

August 28, 1964

M E M O R A N D U M

TO: Alfred A. Baca
Chief Right of Way Agent
Department of Highways

FROM: Norman P. Glass
Assistant Attorney General, Highways

RE: Project No. S-0490(2), Wildwood North
'47 Act

By your letter of August 17, 1964, supplementing previous inquiries on the same topic, you have asked whether the construction of a road across a parcel of land constitutes a "take" as that term is used in reference to the right of way reservation created by the '47 Act (48 U.S.C. 321(d)). We are confident that such an act does constitute such an exercise of the reservation as constitutes a "take" unless, of course, some compensation or agreed consideration was extended to the owner. Probably no act of exercise of dominion and control could more adequately demonstrate a utilization of the reservation than the actual construction of a road.

The question next arises as to the time at which the act of construction must occur if it is to constitute a take. The state has maintained consistently that the existence of a road across a parcel of land at the time of entry does not constitute a take. This situation would arise where a road was constructed over a portion of the public domain which was subsequently entered. The entryman enters subject to the existing roadway and the '47 Act reservation remains for subsequent utilization.

A different situation arises when construction of the road occurs subsequent to entry. When an entry which is complete and in proper form is effected, the entryman gains such inceptive rights in the land as would entitle him to some compensation if a portion were condemned. This same interest, when it arises in lands subject to the '47 Act, is such that an appropriation of a part of the land for road purposes constitutes a "take". That is, while the '47 Act reservation eliminates the obligation to pay compensation for the land appropriated, the entryman has none the less parted with an interest of value to him. This interest

has been "taken" as that term is used in applying the '47 Act.

As this indicates, the determination of a "take" by the act of constructing a road turns on the relationship in time of certain events. Where this relationship is not clear, each parcel will require individual consideration. Additionally, because of the wide latitude given the Alaska Road Commission in its operations, a not inconsiderable number of informal agreements have been made in the past which gave the government entry, use and materials in exchange for other services, and this frequently negates so called "first" takes or loss of the government's later right of entry. This in turn merely emphasizes the need for considering each case alone on its merits.

I hope that this answers your question.

Norman P. Glass

NPG:rw

Dictated by DBB