

violate the government's obligations to the Indian bands under the trust patent.

In the present case, the act of March 3, 1891, grants a perpetual easement over either public lands or reservations of the United States. It is extremely doubtful that an allotment under section 4 of the act of February 8, 1887, upon the public domain, can be regarded as a reservation. By the approval of allotment and issuance of trust patent the Indian was given a written promise that the particular tract would be held in trust for him and that ultimately he should have a fee simple patent, and it is, therefore, very doubtful, to say the least, if land in such status can be considered to be public land of the United States, within the meaning of the act of March 3, 1891. The grant of a perpetual easement, under the act of March 3, 1891, conflicts with the Government's obligations to the Indian, as set forth in section 5 of the act of February 8, 1887, since it prevents the issuance of the fee patent "free of all charge or encumbrance whatsoever."

I am, accordingly, of the opinion that there is no authority under the act of March 3, 1891, for the approval of the application here involved.

Your letter discloses that the superintendent of the Colville school has assessed damages arising to the Indian because of the right of way desired, against the Icele Canal Company, in the sum of one hundred dollars, which amount has been deposited, and is now held by the superintendent. The allottee, it appears, has agreed, in writing, to the granting of the right of way, in consideration of that amount. Proper approval by the Department will be given due consideration upon the presentation of the matter by the Commissioner of Indian Affairs, who has been furnished with a copy of this communication.

Your recommendation is, accordingly, not concurred in, and the papers are herewith returned.

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### INSTRUCTIONS.

*January 13, 1916.*

#### ROADS, TRAILS, BRIDGES, ETC. IN NATIONAL FORESTS—EXCEPTION IN PATENTS.

Where "roads, trails, bridges, fire lanes, telephone lines, cabins, fences, and other improvements necessary for the proper and economical administration, protection, and development of the national forests," have been actually constructed and are being maintained upon public lands of the United States under the provisions of the act of March 4, 1915, or survey has been made and the area needed for such improvements definitely fixed and the construction thereof has been provided for and will be immediately undertaken, and the lands are thereafter disposed of under any of the public land laws, the final certificate and patent should except such portion thereof as is so devoted to public purposes.

JONES, *First Assistant Secretary*:

I am in receipt of your [Secretary of Agriculture] 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. The Commissioner of the General Land Office was there instructed 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 the 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."

In your present communication, you refer to the appropriation act of March 4, 1915 (38 Stat., 1100), containing the following provision:

For the construction and maintenance of roads, trails, bridges, fire lanes, telephone lines, cabins, fences, and other improvements necessary for the proper and economical administration, protection and development of the national forests, \$400,000—

and state as follows:

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.

I am of the opinion that the same reasoning as adopted in the Department's instructions of August 31, 1915, to the Commissioner 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 4, 1915; and that similar exceptions as to lands needed for such improvements may be inserted in the register's final certificate, and 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.

A copy of this communication has been furnished the Commissioner of the General Land Office, for his information.

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## FURNISHING COPIES AND PERMITTING INSPECTION OF RECORDS.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, January 15, 1916.*

The SECRETARY OF THE INTERIOR.

SIR: I am in receipt of your instructions of August 4, 1915 [44 L. D., 235], relative to furnishing certified copies and permitting inspection of the records of the Interior Department, and for the reasons hereinafter set forth, I respectfully request you to modify said instructions in the following particulars:

1. That you will permit me, in my discretion to waive requirement 3, paragraph 1.
2. That you will permit excess money, where the amount does not exceed the cost of the copy by more than 10 cents, to be turned into the Treasury as "earned."