ALFRED E. KOENIG

A-30139 Decided NOV 25 1964

Rights-of-Way: Revised Statutes sec. 2477--Patents of Public Lands: Reservations--Small Tract Act: Generally

A patent of land under the Small Tract Act is subject to an existing public highway right-of-way within the provisions of § 2477 of the Revised Statutes regardless of the absence of a reservation for the right-of-way in the patent; therefore, a reservation for an existing public highway need not be made in a patent for a small tract and a protest against issuance of a patent for that reason is properly dismissed and the question of whether a road is a public highway left for determination in the State courts.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30139

: Colorado 093727

Alfred E. Koenig

: Protest against issuance of
: patents for small tracts
: without reservation of
: rights-of-way dismissed

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alfred E. Koenig has appealed to the Secretary of the Interior from a decision by the Division of Appeals, Bureau of Land Management, dated August 21, 1963, affirming a land office decision of April 19, 1963, affecting his assertion of rights to certain roads located in sec. 20, T. 1 N., R. 71 W., 6th P.M., Colorado, as conflicting with small tract leases.

On October 19, 1962, Koenig filed an application for rights-of-way under the act of January 21, 1895, 28 Stat. 635, as amended, 43 U.S.C. § 956 (1958), for access roads to patented mining claims. Thereafter, J. Leonard Gaines and George N. Crawford, who had filed applications to purchase small tracts which had been leased to them on November 1, 1960 (Colorado 018652 and Colorado 019033, respectively), under the Small Tract Act of June 1, 1938, as amended, 68 Stat. 239 (1954), 43 U.S.C. § 682a (1958), protested against granting any right-of-way which would cross their tracts. They apparently had reference to a road along the Sunbeam Gulch which crosses their tracts. In a letter to the land office dated November 4, 1962, Koenig stated that the Sunbeam Gulch road is an old road which serves many mining claims and that no patents should be issued for tracts crossed by it, including Gaines' and Crawford's, without protecting the rights of landowners served by the road.

The land office found that there is access to the patented mining claims by an existing county road and that the wagon road in Sunbeam Gulch, for which Koenig apparently desired a right-of-way, had not been used for many years, and held that it would be unnecessary to reserve a right-of-way for the road in the patents to be issued for the small tracts. It rejected Koenig's application as to the portion of the road going through the area of the small tract leases, took other action not pertinent here, and dismissed Koenig's protest against patenting lands in the small tract leases without a reservation of the rights-of-way. It dismissed the protests of Gaines and Crawford as being moot.

In his appeal to the Director, Bureau of Land Management, Koenig for the first time asserted that the Sunbeam Gulch road is a valid existing right-of-way over public land pursuant to Rev. Stat. § 2477 (1875), 43 U.S.C. § 932 (1958). 1/ In ruling on the appeal, the Division of Appeals concluded that if the Sunbeam Gulch road is a public highway the right to use the public road would not be noted in a small tract patent, that the issuance of patent for a small tract would not abrogate the right to the use of an existing right-of-way if it had been properly established prior to issuing the small tract lease, that an application would not be accepted if filed for such a right-of-way, and that any questions of interference with use of the road, if it is such a highway, is a matter for local courts. It also noted that appellant had given no reasons why his application under the 1895 act should not be rejected. Therefore, it sustained the land office rejection of the application for that reason.

In his appeal to the Secretary, the appellant does not question the rejection of his application for a right-of-way under the 1895 act across the small tracts in question. The only question which he raises is whether or not reservations should be included in patents issued under the Small Tract Act of the Sunbeam Gulch road which appellant alleges to be an existing public highway. Appellant reiterates his contention that the road in question is a public highway properly established under Federal and State laws. He asserts that there is no authority to issue a patent which would include the highway, and that, therefore, the Bureau of Land Management is bound to exclude the lands of the highway from any patents that may issue, and that the existence of any other road in no way affects the legal status of the public highway.

The Bureau's decision does leave the question of the status of the Sunbeam Gulch road uncertain both for appellant and for the small tract lessees who may be affected by any determination regarding the status of the road insofar as it conflicts with lands leased by them or which may be patented to them. However, in considering whether reservations of public roads granted pursuant to Rev. Stat. § 2477 need be made in grants of public lands, this Department has long taken the position that it is unnecessary to include any reservation or exception for the right-of-way in a patent. Herb Penrose, A-29507 (July 26, 1963), and cases cited therein. The reason for this is that grants of public lands upon which there is such a public highway are subject to the easement despite the absence of a reservation in the patent or grant.

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1/ That section provides that "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Id. The question as to whether a road is a public highway is determined by the law of the State in which the public land is located; therefore this Department has considered State courts to be the proper forum for determining whether there is a public highway under that section of the Revised Statutes and the respective rights of interested parties. Id. Thus, although the Bureau's conclusion may seem unsatisfactory to all of the parties concerned here, it was the proper conclusion in the circumstances as the questions involved are matters for the courts rather than this Department.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F. R. 1348), the decision appealed from is affirmed.

Ernest F. Hom

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Assistant Solicitor
Land Appeals