COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON

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DEC - 1 1932

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The Honorable,

The Secretary of Agriculture.

Sir:

There has been received your letter of August 26, 1932, as follows:

"This Department is constructing Alaska Forest Highway Project No. 11-A2, Sitka Highway, Indian River Park Section. In preparing plans and specifications for this project it was necessary to provide for relocating, in part, and widening the existing road in such manner as will require the removal and resetting of eight power line poles of the Sitka Wharf and Power Company, Inc. of Sitka, Alaska, the transmission lines of which company were erected under a license or permit (Project No. 408, Alaska) issued May 19, 1924, by the Federal Power Commission. The poles of the power company desired to be removed conflict with the revised or widened highway location at survey stations 14+80, 21+90, 27+90, 31+50, 43+60, 44+95, 46+26, and 47+30, all on lands belonging to the United States.

"There is attached hereto a copy of the license or permit issued by the Federal Power Commission to the Sitka Wharf and Power Company, Inc. together with a copy of letter of July 7, 1932, from Mr. H. D. Williams, District Engineer, Bureau of Public Roads, Juneau, Alaska, to Dr. L. I. Hewes, Deputy Chief Engineer, Bureau of Public Roads, San Francisco, California, in which Mr. Williams asks for advice as to who shall pay for the removal and resetting of the poles that are to be removed, and submits certain data concerning the situation which he thinks will be helpful in deciding the question.

"It is felt that the Government should pay for the removal of the poles of the power line in this instance, but it is thought desirable to submit the question to you because of the views expressed by your office in decision of September 8, 1931, to this Department (A-38299) concerning certain contracts therein referred to which had been entered into with telephone companies to provide for reimbursing such companies the cost of removing poles of their lines which interfered with the construction of Montana forest road projects Nos. 24-A, 26-A, and 28-A. In those cases the telephone lines were

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located pursuant to special use permits issued by the District Forester. In the case now presented the power transmission lines are located across lands of the United States under a permit or license issued by the Federal Power Commission pursuant to the Federal Power Act of June 10, 1920 (41 Stat. 1063), as amended by act approved March 3, 1921 (41 Stat. 1353), and the Rules and Regulations adopted by the Federal Power Commission pursuant to such statute.

"In this connection, attention is invited to Articles 9 and 11 of the license pursuant to which the power line is located on the land in question. Article 9 gives the assent of the licensee to changes in the location or design of its transmission lines to avoid inductive interference with telephone lines of the United States, if such changes are made at the expense of the United States; and Article 11 reserves to the United States the right for the Forest Service, without charge, to construct or permit to be constructed in, through, and across the project of licensee railroads, chutes, roads, trails, conduits, and other means of transportation 'not inconsistent with the enjoyment of said project by the Licensee for the purposes herein set forth.' It should be noted also that Article 7 makes the licensee liable for injury to or destruction of any property of the United States, including roads and bridges, which may be occasioned by the maintenance or operation of the project. While, therefore, the permit or license fixes certain liabilities and costs which shall be borne by the licensee and by the United States, respectively, it makes no specific provision as to adjusting or removing any of the project works of the licensee to accommodate subsequent highway construction work which may be undertaken by the United States, except in so far as such provision may be regarded as made by Article 11, which gives the right of entry to the Forest Service for the construction of roads, trails, and certain other named works, but it would seem that by necessary implication from the language limiting such works to such as are 'not inconsistent with the enjoyment of said project by the said Licensee' such entry would have to be made without expense to the licensee.

"The licensee is required under the terms of Article 16 of the license to pay to the United States reasonable annual charges for the purpose of reimbursing the United States for the costs of the administration of the Federal Power Act and for compensating it for the use, occupancy, and enjoyment of the public lands covered by the license. The compensation to be so paid by the licensee is to be prescribed in accordance with Regulation 14 of the Rules and Regulations issued by the Federal Power Commission, and this regulation (Section 2, paragraph C) fixes the minimum charge for the use of public lands and reservations of the United States under any license at the rate of $5.00 per mile, 100 feet or less wide,

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per annum, with proportional increase for additional width.

"It would seem, therefore, that since the United States exacts compensation for the use of the land on which licensee's pole lines were constructed and are now located under authority of the Federal Power Commission, and in the absence of specific provision of the contrary, if it now becomes necessary for the purposes of the United States to remove certain of the poles in order to accommodate the highway construction and provide a proper location and width therefor such removal should be accomplished without cost to the licensee or owners of the transmission lines. It seems that the necessity for clearing the right of way of the pole lines should not be regarded as very different from clearing the right of way of any other obstruction thereon which might interfere with the highway construction operation.

"There is suggested for consideration in connection with this question the fact that the Federal Power Act provides (Section 6) for the issuance of licenses for a period of 50 years, and that such licenses may be revoked only for the reasons and in the manner prescribed under the provisions of the act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after 90 days public notice. The only way that these licenses can be revoked (Section 26) is by a suit in equity, in the Federal courts, for violation of the terms of the license or of the provisions of the act. Prior to the Federal Power Act rights of way for transmission lines were authorized under the act of February 15, 1901 (31 Stat. 790), which act provides 'that any permission given * * * under the provisions of this act may be revoked * * *, and shall not be held to confer any right, easement, or interest in, to, or over any public land, reservation, or park.' In Swendig vs. Washington Power Company, 265 U. S. 322, in discussing the question whether a patent would revoke a permit or license under said act of 1901, the Court said (p. 329, 330):

"'Appellants contend that appellee acquired a mere license temporarily to use the right of way through the lands in question, and that the patents without more revoked the license and deprived appellee of its right of way over the lands therein described. In support of this contention, they stress the concluding clause of the act, stating that the permission given "shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." The purpose of the act is to grant to the Secretary power "to permit the use of rights of way" through the lands referred to. And, in order that control over them may be retained, it is provided that the Secretary in his discretion may revoke such permits. The enterprises mentioned in

the act involve expensive and permanent construction. The use of land necessary for the undertaking specified is to be distinguished from mere licenses to travel over, graze cattle on, or otherwise use or occupy land without investment for construction or improvements. Plainly, the piecemeal revocation of the right of way whenever a patent is issued to a settler along the line, would increase the financial burden and add elements of risk to the investments, and also be inconsistent with the purpose of the act. The clause above quoted should be read to promote and advance, not to defeat, the legislative purpose to permit the use of rights of way through public lands for the industries and utilities mentioned. It is included from an abundance of caution to support and safeguard the Secretary's power of revocation. It means that the permissions given shall not be deemed to confer any right that may not be revoked by him in the exercise of his discretion. There is no other enactment providing for the termination of the use of the rights of way. The right to use continues until the permission given by the Secretary is revoked by him.'

"It would appear that if patents to a land can not work a revocation of a permit under the act of 1901, certainly the building of a road by the United States can not abrogate the rights of a licensee under the Federal Water Power Act. A suit by the United States in the Federal court is necessary to revoke such a license, and then only for violation of the terms of the license or of the act. If in the building of a road the United States seeks to change the rights of a licensee it would seem that it must either condemn or pay for such change, and that the licensee can not be forced to pay for such change.

"To summarize, the situation appears about like this: The United States has granted certain rights of way. Upon the faith of such grant, the grantee has occupied the land and expended money in improvements. The United States in building a highway can not invade these rights or force a vacation thereof contrary to the terms of the grant and the statutes under which the grant was made. If the grantee or licensee should refuse to move at his own expense, it is not clear what course may be pursued unless it be that it will be necessary to defer construction of the road until condemnation proceedings may be completed or until Congress passes an act specifically authorizing payment for the removal of houses, cabins, ~~telephone and telegraph lines, railroads, or other obstructions~~ from the route of a projected highway on lands of the United States.

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"In view of the question heretofore raised by your office in the decision of September 8, 1951, above mentioned, it will be appreciated if you will give consideration to the question of whether Forest highway funds may be used to pay for the removal of the pole lines of the Sitka Wharf and Power Company, Inc. where removal of their poles is necessary to make the approved right of way available for constructing Alaska Forest Highway Project No. 11-A2. As this project has been advertised, bids opened, and award made, and it is desired to start construction work at the earliest possible date, it will be appreciated if the Department can be favored with a prompt determination of the question here submitted."

The only question presented for decision is understood to be whether the appropriation available for the improvement of the public highway in question is available also to defray the expense of removal and relocation of eight power line poles of the Sitka Wharf and Power Company as located by the Company on the public lands involved and which it is stated will interfere with the widening and relocating, in part, of an existing road or highway on such lands of the United States. There apparently is no question involved therefore of a revocation of the license under which these poles were located and there is no question involved of deferring "construction of the road until condemnation proceedings may be completed or until Congress passes an act specifically authorizing payment for the removal of houses, cabins, telephone and telegraph lines, railroads, or other obstructions from the route of a projected highway on lands of the United States." The discussion of these latter questions in your letter, accordingly, may be disregarded.

When consideration thus is limited to the exact facts on which the question presented for decision arises it seems clear the decision A-38299 of September 8, 1931, which you cite, and the earlier decision A-36464 of July 22, 1931, cited therein, are controlling.

In the decision A-36464 of July 22, 1931, it was held that, in the absence of specific authorization therefor in the appropriation act or otherwise in the law, the Interior Department appropriation for the construction of roads and trails could not be used for the removal and/or relocating underground of the power plant line of the Glacier National Park Hotel Company which power plant line had been located in Glacier National Park pursuant to a written license or lease contract entered into with the Secretary of the Interior under authority contained in the act of August 25, 1916, 39 Stat. 536, as amended by the act of June 2, 1920, 41 Stat. 731, and the act of March 7, 1928, 45 Stat. 200, 255, and was desired to be removed and relocated to avoid interference with the park road construction program.

In the decision A-38299 of September 8, 1931, the principle of the earlier decision was applied and the rule which must be applied in such cases was stated as follows:

> " * * * The placing of such lines on public lands must be understood as subject to the paramount needs of the United States, and when their removal becomes necessary because of interference therewith the expenses of such removal may not be charged to the United States in the absence of specific statutory authority to that effect."

The authority for licensing the limited use and occupation of the public lands is for the primary benefit of the licensee and the provision for a nominal annual charge for the purpose of reimbursing the United States for the costs of administration of the licensing act and for the use, occupancy and enjoyment of its lands (section 10, act June 10, 1920, 41 Stat. 1068, U.S.C. 16:803(e), Federal Power Commission Regulation No. 14, section 2) does not even suggest a purpose that the licensing agreements will develve expenditures on the United States of the character your application for decision suggests.

The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication and every doubt should be resolved in favor of the Government. (Boosac Mining Co. v. State of South Carolina, 144 U.S. 550, 562; Louisville Bridge Company v. United States, 242 U.S. 409, 417-418.) The obstruction of a highway is a public nuisance subject to abatement at the instance of the Government (In re Debs, 158 U.S. 587). The Government of the United States through its proper officers exercises exclusive control over highways on Government lands and

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no officer or commission has been authorized to disable the Government from improving existing highways or constructing new highways for the public good. The requiring of removal or relocation of obstructions to such highway projects, although the obstructions were located under a license agreement, does not constitute a taking of property for the public use entitling to compensation but the obstruction may be compelled to be removed at the cost of the licensee. (Cincinnati I. & W. R. Co. v. Connersville, 218 U.S. 336; Union Bridge Co. v. United States, 204 U.S. 364, 397, and cases therein cited.)

Were the appropriations for road construction otherwise specifically available for relocating power line poles, it would seem necessary to assume the use would be limited to the relocation only of such poles as the Federal Power Commission, upon consideration of all the facts, interests, and benefits, had formally decided could not be required to be relocated at the expense of the licensee under the statutes and regulations and the terms of the formal license agreement. Not only is there no appropriation specifically available for removing the power line poles in the present case but it is observed from articles 8 and 11 of the license agreement that the licensee is specifically obligated to so plan and maintain its structures and devices that they will not fall upon or otherwise obstruct traffic and endanger life on highways, whether the high-

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ways existed at the time of the agreement or are improved and/or newly constructed after the date of the agreement, in accordance with the provisions of said article 11.

It must be held on the facts presented that no existing appropriation is available for use in payment of the cost of removal and resetting of the eight power line poles which you state obstruct the construction program respecting existing Alaska Forest Highway Project No. 11-A2.

Respectfully,

(Signed) J.R.McCarl

Comptroller General
of the United States.