STATE OF ALASKA

IBLA 81-580 Decided March 9, 1982

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, declaring null and void ab initio material site right-of-way F-025893.

Affirmed in part, reversed in part.

1. Applications and Entries: Vested Rights -- Patents of Public Lands: Reservations -- Segregation -- Special Use Permits

   Public land may be "appropriated" to a public project or purpose by a Federal or state agency if such appropriation is under authority of law and there is a physical devotion of the land to such use on the ground. Such an appropriation does not segregate or withdraw the land, but creates an easement which is protected, and any subsequent entry, claim, or location is subject thereto. Where a free-use material site permit with a fixed date of expiration is held by a state agency and the site is later included in a homestead entry application, after the rights of the entryman are vested the free-use permit may not be converted to a material site right-of-way with an indefinite term, but the homestead entry remains subject to the permit until it expires.

2. Applications and Entries: Vested Rights -- Patents of Public Lands: Reservations -- Rights-of-Way: Cancellation -- Rights-of-Way: Federal Highway Act -- Segregation

   Where a state agency which for many years has operated a material site under a free-use permit has applied to BLM for a material site right-of-way pursuant to

the Federal Highway Act, and has received permission from BLM to construct (operate) in advance of the grant, and the Department of Commerce has certified that the right-of-way is in the public interest, and the application has been perfected by the application so that nothing remains to be done except the ministerial act of formally issuing the right-of-way, which act is required by regulation at that stage, a homestead applicant who then files an application for land which includes part of the material site and who pays the fees incident to such application will be held to have acquired his vested right to the homestead land subject to the material site right-of-way issued thereafter, and the homestead patent issued several years later was properly encumbered by a reservation of the right-of-way.

3. Appeals -- Applications and Entries: Vested Rights -- Contests and Protests: Generally -- Patents of Public Lands: Reservations -- Rights-of-Way: Cancellation -- Rights-of-Way: Federal Highway Act -- Segregation

A homestead entryman who 22 years ago received a patent with a reservation of a material site right-of-way, but who accepted such patent without protest or appeal is not entitled to have the right-of-way canceled now on the basis of his assertion that the right-of-way was unauthorized.

4. Appeals -- Board of Land Appeals -- Patents of Public Land: Reservations -- Rights-of-Way: Federal Highway Act -- Rules of Practice: Appeals: Generally

Where a homestead patent is impressed with the reservation of a right-of-way for a material site which is held and operated by a state agency, the Department of the Interior retains its jurisdiction to determine whether the right-of-way has continuing efficacy or whether it should be canceled.

APPEARANCES: Gary Foster, Esq., Assistant Attorney General, Fairbanks, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The State of Alaska, Department of Transportation and Public Facilities, appeals from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated March 23, 1981, declaring null and void ab initio material site right-of-way F-025893. BLM's decision also vacated its earlier decisions of September 13, 1961, granting the right-of-way (ROW), and March 22, 1978, accepting the State's proof of use.

Although the lands to which ROW F-025893 attaches are presently owned by Kelln and James Weidner, these lands were formerly within the boundaries of two adjacent homesteads. 1/ Roughly one-half of the 13.77-acre material site was within the boundaries of homestead patent 1228323 issued on August 22, 1962, to Alver J. Partridge; the remaining half was within the boundaries of homestead patent 1230696, issued to John James Weidner on January 31, 1963. BLM's action declaring ROW F-025893 null and void ab initio was apparently occasioned by a letter from Kelln and James Weidner requesting this action. The Weidners allegedly purchased the Partridge homestead after it was patented to Partridge.

The facts causing BLM to take the action it did are best understood in the following chronological sequence:

1951 -- BLM issues free-use gravel permit FSN 08909 to the Alaska Road Commission under Act of July 31, 1947, 30 U.S.C. § 601 (1976).

1954 -- Free-use gravel permit extended for 5 years.

March 1959 -- Free-use gravel permit further extended to 1964.

November 1959 -- Homestead entry application F-024396 filed by Alver J. Partridge; receipt issued for fees paid by Partridge.

June 1960 -- Alaska Department of Public Works applies for a material site easement under the Act of November 9, 1921, and the Federal Aid Highway Act of August 27, 1958, 23 U.S.C. § 317 (1976).

July 1960 -- BLM grants advance permission to construct right-of-way to Alaska Department of Public Works.

August 1960 -- Homestead entry application F-026341 filed by John J. Weidner; receipt issued for fees paid by Weidner.

1/ The lands to which ROW F-025893 attaches are located in secs. 3 and 4, T. 11 S., R. 11 E., Fairbanks meridian, Alaska.

February 1961 -- Notice of allowance of Partridge homestead entry issued.

September 1961 -- BLM grants ROW F-025893 for material site to Alaska Department of Public Works for project FAP 62-3, subject to all valid rights existing on the day of the grant.

December 1961 -- Notice of allowance of Weidner homestead entry issued.

1962 -- Homestead patent 1228323 issued to Partridge without any reservation of the land or resources relating to the material site.

1963 -- Homestead patent 1230696 issued to Weidner with reservation of a ROW for material site under 23 U.S.C. § 317 (1976).

1968 -- Alaska files proof of construction/use for ROW F-025893.

1978 -- BLM accepts proof of construction/use.

In its decision of March 23, 1981, BLM declared ROW F-025893 null and void ab initio because it had been granted without authority. This conclusion was based upon BLM's finding that the homestead entries of Partridge and Weidner had segregated the lands at issue, appropriated them for private use, and withdrawn them from subsequent entry or acquisition. In finding that the Weidner homestead entry segregated a portion of the lands at issue, BLM relied upon the doctrine of "relation back." This doctrine provides that upon the issuance of a patent or the allowance of an entry, the rights of an applicant are deemed to relate back to the date of the homestead application. Such doctrine is evoked only to protect the rights of an applicant and one in privity with him in order to preclude intervening rights of other claimants. Albert A. Howe, 26 IBLA 386 (1976); White v. Roos, 55 L.D. 605 (1936). Thus, Weidner's entry was deemed to have been made in August 1960, prior to the grant of ROW F-025893 to the State.

On appeal, counsel for the State argues that BLM had authority to issue ROW F-025893 because it maintained continuing authority over the site by virtue of the segregative effect of the free-use gravel permits. The permits referred to by counsel predate even the earliest homestead application at issue by several months.

The effect of the BLM decision holding that the material site was null and void from its inception would be to deprive the State of an interest which it has long claimed and utilized, and to recognize that Weidner's title to both homestead tracts is, and has been, unencumbered by any reservation pertaining to this apparently valuable material site. It would nullify the reservation in the Weidner patent, and perhaps support a claim by Weidner against the State for damages or inverse condemnation.

An analysis of the foregoing chronology of events reveals several complex issues regarding the correctness of the legal premises upon which BLM decided the matter, as well as issues concerned with its jurisdictional authority to adjudicate the matter at all at this stage. The more salient of these issues are enumerated as follows:

1. Did the issuance of free-use gravel permit FSN 08909 to the Alaska Road Commission in 1951, and its subsequent renewal to 1964 (by which time the material site ROW was operative) have the effect of segregating the land involved from lawful entry and appropriation under the homestead law during 1959 and 1960 by Partridge and Weidner, respectively?

2. If the answer to issue number 1 above is negative, did the filing by the Alaska Department of Public Works of its application for a material site ROW in June 1960, and the BLM decision granting advance permission to the State to proceed with construction, both being prior in time to Weidner's filing of his homestead application in August 1960, have the effect of precluding Weidner from entering the land without the encumbrance?

3. If the answers to issue numbers 1 and 2 are both negative, what was the effect of the inclusion in Weidner's patent of the material site ROW? Did the reservation serve to create a dominant estate notwithstanding the imperfection of the ROW prior to the entry of Weidner?

4. If the answer to issue number 1 above is affirmative, what was the effect of issuing a patent to Partridge conveying the fee title to him without a reservation of the material site ROW?

5. What effect, if any, flows from Weidner's failure to timely protest or appeal the reservation of the ROW recited in his patent? Is his claim barred from administrative review under Departmental rules of practice, 43 CFR 4.411?; by a statute of limitations?; by laches?; by the doctrine of administrative finality?

6. Having conveyed the fee title to the Partridge homestead without reserving the ROW, and having prior thereto granted the ROW to the State, does the Department have jurisdiction to adjudicate the disputed claims of superior entitlement between the State and Weidner in view of Germania Iron Co. v. United States, 165 U.S. 379 (1897)?

Ordinarily, we would address the jurisdictional and procedural issues first. However, for reasons which we trust will become apparent, we will proceed initially with a consideration of the substantive issues in their enumerated order.

[1] The historic view is that when the United States devotes federal land which is otherwise unappropriated at the time to a federal

purpose, and actually utilizes the property through the physical construction or delineation of the intended use on the ground, that land and usage is preserved as against a subsequent entry, settlement, location, purchase, or other claim under the public land laws. For historical reference and for the foundation of the rule, see Wilcox v. Jackson, 13 U.S. (Pet.) 266 (1839), wherein certain lands improved by the Army at Fort Dearborn, Chicago (which had been abandoned by the Army but which were still in some use by the Indian agent), were held to be "appropriated" for federal use so as to defeat their acquisition by a preemption claimant.

A similar result was ordered and established as Departmental policy in a case in which the Forest Service had constructed telephone lines on federal land in a national forest. The First Assistant Secretary instructed the Commissioner of the General Land Office to the effect that if such construction had been accomplished under authority of law, and if there had been an actual physical action taken on the ground itself to manifest the appropriation of the land for devotion "to the public use," then an exception preserving such use should be included in the register's final certificate and in the patent when issued. Instructions, 44 L.D. 513 (1916).

Moreover, a number of cases have provided that where, pursuant to lawful authority, federal land is physically devoted to some public project or public purpose by an agency of a state government, the land involved is either segregated from private acquisition under the Public land laws or that one who subsequently acquires such land from the government takes it subject to a reservation or exception which preserves the governmental right to maintain and continue the public purpose use.

In a case very similar to the instant appeal, Southern Idaho Conference Association of Seventh Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969), BLM had issued a materials use permit to the State of Idaho for materials to be utilized in Federal Aid highways. The land was later patented -- with an appropriate reservation of the site -- as a desert land entry, and later conveyed to plaintiff. When the State continued its removals of sand and gravel from the site, plaintiff sought an injunction and the United States sued to quiet its title to its asserted interest in the site. The Court held, inter alia, that there need not have been an order or proclamation withdrawing from entry the land upon which the material site is located; that the entry by the desert land entryman was subject to the prior appropriation by the United States as a material source and site; and that the title conveyed by the patent remains subject to the material site until it is specifically canceled by the Secretary. Id. at 415.

The case of Schaub v. United States, 103 F. Supp. 873 (D. Alaska 1952), aff'd, 207 F.2d 325 (9th Cir. 1953), is informative in this regard, although not controlling. Although the factual circumstances were very similar to those encountered in Southern Idaho Conference

Association of Seventh Day Adventists v. United States, supra, and the Court reached the same result, the case may be distinguished on the basis that the special use permit for the material site in the Schaub case was created initially by the Regional Forester for the use of the Bureau of Public Roads pursuant to 48 U.S.C. § 341, now 16 U.S.C. § 497a (1976). That statute is limited to interests created under the authority of the Secretary of Agriculture on national forest lands in Alaska, and it expressly provides that after such permits have been issued and so long as they continue in effect, the lands therein described shall not be subject to location, entry, or appropriation under the public land laws or mining laws, or to disposition under the mineral leasing laws. 2/ The result, then, in Schaub, was foreordained by statute. However, the Court noted that a materials site ROW had also been issued for the site under 23 U.S.C. § 18, now 23 U.S.C. § 317 (1976), just as in the instant case. Nevertheless, the Court held that because the land was in the actual use and possession of the United States, which had already made an appropriation of the sand and gravel, "the pit was not open to relocation even in the absence of a special use permit or an order setting it aside." Id., 103 F. Supp. at 873 (emphasis added).

This Board has also previously addressed the issue with fairly consistent results. Our most noteworthy opinion in this context is State of Alaska, 46 IBLA 12 (1980), a case which grew out of circumstances which are almost astonishingly parallel to those encountered in the case before us now. There we held expressly that although the free-use permit issued to the Alaska Road Commission did not segregate the land from further appropriation, the subsequent claims and entries of the homesteader were made subject to the free-use permit, citing the regulation of that time, 43 CFR 259.21(d), now redesignated 43 CFR 3621.2. 3/ That regulation provided, in part:

> (d) A free-use permit may be issued to any Federal, State, or Territorial agency * * *. Such permits shall constitute a superior right to remove the materials and

2/ This broad, general, exclusion from entry, location, or disposition of the affected lands is peculiar to use permits issued by the Secretary of Agriculture within national forest lands in Alaska under this particular statute. We have held that other use permits and rights-of-way issued by the Department of Agriculture do not have this segregative effect in the absence of a similar statutory provision or a formal withdrawal, particularly with reference to mining locations. See, e.g., United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980); United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974); A. W. Schunk, 16 IBLA 191, 81 I.D. 401 (1974); Sol. Op., 67 I.D. 225 (1960); United States v. Crocker, 60 I.D. 285 (1949); 2 Lindley on Mines (3rd ed.) § 530; Eugene McCarthy, 14 L.D. 105 (1892).

3/ At the time of the Partridge entry, this regulation was found at 43 CFR 259.21(d). In 1960, this regulation was renumbered as 43 CFR 259.63.

will continue in full force and effect, in accordance with its terms and provisions, as against any subsequent claim to or entry of the lands.

But State of Alaska, supra, held that although the entryman took his entry subject to the pre-existing free-use material site permit, the issuance of a material site ROW thereafter was unauthorized, and properly revoked later by BLM as being null and void from its inception. The rationale for this holding, implied but not articulated in the text, was that the free-use permit was for a fixed term of time, with a specific date of expiration. An entry made thereafter was subject to the terms of the permit, which would expire in due course, leaving the entry unencumbered thereby. After the rights of the entryman attached, the land was segregated from the creation and/or imposition of other uses, reservations, or estates by a regulation then in force, 43 CFR 101.2(a) (1960). This segregative effect in favor of the agricultural entry related back to the time of the filing of the homestead application and the payment of incidental fees. Thereafter, the decision held, BLM could not enhance the nature of the reserved estate by converting a permit for a specific term to a ROW with an indefinite term.

We conclude, therefore, that both the Partridge and the Weidner homestead entries were made subject to the free-use material permit then held by the Alaska Road Commission, which was effective until 1964. The filing of the Partridge homestead application, with payment of the fees, segregated the entered land for homestead purposes effective as of November 1959, so as to preclude the later encumbrance of the material site ROW, which was invalid insofar as it included land in the Partridge homestead. The patent issued to Partridge, therefore, properly did not include a reservation of the ROW.

[2] The situation with respect to the Weidner entry is more troublesome. (See issue number 2, supra.) Because the Alaska Department of Public Works had applied for the material site ROW and BLM had issued a decision authorizing the State agency to construct ("operate") the facility in advance of the ROW grant before Weidner made his homestead application, we must decide the effect of that chronology. It should be noted that the Bureau of Public Roads, on behalf of the Secretary of Commerce, had certified to BLM that the requested ROW was consistent with the public interest, as required by the Federal Aid Highway Act, supra, and that this also occurred prior to the filing of Weidner's homestead application. The regulation in effect at that time, 43 CFR 244.56 (1960), provided in part:

> Upon receipt of an application * * * the Manager will return a duplicate map or maps to the State highway department which will forward them to the Secretary of Commerce for his determination that the lands are necessary for the purposes desired, as required by the act. Upon the receipt of such determination, if all else be regular, the right of way will be approved. [Emphasis added.]

i.e. Omnibus Deed

Since the record does not disclose any irregularity in the application by the State agency for the ROW, it would appear that at the time Weidner filed his homestead application the only thing necessary to the perfection of the ROW was the mere ministerial act of approving it by formal issuance of the granting document, an act which was required by regulation.

Moreover, at that time there had been a physical appropriation and devotion of the land to a public purpose under authority of law, which had been sanctioned by the Department of Commerce and the Department of the Interior. This, in itself, would seem a sufficient basis to preserve the public interest in the site until the formal ROW approval could be issued, under the rule applied in Wilcox v. Jackson, supra; Instructions, supra; Southern Idaho Conference Association of Seventh Day Adventists v. United States, supra; and Schaub v. United States, supra. It will be recalled that both the Southern Idaho Conference Association of Seventh Day Adventists and the Schaub cases, the respective Courts opined, in obitur dictum, that a material site ROW such as this would have been preserved even without an order or proclamation withdrawing the land from entry, and even in the absence of a special use permit or an order setting it aside.

The general regulations of the period provided with reference to all types of ROW's that anyone "entering or otherwise appropriating a tract of public land, to part of which a right-of-way has attached under the regulations * * * take the land subject to such right-of-way and without deduction of the area included in the right-of-way." 43 CFR 244.7. But the regulations do not address a circumstance such as this, where the State's ROW application and use predate the initiation of a homestead entry made before the ROW grant was formally approved. The essential question, then, is whether the ROW can be said to have "attached" at the time of the filing of Weidner's application. We hold that it had attached, as suggested by the case law cited above.

Those authorities allude to the land having been "appropriated" to public purposes. The character and quality of the "appropriation" in this instance was fixed by the pending ROW application (which had been fully perfected by the State), and by the certification by the Department of Commerce and the approval given by BLM to operate. To allow Weidner's application to intervene at this stage and defeat the prior filed State application would be contrary to public policy and to all previous pronouncements dealing with the subject. Accordingly, we hold that the Weidner homestead entry was subject to the ROW, and that the reservation was properly included in his patent.

Issue numbers 3 and 4 thus are also resolved.

[3] Assuming, arguendo, that we are in error in holding that Weidner's entry was subject to the ROW, it must be observed that his failure to seek the administrative remedy which was available to him then, bars him from seeking such a remedy now. He could have protested

the incorporation of the reservation in the patent when it issued and initiated a timely administrative appeal from any response by BLM which was adverse to his interest. Therefore, BLM erred in voiding the State's ROW more than 20 years later at Weidner's behest without considering the implications of Weidner's failure to act in accordance with the Department's rules of practice to preserve whatever right he believed he had.

We will forego a discussion of whether he may now be barred from judicial review of the question by a statute of limitations, laches, or other defenses to enforce repose, but we will point out that these would have been cogent considerations for BLM to take into account before acting as it did.

The only proper administrative avenue by which Weidner could have sought to expunge the ROW reservation at this late date would have been by the filing of an application to reform his patent pursuant to section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1976). However, favorable action on such an application could only be premised on a finding that the reservation was included in the patent by error, and as we have here held that it was not error, the filing of such an application now would afford no viable recourse.

[4] Turning to the jurisdictional issue, this Board has on several occasions observed the rule announced in Germania Iron Co. v. United States, supra, to the effect that upon issuance of a patent the legal title is transferred out of the United States, so that this Department no longer has jurisdiction to adjudicate conflicting claims of title and interest between non-Federal parties. See, e.g., Silver Spot Metals, Inc., 51 IBLA 12 (1980). At first impression, it would appear that this is such a case, requiring the controversy between the State and Weidner to be resolved privately between them or by a court of competent jurisdiction.

However, this concern was addressed in Southern Idaho Conference Association of Seventh Day Adventists v. United States, supra, wherein the Court of Appeals said:

> [The material site] * * * was not revoked or canceled by the "final disposal" through issuance of the patent. On the contrary, the patent expressly reserved the right-of-way for the material site in accordance with Department regulations. Neither the statute nor any regulation gives appellant any right of revocation or cancellation.
>
> Under the patent reservation and the applicable statute and regulation the material site easement was appropriated by the United States through the Department of Interior and transferred to the State of Idaho pursuant to the provisions of 23 U.S.C. § 317. The United States still

retains the easement in the material site subject to the permit. [Footnote omitted.]

418 F.2d at 415.

Thus, the retention by the United States of an easement of record is sufficient to confer jurisdiction on this Board to determine its efficacy.

In summary, then, the Partridge patent contained no reservation of a material site, but his entry was subject to the free-use permit which had issued for a specific term of time which expired in 1964. Thereafter, the State has had no right under the patent or the laws of the United States to occupy that portion of the site or to possess its resources. The ROW issued by BLM on the Partridge entry, after Partridge had established a prior right to the land, was indeed unauthorized and BLM acted correctly in recognizing this and in canceling the ROW insofar as it affected land in the Partridge homestead. However, that portion of the site which lies within the Weidner homestead patent was properly reserved as a material site ROW pursuant to 23 U.S.C. § 317 (1976) or, alternatively, as a common law ROW "appropriation" by the United States of its own land under authority of law for a public purpose, and the land will remain so encumbered until the ROW is properly revoked by the United States.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge