LAWS OF ALASKA

1966

Source: HB 415 am

Chapter No.: 92

AN ACT

Relating to the disposition of certain legal interests in land by the State of Alaska; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. PURPOSE. This Act is intended to alleviate the economic hardship and physical and mental distress occasioned by the taking of land, by the State of Alaska, for which no compensation is paid to the persons holding title to the land. This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions to many citizens of the State of Alaska, and which, if not curtailed by law, will continue to adversely affect citizens of this state. Those persons who hold title to land under a deed or patent which contains a reservation to the state by virtue of the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, are subject to the hazard of having the State of Alaska take their property without compensation because all patents or deeds containing the reservation required by that federal Act reserve to the United States, or the state created out of the Territory of Alaska, a right-of-way for

roads, roadways, tramways, trails, bridges, and appurtenant structures either constructed or to be constructed. Except for this reservation the State of Alaska, under the Alaska constitution and the constitution of the United States, would be required to pay just compensation for any land taken for a right-of-way. It is declared to be the purpose of this Act to place persons with land so encumbered on a basis of equality with all other property holders in the State of Alaska, thereby preventing the taking of property without payment of just compensation as provided by law, and in the manner provided by law.

• Sec. 2. TAKING OF PROPERTY UNDER RESERVATION VOID. After the effective date of this Act, no agency of the state may take privately-owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, and taking of property after the effective date of this Act by the election or exercise of a reservation to the state under that federal Act is void.

• Sec. 3. PROSPECTIVE APPLICATION. This Act shall not be construed to divest the state of, or to require compensation by the state for, any right-of-way or other interest in real property which was taken by the state, before the effective date of this Act, by the election or exercise of its right to take property through a reservation acquired under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418.

• Sec. 4. SHORT TITLE. This Act may be cited as the Right-of-Way Act of 1966.•

• Sec. 5. EFFECTIVE DATE. This Act takes effect on the day after its passage and approval or on the day it becomes law without such approval.

Approved by Governor April 13, 1966
Actual effective date: April 14, 1966

A SUMMARY OF '47 ACT OPINIONS

Alaska Department of Law

April 1965

Prior to the years of World War II, the Territory of Alaska experienced little road construction activity. Much of the activity of the Alaska Road Commission and its predecessors was conducted across the public domain and required minimal right-of-way acquisition. A marked increase in population in the years following the War and a related increase in activities designed to reduce public lands to private ownership increased the frequency with which right-of-way was necessitated over lands to which title had passed from the United States.

In recognition of this trend and in an attempt to reduce the expenditure of governmental funds, Congress passed the Act of July 24, 1947, (61 Stat. 418, 48 U.S.C.A. 321 d). See H.R. 673. This statute, now known as the '47 Act, provided:

> In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds by the United States hereafter conveying any lands to which it may have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon 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 of any State created out of the Territory of Alaska. When a right of way reserved under the provisions of sections 321a-321d of this title is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops thereon if not harvested by the owner, and for the value of any improvements, or for the cost of removing them to another site, if less than their value. June 30, 1932, c. 320, § 5, as added July 24, 1947, c. 313, 61 Stat. 418.

The effect of this Act was to reserve to the government a right-of-way across lands subsequently passing into private ownership and to thus avoid the necessity of re-acquiring lands for future road construction.

EFFECTIVE DATES

The '47 Act became effective on July 24, 1947, and was prospective in application only. That is, it applied only to lands which were taken up, entered, or located, or otherwise passed into private ownership after this date. Lands entered or patented before July 24, 1947, could not be subjected to the '47 Act unless, perhaps, they were returned to Government ownership during the time the Act was in effect.

The '47 Act was repealed by an Act of Congress which provided that the repeal take effect on July 1, 1959. Thus, lands patented or entered after this date are not subject to the Act. (17 May 1962) See, Decision No. 246, Alaska Supreme Ct.

EFFECT OF REPEAL

The repeal of the '47 Act merely eliminated the statutory directive that such a reservation be inserted into the patents of lands thereafter taken up. Lands which were patented subject to the '47 Act before its repeal were in no way affected. As will be shown below the effect of the '47 Act was to create an interest in real property which would remain in the government when the remaining interests constituting the fee title were conveyed away. Repeal merely prevented

further similar interests from being created, leaving existing interests unchanged. A similar situation would arise if a law such as the Homestead Act would be repealed. In such a case, homesteading would no longer be available but property interests acquired in the past under the Homestead Act would not be lost. See Myers v. U. S., 210 F.Supp. 695 (1962).

NATURE OF THE RESERVATION

A reservation is an interest in real property. It is created by the grantor retaining to himself some element of the fee when the remaining elements are conveyed away. Therefore, when patents were issued on lands subject to the '47 Act one of the interests in the land (". . . a right of way thereon for roads. . .") never passed to the patentee. Since this interest never passed to the patentee and was never owned by him it follows that at the time of utilization nothing is taken from him for which payment becomes due under the constitutional requirement of compensation for the taking of property.

The precise location and extent of the right-of-way reservation is not indicated in the '47 Act or in the patents issued thereunder. The property interest in the government, however, remains in effect and becomes fixed at the time it is utilized.[2] See, Myers v. U. S., supra.

> ". . . Not included within the limits of any organized municipality. . ."

The applicability of this clause to a particular parcel is to be viewed in relation to the time the parcel was entered and patented. If a parcel was not included within an

organized municipality at the time of entry, etc., the reservation attached. Once a parcel became subject to the '47 Act, however, its subsequent incorporation within the limits of a municipality will not serve to divest the government of its property right in the land

The nature of the issue presented by this clause was illustrated by a problem encountered at Girdwood. Certain parcels there were entered and patented at various dates from 1954 through June of 1959, during which time the parcels were not within a municipality. Subsequently, on September 20, 1961, the City of Girdwood was incorporated and included the parcels in question. The '47 Act reservations survived. (25 September 1964).

> ". . . (T)here shall be expressed that there is reserved. . ."

This clause served as a directive from the Congress to the Government agents who issued patents deeds to lands in Alaska to express the '47 Act reservation in the documents issued by them. In the majority of cases this directive was complied with. One may expect to find, however, patents to parcels which were subject to the '47 Act in which no mention is made of this reservation.

Agents issuing patents had no authority to omit the '47 Act reservation from patents to which it applied. The terms of the statute are controlling. Therefore, lands entered and patented during the life of the '47 Act are subject to the reservation even if it is not expressed in the patent.

". . . (F)or roads, . . . bridges, and appurtenant structures. . ."

The purposes for which the '47 Act reservation may be utilized are set out in the Act in general terms which do not clearly resolve the propriety of every contemplated use. No problem is anticipated from utilizing the reservation for a roadbed and attendant right-of-way or for a bridge with necessary supports and approaches. These are the essential elements which the Congress must have contemplated in adopting the Act. The scope of the "appurtenant structures" use for which utilization is authorized has not been fully developed.

Some uses have been proposed which have been determined to be outside the scope of the '47 Act reservation. Thus, proposed utilization of the reservation for a gravel pit site (30 October 1961) and for a channel change outside of the right-of-way (19 November 1964) have been viewed as improper uses.

A related question has been raised concerning the propriety of utilizing the '47 Act to acquire access rights to and from the right-of-way from adjacent parcels. In the case of '47 Act right-of-way, the State has the power to effect some limitations on access. (17 October 1963). But as a general rule access is an incident of the ownership of the parcels abutting on a right-of-way and not a part of the right-of-way itself. Since the '47 Act reserved only the right-of-way, acquisition of access from abutting owners it is usually a compensable item. (29 September 1964). The reservation is certainly not broad enough to reserve access generally along a limited access facility.

COMPENSATION

By utilization of the '47 Act reservation the Government describes and locates on the ground the right-of-way created by the authority of the Act. Since the interest utilized has at all times remained in the Government, no real property is taken from the patentee (or his grantee) which necessitates payment of compensation under the law.

The fact that the ownership of the right-of-way remained in the Government leads to the further conclusion that no compensation is due the patentee by way of severance damages (23 July 1963) or proximity damages (27 April 1964). If, after utilization of the right-of-way, the patentee holds two parcels which are separated by the roadway, he is viewed as having held two separate parcels from the time the patent issued.

The Act does direct the payment of compensation some items. Thus, payment is to be made for the value of growing crops and of improvements located within the area utilized. The cost of removal to another site is to be substituted if it is less than the value of the improvement. The determination of what constitutes an improvement is essentially one of distinguishing real property from personal property and must often be submitted in a case by case consideration. However, the value of clearing has been determined to be an improvement within the terms of the '47 Act and thus compensable (14 January 1964).

The fact that the utilization of '47 Act right-of-way is not of itself a compensable act, (except as noted above) must

be carefully distinguished from possible elements of damage to the owner resulting from the manner in which the right-of-way is used after it is located. The Alaska Constitution, Art. I, Sec. 18, provides that private property shall not be taken or damaged for public use without just compensation. While the exercise of the '47 Act reservation does not constitute a compensable taking of property, such acts as effecting a substantial change in grade or elevation for the roadway may constitute an element of damage to owners adjacent to the right-of-way. Persons acquiring right-of-way should, therefore, be alert for compensable interest even in the '47 Act lands.

"FIRST TAKE"

The '47 Act has been interpreted to grant authorization only for the "first take." This term is a misnomer and the term "first utilization" is preferable. Once the reservation has been utilized in respect to any given patent the right-of-way becomes established and located and the State must compensate the owner for any subsequent taking for change of road location, widening of the original right-of-way width, etc. (13 Feb. 1962). An exception to this rule may be made in the event a change in the right-of-way is necessitated soon after notice of utilization is served in which case an amendment of the original notice may be possible (3 April 1962).

The existence of a road over a parcel prior to entry and patent is not considered a utilization of the reservation. The patentee is considered as having acquired the property subject to the existing road and the reservation of the '47 Act

survives. The construction of a road across a parcel subsequent to issuance of patent would constitute a utilization even if no notice of utilization was served (28 August 1964).

The presence of a utilization may be negatived in any case where some agreed consideration was conveyed to the owner at the time a right-of-way was acquired. That is, if the owner accepted any cash or other valuable compensation in return for granting a right-of-way to the Government the transaction is viewed as a purchase and sale and not as an exercise of the reservation. The '47 Act reservation may be utilized later.

An additional "first utilization" problem is encountered where a tract conveyed by a single patent has since been subdivided and is now held by two or more owners. In this situation the reservation remains in effect and may be utilized over portion of the area subject to the original patent even though it may affect two or more of the present lot owners. Location of a right-of-way over one or more of the present lots constitutes a "first utilization" as to the entire area of the original patent. The '47 Act authorized a single free utilization. This reservation is utilized and expended if a right-of-way is located over any part of the land conveyed by a given patent. a utilization may be from several owners if the land has been subdivided, but it also may be from only one of the subdivided tracts. Once the reservation has been utilized, the entire tract issued under a given patent is free from the '47 Act reservation. (23 May 1962)

ACT OF JULY 24, 1947
(48 USC 321 d)

"In all patents for lands hereafter taken up, entered or located in the Territory of Alaska, and in all deeds hereafter conveying any lands to which it may have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right of way thereon 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 any State created out of the Territory of Alaska. When a

of way reserved under the provisions of Sections 321a 321c of this title is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops thereon if not harvested by the owner, and for the value of any improvements, or for the cost of removing them to another site, if less than their value."

30, 1932,c. 320, Sec. 5, as added July 24, 1947, c. 313, 61 Stat. 418. (For legislative history and comment, see 1947 U. S. Code Cong. Service, p. 1352.)

MEMORANDUM State of Alaska

TO: District Highway Engineer
Juneau Fairbanks
Valdez Anchorage

DATE: February 10, 1966

FILE NO: 23-2900

ATTN: All District R/W Agents

SUBJECT: Transmittal Supreme Court Opinion
Crosby Case

FROM: Dick Chitty
Acting Chief Right of Way Agent
Department of Highways

I have attached a copy of Supreme Court Opinion No. 322 dated February 3, 1966 concerning the Crosby Case.

The Court states, "----we are of the opinion that the 1947 Act has no application to public lands acquired under the Small Tract Act,----." The Small Tract Act is the Act of June 1, 1938, 52 Stat. 609, 43 U.S.C.A. 682 (a)(1964) which was made applicable to Alaska in 1945. (Act of July 14, 1945, 59 Stat. 467)

All lands dispensed by the B.L.M under the Small Tract Act, regardless of what they are called, are not subject to the Act of 1947.

S.O.P. 2362-02 has been rescinded. Previous negotiations under this S.O.P. are being processed for payment at this time. Small Tract Act parcels which have not been negotiated should be contacted as soon as possible.

Attachments: As stated

RECEIVED

FEB 15 1966

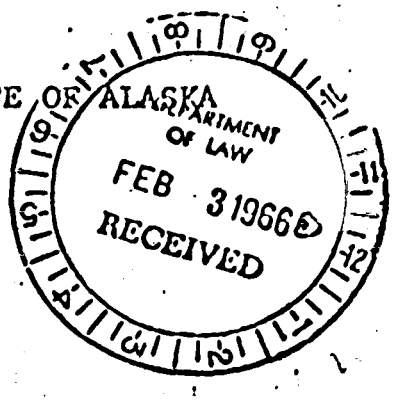
RIGHT OF WAY SECTION
ANCHORAGE DISTRICT

RECEIVED

FEB 14 66

Dept. of Highways Anchorage District	INIT	ACT
District Engineer		
Construction		
Pre-Construction		
Maintenance		
Administration		
Materials		
Supply		
R/W	✓	✓
File		

THE SUPREME COURT OF THE STATE OF ALASKA



STATE OF ALASKA,
DEPARTMENT OF HIGHWAYS,

Appellant,

v.

WARREN CROSBY and
KATHRYN CROSBY,

Appellees.

File No. 584

OPINION

[No. 322 - February 3, 1966]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, James M. Fitzgerald, Judge.

Appearances: Warren C. Colver, Attorney General of Alaska, and Mary Frank LaFollette and Donald E. Strouse, Assistant Attorneys General, for Appellant. M. Ashley Dickerson, Anchorage, for Appellees.

Before: Nesbett, Chief Justice, Dimond and Rabinowitz, Justices.

DIMOND, Justice.

The appellees own real property which their grantor obtained by patent from the United States. The patent provided that the grant of the property was subject to

> [T]he 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).

By virtue of the foregoing reservation, the state claimed a right-of-way for highway purposes across a portion of appellees' land. The trial court held that such reservation in the patent was invalid and of no effect, and at the instance of appellees, entered judgment for appellees and enjoined the state from entering on or appropriating the portion of appellees' land in question. The state has appealed.

The state's first point is that the United States was an indispensable party to this action, and since it was not made a party the action ought to have been dismissed.

Civil Rule 19, which was adopted from Rule 19, Federal Rules of Civil Procedure, deals with the compulsory joinder of

parties.[1] It recognizes the classes of indispensable, necessary and proper parties that were first developed in the equity courts.[2]

An indispensable party is one whose interest in the

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[1] Civ. R. 19 provides:

> (a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> (b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be made parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court, the court shall order them summoned to appear in the action. If jurisdiction over them cannot be acquired except by their consent or voluntary appearance, the court in its discretion may proceed in the action without making them parties, but the judgment rendered therein does not affect the rights or liabilities of absent persons.
>
> (c) Same - Names of Omitted Persons and Reasons for Non-Joinder to Be Pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

[2] 2 Barron & Holtzoff, Federal Practice and Procedure § 511, at 85 (rules ed. 1961).

controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over such party.[3] The determination of indispensability or lack of it involves a discretionary balancing of interests.[4] On the one hand, consideration must be given to the possibility of rendering a judgment that will have an adverse factual effect on the interests of persons not before the court, and to the danger of inconsistent decisions, the desire to avoid a multiplicity of actions, and a reluctance to enter a judgment that will not end the litigation.[5] On the other hand, consideration must be given to the desirability of having some adjudication if at all possible rather than none, leaving the parties before the court without a remedy because of an "ideal desire to have all interested persons before the court."[6] Courts exist for the determination of disputes, and they have

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3 Commercial State Bank v. Gidney, 174 F. Supp. 770, 780-781 (D.D.C. 1959), aff'd, 278 F.2d 871, 872 (D.C.Cir. 1960).

4 2 Barron & Holtzoff, Federal Practice and Procedure § 512 (Supp. 1964).

5 Ward v. Louisiana Wild Life and Fisheries Comm'n, 224 F. Supp. 252, 256 (E.D. La. 1963); Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, at 338 (1957).

6 3 Moore, Federal Practice § 19.07, at 2154-55 (2d ed. 1964); Gauss v. Kirk, 198 F.2d 83, 85 (D.C. Cir. 1952); Reed, Compulsory Joinder of Parties in Civil Actions, supra note 5.

an obligation in particular litigation to make meaningful determinations if at all possible.[7]

The fundamental issue here is whether the state may take appellees' land for highway purposes without payment of just compensation. It may if the reservation in the patent for a highway right-of-way is valid; it may not if the reservation is invalid. If that issue may not be decided without joining the United States as a party to the action, then it is unlikely that the issue could be decided at all since the United States could not be made a party without its consent. This would mean - assuming that the reservation is invalid - that appellees would be deprived of their right to be awarded just compensation for the taking of or damage to their property for a public use.[8] They would be unable to challenge the asserted right of the state to utilize the reservation for highway purposes contained in the patent to the property. To hold that the United States is an indispensable party in

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7 Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 337 (1957).

8 Article I, § 18 of the Alaska Constitution provides:

> Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

this suit would be to interpret and apply procedural rules in such a way that appellees could not avail themselves of a constitutional safeguard against the taking of their property without the awarding of just compensation.

It is not apparent that the United States has an interest in the matter in controversy which would be adversely affected by the judgment entered by the court below. It is the state, and not the United States, which is constructing the highway and seeking to utilize an asserted right-of-way across appellees' land. Conceivably, the United States could have an interest in effectuating the reservation of a right-of-way in the patent to appellees' land for the benefit of the state, since the United States was the grantor of the land and inserted the right-of-way wording in the patent. This may possibly lead to future litigation by the United States in seeking a judicial declaration that the reservation of the right-of-way is valid and subsisting. But as undesirable as it may be to have the possibility of another suit involving the same issue, it is less desirable to leave

the appellees without any remedy at all.[9] We hold that the United States is not an indispensable party to this action.

Appellant's next point is that the reservation for highway purposes was properly included in the patent by reason of the provisions of the Act of July 24, 1947, 61 Stat. 418, 48 U.S.C.A. § 321(d) (1952). That act provides:

> In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds by the United States hereafter conveying any lands to which it may have re-acquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon 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 of any State created out of the Territory of Alaska.

The land involved in this action was acquired under the federal Small Tract Act of June 1, 1938[10] which was made

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9 Bourdieu v. Pacific Western Oil Co., 299 U.S. 65, 70-71, 81 L.ed. 42, 45-46 (1936); Zwack v. Kraus Bros. & Co., 237 F.2d 255, 259 (2d Cir. 1956); Black River Regulating Dist. v. Adirondak League Club, 282 App. Div. 161, 121 N.Y.S.2d 893, 904 (1953), rev'd on other grounds, 307 N.Y. 475, 121 N.E.2d 428 (1954), appeal dismissed, 351 U.S. 922, 100 L.ed. 1453 (1956).

10 Act of June 1, 1938, 52 Stat. 609, 43 U.S.C.A. § 682(a) (1964).

applicable to Alaska in 1945.[11] That statute provides in part:

> The Secretary of the Interior, in his discretion, is authorized to sell or lease to any person or organization . . . . a tract of not exceeding five acres . . . under such rules and regulations as he may prescribe, ...

The trial court held that public lands that are leased or sold under the Small Tract Act are not lands that have been "taken up, entered, or located" within the meaning of the act of July 24, 1947, and therefore that the reservation for highway purposes under the 1947 act was not applicable to appellees' land and was improperly inserted in the patent.

The purpose of the act of July 24, 1947, was stated by the House Committee on Public Lands as follows:

> This bill is designed to facilitate the work of the Alaska Road Commission. As the population of Alaska increases and the Territory develops, the road commission will find it increasingly difficult to obtain desirable highway lands unless legislative provision is made for rights-of-way.
>
> The Committee on Public Lands unanimously agree that passage of this legislation will help to eliminate unnecessary negotiations and litigations in obtaining proper rights-of-way throughout Alaska.[12]

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11 Act of July 14, 1945, 59 Stat. 467.

12 1947 U.S. Code Cong. Serv. 1353.

From such statement of purpose it is apparent that under the various land laws applicable in Alaska whereby persons could acquire portions of the public domain, an executive agency or officer of the government did not have the discretionary authority to reserve rights-of-way for highway purposes. If such authority had existed, then the legislation would have been unnecessary. It is logical to conclude, then, that the 1947 Act, in speaking of lands "taken up, entered, or located", had reference only to those public land laws where discretionary authority on the part of a government officer or agency to impose reservations for rights-of-way was absent, and was not intended to apply to those laws where such authority existed.

Under the Small Tract Act the Secretary of the Interior has the discretionary authority, first of all, to sell or lease small tracts and secondly, to do so under "such rules and regulations as he may prescribe." That such grant of authority was considered broad enough to authorize the Secretary to impose reservations for rights-of-way is apparent from the fact that in 1953 the Secretary made effective the following regulation:

> Unless otherwise provided in the classification order, the leased land will be subject

> to a right-of-way of not to exceed 33 feet in width along the boundaries of the tract for street and road purposes and for public utilities.[13]

This was the only reservation for a right-of-way that the Secretary, by regulation, prescribed as to small tracts.[14] He did not by rule or regulation provide that land leased or sold under the Small Tract Act would be subject to the general reservation of a highway right-of-way as prescribed by the act of July 24, 1947.

In the light of the legislative purpose of the 1947 Act and the discretionary authority of the Secretary of the Interior under the Small Tract Act to sell or lease lands under such rules and regulations as he may prescribe, we are of the opinion that the 1947 Act has no application to public lands acquired under the Small Tract Act, and therefore, that the reservation for highway purposes included in the patent to appellees' property under the 1947 Act was ineffective.

The state's third point is that the court erred in dismissing its counterclaim against appellees, which stated that

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[13] 15 Fed. Reg. 6222 (1950) (codified as 43 C.F.R. § 257.16(c) (1954), superseded Jan. 15, 1955).

[14] Such a reservation was included in the patent to appellees' property in addition to the reservation under the act of July 24, 1947.

[S]hould the provisions of the act of July 24, 1947, 48 USCA 321(d), be determined not to apply to these premises, then, in such event, the entry of plaintiff pursuant thereto was an act of inverse condemnation.

A pre-trial order reflects that the state and appellees had entered into a stipulation which provided in part as follows:

> 2. That on October 23, 1962 the State, through its Department of Highways, appropriated, without instituting an eminent domain proceedings or without filing a declaration of taking, a strip of land 42 feet in width along the south side of the 33 foot right-of-way along the northerly boundary of the tract in question. The area taken then is 42 feet by 297 feet and contains _____.
>
> 3. That the total area of the parcel from which the property was appropriated is 2.5 acres.
>
> 4. The interest taken is a perpetual easement and rights-of-way for all road and highway purposes.
>
> 5. The time of just compensation will be as of the date of appropriate taking, October 23, 1962.
>
> The above stipulations and agreements are made only for the purpose of trying the issue of just compensation and are not made for any other purpose and are received subject to the qualification that such stipulations or agreements will not prejudice any of the parties' claims or contentions.

Subsequently, the court allowed the appellees to file a fourth amended complaint which asked that the state

be enjoined from appropriating appellees' property and which also asked for damages for trespass. The court permitted appellees to proceed on the trespass theory, rather than limiting the action to one of determining just compensation for lands taken or damaged for public use by the state under its power of eminent domain. An injunction was issued against the state and its counterclaim was dismissed. Trial of appellees' claim of trespass was deferred until a later time.[15]

When the state appropriated appellees' land for the construction of a highway, it was exercising the power of eminent domain. It is true that the state did not utilize condemnation proceedings prescribed by law and by rule.[16] That was because the state mistakenly, but in good faith believed that it could rely upon the reservation of a right-of-way for highway purposes contained in the patent to appellees' land. But neither the failure to institute a condemnation action nor appellees' assertion of a claim based on the theory of trespass changed the essential nature of the state's

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15 The trial court directed the entry of final judgments as to the injunction and the dismissal of the state's counterclaim, stating in accordance with Civ. R. 54(b) that there was no just reason for delay.

16 AS 09.55.240-.460; Civ. R. 72.

action in appropriating appellees' property. Such action was still the exercise of the power of eminent domain because private property was being taken by the state for a public use. Since under Art. I, § 18 of the Alaska Constitution private property may not be taken or damaged for public use without just compensation, the fundamental basis of appellees' claim for damages is the constitutional provision mentioned, and the acts of the state in appropriating appellees' land are in the nature of inverse condemnation.[17] This appears to have been recognized by appellees when they entered into a stipulation with the state to the effect that on a certain date the state had appropriated, without institution of condemnation proceedings, a portion of appellees' land, and that "the time of just compensation will be as of the date of appropriate taking, October 23, 1962." The trial court was in error in failing to recognize the essential nature of this action as one in condemnation and to proceed accordingly.

The state's final point is that the court erred in granting a permanent injunction prohibiting the state from entering upon or appropriating a certain portion of appellees' land.

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17 Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963).

In speaking of the injunction the trial court said:

> I didn't intend this injunction to preclude them from any action to otherwise acquire the land, other than to go on the land and continue to take it without some sort of legal process.

This statement might be construed as meaning that the state must first institute condemnation proceedings in accordance with statute and rule before it may enter upon and utilize the property that it has already appropriated. We believe that such a requirement is unrealistic. The property has already been taken. It would serve no useful purpose to insist now that the state must initiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be determined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state. Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and since we

have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.

The judgment is reversed and the case is remanded to the superior court for further proceedings consistent with the views expressed in this opinion.

RABINOWITZ, Justice, dissenting in part.

I disagree with the majority's conclusion that the reservation for highways provided for by 48 U.S.C.A. § 321(d) has no applicability to the patent in issue. In my opinion neither the legislative history of the 1947 act nor construction of the language "taken up, entered, or located" supports the conclusion that the 1947 act is inapplicable to sales of land under the Federal Small Tract Act of June 1, 1938.

The patent which was issued on December 3, 1953, to appellees' predecessor in interest contained four reservations relevant to this appeal. The pertinent portions of the patent disclose that it was issued subject to the following reservations:

> (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); . . .

In addition to the foregoing reservations, which were part of the printed portion of the patent, the patent also contained the following typed portion:

> 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.[1]

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[1] As the majority opinion points out this reservation was inserted under the discretionary authority vested by the Small Tract Act in the Secretary of Interior to sell or lease small tracts under such "rules and regulations as he may prescribe."

Under this rule making authority, the Secretary of Interior promulgated the following regulation:

> Unless otherwise provided in the classification order, the leased land will be subject to a right-of-way of not to exceed 33 feet in width along the boundaries of the tract for street and road purposes and for public utilities.

Apparently the question of whether the 1947 act's reservation for highways applies to patents issued pursuant to the Small Tract Act is one of first impression.[2]

The 1947 act (48 U.S.C.A. § 321(d) (1959)) provided in part:

> In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska . . . there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon for roads, roadways, highways . . . and appurtenant structures constructed or to be constructed by or under the authority of the United States or of any State created out of the Territory of Alaska. (Emphasis supplied.)

Appellant contends that the trial court's conclusion that lands leased or sold under the Small Tract Act[3] are not lands "taken up, entered, or located" under the 1947 act and therefore are not subject to the 1947 act's reservation for highways is erroneous. I am of the opinion that appellant's view has merit.

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[2] Note: The act of July 24, 1947, 61 Stat. 418, 48 U.S.C. § 321(d) (1959), was repealed (effective July 1, 1959) by Pub. L. 86-70, § 21(d)(7), 73 Stat. 146.

I am of the opinion that the trial court was correct in concluding that the repealer of the 1947 act was not intended to have retroactive effect.

[3]

In urging that the 1947 act is applicable to lands sold or leased under the Small Tract Act, appellant makes several persuasive points. Initially, appellant contends that there is no difference between the applicability of the 1947 act to Small Tract Act lands which have been leased or sold and the applicability of the 1890 act[4] (reservation of a right-of-way for ditches or canals), and the 1914 act[5] (reservation of a right-of-way for construction of railroads,

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4 The act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 945 (1959), provides:

> In all patents for lands taken up after August 30, 1890, under any of the land laws of the United States . . . it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals. . . (Emphasis supplied.)

5 The act of March 12, 1914, 38 Stat. 305, 48 U.S.C. § 305 (1952), provides:

> In all patents for lands taken up, entered, or located in Alaska after March 12, 1914, there shall be expressed that there is reserved to the United States a right of way for the construction of railroads, telegraph and telephone lines. . . . (Emphasis supplied.)

Note: As shown in the text, reservations under both the 1890 act and the 1914 act were included in the subject patent.

telegraph and telephone lines) to these same lands.[6] Appellant then cites authorities which have broadly construed the words "taken up" in the 1890 act and urges that this court should adopt these authorities and render a broad construction to the terms "taken up, entered, or located" as used in the 1947 act.[7]

I am of the view, upon consideration of the authorities cited by appellant, that a broad construction of the terms "taken up, entered, or located" as used in the 1947 act, is appropriate here. A broad construction leads to the conclusion that lands sold or leased pursuant to the Small Tract Act of June 1, 1938, were subject to the

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6 Appellant additionally points out that if the 1947 act's reservation is held inapplicable to the subject patent then the same result is reached as to the reservations contained in the 1890 and 1914 acts.

7 Appellant relies on the following authorities (interpreting the 1890 act) in support of the broad construction argument it has advanced in regard to the 1947 act. United States v. 5.61 Acres of Land, 148 F. Supp. 467 (D. Cal. 1957); United States v. Van Horn, 197 Fed. 611, 616 (D. Colo. 1912); United States ex rel Southern Pac. R.R. v. Lane, 46 L.D. 407 (1917); Clement v. Ironshields, 40 L.D. 28 (1911); Interior Dep't. Instructions, 36 L.D. 482 (1908); Cosby v. Danziger, 38 Cal. App. 204, 175 Pac. 809, 810 (1918); Minidoka & S. W. Ry. v. Weymouth, 19 Ida. 234, 113 Pac. 455, 458-59 (1911); Green v. Wilhite, 14 Ida. 238, 93 Pac. 971, 973 (1908).

reservation for highways contained in the 1947 act. Such a construction in turn results in the conclusion that in the case at bar appellant had the right to use this reserved right-of-way in addition to the thirty-three foot right-of-way reserved along the northerly and easterly boundaries of appellees' land.[8]

I think it is appropriate to point out that in making the foregoing argument to this court, appellant, to a great extent, relies upon the Ironshields[9] decision for

8 Supra note 1.

9 Supra note 7. In the Ironshields case, the issue was whether a reservation under the 1890 act for "ditches and canals" was includable in the subject patent pertaining to Sioux Indian Reservation lands sold pursuant to the act of March 2, 1889, 25 Stat. 888. The decision read in part:

> It will be noted that the reservation was to be inserted 'in all patents for lands hereinafter taken up under any of the land laws of the United States'.... If the actual disposition occurred after the passage of the Act, the land was undoubtedly 'taken up' within the meaning of those words as used in the Act of 1890, and this would be so whether the disposition occurred through allotment, sale, homestead, or other manner of disposition. (Emphasis supplied.)

the first time.[10] It is also pertinent to note that appellant additionally relies upon and cites an unpublished "Memorandum of Opinion of the Office of the Solicitor, Department of the Interior, dated October 9, 1959."[11]

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10 In its brief appellant states:

> The case was, apparently, unknown to all counsel in the proceedings in the Superior Court herein, and was thus not called to the attention of the Court.

11 As to the Memorandum Opinion, appellant asserts that it

> held that patents issued pursuant to the provisions of the Small Tract Act (during the effective period of the 1947 Act) must contain the Reservation of the 1947 Act.

This Memorandum Opinion also was not brought to the attention of the trial court.[12]

I concur in all other aspects of the majority's opinion.

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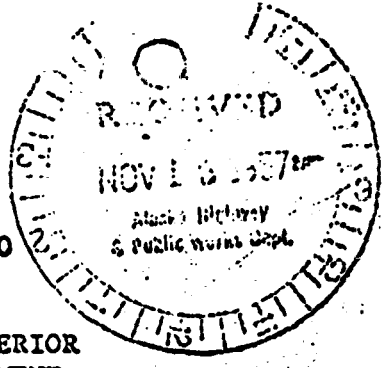
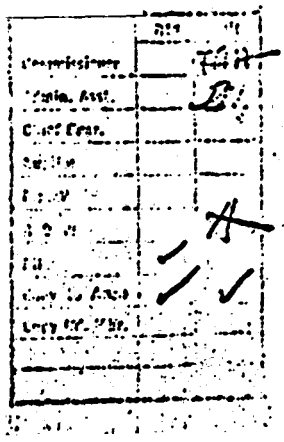
12 The Memorandum Opinion of the Office of the Solicitor reads in part as follows:

> It is apparent that there could be an overlapping of rights-of-way over a tract of land as where a right-of-way generally provided for under the act of 1947, supra, and specifically referred to in reservation designating a certain width, could intersect or cross an access boundary road reserved under authority of 43 CFR 257.17(b).
>
> Each authority has a separate and distinct application and should be included to authorize separate reservations in the Final Certificate and patent, as well as the Classification Order.

Note: Under the authority of Udall v. Tallman, 380 U.S. 1, 13 L.ed.2d 616 (1965), appellant further argues that deference must be given to the Department of Interior's construction of the 1947 act.

A10.6





Circular No. 1680

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON

CODE OF FEDERAL REGULATIONS
TITLE 43--PUBLIC LANDS: INTERIOR

CHAPTER I--BUREAU OF LAND MANAGEMENT
SUBCHAPTER A--ALASKA
PART 74--RIGHTS-OF-WAY

Section 74.27, relating to rights-of-way for roadways in Alaska is amended by adding thereto a paragraph reading as follows:

The Act of July 24, 1947 (61 Stat.418, 48 U.S.C. 321d) amended the Act of June 30, 1932 (47 Stat.446) by adding at the end thereof a new section, as follows:

"Sec. 5. In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds by the United States hereafter conveying any lands to which it may have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon 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 of any State created out of the Territory of Alaska. When a right-of-way reserved under the provisions of this Act is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops thereon if not harvested by the owner, and for the value of any improvements, or for the cost of removing them to another site, if less than their value."

(R.S. 453, 2478;43 U.S.C. 2, 1201)

(Sgd) Marion Clawson
Director

Approved: May 26, 1948
(Sgd) J. A. Krug
Secretary of the Interior.

(PUBLIC LAW 229)