of the numerous public purposes for which property is used by the Government. (It would require very clear language in the Acts of Congress before any intention thus to place the public lands of the

United States beyond its control by mere settlement of a party, with a declared intention to purchase, could be attributed to its legislation.

"The question here presented was before this court, and was carefully considered in the case of Frisbie v. Whitney, reported in the 9th of Wallace. And it was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any right in the land occupied, as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

"The decision in Frisbie v. Whitney was pronounced by a unanimous court, and subsequent reflection has satisfied us of its entire soundness. The construction there given to the pre-emption laws is, as there stated, in accordance with the construction uniformly given by that department of the Government, to which the administration of the land laws is confided, and by the chief law officers of the Government to whom that department has applied for advice on the subject. It is the only construction which preserves a wise control in the Government over the public lands, and prevents a general spoliation of them under the pretence of intended settlement and pre-emption. The settler being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the Government, a convenient protection for any trespass and waste, in the destruction of timber or removal of ores, which he might think proper to commit during his occupation of the premises."

Thus, the court in the Yosemite Valley Case reiterated and explained the reason for the rule that the right acquired by a settler on the public domain is subordinate to the right of the Government to place the Federal land to other uses which the Government may consider to be for the good of all the people and paramount to the good of a single person. The court stated that a settler on the public land does not acquire an inchoate or absolute right to a patent from the Government until the settler has done all the acts required of him by the Government for the acquisition of his patent including the payment of fees. The court states that until the settler has fully complied with all the acts and paid all the fees required of him, he does not have an absolute right to patent and the Government may withdraw or appropriate the land to other use.)10/

10/The Yosemite Valley Case deals with a settler attempting to acquire title under the old pre-emption law. The doctrine of the Yosemite Valley Case has, without exception, been held to apply with equal authority to all types of entries under the public land law including: The General Homestead Law, A. Beinusky, 41 L.D. 627; sites for Trade and Manufacture, Russian-American Packing Co. v. U.S., 199 U.S. 570; the Townsite Law, City of Guthrie v. Hamer, 3 Okl. 652, 41 P. 647; the Railroad Selection Acts, Teupey v. Madson, 178 U.S. 215; State Lieu Selections, Eastern Oregon Land Company v. Deschutes R.Co; 246 Fed.400; Mining Claims, U.S. v. Midwest Oil Co., 236 U.S.459; Unsurveyed Land and the Reclamation Act, U.S. v. Hanson, 167 Fed. 881; and, Surveyed Land, U.S. v. Morton, 19 F. (2d) 835.

From the foregoing discussion it can be seen that the first two conclusions of the Secretary, as set forth above, are fully supported by law. The third conclusion, that an exception may be inserted in any patent embracing appropriated public lands where such lands have been appropriated in accordance with a law passed by Congress which provides monies for the purposes for which such lands are appropriated, naturally and consequently follows from the principles discussed above. If the Government has the authority to appropriate public lands, whether vacant or entered and spend monies provided by an act of Congress to construct facilities on such lands, certainly the Government has the authority to protect such interest by inserting an exception relating to such interest in any patent that may subsequently issue for such lands. If such an exception were not inserted in subsequent patents the Government would be constantly required to institute suit to establish its interest in the lands. As pointed out above, this right to make such exceptions has recently been confirmed by the Interior Department,11/ and is in accordance with the regulations otherwise found in the code,12/ and therefore, we feel that such practice should be followed by the Land Office.

In view of the foregoing it is our conclusion that when a federal agency files, in the appropriate Land Office, an application for a right-of-way over public lands, whether such lands are vacant or entered,13/ along with a plat or map depicting such right-of-way and evidence that monies appropriated by law have been spent or will be immediately expended on such right-of-way, such right-of-way may be noted on the appropriate Land Office records and an

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11/ See footnote 5, supra.

12/ See 43 CFR Part 101.3.

13/ As set forth in the foregoing discussion, if an entryman has completed all the requisites of the law and regulations to acquire patent to the entered lands prior to the time of the Government's appropriation, any patent issued for such entered lands to the entryman will not contain an exception as to such subsequent Government appropriation. By doing all that is required by the law and regulations means that the entryman has fulfilled all residence requirements, publication has been made, protest time has elapsed and all fees have been paid.

exception clause inserted in any patent that is subsequently issued embracing lands covered by such right-of-way. It is also our conclusion that such action by the Land Office would protect the Government's interests in such rights-of-way.

We would appreciate your comments on our conclusions and if you have any further questions concerning this matter, please advise.

For the Regional Solicitor

Eugene F. Wiles, Field Solicitor
Juneau Region

cc: Regional Solicitor