STANDARD FORM NO. 64

26-21 BUREAU OF PUBLIC ROADS

#11.6

Office Memorandum · UNITED STATES GOVERNMENT

TO : Mr. E. H. Swick, Regional Engineer
Juneau, Alaska

DATE April 1, 1948

FROM : C. M. Enfield, General Counsel
Washington, D. C.

SUBJECT: Legal Problems Relating to Right-of-Way Acquisition in Alaska

The purpose of this memorandum is to furnish my general views on the Bureau's rights in connection with highway right-of-way in Alaska, to answer, to the extent possible from the sketchy facts which are available, the specific questions which you have raised in previous correspondence, and to indicate the circumstances under which condemnation procedure may be utilized to insure availability of right-of-way to meet construction requirements. The observations made herein have been discussed informally with legal personnel of the Departments of the Interior and Justice, but should not be considered as representing the official views of those departments.

It is considered that, under the authority of the Act of Congress approved July 24, 1947 (61 Stat. 418; 48 U.S.C. 321d), all entries made on public lands subsequent to said date and all patents based thereon have been and are subject to a reservation in the United States of any and all rights-of-way, without limitation as to number or widths, for public highways already constructed or to be constructed on said land.

As was stated by the House Committee on Public Lands in Report No. 673, dated June 24, 1947, "The Committee on Public Lands unanimously agreed that passage of this legislation will help to eliminate unnecessary negotiations and litigation in obtaining proper rights-of-way through Alaska." This legislation was introduced at the request of the Department of the Interior as expressed in a letter dated January 13, 1947, to the Speaker of the House, which was set forth and made a part of the Committee Report. The letter states in part, ". . . However, for the proper location of roads and in the interest of public service, it is necessary in some instances to cross lands to which title has passed from the United States. These instances are becoming more numerous as the population of the Territory increases and obtaining rights-of-way over such lands has, in a number of cases, presented difficulties requiring court action and the expenditure of Federal funds. The proposed legislation is similar to the provisions of the Act of August 30, 1890, (43 U.S.C. 945) which reserves rights-of-way for ditches and canals constructed by the authority of the United States west of the 100th meridian. The proposed bill would be applicable to both public domain and acquired lands of the United States."

The 1890 Act was construed by the Supreme Court of the United States in the case of Ide v. United States (263 U. S. 497). The court pointed out that, at the time of enactment of the legislation, the United States had no canals or ditches either constructed or in the process of construction, but that investigations were being conducted toward the formulation of plans for reclamation projects. "At an early stage of the investigations, Congress became solicitous lest disposal of lands in that region under the land laws might render it

difficult and costly to obtain the necessary rights-of-way for canals and ditches when the work was undertaken. To avoid such embarrassment Congress at first withdrew great bodies of the lands from disposal under the land laws. . . . That action proved unsatisfactory and, by Act of August 30, 1890, Congress repealed the withdrawal, restored the lands to disposal under the land laws, and gave the direction that in all patents there should be a reservation of rights-of-way. . . ." The court held further that the statutory reservation was known to all and "all entrymen thereafter acted in the light of that knowledge so charged to them." As said by the lower court in Green v. Hillhite (93 P. 973), the "Congress was taking this precautionary measure for the protection of a right-of-way to the Government in the event it should later adopt a reclamation policy and enter upon such works. It intended thereby to save the Government from the expense of purchasing and condemning rights-of-way when the Government became ready to construct any canal or ditch."

I believe, therefore, that the reservation under the 1947 Act constitutes an inseparable incident and burden of ownership of such lands and that when the Bureau utilizes the right-of-way, it is doing that which it has a right to do and is not liable to pay compensation therefor. The Bureau is, however, obligated, under the Act, to make payment for the full value of crops and improvements located on rights-of-way, traversing land under valid entry or under patent, when said rights-of-way are utilized. This obligation does not extend to payment of severance damages to land, crops, or improvements outside the rights-of-way. Before making any efforts to reach agreement with entrymen for crops and improvements, you should be assured that the Bureau of Land Management considers the entry to be valid and in good standing since, if not, the entryman's sole rights would be those of removal. Any agreements reached for crops and improvements should contain also a provision releasing the United States from all claims to compensation arising from its utilization of the rights-of-way.

Parties holding patents dated subsequent to July 24, 1947 who made valid homestead entry prior to said date are entitled to "just compensation" for the taking of any of their lands unless a particular patent includes a general right-of-way reservation in which event the patentee would be entitled to payment only for crops and improvements.

Parties holding patents dated prior to July 24, 1947 are, of course, entitled to "just compensation" for any taking of their lands.

Patentees of lands not subject to the 1947 Act are entitled to be paid "just compensation" for the taking of any right-of-way in addition to that already included within the limits of established roads. If the right-of-way limits are not defined on the ground or by plats, then the right-of-way would ordinarily be considered as encompassing the roadway itself plus such additional widths as were, at the time of establishment, considered to be reasonably necessary for the protection of the roadway. In reaching a decision as to the limits of a particular existing right-of-way, you should consider all available information bearing on the intent of the Government at the time of establishing the road including terrain features and accepted practices in the area. Generally, it would appear from the facts heretofore submitted that you will be able to support a claim to a 66-foot right-of-way.

In general, I believe that the views expressed above cover most of the questions raised in the specific cases set out in your memorandum of August 21. However, specific comments as to each case are set forth below:

Case 1. It is considered extremely doubtful that RS 2477 was intended to apply to rights-of-way required by the United States. This statute constitutes a continuing offer by the United States to others to make public lands available for highway construction. Rather, we feel that the authority for acquisition of right-of-way for public highways in Alaska stems from the Act of January 27, 1905 (33 Stat. 616), as amended by the Act of June 30, 1932 (47 Stat. 446), the Act of July 24, 1947 (61 Stat. 418), and Section 107 of the Federal-Aid Highway Act of 1956. See my comments above on the matter of determining the legal limits of an established right-of-way.

Case 2. On the basis of the facts submitted, it seems reasonable to assume that the United States has a right-of-way by prescription to the roads as established. The width of the right-of-way is a question of fact as is discussed earlier in this memorandum. Under these circumstances, there would not be any authority to compensate the patentee.

Case 3. Where the 1947 Act is not applicable, it is considered that a right-of-way established by prescription does not shift and that the patentee would be entitled to compensation for any improvement involving right-of-way beyond the limits of that previously considered as having been established.

Case 4. An entryman in good standing has an inchoate property right, even as against the United States, which permits him to use and occupy the land and its resources in developing the property in a manner which will enable him to obtain a patent. While he may not alienate the land or any interest therein, as for example, by selling gravel to third persons, he would not be precluded from transferring any interest which he might have in the gravel to the United States. Nevertheless, inasmuch as legal title to the gravel is still in the United States, there is considerable doubt as to the proper basis of assigning value, if any, to the entryman's interest. Under the circumstances, if project requirements make it necessary to obtain gravel from entrymen who demand payment of compensation, it would appear to be advisable to institute condemnation proceedings and to file Declarations of Taking with a deposit of $1.00 for each ownership. An alternate procedure, if acceptable to a particular entryman, might be to obtain a right of entry and reserve to the entryman the right to bring suit to determine his interest. We are giving consideration to the advisability of presenting this and other questions to the Comptroller General. However, the procedures suggested herein should take care of your immediate requirements.

Case 5. The 1947 Act reserves rights-of-way in any number needed.

Case 6. If the 1947 Act is applicable we have unlimited rights. If the 1947 Act is not applicable we must pay for any rights-of-way beyond the limits of those previously established.

Case 7. Under the facts stated, the 1947 Act would be applicable. The Act reserves rights-of-way in any widths needed.

Case 8. If the entry was subsequent to the 1947 Act, the Bureau may utilize such rights-of-way as it desires. If a valid entry was made, under the applicable law, prior to the 1947 Act, the right-of-way is limited to that previously established.

Case 9. This was answered in our memorandum of March 3, 1958, Subject: Authority of Territory to grant permittee leases covering school section lands.

Where negotiations with parties from whom the Bureau is taking right-of-way are not successful, it will, of course, be necessary to proceed to condemnation. As to entrymen and patentees whose land is subject to the 1947 Act, I believe that there is legal authority for the Bureau merely to give notice that it proposes to utilize its right-of-way and to take possession of the land. However, it is realized that this course of action involves practical problems in that legal obstacles could conceivably be presented, based either on a contest of the Bureau's interpretation of the 1947 Act or on a disagreement with our appraised value of crops and improvements, which might result in a delay in construction this season. Therefore, if agreements cannot be reached as to the value of crops and improvements or if you believe that an entryman, or patentee, whose land is subject to the 1947 Act, may contest the Bureau's taking of possession of the right-of-way, it will be satisfactory to proceed to condemnation, to file Declarations of Taking, to deposit $1.00 into court for each ownership as to which the value of crops and improvements is not in issue, to deposit the appraised value of the crops and improvements located within the right-of-way with respect to each ownership as to which an agreement as to value cannot be reached, and to request court orders of possession of the land. Entrymen and patentees should be advised prior to the institution of any proceeding of the action to be taken by the Bureau and the reasons therefor.

In your preparation of requests for condemnation please refer to RPM 21-4.2 and to my memorandum of March 4 to Mr. Williams, copies of which were furnished to you. Also, please include a report of pertinent facts as to each tract recommended for condemnation. Should you desire any additional information, please advise and we will furnish you with immediate replies.

I realize that there are many legal problems affecting right-of-way acquisition in Alaska and that it will undoubtedly be worth while for Mr. Krever to meet with you and your staff and probably with representatives of the Department of Justice and the Bureau of Land Management to discuss matters of common interest.

However, inasmuch as we are furnishing our views in this memorandum on the questions with which you are apparently immediately concerned and in light of our present staffing situation and the press of business here, it would be preferable if this visit could be deferred for about 90 days.

On the other hand, if you feel that an immediate visit is necessary and will be of value in connection with the two projects which you propose to construct this season, please let me know and I will make necessary arrangements.