

John Bennett

From: John Bennett
Sent: Friday, September 11, 2020 2:20 PM
To:
Subject: RE: Y20-11591 / 5795 Supply Road

I think I understand what is going on. Generally, title examiners do not analyze or interpret land title. Essentially they report exactly what they see in the Recorder's Office records and anything that is questionable or appears ambiguous is relegated to the Special Exceptions to the Title Insurance policy. Just like Vegas. They are betting that the cost of their liabilities will not exceed the value of the policy premiums and to ensure this, they exclude any potential title liabilities. Otherwise they would never make any money and go broke.

In terms of transportation easements, the Alaska Title industry was taken to task almost 40 years ago when a claim was made against a policy for not disclosing the effect of a federal Public Land Order highway easement that crossed a insured's property. This went to the Alaska Supreme Court in the 1983 State v. Alaska Land Title Association case. The Title Association argued that the PLOs were not filed at the recorder's office and therefore they had no obligation to disclose them or insure against their effect. The court said that they were as good as recorded as they had been filed in the Federal Register and the insurers were liable. The real problem was that to determine whether a PLO, '48 Act, RS2477 or similar highway ROW requires a lot of research and experience to determine whether they had an effect over a specific piece of property. Immediately after that case, title agencies would send out form letters to DOT on every parcel adjoining a highway asking DOT to provide documentary evidence of the highway easement. That was not a service that DOT was prepared to provide so the next best thing was to except the potential highway easements from the insured title. Generally they would except any right in the public established by RS2477 (Trails & Section Line Easements) and the more general "Rights of the public and governmental bodies in and to any portion of said land lying within a public highway or right of way."

Your situation is the exact opposite. There is a black and white (and apparently) clear express reservation in your patent speaking to the 33' Small Tract Easement. For the title company to ignore this they would have to acknowledge the Alaska Supreme Court's 2013 McCarrey v. Kaylor decision and then understand how it applies to your property. They don't have the experience to do this and so they are saying that maybe it exists or maybe it doesn't but no matter, as we are excepting it from the title insurance policy we will bear no risk.

The USA will never issue any release to the easement because it does not benefit their property, they do not manage them and the statute of limitation for resolving any patent conflicts has long since passed. The State through DOT could issue a QCD as the various utilities did but that would just relate to their potential interest to use the easement. While your process of obtaining QCDs from the Utilities removes maybe 90% of the risk that the easement would be used and maybe my report increases that to 95%, the only 100% way to make it go away is either a FNSB vacation or a Quiet Title Action. Unfortunately, you have found that there is little motivation on the part of FNSB to process a vacation and the cost of a quiet title action can be severe.

Ultimately, the prospective purchaser has to decide whether the uninsured risk is reasonably real or not. I've rarely put much stock in title insurance policies. They are like, "You are covered if a blue elephant gets dropped out of a C-130 and lands on your house." But if any covered title defect shows up they will challenge you in court to the bitter end to avoid paying and if they lose they only pay on the value of the property when the policy was issued.

I can't remember if you had told me in the past whether you have talked to FNSB about vacation after my report and the utility QCD's. You would think that would show that they are not being reasonable in withholding the vacation. Essentially you would be requesting to vacate an easement that the Alaska Supreme Court and my analysis says doesn't exist.