PUBLIC LAND ORDER CASES

Public Land Order Rights of Way and '47 Act Cases

A number of Public Land Order cases have been decided by the Alaska Supreme Court and the Federal Court system. The following are the summaries of several of those cases. These summaries are solely for the purpose of identifying the cases and the issues. Please consult your own attorney in determining the applicability and accuracy of the summaries as they apply to your individual requirements.

1. U.S. v. Anderson, 113 F.Supp 1, (D. Alaska 1953)

PLO 386 effective July 31, 1947 withdrew a 300 foot wide strip of land on each side of the centerline of the Alaska Highway from the Canadian Border to the Richardson Highway junction in Big Delta. On January 13, 1948 Anderson staked five acres after deciding the BLM clerk was in error about a reservation for the highway. He filed a notice of headquarters and business site with the territorial recorder. On the site he built a roadhouse, powerplant and other structures. Since the land was not open to entry and the parties failed to file their entry with BLM, they were "mere trespassers".

2. Hillstrand v. State, 181 F. Supp 219 (1960)

Once right of way has been selected and defined, later improvements, necessitating utilization of land upon which road is not already located, can only be accomplished pursuant to condemnation and compensation provisions.

3. Myers v. United States, 210 F.Supp 695 (D. Alaska 1962)

The road from Wasilla to Big Lake Junction was originally constructed in 1949. The property owners, Myers and Weaver, made entries in 1953. The patents issued in 1954 and 1956 were subject to a reservation under the "47 Act", 48 USC 321d, which stated: "the reservation of a right of way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or by any State

created out of the Territory of Alaska, in accordance with the act of July 24, 1947 (61 Stat., 418, 48 USC sec. 321d)."

The road improvement was staked in 1957 and notices of utilization were given to the owners in 1958. The road was reconstructed in 1959, plaintiffs sued for damages. One issue raised by the owners was whether the initial road construction in 1949 was the only election under the "47 Act" the Bureau of Public Roads was entitled to make.

The road was originally constructed in 1949 across public domain. Anyone who later acquired title to the property would take it subject to that right of way. The construction in 1959 was the first exercise of the "47 Act" provisions. Amendment 2 of Secretarial Order 2665 increased the width of the road to 300 foot wide through road, which became effective when the BPR notified the owners and constructed the road.

MEYERS' PATENT CLAUSES

NOW KNOW YE, That the United States of America, in consideration of the premises, DOES HEREBY GRANT, unto the said claimant and to the heirs of the said claimant the tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging; unto the said claimant and to the heirs and assigns of the said claimant forever; subject to (1) any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; (2) the reservation of a right-of-way for ditches or canals constructed by the authority of the United States, in accordance with the act of August 30, 1890 (26 Stat., 391, 43 U.S.C. sec. 945), and (3) the reservation of a right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or by any State created out of the Territory of Alaska, in accordance with the act of July 24, 1947 (61 Stat., 418, 48 U.S.C. sec. 321d). There is also reserved to the United States a right-of-way for the construction of railroads, telegraph and telephone lines, in accordance with section 1 of the act of March 12, 1914 (38 Stat., 305, 48 U.S.C. sec. 305); excepting and reserving also, to the United States, pursuant to section 5 of the act of August 1, 1946 (60 Stat., 760, 42 U.S.C. sec. 1805), all uranium, thorium, or any other material which is or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same. Excepting and reserving, also to the United States all the coal in the lands so patented, and to it or persons authorized by it, the right to prospect for, mine, and remove such deposits from

the same upon compliance with the conditions and subject to the provisions and limitations of the Act of March 8, 1922 (42 Stat. 415).

4. State of Alaska Dept. of Highways v. Crosby, 410 P.2d 724 (1966)

All lands disposed by BLM under the Small Tract Act (Act of June 1, 1938, 52 Stat. 609) which was made applicable to the State of Alaska in 1945 (Act of July 14, 1945, 59 Stat. 467) are not subject to the Act of 1947. This exception applies even if the small tract patent contains a '47 Act reservation.

The Court found the legislation was for those grants where the government did not have discretionary authority to reserve a right-of-way. In the Court's opinion, the '47 Act was not intended to apply where the government had the authority to reserve a right-of-way, such as it had under the Small Tract Act.

5. Matanuska Valley Bank v. Abernathy, 445 P.2d 235 (1968)

Upon discovering that the roadhouse she had purchased from the bank was within the 300 foot wide right of way reserved for the Glenn Highway under PLO 1613, Mrs. Abernathy sued for rescission of her sale contract. The Court found mutual mistake because the sale price indicated that the beneficial use of the property was for a roadhouse. With the highway reservation eliminating the right for the building to be located where it was, the court allowed Mrs. Abernathy to rescind her agreement.

6. Hahn v. Alaska Title Guaranty Co., 557 P.2d 143 (1976)

The Hahn's purchased a title insurance policy from Alaska Title Guaranty, ATG, that indicated there was a right of way over the east 33 feet of the property. The state subsequently claimed a right of way 50 feet wide by virtue of PLO 601 dated August 10, 1949, and published August 15, 1949. The PLO was not recorded and the patent issued in 1961 did not refer to the PLO easement. In 1974 the state occupied the 50 feet. The primary issue was whether the title company was required to list the 50 foot wide right of way as an encumbrance. The title company claimed that its coverage was limited to the public records and a PLO published in the Federal Register is not a public record. The court first applied the rule of law that ambiguities are to be construed in favor of the

insured. It also found that provisions of coverage should be broadly construed while limitations are interpreted narrowly against the insured. The court held that publishing in the federal register was constructive notice. The title company argued that the terms "the recording laws" in the policy referred to Alaska's recording laws. The court refused to accept that limitation.

7. State Dept. of Highways v. Green, 586 P.2d 595 (1978)

Green and Goodman were the owners of small tracts along Tudor Road which were subject to a 33 feet wide easement reservation under the authority of the Small Tract Act. In addition the patents were subject to the 47 Act.

The lots were classified for small tracts on March 23, 1950, Goodman's predecessor allegedly leased the lot on April 12, 1950, (actual date of lease per subsequent Goodman case was June 30, 1950), Secretarial Order (SO) 2665 was published in Federal Register on October 20, 1951, and patent to the Goodman parcel was issued on April 28, 1952.

The Greens' parcel was originally leased was on September 1, 1952. It was patented on December 1, 1953.

SO 2665 established a width of 50 feet each side of centerline for local roads, all roads not classified through or feeder. Tudor was not classified in SO 2665.

Greens argued that section 321d of 48 USC and SO 2665 did not apply due to the specific reservation of an easement in the small tract act; a result previously reached in State, Department of Highways v. Crosby, 410 P.2d 724 (1966). The state however was not relying on 321d but another section 321a which turned over the authority of the Board of Road Commissioners to the Secretary of the Interior, as well as SO 2665.

SO 2665 is a general order whereas the reservation created by the small tract act was specific. The Court ruled the two conflicting orders should be "harmonized if possible" unless there is a conflict. Since the 33 foot reservation was for access streets serving interior lots and the 50 foot reservation was for local roads there was not a conflict. The court relied on the rule of construction that "where language of a public land grant is subject to reasonable doubt such ambiguities are to be resolved strictly against the grantee and in favor of the government".

As to the Goodmans the court ruled that SO 2665 applied to Goodmans only if the effective date of the lease was preceded both by construction of the road and

the issuance of SO 2665. Once construction was begun the lessee would take subject to the Secretary of the Interior's authority under 48 USC 321a.

Although the Court ruled that SO 2665 did not apply to Goodmans, the roadway may have been appropriated by construction prior to the lease. Sufficient evidence was not available to determine if construction had taken place. The court ordered the case remanded for the lower court to determine the date the road was planned and its width, the date the road was staked and its width and the date construction began.

GREEN'S (BANTZ) PATENT CLAUSES

NOW KNOW YE, That the United States of America, in consideration of the premises, DOES HEREBY GRANT, unto the said claimant and to the heirs of the said claimant the tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging; unto the said claimant and to the heirs and assigns of the said claimant forever; subject to (1) any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; (2) the reservation of a right-of-way for ditches or canals constructed by the authority of the United States, in accordance with the act of August 30, 1890 (26 Stat., 391, 43 U.S.C. sec. 945), and (3) the reservation of a right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or by any State created out of the Territory of Alaska, in accordance with the act of July 24, 1947 (61 Stat., 418, 48 U.S.C. sec. 321d). There is also reserved to the United States a right-of-way for the construction of railroads, telegraph and telephone lines, in accordance with section 1 of the act of March 12, 1914 (38 Stat., 305, 48 U.S.C. sec. 305); excepting and reserving also, to the United States, pursuant to section 5 of the act of August 1, 1946 (60 Stat., 760, 42 U.S.C. sec. 1805), all uranium, thorium, or any other material which is or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same. Excepting and reserving, also, to the United States all oil, gas and other mineral deposits in the land so patented, together with the right to prospect for, mine and remove the same according to the provisions of said Act of June 1, 1938. This patent is subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located along the north and east boundaries of said land.

8. 823 Square Feet, More or Less v. State (Goodman), 660 P.2d 443 (1983)

Although the actual road and ditches were only 48 feet wide, the staking, stripping and clearing 100 foot wide corridor were sufficient acts to appropriate a 50 foot wide right of way on the Goodman property since the construction took place before the issuance of the lease. Justice Burke concurred in the result but did not agree that a road could be appropriated by construction alone. He argued that PLO 601, issued prior to the construction of Tudor Road, could be applied creating a width of 50 feet.

9. State v. Alaska Land Title Association, 667 P.2d 714 (1983)

This is the primary case for PLO rights of way.

By virtue of PLOs 601, 757 and 1613 and Departmental Order 2665, the State of Alaska and the Municipality of Anchorage claimed easements for local, feeder and through roads greater than shown in the patents. Three properties, owned by Pease, Boysen and Hansen, were involved in the appeal.

PLO 601 was effective on August 10, 1949; PLO 757 and DO 2665 on October 19, 1951 and PLO 1613 on April 7, 1958.

The lease for the Pease small tract was dated May 1, 1953. The patent, issued on October 4, 1955, contained 33 foot easements along two boundaries, one of which was Rabbit Creek Road, and a blanket reservation under 43 USC 321d (the 47 Act). Rabbit Creek Road was in existence at the time of the original lease.

Boysen had property bordering the Seward Highway. The date of entry was January 2, 1951 and the patent was issued on May 15, 1952 with a 47 Act reservation. The Seward Highway was constructed prior to the effective date of any of the PLOs.

Hansen's property was entered on January 23, 1945 with a patent issued on June 1, 1950. Hansen's property was entered prior to 1947 therefore it was not subject to a 47 Act reservation.

As to the Hansen property, the Court ruled that the property was not subject to PLOs or DO since the entry in January, 1945 was prior to the effective date of any of them. The other two properties were found to be subject to PLO rights of

way. A number of arguments against the validity of the PLO rights of way were dismissed by the Court.

Right of Way Act of 1966: Both Pease and Boysen's patents were subject to a 47 Act reservation. They argued that the Right of Way Act of 1966 (ROW Act) precluded the State and Municipality's claims for feeder and local roads under the DO. The Court ruled the ROW Act applied only to the 47 Act reservation, 43 USC 321d. DO 2665 was promulgated under 43 USC 321a, which was not repealed by the ROW Act.

Constructive Notice: The PLOs and DO were not recorded. On April 4, 1959 the Federal government conveyed its interest in the Alaska highways to the State. That deed was not recorded until October 2, 1969. Pease and Boysen claimed the State's interest was invalid against them as subsequent innocent purchasers in accordance with AS 34.15.290 which protects subsequent innocent purchasers for value who are without notice of a prior interest. "An innocent purchaser must lack 'actual or constructive knowledge' of the conflicting deed or encumbrance that the purchaser seeks to avoid." At 725. The Court distinguished PLOs and the DO from a wild deed outside the chain of title as was the case in Sabo v. Horvath, 559 P.2d 1038 (1976). A deed recorded prior to issuance of the patent was a wild deed outside the chain of title. However; in this case the issue was whether the publication of the PLOs and DO in the Federal Register was constructive notice. The Court reaffirmed its earlier decision in Hahn v. Alaska Title Guaranty Co., 557 P.2d 143 (1976) that publishing in the Federal Register was constructive notice; therefore subsequent purchasers were not innocent purchasers protected by the recording statutes.

Title Company Liability: The Court was asked to overturn Hahn v. ATG, since the PLOs and DO were not recorded in Alaska. The Court refused to do so. The title companies were subject to the claims of Pease and Boysen.

Estoppel: Pease and Boysen claimed the State and Municipality were estopped from claiming an interest due to the fact that for over 20 years the State and Municipality allowed the property to be developed in a manner inconsistent with the assertion of the claimed easements. "Estoppel requires 'the assertion of a position by conduct or word, reasonable reliance thereon by another party and resulting prejudice.'" Citing Jamison v. Consolidated Utilities, Inc., 576 P.2d 97, 102 (1978) at page 726. Relying on its finding that the constructive notice was imparted by Federal Register, the Court ruled that notice made reliance by the parties unreasonable, therefore the estoppel claim lacked merit.

Patent Statute of Limitations: The patents did not contain any reservation for the PLO and DO rights of way. The six year statute of limitations to contest a patent had expired long before the State claimed its easement interest. In reaffirming State, Department of Highways v. Green, 586 P.2d 595 (1978), the

Court found that a right of way not expressed in the patent was a valid existing right and the patentee takes subject to such right.

> [B]y operation of law, land conveyed by the United States is taken subject to previously established rights-of-way where the instrument of conveyance is silent as to the existence of such rights-of-way. No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because the patent contains an implied-by-law condition that it is subject to such a right-of- way. At 727.

Staking: The lower court held that the additional widths created by DO 2665 did not apply to the rights of way for Rabbit Creek Road adjacent to the Pease property and the Seward Highway adjacent to the Boysen property because the road had not been "staked" in accordance with the terms of DO 2665. The Supreme Court rejected that conclusion on the basis that the staking was only required for new construction. Since the roads were in existence at the time of the DO, staking was not required.

10. Resource Investments v. State Dept. of Transportation, 687 P.2d 280 (1984).

Reaffirmed decision in Alaska Land Titles case that a homestead entry was a valid existing right. The State argued that Executive Order 9337 is only partially based on the Pickett Act, which limited the Secretary of the Interior's authority to make withdrawals, such that the withdrawals would not include lands within a homestead entry. EO 9337 was also in part based on the inherent authority of President to make withdrawals and that authority does not protect a homestead entry. The court ruled against the State citing Stockley v. U.S., 260 U.S. 532, 544 (1923) finding that a valid existing right was a lawfully initiated claim which upon compliance with the land laws would ripen into a title.

11. State, Dept. of Transportation v. First National Bank, 689 P.2d 483 (1984)

Bank's predecessor, Pippel, on June 10, 1946, entered onto land that was secretly withdrawn for the military by PLO 95 in 1943. BLM canceled the entry, then subsequently reinstated it. A patent was issued to Pippel on October 11, 1950. PLO 95 was not revoked until April 15, 1953.

The state argued that the entry was not a valid existing right due to the invalid entry on withdrawn land, therefore the property was subject to a 300 foot wide right of way under PLO 601. However, the Court ruled that once a patent is issued, defects in the preliminary process are cured. Since the state did not contest the patent within the six year statute of limitations, the patent made the 1946 entry presumptively valid. Consequently the entry related back to 1946, prior to the PLO.

12. Simon v. State, 996 P.2d 1211 (2000)

Simons, the owners of property subject to a PLO 1613 easement, disputed the State's right to relocate the road within the 300 foot wide right of way contending the PLO 1613 easement limited the state to improving the road within the confines of the existing roadbed and also argued the easement did not allow the state to use subsurface materials from the easement area. The Supreme Court affirmed the trial courts ruling that "as long as the state's changes were reasonably necessary to improve the Glenn Highway, PLO 1613 allowed it to relocate the highway anywhere within 150 feet of the centerline of the original roadbed and to use any subsurface materials in the rebuilding process."