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

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); Nathais 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

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