UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Juneau Region
Anchorage Field Office
P.O. Box 480
Anchorage, Alaska

February 14, 1958

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Amended in part — see Assoc. Solicitor's Memo of March 15, 1960

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 offical 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.

SOURCE:
BLM (Bonnell)

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 gives 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/

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.

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 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. In so far 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:

> "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.

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 Government, 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; 46 L.D. 55; 46 L.D. 109; 49 L.D. 549; 53 L.D. 365; 53 L.D. 453; 60 I.D. 129; 66 I.D. 314; 60 I.D. 491; 60 I.D. 299; BLM Glossary of Public-Land Terms, page 38.

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/ 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

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.

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 -

> 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 app ropriate 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 app ropriation:

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 the Solicitor 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 . . .

"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 these 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 proclmation, but may be accomplished by occupation by the Government 7/ or by the mere planning to construct

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 app ropriation 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.

on public land pursuant to Congressional authority.[8] 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]

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. Fickett, 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,

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8/ Lyders v. Ickes, 84 P.(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.

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.

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 /:. '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/

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.

10/ The Yosemite Valley Case dealt 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. Reinousky, 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. Beamer, 3 Okl. 652, 41 P. 647; the Railroad Selection Acts, Taupey v. Madsen, 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. Norton, 19 F.(2d) 836.

11/ See footnote 5, supra.

12/ See 43 CFR Part 101.3.

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 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

Eugene F. Wiles, Field Solicitor
Juneau Region

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.

4

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Juneau Region
Anchorage Field Office
P.O. Box 480
Anchorage, Alaska

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February 24, 1958

Memorandum

To: Area Administrator, Bureau of Land Management, Juneau

From: Field Solicitor, Anchorage

Subject: Conflict of 44 L.D. 513 rights-of-way with applications for Indian allotments

Reference is made to the Fairbanks Land Office Manager's memorandum concerning the above subject.

In this memorandum Mr. Jenks advises that one Phillip Peter, a Native of Alaska, applied for a homestead allotment on November 23, 1952, under the act of May 17, 1906 (34 Stat. 177; 48 U.S.C. 357). However, at the time the application was filed the land description furnished by Mr. Peter was inadequate to identify the land applied for and the allotment was therefore not allowed. It was not until March 20, 1956, that Mr. Peter furnished a description which enabled the unsurveyed land status section to furnish a status report of these lands which would permit the allowance of the application. Mr. Jenks also advised that subsequent to November 23, 1952, when Mr. Peter's application was filed, and prior to March 20, 1956, when Mr. Peter furnished an adequate description of the land, a 44 L.D. 513 appropriation covering portions of the land included in Mr. Peter's application was noted on the tract book, and that thereafter when the status report concerning Mr. Peter's application was submitted this appropriation appeared in conflict with his application.

Based on the foregoing facts, Mr. Jenks has requested an opinion as to whether the allotment application filed in 1952, which application was predicated upon occupation prior to such date, will take precedence over the subsequent 44 L.D. 513 appropriation, thus requiring the cancellation of that portion of the appropriated land which is in conflict with Mr. Peter's application. Mr. Jenks has also requested an opinion as to the effect of any native application for a homestead allotment under the 1906 act, which application is filed subsequent to a 44 L.D. 513 appropriation, when such native application is based upon occupancy prior to the date of such appropriation.

SOURCE:
BLM (Bonnell)

The acts of May 17, 1884 (23 Stat. 24), and June 6, 1900 (31 Stat. 321-330), provide in effect that Natives of Alaska who were using lands and in actual possession of such lands at the time of the enactment of the above laws would not be disturbed in their possession of such lands, but that the terms under which they could acquire title to such lands would be reserved for future legislation by Congress. In Mr. Jenks' memorandum he has not indicated whether Mr. Peter's, or the other anticipated applicant's, claims of occupancy are derived from possession based upon the aforementioned acts of Congress or whether such occupancy was initiated after the enactment of these laws.

In view of the fact that those Natives who are or may be claiming occupancy rights predicated on the acts of 1884 or 1900 may have greater rights than those claiming occupancy subsequent to such dates, we will discuss each situation separately.

The following discussion is based upon the premise that occupancy of the land was initiated subsequent to the aforementioned acts of Congress, and is not based upon any rights that may have been acquired in accordance with such acts.

The act of May 17, 1906, supra, as amended by the act of August 2, 1956 (P.L. 931, 84th Congress, Chap. 891, 2nd Session), reads in pertinent part as follows:

> "The Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska, or, subject to the provisions of the act of March 8, 1922 (42 Stat. 415, 48 U.S.C. 376-377), vacant, unappropriated, and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits, to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family, or is twenty-one years of age;"* * *. (Emphasis supplied.)

The regulations promulgated pursuant to the act of 1906, as amended, are set forth in 43 CFR Sec. 67.1 to Sec. 67.10. The pertinent portions of these regulations are found in Secs. 67.9 and 67.10. These sections read as follows:

> "67.9 Action by manager on applications. The manager will carefully examine each application, and if he finds it complete in all respects and no objection is shown by his records, he will allow it and will advise the applicant of the allowance by special letter, reading substantially as follows:
>
> "Your application under the act of May 17, 1906 (34 Stat. 197), No. _____, for _____ has been

placed of record in this office and forwarded to the Bureau of Land Management.

"This action segregates the land from the public domain, and no other application can be allowed therefor, or settlement rights attach, during the life of this application.

"If the application is incomplete or in conflict with any other application or claim of record, the manager will take such action as the facts may warrant. The application, upon allowance, will operate as a segregation of the land. Any application subsequently presented which conflicts therewith in whole or in part, should be rejected, as to the part in conflict, subject to appeal, unless rights superior to those of the Indian or Eskimo claimant are asserted under the conflicting application."

"67.10 Proof required before approval of application. An allotment application will not be approved until the applicant has made satisfactory proof of five years' use and occupancy of the land as an allotment. Such proof must be made in triplicate, corroborated by the statements of two persons having knowledge of the facts, and it should be filed in the land office. It must be signed by the applicant but need not be sworn to. The showing of 5 years' use and occupancy may be submitted with the application for allotment if the applicant has then used or occupied the land for 5 years, or at any time after the filing of an application when the required showing can be made. The proof should give the name of the applicant, identify the application on which it is based, and appropriately describe the land involved. It should show the periods each year applicant has resided on the land; the amount of the land cultivated each year to garden or other crops; the amount of crops harvested each year; the number and kinds of domestic animals kept on the land by the applicant and the years they were kept there; the character and value of the improvements made by the applicant and when they were made, and the use if any to which the land has been put for fishing or trapping."

The foregoing regulations reveal that there are two steps or phases to be accomplished before a Native may finally receive his allotment. First, the application must be allowed by the Land Office Manager, and second, the application after allowance must be approved. The allowance of the application is predicated upon a careful examination of each application which reveals that the application is complete in all respects and that there are no objections of record. The approval is based upon satisfactory proof of five years use and occupancy of the land applied for as an allotment.

The law and the regulations also reveal that the authority to allow allotments is discretionary and only vacant, unappropriated, and unreserved lands are subject to allotment, and that any land applied for under the act is not segregated from the public domain and does not become land segregated for Native allotment purposes until such application is allowed.

In interpreting the fourth section of the General Allotment Act of February 8, 1887 (24 Stat. 388), as amended, which section pertains to Indian allotments on public lands and which is somewhat similar to the act in question, the Department in the case of Lacey v. Grondorf et al. (38 L.D. 553) held in pertinent part as follows:

"The 4th section of the act of February 8, 1887, provides:

> "That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.
>
> "This act was designated to afford to Indian settlers upon public lands the same privilege of entering such lands as white settlers. While allotments made under said section are necessarily on the theory that the allottees are Indians, yet they are not in the same situation as are allottees of tribal lands where rights flow from some specific act for the division of tribal property in which each member of the tribe has an inherent individual interest. Indian settlers under the above section are on practically the same footing as white settlers on the public lands. It has been held that section 4 of the act of February 8, 1887, is in its essential elements a settlement law, and that 'to make such act effective to accomplish the purposes in view, it was doubtless intended it should be administered so far as practicable like any other law based upon settlement.' Indian Lands--Allotments, 8 L.D., 647; Instructions, 32 L.D. 17. So that the practice, rules, and decisions governing white settlers on the public lands are, with certain reasonable modifications due to the habits, character, and disposition of the race, equally applicable to Indian settlers."

From the foregoing it can be seen that Native settlement on public lands for the purposes of obtaining allotments are governed by the same rules and principles as applied to white settlers on public lands. In this relation it is a well established principle of law that although the occupation of public land by a bona fide settler

confers a preference right over others in acquiring such land which will enable the settler to protect his interest against other individuals, such settlement and occupation does not confer a vested right as against the United States in the land so occupied and such lands may be withdrawn or appropriated by the United States at any time prior to the perfection of this settlement right even though this action may defeat the inchoate right of the settler.[1] It has also been held that the mere filing of an allotment application without further compliance with the law or regulations does not afford a native applicant a vested right to the lands applied for[2] and this is particularly true where the allowance of the allotment is discretionary as in the instant case.[3]

In the instant case, although Mr. Peter and the other anticipated allotment applicants may have been occupying public lands prior to the time a 44 L.D. 513 appropriation became effective, it appears that they have not, prior to such appropriation, met the necessary requirements set forth in regulations above to segregate the land from the public domain, thus perfecting their entries and acquiring a vested right, in that their allotment applications were neither allowed nor approved prior to such appropriation. Therefore, in accordance with the above principles of law their occupation of such public land prior to the appropriation would merely be permissive until perfected by the allowance of their allotment applications by the Land Office Manager, and the United States would have the right and the authority to appropriate the occupied lands for public purposes any time prior to the approval of the application.

In view of the foregoing, it is our opinion that the United States may appropriate, pursuant to the principles set forth in 44 L.D. 513, any lands occupied by Natives pursuant to the act of 1906 as amended, when such occupancy is not based upon rights acquired by the act of 1884 and 1900 even though such occupancy preceded the appropriation, if such appropriation was made prior to the allowance of the application for an allotment. It is also our opinion, in the circumstances set forth above, that until an application for an allotment is allowed the lands are not segregated for Native purposes and that such lands therefore remain a part of the public domain and are under the jurisdiction of the Bureau of Land Management, and that any 44 L.D. 513 appropriation effectuated prior to the allowance

1/ Frisbie v. Whitney, 9 Wall. 187; Russian American Packing Co. v. U.S., 26 S.Ct. 157, 197 U.S. 570, 50 L.Ed. 314. The Yosemite Valley Case, 15 Wall. 77, 82 U.S. 77.

2/ Clark Jr. v. Bently et al. (On Rehearing), 51 L.D. 98; Martha Head et al., 48 L.D. 567; Louisa Walters, 40 L.D. 196; C. N. Colton 12 L.D. 205.

3/ Opinion April 8, 1937, 56 I.D. 102; Lemieax v. United States et al., 15 F.(2d) 518; Yakutat and Southern Railway v. Setuck Harry Heir of Setuck Jim, 48 L.D. 362; Frank St. Clair (on Petition), 53 I.D. 194.

of an allotment application should be processed by the Bureau of Land Management. It therefore follows that if Mr. Peter's occupancy was not based upon rights acquired pursuant to the act of 1884 or 1900, and 44 L.D. 513 appropriation was effectuated prior to the allowance of Mr. Peter's application, the allowance of such application should be subject to the Army's right-of-way appropriation.

As indicated in the foregoing discussion, if in an application for an allotment, pursuant to the 1906 act supra, a Native bases his occupancy of the land upon rights acquired under the acts of 1884 or 1900, the applicant may have a greater right or equity in the land so occupied than those who are not claiming occupancy pursuant to said acts. The following is a discussion concerning those applicants who base their occupancy on rights acquired under these acts.

The acts of 1884 and 1900 read in pertinent part as follows:

Act 1884

"* * * That the Indians or other persons in said district [Alaska] shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them but the terms under which such person may acquire title to such lands is reserved for future legislation by Congress:* * *."

Act 1900

"* * * The Indians or persons conducting schools or missions in the District [Alaska] shall not be disturbed in the possession of any lands now actually in their use and occupation.* * *"

In the case of United States v. Miller, District Court of Alaska, Division No. 1 (unreported), the United States, pursuant to the Second War Powers Act of March 27, 1942 (56 Stat. 177, 50 U.S.C.A. 171a), brought a condemnation proceeding in the U.S. District Court to acquire certain tidelands in Alaska. In this action the Tlingit Indians of Alaska filed an answer claiming compensation and damages on the basis that they had been in possession of the lands being condemned ever since the year 1867, and from time immemorial prior thereto, and that they were the aboriginal users and occupants of such land and entitled to exclusive possession of the land. The United States demurred to this answer on the ground that it appeared from the pleading that the Tlingit Indians had no interest in the property sought to be condemned as would entitle them to compensation. The demurrer was sustained, and since the Tlingit Indians elected to stand on the allegations of their pleading, the court filed its final judgment in which it was decreed that none of the Indians

should receive any compensation for the taking of the lands and that the fee simple title was vested in the United States free and clear of any encumbrances whatsoever. From this judgment an appeal was taken by the Tlingit Indians to the Circuit Court.

The Circuit Court in its opinion Miller v. United States, 159 F.(2d) 997, recognized original Indian title or aboriginal rights of the Indians in the States of the United States. The court, citing United States v. Alcea Band of Tillamooks, 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29, then stated that although Congress undoubtedly had the power to extinguish this original Indian title this right could not be extinguished without compensating the occupants. Although the Circuit Court held that the original Indian title or aboriginal rights existed in the States and that these rights could not be taken by the United States without compensation, the court ruled that original Indian title or aboriginal rights were nonexistent in Alaska because such rights had been extinguished by the Treaty with Russia proclaimed by the United States on June 20, 1867 (15 Stat. 539). It was then determined that although the original Indian title or aboriginal rights had been extinguished by the treaty with Russia the Tlingit Indians of Alaska were still protected in their right of occupancy by the acts of 1884 and 1900, and that therefore by analogy with the compensable interest of the Indians in the States for their aboriginal rights, these Alaskan Indians were entitled to compensation for the loss of their rights of occupancy acquired pursuant to the acts of 1884 and 1900. Accordingly, the decision of the District Court was remanded for further proceedings consistent with the Circuit Court's decision.

In view of the holding in the Miller case it would appear that if a Native applied for an allotment pursuant to the act of 1906 and his right of occupancy was predicated upon the acts of 1884 or 1900, this right of occupancy could not be defeated by a 44 L.D. 513 appropriation initiated subsequent to his occupation even though such appropriation became effective prior to the allowance of his allotment application, because in accordance with the Miller case the appropriation and use of such land by the United States without paying compensation for the use of the land would constitute a taking of property without due process of law in violation of the Fifth Amendment of the United States Constitution. However, in the case of Tee-Hit-Ton Indians v. United States, 120 Fed. Supp. 202, 15 Alaska 1, 128 Ct. Cl., the Court of Claims reached a different conclusion than that reached by the Circuit Court in the Miller case.

The facts in the Tee-Hit-Ton case reveal that the Secretary of Agriculture, by virtue of the authority set forth in the joint resolution of August 8, 1947 (61 Stat. 720), agreed to sell to a pulp and paper company all of the merchantable timber on a specified portion of land in Alaska. After the agreement to sell was consummated the Tee-Hit-Ton Indians, a clan of the Tlingit tribe, filed suit against the United States alleging aboriginal ownership of the lands and ownership by virtue of the act of 1884 and 1900, and

claiming compensation for the loss of the timber by virtue of the Fifth Amendment of the Constitution.

The Court of Claims refused to decide whether or not the original or aboriginal Indian title survived the Treaty of 1867, but held that even if such title survived this treaty such title was not sufficient basis to maintain this suit as there had been no recognition by Congress of any legal rights in the Indians to such lands. The Court also held that no rights inured to the Indians by virtue of the act of 1884 and 1900 that would allow compensation by virtue of the Fifth Amendment, and accordingly the petition of the Tee-Hit-Tons was dismissed.

Because of the agreement as to the importance of the question of compensation for the taking of land occupied in Alaska under aboriginal use and claim of ownership, and the conflict concerning the effect of Federal legislation protecting Indian occupation between the Tee-Hit-Ton case and the Miller case, the Supreme Court of the United States granted certiorari in the Tee-Hit-Ton case. 347 U.S. 1009, 74 S.Ct. 864, 98 L.Ed. 1133.

In the decision of the Supreme Court, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 75 S.Ct. 313, 15 Alaska 418, the Supreme Court affirmed the ruling of the Court of Claims in the Tee-Hit-Ton case, thus overruling the Circuit Court's holding in the Miller case.

The opinion of the Supreme Court reads in pertinent part as follows:

> "The problem presented is the nature of the petitioner's interest in the land, if any. Petitioner claims a 'full proprietary ownership' of the land; or in the alternative, at least a 'recognized' right to unrestricted possession, occupation and use. Either ownership or recognized possession, petitioner asserts, is compensable. If it has a fee simple interest in the entire tract, it has an interest in the timber and its sale is a partial taking of its right to 'possess, use and dispose of it.' United States v. General Motors, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311. It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking pro tanto of its asserted rights in the area.

"The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioners in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.

"[2] I. Recognition. - The question of recognition may be disposed of shortly. Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking. The petitioner contends that Congress has sufficiently 'recognized' its possessory rights in the land in question so as to make its interest compensable. Petitioner points specifically to two statutes to sustain this contention. The first is § 8 of the Organic Act for Alaska of May 17, 1884, 23 Stat. 24. The second is § 27 of the Act of June 6, 1900, which was to provide for a civil government for Alaska, 31 Stat. 321, 330. The Court of Appeals in the Miller case, supra, felt that these Acts constituted recognition of Indian ownership. 159 F.(2d) 997, 1002-1003, 11 Alaska 285, 294-296.

"[3, 4] We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the status quo until further congressional or judicial action was taken. There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. Hynes v. Grimes Packing Co., 337 U.S. 86, 101, 69 S.Ct. 968, 978, 12 Alaska 348, 366, 93 L.Ed. 1231.* * *"

"(b) There is one opinion in a case decided by this Court that contains language indicating that unrecognized Indian title might be compensable under the Constitution when taken by the United States. United States v. Alcea Band of Tillamooks, 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29.

"Recovery was allowed under a jurisdictional Act of 1935, 49 Stat. 801, that permitted payments to a few specific Indian tribes for 'legal and equitable claims arising under or growing out of the original Indian title' to land, because of some unratified treaties negotiated with them and other tribes. The other tribes had already been compensated. Five years later this Court unanimously hold that none of

the former opinions in Vol. 329 of the United States Reports expressed the view that recovery was grounded on a taking under the Fifth Amendment. United States v. Tillamooks, 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738. Interest, payable on recovery for a taking under the Fifth Amendment, was denied.

"Before the second Tillamook case, a decision was made on Alaskan Tlingit lands held by original Indian title. Miller v. United States, 9 Cir., 159 F.(2d) 997, 11 Alaska 285. That opinion holds such a title compensable under the Fifth Amendment on reasoning drawn from the language of this Court's first Tillamook case. After the Miller decision, this Court had occasion to consider the holding of that case on Indian title in Hynes v. Grimes Packing Co., 337 U.S. 86, 106, note 28, 69 S.Ct. 968, 979, 981, 12 Alaska 348, 367, 372, 93 L.Ed. 1231. We there commented as to the first Tillamook case: 'That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment.' We further declared 'we cannot express agreement with that [compensability of Indian title by the Miller case] conclusion.'

"[8] Later the Government used the Hynes v. Grimes Packing Co. note in the second Tillamook case, petition for certiorari, 75 S.Ct. 319, to support its argument that the first Tillamook opinion did not decide that taking of original Indian title was compensable under the Fifth Amendment. Thereupon this Court in the second Tillamook case, 341 U.S. 48, 71 S.Ct. 552, 553, held that the first case was not 'grounded on a taking under the Fifth Amendment.' Therefore no interest was due. This later Tillamook decision by a unanimous Court supported the Court of Claims in its view of the law in this present case. See Tee-Hit-Ton Indians v. United States, 120 F. Supp. 202, 15 Alaska 1, 128 Ct. Cl. 82, 87. We think it must be concluded that the recovery in the Tillamook case was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes, rather than upon a holding that there had been a compensable taking under the Fifth Amendment. This leaves unimpaired the rule derived from Johnson v. McIntosh, 8 Wheat. 543, 5 L.Ed. 681, that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.

"This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." (Emphasis supplied.)

In view of this decision by the Supreme Court, it appears that those Natives whose occupancy rights are predicated upon the acts of 1884 and 1900 also merely have a permissive right to occupy the land, and that until this right of permissive occupancy is perfected by complying with the law and regulations of the Indian Allotment Act or one of the other public land laws, such lands may be appropriated by the Federal Government. It is therefore our opinion that those Natives who file an application to receive an allotment under the act of 1906, and in such application claim occupancy dating back to 1900 or 1884, are subject to the same rules and principles as those set forth above concerning Natives whose occupancy rights do not date back to 1900 or 1884.

If we can be of further assistance, or if there are further questions, please advise.

For the Regional Solicitor

Eugene F. Wiles

Eugene F. Wiles, Field Solicitor
Juneau Region

Betsy's 446D

(5)

IN REPLY REFER TO

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Box 1841
Juneau, Alaska

LU 16-7

Rts of Way

Aug 8, 1958

BUREAU OF LAND MANAGEMENT
RECEIVED
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JUNEAU OFFICE
JUNEAU, ALASKA

Memorandum

To: Operations Supervisor, Juneau

From: Area Administrator

Subject: 44 LD 513 - Rights-of-Way

In response to your July 29 memorandum and confirming our recent conversations, I submit the following:

1. Wiles' opinion states that prior to the earning of equitable title, 44 LD 513 rights-of-way may be imposed over public lands, vacant or entered. This would include a small tract lease.

2. The Director's office has questioned Wiles' opinion. They state that this is contrary to the way the 44 LD is administered in the States, and they have taken the matter to the Solicitor's office.

3. The Director's office has advised us not to adjudicate on the basis of the Wiles memorandum until we receive further notice from them. (See copy of memorandum attached.)

Under the circumstances, we have two courses of action before us. The first would be to cease adjudication altogether in cases in which this right-of-way question arises. The second is to proceed with adjudication, disregarding Wiles' opinion, and proceeding in the same manner as in the past in substantial conformance with the Regional Administrator's July 25, 1949 memorandum which you attached. We suggest you follow the latter action.

Area Administrator

Attachment

SOURCE:
BLM (Bonnell)

DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C.

5.Cons.

Memorandum

To: Area Administrator, Area 4

From: Director

Subject: Rights-of-way for Government use appropriated under the principles of 44 L. D. 513

Please refer to our memorandum of July 9 on this subject (5.Cons:D). Since writing that memorandum we have noted Solicitor's opinion M-36893, (65 L. D. 200) in which it was held that "in practice the Department has limited its authority to reserve from grants made by patent, road and other rights-of-way constructed with Federal funds to those cases where construction preceded the initiation of the right on which the patent is based." The opinion held that "a right-of-way across a patented mining claim cannot be based upon construction initiated after the location of the claim, but in such case the rights will have to be obtained from the locator, if obtained before patent issues, or from the patentee or his successor in title if obtained after such issuance."

We think that the Field Solicitor's memorandum to you of February 14, in which he held that the appropriation of a Government right-of-way need not precede the allowance of a homestead entry, is inconsistent with this opinion of the Solicitor. We believe that you should act in conformity with the Solicitor's opinion M-36893 rather than the Field Solicitor's memorandum, unless you are advised to the contrary when we receive a reply to our memorandum of July 9 to the Associate Solicitor.

For the Director:

Betsy's 44 LD

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Anchorage, Alaska

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July 25, 1949

MEMORANDUM

To: Managers, District Land Offices, Region VII

From: Regional Administrator

Subject: Notation of right-of-way on records, under Departmental instructions of January 13, 1916 (44 L.D. 513)

In view of the increased activities by agencies of the Federal Government in Alaska, it is anticipated that maps and plans for various projects will be filed in the District Land Office for notation of the rights-of-way, with request that an excepting clause be inserted in any final certificate and patent which may be subsequently issued for the land affected, in accordance with Departmental instructions of January 13, 1916 (44 L.D. 513). These instructions have been held by the Department to apply to projects constructed by any Federal Agency, upon the public lands.

By memorandum from the Director, dated May 13, 1949, I have been authorized to cause the appropriate notation to be made on the records of such projects when initially filed in the district land office, without the necessity of first obtaining direction from the Washington office to do so, as heretofore under the previous practice.

In order that there may be uniformity in the processing of such cases, the following procedure will be adopted:

Section 1. Project maps. Maps should be filed in triplicate, showing the definite location of the right-ofway for the project, with relation to the public land surveys by courses and distances from the nearest corner, unless that corner is more than six miles distant, in which case the survey should be connected with some prominent natural object or permanent monument, which can be readily recognized and recovered.

Section 2. Filing of project maps. The maps should be filed in the proper District Land Office by the Chief Officer of the Federal Agency or its duly authorized representative, together with a written application for notation on the tract book records of the Bureau of Land Management of the right-of-way for the project, in accordance with Departmental Instructions of January 13, 1916 (44 L.D. 513). The application should contain the following showing:

(a) That construction of the project has been authorized and is to be paid for with money appropriated by Congress.

(b) If the project has been constructed, the date and cost of construction should be given, or if not constructed, that its construction

SOURCE:
BLM (Bonnell)

will immediately follow, as no right may be acquired by reason of the filing of such maps for future construction as against a subsequent entryman (47 L.D. 181).

(c) If the project is, or is to be located on reserved or withdrawn public lands under the jurisdiction of a Federal Agency other than the Bureau of Land Management, a clearance from such agency must accompany the application and maps.

Sec. 3. Action by Manager. Upon receipt of the application and maps the Manager will proceed as follows:

(a) Examine the tract books and other available records and ascertain whether the project involves vacant and unappropriated lands. If the land affected is entered or patented, he will return the application and maps to the agency filing the same with notice of that fact.

(b) If the project affects vacant and unappropriated public land, including land in withdrawal or reservation, he will assign a current serial number to the application and maps, stamping thereon the date of filing, and otherwise treat the same as a right-of-way application, and will take the following steps:

(i) Examine the application and maps as to their factual sufficiency and requirements, as set forth in secs. 1 and 2, above.

(ii) Call upon the agency filing the application for any additional showing, if required, to complete the application or to furnish proper maps.

(iii) When the application and maps are found to be satisfactory, or made so after further showing, and the lands affected are under the jurisdiction of an agency other than the Bureau of Land Management, and proper clearance by such other agency is shown to have been obtained, the Manager will make appropriate notations of the right-of-way for the project on his tract book records, if the lands are surveyed, or on appropriate maps if unsurveyed, and shall insert in any final certificate which may be issued for the land affected and subsequently entered, as excepting clause similar to that quoted in the instructions of January 13, 1916 (44 L.D. 513), and shall notify the interested agency of the action taken. He will then transmit a copy of his notice of the action taken, together with a copy of the map, to the Director, Bureau of Land Management, Washington, D.C., and one copy of the notice and map to the Regional Administrator, retaining the remaining copy of the map for the files of his office.

(iv) Where the project affects lands under the jurisdiction of the Bureau of Land Management, the Manager shall proceed as provided in Sec. 3(a), (b), (i) and (ii), and will then transmit

the application and two copies of the map, together with a status report, to the Regional Administrator. No notation of the right-of-way for such projects will be made on the tract books or other record until directed by the Regional Administrator.

Sec. 4. Action by the Regional Administrator. Upon receipt of the application and maps for a project in the cases mentioned in Sec. 3(b)(iv) above, the Regional Administrator shall determine whether or not there are any objections to the construction of the project on the location indicated. If there is no objection, he will by memorandum instruct the Manager to make the appropriate notations on the tract book and other records in the district land office, and will transmit a copy of the memorandum and map to the Director, Bureau of Land Management, and notify the agency in question of the action taken.

Should there be any objection to the acceptance of the maps and to their notation on the records, the Regional Administrator shall refer the case to the Director, for appropriate instructions.

/s/ Lowell M. Puckett
Lowell M. Puckett
Regional Administrator

I concur:

/s/ Abe Barber
Abe Barber
Regional Counsel

cc: DLO - Anchorage
Fairbanks
Director, BLM
CAA, Anchorage
Alaska Road Commission

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

3.8

March 15, 1960

M-36595

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor, Division of Public Lands

Subject: Appropriation of rights-of-way on public lands for government use

Your office's memorandum of July 9, 1958, called to our attention memoranda dated February 14 and 24 from the Field Solicitor to the Area Administrator, both at Anchorage, which discuss the effect of Federal appropriation of rights-of-way on entries and Indian occupancy claims. We have had additional correspondence with the Field Solicitor on this question.

The courts have zealously protected the rights of those who have made valid entries, locations, and selections on public lands. In Hastings R.R. Co. v. Whitney, 132 U.S. 357, 364 (1889), the court found in favor of an allowed homestead entry against a railroad company claiming under a Congressional grant by the act of July 4, 1860 (14 Stat. 87), stating that

> "So long as it remains a subsisting entry of record, whose legality has been passed for by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

See also Cornelius v. Kessel, 128 U.S. 456 (1888); United States v North American Co., 253 U.S. 330 (1920); Payne v. Central Pacific R.R. Co., 255 U.S. 228 (1921).

The Department also has long recognized the vesting of rights by those holding allowed entries, for example, against later Government withdrawals of public lands. Op. Atty. Gen., 1 L.D. 30 (1881); Mathais Ebert, 14 L.D. 589 (1892); Instructions, June 6, 1905 (33 L.D. 607, 608). In the cases of May C. Sands, 34 L.D. 653 (1906) and John L. Maney, 35 L.D. 250 (1906), cited in the Field Solicitor's memorandum, the withdrawal order appears in each case to have preceded allowance of the entry. The former case held that an entry is a contractual right against the Government. We find no clear basis moreover for the suggested distinction between "specific" and "general" reclamation withdrawals. See 43 CFR 230.15; Edward F. Smith, 51 L.D. 454

(1926). Certainly none of the cited decisions hold that the entryman could be deprived of his entry without compensation.

We cannot doubt that an appropriation of lands by a Government agency under the Instructions, January 13, 1916 (44 L.D. 513), would be subject to any valid entry existing at the time of tract appropriation. The Solicitor has said that:

> "In practice the Department has limited its authority to reserve from grants made by patent, road and other rights-of-way constructed with Federal funds to those cases where construction preceded the initiation of the right on which the patent is based. Instructions of August 31, 1915 (44 L.D. 359) and Instructions of January 13, 1916 (44 L.D. 513)."

Opinion of April 23, 1958 (65 I.D. 200, 202).

Surely an allowed entry is such an "initiation of the right" as to protect it from later appropriation by a Government agency without compensation. See Solicitor's Opinion of September 30, 1921 (48 L.D. 459, 462). We find no evidence that the entries involved in either the 1915 or 1916 Instructions preceded the Government appropriation.

The Department's disinclination in the instructions to accept "a mere survey" as "an appropriation of the land to the public use", and urging "staking the area", can hardly be explained except as provision for giving notice to later entrymen that they could only enter the lands subject to the Government's appropriated rights. To be fully consistent with these instructions and the regulations (43 CFR 205.13), we should not encourage Federal agencies to rely on mere filing of a map, without staking the area on the ground sufficiently to evidence an actual appropriation of the land.

The courts have held that a mere settler, who has no allowed entry, has no rights against the Government. Yosemite Valley case, 82 U.S. 77, 87 (1872). Like allowed entries, however, we believe continued Indian occupancy in good faith would receive protection against later appropriations. See A.S. Wadleigh, 13 L.D. 120 (1891). The Congress may of course extinguish the occupancy rights of any Indians. See United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941); Tee Hit Ton Indians v. United States, 348 U.S. 272 (1955). Indian occupancy rights are otherwise protected against later adverse claims or Government withdrawals. Cramer v. United States, 261 U.S. 219 (1923); Schumacher, 33 L.D. 454 (1905); Departmental Opinion, 56 I.D. 395 (1939).

In the Tee Hit Ton case supra, the Supreme Court held that Congress could by statute refuse to recognize Indian tribal rights of occupancy and disqualify Indians from compensation for the taking of timber under a specific statute providing for such timber cutting. The case did not hold that a Federal agency could ignore actual occupancy by an Indian, or group of Indians, without specific provision

therefor by Congress. Whether or not the Indian interest is by law compensable, the Department's position, protecting lawful Indian occupancy, is clear. Solicitor's Opinion, 53 I.D. 481, 489 (1931); Associate Solicitor's Opinion, M-36539, November 19, 1958.

We recognize the additional acuteness of the problem in Alaska since the repeal of the act of July 24, 1947 (48 U.S.C., sec. 321d) by Section 21(d)(7) of the Alaska Omnibus Act of June 25, 1959 (73 Stat. 146). See Associate Solicitor Memorandum, December 23, 1959, to Regional Solicitor at Juneau. However, the needs of Government agencies should not override the necessity for giving entrymen and Indian occupants every protection afforded them by previous judicial and administrative rulings in the absence of contrary legislation. The Field Solicitor's memoranda of February 14 and February 24, 1958, to the extent that they are inconsistent with this opinion, should not be followed.

(Sgd) C. R. Bradshaw

C. R. Bradshaw
Associate Solicitor
Division of Public Lands

Interior--Duplicating Section, Washington, D. C.