ALASKA HIGHWAY RIGHTS-OF-WAY AND HOMESTEAD ENTRIES

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Introduction:

When is a federal homestead patent subject to an RS-2477 or Public Land Order highway right-of-way? The intent of this paper[1] is to provide guidance for professionals who develop right-of-way (ROW) mapping on behalf of the Department of Transportation and Public Facilities (DOT&PF) and other State of Alaska agencies or perform surveys in which the status of a public ROW must be determined.

Two of the primary authorities for highway ROW in Alaska include Public Land Orders (PLO) issued by the Department of the Interior prior to statehood and RS-2477, a part of the 1866 federal mining law that provided for public ROW along certain trails and section lines. Each of these authorities included conditions respecting prior claims by individuals and federal actions. For an RS-2477 ROW to become effective, it must be applied to "public lands, not reserved for public uses". The highway PLOs were specifically "subject to valid existing rights". With regard to the effect of a public ROW and an individual claimant's rights, an important question must be answered: When do the entryman's rights vest and constitute a valid existing right that segregates land from the public domain and will defeat a highway ROW authority?

Federal land disposals to individuals include Homesteads, Headquarters Sites, Homesites, Small Tracts, Trade & Manufacturing Sites, Federal Townsite Lots, Federal Mining Claims and Native Allotments. While the focus of this paper is on Homesteads, additional discussion covering Homesites, Headquarters and Trade & Manufacturing Sites will be provided within this paper due to their similarities with homesteads.

Today, when you are tasked with evaluating a property to determine the validity of an RS-2477 based trail, section line easement or PLO ROW, the homestead adjudication has long been completed and the patent issued. This is because homesteading on federal lands in Alaska ended over 30 years ago. All that is important now is a determination of the earliest date by which the lands have been segregated from the public domain due to a valid homestead entry. If the federal homestead program were still in effect, determination of the segregation of an unpatented claim date could be far more complex.

[1] More correctly stated, this is actually four separate papers combined. The first section on Highway ROW and Homestead Entries should provide the information necessary to evaluate PLO and RS-2477 rights-of-way over patented federal homesteads. The second section titled Alaska Homesteads provides a detailed background on the homestead adjudication process. The third section discusses the 2015 Alaska Supreme Court case, *Luker v. Sykes*. The final section covers Homesites, Headquarter Sites and Trade & Manufacturing Sites.

The homesteader secures a "valid existing right" that segregates the land from the public domain when they have made the first valid entry that will lead to issuance of a patent.

> *Homesteads: The entryman secures a "valid existing right" that segregates the land from the public domain when they have made the first valid entry that will lead to issuance of a patent.*
>
> - *Entry on Surveyed lands: Segregation occurs on the date the Homestead Entry Application is filed.*
> - *Entry on Unsurveyed lands: Segregation occurs on the date that the Notice of Location of Settlement or Occupancy Claim form is filed.*

To segregate the land from the public domain and protect a homestead claim against the imposition of a future federal action, a valid homestead entry *by application* must be filed at the Land Office. To establish a valid entry, the homesteader must file a *Notice of Location of Settlement or Occupancy Claim* and perform the acts of occupying, possessing and improving the land or file a *Homestead Entry Application*.

If a homesteader's rights are established by the filing of a *Homestead Entry Application* over surveyed lands or a *Notice of Location of Settlement or Occupancy Claim* over unsurveyed lands, and the abstract only indicates a single application filed, then your evaluation of an RS-2477 or PLO right-of-way may be nearly complete. All you need to know is whether the application was filed before the ROW authority was in place. If so, the claim would not be subject to the ROW. **[Note: if your case is that straightforward, you may not need to read any further!]**

The courts often refer to a homesteader's application without specifying whether they are describing a *Notice of Location of Settlement or Occupancy Claim* or a *Homestead Entry Application.* As a result, their decisions may be less than helpful when considering an abstract that indicates multiple applications filed. In 2015, the case *Luker v. Sykes*[2] was considered by the Alaska Supreme Court. This is currently the only Alaska case regarding a homestead entry

[2] *Luker v. Sykes*, 357 P.3d 1191, WL 6087341, Alaska, October 16, 2015.

onto unsurveyed rectangular lands. A part of the controversy revolves around the multiple "applications filed" references in the BLM abstract. A detailed discussion of the section line easement questions considered in *Luker v. Sykes* at the Supreme Court and the trial courts is provided within this this paper.

There are many other elements within the homesteading process regarding fees, failure to file certain forms, leaves of absence and cultivation requirements but they are not critical to this discussion.

ROW Authorities and Land Status:

Public Land Order rights-of-way and RS-2477 based trail and section line easements constitute two of the predominant authorities for highway rights-of-way (ROW) in Alaska[3]. The application of these authorities depends upon the federal land status at the time they were imposed.

Prior to statehood, the majority of land in Alaska was under the jurisdiction of the federal Department of the Interior (DOI). The PLOs issued by DOI are estimated to form the basis for the majority of the 4,300 constructed miles of highway ROW conveyed to the State of Alaska in 1959[4]. On August 10, 1949, Public Land Order No. 601 withdrew public lands for highways from the public domain. While there had been earlier PLOs relating to specific highways, this was the first highway PLO of broad application. Prior to PLO 601, the primary authority for highway ROW was Section 2477 of the Revised Federal Statutes[5]. While the availability of PLOs[6] to establish new highway ROW ended at statehood, the RS-2477 authority for trails and section line easements continued until its repeal by section 706(a) of the *Federal Land Policy and Management Act of 1976* (FLPMA).

The application of both PLO and RS-2477 authorities requires consideration of the pre-existing land status. The difference between the two authorities is that RS-2477 could only apply to "unreserved"[7] lands and the PLOs were "Subject to valid existing rights…"[8]. The

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[3] For a more detailed discussion, see *Highway Rights of Way in Alaska*, dated 1/1/13 – minor rev. 3/24/13 available on-line at https://www.alaskapls.org/wp-content/standards2013/Highways-2013.pdf

[4] On June 30, 1959, pursuant to section 21(a) of the *Alaska Omnibus Act*, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska.

[5] *State v. Alaska Land Title Ass'n*; 667 P2.s 715, May 27, 1983; Footnote 8 – (RS2477 – 43 U.S.C. sec. 932)

[6] PLO 601, PLO 757, SO 2665 & PLO 1613

[7] "The right-of-way for the construction of highways over public lands, *not reserved* for public uses, is hereby granted."

[8] PLO 601/PLO 757 – "Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes…"

difference between the "unreserved" and "subject to" requirements is important to consider when evaluating their application. A variety of land actions could serve to "reserve" federal public domain lands and prevent the application of an RS-2477 trail or section line easement. They include homestead entries, withdrawals for power sites, military purposes, air navigation facilities, railroads and others. I have not included mining claim locations in this group as they represent a unique category where the claimant's rights change from mining only to fee ownership upon receipt of patent. Mining claims will be addressed in a subsequent paper. RS-2477 required that the lands be unreserved. If any of the aforementioned withdrawals or reservations were in place prior to documented RS-2477 trail dedication by user or acceptance by government action, the application of the RS-2477 authority would be ineffective over the lands subject to the withdrawals or reservations. A PLO ROW could be applied where a withdrawal or reservation existed, however, its use would be "subject to" the prior valid existing rights. Should the withdrawal or reservation be revoked in the future, the PLO would rise to become the senior right.[9] When evaluating "valid existing rights", it is important to consider the gaps that occur when homestead entries are relinquished or withdrawals revoked. These relinquishments and revocations may open the public domain to new entries or withdrawals. These gaps, even though limited in time, can provide opportunities to impose an RS-2477 or PLO ROW.

Legal Jurisdiction

The ROW and land disposal authorities considered in this report are based in federal law. In addition, while there are many federal legal resources to draw upon for guidance relating to homestead entries and the effect of ROW authorities upon them, once the homestead has gone to patent, legal conflicts would generally be resolved in the State court system. Federal court jurisdiction over real property cases would apply where it involves federal lands or where the federal government holds a trust relationship with a native allottee.

A recent Alaska Supreme Court case[10] specifically considered subject matter jurisdiction in a case relating to a tax foreclosure of a patented homestead by the local government. The appellant argued that state courts did not have jurisdiction over his land as title had been derived from a federal land patent. The Court ruled that "Once [a land] patent issues, the

[9] See *State of Alaska v. David B. Harrison, et al.* – U.S. District Court, Alaska – Case No. A94-0464-CV – Order dated October 28, 1998. This case considers a PLO highway ROW imposed over an existing Railroad Townsite. The townsite was eventually revoked and a native allotment claim filed. The court ruled that the PLO constituted a valid existing right that the allotment would be subject to once the PLO moved into the senior position. The court ruled "…there is no inconsistency or conflict between the railroad townsite withdrawal and Public Land Order 601."

[10] *Ray Pursche v. Matanuska-Susitna Borough*, Alaska Supreme Court No. S-15824, March 25, 2016

incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts."

The U.S. Constitution declares federal law the supreme law of the land and that state courts are bound by the supreme law. Alaska courts may cite federal court decisions, administrative law such as Interior Board of Land Appeals decisions (IBLA) and federal solicitor's opinions. However, once the Alaska Supreme Court has issued a decision, it can only be appealed to the U.S. Supreme Court. To the extent that the Alaska Supreme Court has ruled on an issue relevant to this report, it will be given the greatest weight. Other relevant sources will be cited where the Alaska courts have not ruled on an issue or where they formed the basis for an Alaska court decision.

Disclaimer: R&M Consultants, Inc. is not a law firm, does not offer legal services and this paper is not presented as legal advice. It is offered as a summary of resources and views relating to right-of-way issues that have been collected over many years. Should you require legal advice on these issues, we recommend that you obtain the services of an attorney.

ROW Determination: Ambiguities & Philosophical Considerations

Researching the validity of an RS-2477 or PLO right-of-way is a relatively common task for the ROW mapper/surveyor. In a typical research scenario, the date of segregation from the public domain is often based on an application date as listed in the BLM on-line abstract for federally patented lands. Occasionally, the on-line abstract may not provide sufficient detail to reach a definite answer. In addition, ambiguities in the law and the patent process may lead to differing conclusions.

After 30 years working with this type of ROW research, I find that my conclusions have changed more than once as I gained a better understanding of the law and the homestead adjudication process:

- Initially, to determine the date of segregation, we only used the "Application Filed" date as listed in the BLM historical index, serial pages or electronic database.
- Upon review of the changes between the Pre-1950 and Post-1950 CFRs relating to land segregation and the entry process, I concluded that weight should be given to the entryman's date of occupancy/residency to fix the date of segregation. This view would have the entryman rights beyond those they were legally due.
- At the initial 2017 edition of this paper, I noted that for an entry to successfully segregate land from the public domain, the entryman must file the appropriate application and fulfill the acts of occupying, possessing and improving the land

according to law. As a result, I concluded that the date of segregation for unsurveyed lands was the latter of two dates: The date the Location Notice was filed or the date of actual "residence". This may have been an appropriate consideration for unpatented claims prior to the end of the homestead program.

- In this revised edition, given that we now only deal with patented claims, my conclusion relies on the legal doctrine of "relation back". This doctrine holds that once the patent has been issued, the homesteader's rights relate back to the date that the entry was properly filed with the appropriate government office.

Relation Back

The legal doctrine of "relation back" is further discussed in following footnotes relating to case law and IBLA decisions.[11] Essentially, the claimant's rights will date from the time the entry was made and not from the time that the patent was issued.

> *The doctrine of "relation" is that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had.*[12]

The homesteader's rights will not "relate back" to the date of the initial occupation/possession/settlement but to the date of application. This means that segregation of the land from the public domain will relate back to the date the homestead entry application or location notice is filed.

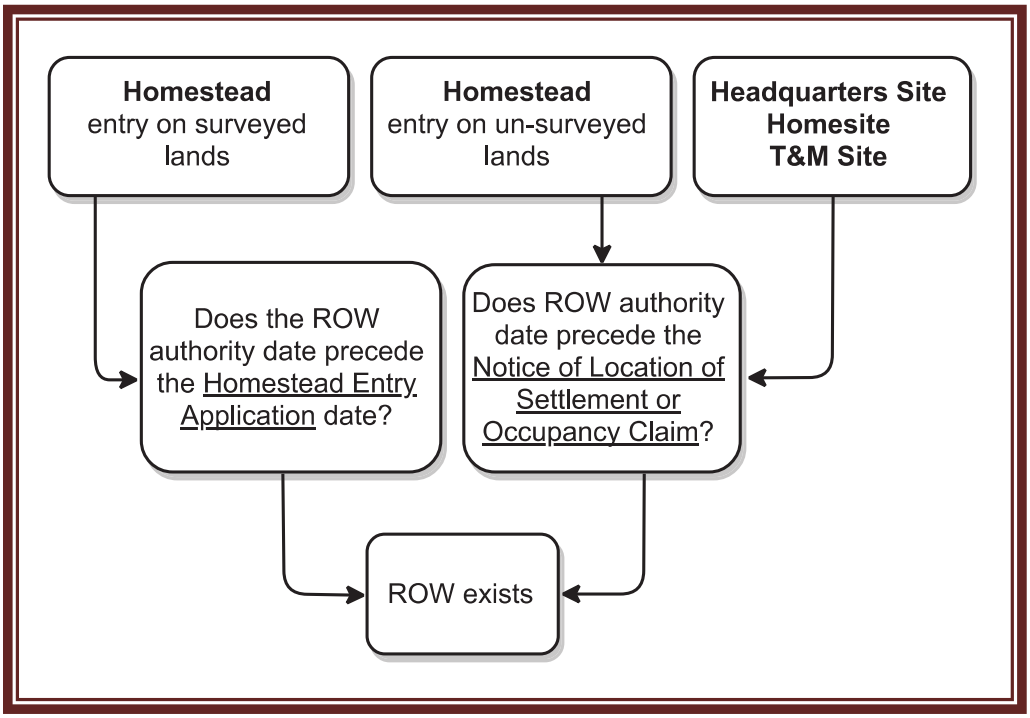
The lands we will consider for entry and segregation fall into two broad categories, those that were surveyed prior to occupation and entry and those that were unsurveyed. Most of the ROW cases involving entry and segregation that have come before the Alaska Supreme Court relate to surveyed lands. These are generally the easier to resolve, as the focus will be solely on the date that the Homestead Entry Application was filed. If your research is limited to the application date provided by the BLM on-line database[13], the odds are that you will reach the correct conclusion 90% of the time. The problem with the abstract presented in the on-line

[11] See footnotes 48, 70, 71, 106, 116.
[12] Black's Law Dictionary, 6th Edition
[13] ALIS Online or Alaska Land Information System now referred to as ACRES or the Alaska Case Retrieval Enterprise System.

database is that it is too limited to provide the detail you might require. It will generally list an "Application Filed" or "Application Received" without stating what type of application it is. Often, the time between the filing of the appropriate application and the date of the right-of-way authority is measured in terms of months or years making the determination regarding ROW validity or "which came first" fairly clear. Occasionally, we will find that the separation may be only by a few days. In these situations and those where the abstract is ambiguous, we recommend that you obtain the full homestead file from BLM or the National Archives and review the entire case history.

If the lands entered upon for a homestead were surveyed, the critical form will be the Homestead Entry Application (Form 4-007). For un-surveyed lands entered for a homestead or surveyed/un-surveyed lands entered for a Headquarters Site, Homesite or Trade & Manufacturing Site, the critical form will be the Notice of Location of Settlement or Occupancy Claim in Alaska (Form 4-1154).

Given that a patent "relates back" to the appropriate application date, the following flowchart is all that is required to determine whether a PLO or RS-2477 ROW is valid across a patented homestead or HQ/T&M/Home Site are the relevant application dates:



Even when dealing with patented claims that would relate back to the date of filing of the appropriate application, ambiguities may arise that could lead you to question your

conclusions. The initial draft of this paper was in February of 2017. Review comments by members of DOT&PF ROW Engineering staff suggested that reaching an absolute and defensible conclusion on these issues could be far more difficult than the application of a simple procedure. Applications for entry and location notices were not always filed at the BLM offices. Location Notices for Settlement of a homestead or Trade & Manufacturing Site could have been made before a U.S. Commissioner or a judge[14], then recorded and possibly not copied to the BLM/GLO office for inclusion in the case file. Finding specific documents in the Recorder's Historical indices can range from difficult to impossible. One significant concern about the recordation of such notices is whether one could be lost or misfiled. The Alaska Recorder's office cites examples of "disasters" such as the Chitina Recording District fire in 1949 that may have destroyed records between 1890 and 1944. Other disasters included the damage to the Valdez books caused by the 1964 tsunami. The concern is whether a homestead claim could erroneously be made subject to a public right-of-way solely because record of the entry application could not be easily found.

Examples

A good example of how things can go wrong when deciding whether a claim is subject to a public ROW is the Meier Lake lodge at approximate milepost 170 of the Richardson Highway. The Meier Lake case (U.S. Survey No. 3318) had a documented occupancy dating back to 1906 and the BLM abstract indicated that the T&M Site application for Henry and Maude Tatro was dated 9/22/49, only 44 days after the imposition of PLO 601. Based on that initial review, it was determined that the T&M site would be subject to a 300-foot wide highway easement which would have included a variety of encroaching structures.

In the 2013 edition of the Highway Rights-of-Way in Alaska paper, I discussed the Meier Lake T&M sites and reached a revised but correct conclusion for the wrong reason. My understanding of the effect of the pre and post 1949 regulations regarding entry applications and occupancy led me to believe that the entryman's occupation dating as far back as 1945 would prevent application of a PLO 601 ROW.

[14] RS-2294 An Act To amend section 2294, United States Revised Statutes, relating to homesteads., dated February 23, 1923: "*Sec. 2294 That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone Acts may in addition to those now authorized to take such affidavits, proofs, and oaths be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated…the proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver when transmitted to the with the fees and commissions allowed and required by law.*"

Within the BLM case file for the Tatro site was an application to purchase the T&M site that was sworn before the U.S. Commissioner for Alaska at Copper Center on August 9, 1949, one day before the effective date of PLO 601. The September 22, 1949 document in the case file and cited in the abstract as an "Application Filed" was a request for information regarding survey costs. Either BLM overlooked the August 9, 1949 application or they had a different interpretation of how they should be handled. The result could have been an inappropriate imposition of a highway easement across the Tatro's claim. In summary, the Tatro's patent was issued on December 20, 1955, however, their rights and segregation of the land from the public domain occurred on August 9, 1949 according to the doctrine of "relation back" when they filed their T&M application before the U.S. Commissioner. As this was one day prior to the effective date of PLO 601, the Tatro T&M site was not impressed with a 300-foot wide highway easement. The public did have a right to cross over U.S. Survey No. 3318, but its width would be limited to the physical footprint of the road and it would be based either on an easement by prescription or RS-2477.

The philosophical question is this: When you are making a ROW determination where the facts are unclear, and part of the record may be missing or not readily available, when should you give the benefit of the doubt to the entryman/owner and when should you leave no stone unturned?

In 1989, I was researching the existing right-of-way for Davis Road in Fairbanks. The road centerline followed the property line between BLM Small Tract Lots, each of which was subject to a 33-foot wide reservation for roads and utilities. Davis road was constructed by the Alaska Road Commission and subject to a DO 2665 local road easement of 50-feet on each side of centerline. The property owner contested our assertion of the extra 17-feet of ROW. Our research was extensive to prove our case. We pored over ARC construction staking field books, Farm Road petitions, and historic maps in addition to requesting 1,050 pages of documents from the National Archives. Eventually both parties filed for summary judgment in Superior Court.[15] DOT&PF was the prevailing party but occasionally I wondered whether the level of effort, cost and depth of research was appropriate. Certainly, the public should not have to purchase ROW if it can show that it already holds that interest. However, if the research and litigation costs to prove that existing ROW exceed the cost to acquire a new express easement, is the public being well served? In addition, the focus of a highway improvement project is public safety. If the extended research and litigation to prove an existing ROW delays a project for even one construction season, will it be worth the increased project costs due to

[15] *State of Alaska v. Kevin C. Keener, Et. Al.*, Case No. 4FA-89-1954 Memorandum Decision issued May 23, 1990

maintenance and inflation and decreased public safety due to continued degradation of the existing road? These questions may not be easy to answer but should be considered as a part of the overall research project.

Conclusion

The key issue in this report is the determination of the date by which federal lands are segregated from the public domain and whether they would have been subject to the imposition of an RS-2477 or PLO highway right-of-way. Prior to patent, it is not the homestead settlement or occupation of the land alone that segregates lands, although those actions may provide protections against claims by parties other than the federal government. The homesteaded lands would become segregated from the public domain upon the filing of a *Notice of Location of Settlement or Occupancy Claim* along with acts of settlement and improvements upon the land or a *Homestead Entry Application* on the appropriate form at the federal land office. These actions would constitute valid entries establishing the homesteader's rights. **Once patent is issued, the homesteader's rights will relate back to the date of the initial application that led to patent.**

When evaluating a ROW authority against a homestead entry, you might find that the BLM on-line abstract contains many entries, some of which may be unclear. The only way to assure that you have the information necessary to make a good evaluation is by obtaining the complete Homestead case file from the National Archives.

Alaska Homesteads

Background

Homesteading was initially allowed under the *Homestead Act of Alaska*[16] in 1898 and ended on October 21, 1986[17]. The 1898 Act essentially extended the existing 1862 Homestead Act[18] to Alaska. "Before 1910, around 20 homesteads had been patented in all of Alaska, with under a thousand before 1940. Between 1901 and 1988, fewer than 3,500 homestead patents were awarded to individuals in Alaska…"[19] Homesteading was essentially an agricultural program. "All unappropriated public lands in Alaska adaptable to any agricultural use are subject to homestead settlement, and, when surveyed, to homestead entry,…"[20] "…Federal land in Alaska had to be officially open to homestead entry before homestead claims could be filed. Prior to 1918, the land had to be surveyed to register claims with the General Land Office (GLO) Even so, people who settled on land before an official opening or survey generally had preference rights to file a claim on their land."[21]

Recognizing the unique challenges presented by homesteading in Alaska, the homestead requirements were modified over time. This included changes in the number of acres that could be allowed, habitable dwelling requirements, a reduction of the residency requirements from 5 to 3 years and a reduction in the number of acres a homesteader had to cultivate.

Since 1898, the federal homestead statutes for Alaska were amended 8 times; however, the 1862 Homestead Act is listed as the authority by which homestead patents in Alaska were patented. The *Act of April 29, 1950*[22] was significant in that it changed the notice of settlement requirements. Prior to this Act, a person who settled on unsurveyed public lands was required to post a notice of settlement on the land and file a copy of the notice at the "recording district" office within 90 days of settlement. No posting or recordation of a location notice was required for surveyed lands, however, an application for entry was required to be filed at the

[16] 30 Stat. 409, May 14, 1898

[17] Section 702 of the *Federal Land Policy and Management Act* (FLPMA), effective on October 21, 1976 repealed the homestead laws across the U.S. including Alaska. The repeal in Alaska was deferred by a 10-year sunset provision.

[18] 12 Stat. 392, May 20, 1862, *An Act to secure Homesteads to actual Settlers on the Public Domain.*

[19] *History of Alaska Homesteading*, 1898 – 1988; BLM Alaska Brochure

[20] 1949 43 CFR § 65.1 *Lands subject to settlement and homestead entry*.

[21] Alaska BLM Website *Homesteading Frequently Asked Questions* (FAQ) See URL noted above.

[22] 64 Stat. 94, April 29, 1950, P.L. 493

"district land office" within 3 months after the date of settlement in order to preserve the preference right of entry as against subsequent settlers.[23]

The 1950 Act required "that within ninety days from the date of settlement on surveyed or unsurveyed lands a notice shall be filed by or on behalf of the settler for record in the United States land office for the district in which the land is situated." If the notice of the claim was not filed within the prescribed period, " …no credit shall be given for residence and cultivation had prior to the filing of notice, petition for free survey, or application to make entry, whichever is earliest."[24] The penalty for failure to file a notice of location within 90 days could be significant. Homestead claims in Alaska were to be perfected in accordance with the provisions of the *Act of June 6, 1912* that reduced the required residency to receive patent from 5 years to 3.[25] The Act of 1912 also stated that "That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land…" Prior to 1950, the mere posting and filing of the location notice would not initiate the 3-year "residency" clock, but an actual permanent residence could. In this scenario, a claimant could log time against the 3-year residency requirement without having filed their location notice. The risk in doing so was that they had no protection against other claimants and could lose their preference right to the land.[26]

The 1950 changes served to flush out claimants who were occupying public lands without having filed a notice of location. Under the new rule, credit for residency would not start and be chargeable against the 3 years unless the notice was filed at the land office (BLM) within 90 days of initiation of the claim.[27] Under this scenario, the claimant could at best obtain credit for 90 days against the 3-year residency requirement.[28]

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[23] 1949 43 CFR 65.2 *Form of settlement on unsurveyed land*; 65.3 *Notice of Settlement*; 65.4 *Settlement on surveyed lands*.

[24] 1950 43 CFR 65.3b *Failure to file notice*.

[25] 1949 43 CFR 65.14 *Law under which homestead must be perfected*; restated through 1975 43 CFR 2567.2(e)

[26] "As between conflicting claims to public lands, he whose initiation is first in time, if adequately followed up, is deemed first in right, and, if his claim is finally, approved, his right relates back to the date of its initiation to the exclusion of any intervening claim." *United States, v. 348.62 Acres of Land, Etc*., (D. Alaska 1943, 10 Alaska 351 citing *Christie v. Great Northern R. Co*., 9th Cir., 1922, 284 F. 702. Also see *United States v. Bagnell Timber Co.,* 8th Circuit Court of Appeals, March 5, 1910: "One who takes possession of a tract of public land with a view to becoming an entryman under the homestead law, except as to the limited statutory time allowed him preceding actual entry at the land office, is a mere 'squatter' having no rights in the land as against the government or others."

[27] See *Vernard E. Jones*, 76 I.D. 133, June 30, 1969. "Although prior approval by the land office is not needed in order to settle upon land in Alaska, a settler is required by the act of April 29, 1950, 48 U.S.C. secs. 371, 461a (1958), within 90 days after settling upon land, to file in the appropriate land office a notice of location or

The 1903 Homestead Act[29] provided that after the 5-year residency period had been met, or the settler desired to commute (pay cash to reduce residency and cultivation requirements), and the rectangular system of surveys had not been extended to the homestead area, the procedure for obtaining patents of the unsurveyed lands outlined in Section 10 of the Act of 1898 would apply. Section 10 also required that the claims be "substantially square in form." While the rectangular survey system was extended to Alaska by the Act of March 3, 1899 (30 Stat. 1074), none were made until 1905.[30] The first special survey was performed near Angoon, Alaska in 1891 and was accepted on April 23, 1893. The "special survey", only used in Alaska and referred to as a U.S. Survey, provided the vehicle to survey and plat homestead patents in Alaska prior to the extension of the rectangular survey system.

The 1918 Homestead Act Amendment[31] provided a free survey to the homesteader who was ready to submit final proof for patent where the rectangular system had not yet been extended to the homestead area. The 1926 Homestead Act provided for non-rectangular homesteads if topographic conditions made rectangular boundaries not feasible or economic.[32]

Homestead Settlement/Entry Definitions

There were several steps in the process for an individual to obtain a patent for a federal homestead. The variety of terms used in the federal land disposal process and interpretation of these terms by federal agencies and the courts has created some ambiguity regarding the rights of the homesteader and the application of the highway ROW authorities. These terms include the following: *settlement, occupation, possession, location, posting, recordation, application, homestead entry, vesting, notice of allowance, relinquishment, valid existing rights, relation back, inceptive right, inchoate title and patent*. The meaning of these terms is further confused by ambiguities in the homestead process and conflicts in the many resource materials. Homesteading in the United States goes back more than 150 years and homesteading in Alaska ended more than 30 years ago. The Bureau of Land Management (BLM) has lost most of its institutional memory as all of their adjudicators with direct experience in processing a homestead file have since retired. As a result, there are few people remaining who were experienced with the adjudication and terminology of homesteading and even the relevant case law can be ambiguous or conflicting with regard to definitions. This paper intends to fill in

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settlement. The purpose of such notice is to provide the land office with information needed for the administration of public lands and to allow the settler to receive credit for his occupancy and use of the land…"

[28] Note that the discussion of the changes under the Act of 1950 is for general reference and does not address all of the variations under the statute or regulations.

[29] *Act of March 3, 1903* amending Section One of the *Act of 1898.*

[30] *A History of the Rectangular Survey System*, C. Albert White, 1983

[31] 40 Stat. 632, Act of June 28, 1918, *An Act to amend the homestead law in its application to Alaska, …*

[32] 44 Stat. 243, April 13, 1926 *An Act to authorize a departure from the rectangular system of surveys…*

some of the blanks with a review of relevant Interior Board of Land Appeals (IBLA) decisions, homestead case files, federal regulations and case law.

The application of an RS-2477 or PLO right-of-way revolve around the date by which the public domain lands were no longer "unreserved" by virtue of the "valid existing rights" associated with a homestead entry. What constitutes a homestead entry and what actions fix the date to be used in the right-of-way analysis?

In 1907, the 8th Circuit Court of Appeals explained some of the confusion with the term "entries".

> In statutes and in common parlance the word "entries," when applied to proceedings in the land office under the homestead law, is used with various meanings – sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole.[33]

The 2015 Alaska Supreme Court case *Luker v. Sykes* cited *United States v. 348.62 Acres of Land, Etc.*[34] for the definition of homestead entry. Citing a variety of preceding federal cases, *United States* provides several key homesteading definitions (emphasis added in bold):

> The term **entry**…It means, that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known, in the legislation of several states, by the epithet of an entry-taker, and corresponding very much in his function with the registers of land-offices, under the acts of the United States. [Citing *Chotard el al. v. Pope et. al.,* 25 U.S. 586, 588, 6 Led. 737]
>
> A '**homestead entry**' *** is the initial step taken in the land office towards acquiring ownership under the homestead law, and precedes the performance on the part of a homestead claimant of the conditions of residence upon and improvement of the land, which constitute the real consideration for the transfer of the title, and which are conditions precedent to the vesting of title in the homestead settler. [Citing *McCune v. Essig*, C.C., 118 F. 273, 276]
>
> "'**Entryman**' [means] one who enters upon public land with intent to secure an allotment under the homestead, mining, or other laws." [Citing *Indian Cove Irr. Dist. V. Prideaux*, 25 Idaho 112, 136 P. 618, 620, Ann.Cas. 1916A, 1218]
>
> What constitutes an **entry**… 'Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant

[33] *Stearns v. United States*, 152 Fed. 900, 82 C.C.A. 48, 8th Circuit Court of Appeals, February 1, 1907.
[34] *United States v. 348.62 Acres of Land, Etc.*, 10 Alaska 351 (D.Alaska 1943), October 23, 1943.

> must make an affidavit setting forth the facts which entitled him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made – the land is entered.' [Citing *Hastings Etc. Railroad Co. v. Whitney*, 132 U.S. 357 (1889)]

Another definition relating to homestead entries is that of the "settler", "settlement" and "settlement claim". The 1963 BLM brochure *Homesteading in Alaska*[35] distinguishes between the homestead "settler" and the homestead "entryman". A homestead claim may be initiated by "settlement" on surveyed or unsurveyed lands and requires the acts of "settlement". A homestead "entry" can only be made on surveyed lands and is initiated by presentation of an "application to enter". Residence must be established on the land within 6 months from the date of the Notice of Allowance (Entryman) or filing of the location notice (Settler). Federal regulations[36] provides a definition of "settlement claims":

> **Settlement Claims** – Initiation of settlement claims. Settlement is initiated through the personal act of the settler placing improvements upon the land or establishing residence thereon; he thus gains the right to make entry for the land as against other persons.

An RS-2477 ROW can only be impressed over "unreserved public lands". The highway PLOs specifically applied to "public lands". The Alaska Supreme Court provides a definition in *Hamerly v. Denton*[37]*:*

> The term '**public lands**' means lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler.

Why is it important to distinguish between "settlement" and "entry"? The difference is well described in the IBLA case *Richard T. Pope.*[38]

> There are two alternative methods by which a prospective homesteader in Alaska can endeavor to acquire homestead land, as explained in 43 CFR 2511.2(a)(1):

[35] *Homesteading in Alaska*, U.S. Department of the Interior, Bureau of Land Management, ALO-Inf-52 Aug 63. https://archive.org/details/HomesteadinginAlaska

[36] *Settlement Claims*, 43 CFR § 166.15, 1963

[37] *Hamerly v. Denton*, 359 P.2d 121, January 27, 1961.

[38] *Richard T. Pope*, IBLA 76-666, September 20, 1976.

> (a) Ways in which claims may be initiated; area enterable. (1) Claims in Alaska under homestead laws may be initiated by settlement on either surveyed or unsurveyed lands of the kind mentioned in the foregoing section. Claims may also be initiated on surveyed lands of that kind by the presentation of an application to enter.
>
> The first method involves simply going upon the land and appropriating it to the claimant's use and filing a notice of location and settlement of the claim within 90 days thereafter with the requisite filing fee. This method of acquiring what is generally referred to in the BLM vernacular as a "homestead settlement claim" is attended by considerable risk that the land may be withdrawn, or classified for some public use, or subject to the prior claim of another, or have been the subject of a prior selection by the State of Alaska or by entitled Alaska Natives. However, it affords the homesteader the advantage of immediate possession.
>
> The alternative and, at least ostensibly, the more prudent practice, is to apply to the BLM's Alaska State Office to be allowed to make homestead entry of the particular land described in the application, and then wait until the application has been thoroughly reviewed and formally approved and permission to enter has been officially given. This is called an "allowed homestead entry." While this procedure is time-consuming, its supposed virtue lies in the presumption that when and if the Bureau does at last allow the entry, the homesteader will have the assurance that his entry onto the land has the official sanction of the federal government.

Homestead Settlement Claims

A homestead settlement claim may be made on surveyed or unsurveyed public lands. In each situation, the entryman must first physically "appropriate" and occupy the land. "Settlement is initiated through the personal act of the settler placing improvements upon the land or establishing residence thereon;"[39] "A settler on unsurveyed land is required to mark the claim by permanent monuments at each corner..."[40] For surveyed lands, "Settlement on any part of a surveyed quarter section subject to homestead entry gives the right to enter all of the quarter section..."[41] The next step would be to file the settlement claim with the BLM Land Office.

> Notice of Settlement. (a) A person making settlement on or after April 29, 1950 on unsurveyed land, in order to protect his rights, must file a notice of the

[39] *43 CFR § 166.15 Initiation of settlement claims.* (1963) Note: Section 166 is for Homesteads in general, while Section 65 is for Homesteads in Alaska.

[40] *43 CFR § 65.4 Marking corners of claim on unsurveyed lands; rights acquired by settlement on surveyed lands.* (1963)

[41] Ibid.

> settlement for recordation in the land office for the district in which the land is situated, and post a copy thereof on the land, within 90 days after the settlement. Where settlement is made on surveyed lands, the settler, in order to protect his rights, must file a notice of the settlement for recordation, or an application to make homestead entry, in the land office for the district in which the land is located within 90 days after settlement.[42]

Within 6 months after the recording of the *Notice of Location of Settlement or Occupancy Claim in Alaska* form with the Land Office a residence must be established upon the claim.[43]

The filing of the *Notice of Location of Settlement or Occupancy Claim* in itself vests no rights in the claimant. See *Vernard E. Jones*[44]*:*

> Although prior approval by the land office is not needed in order to settle upon land in Alaska, a settler is required by the act of April 29, 1950, 48 U.S.C. secs. 371, 461a (1958), within 90 days after settling upon land, to file in the appropriate land office a notice of location or settlement. The purpose of such notice is to provide the land office with information needed for the administration of public lands and to allow the settler to receive credit for his occupancy and use of the land…
>
> The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the act performed in occupying, possessing and improving land and their relationship to the requirements of the law under which the settler seeks to obtain title.
>
> The actual appropriation and occupancy of land generally are accomplished facts at the time a notice of location is filed. Thus, the acceptance of a notice of location for recordation is not the allowance of an application for land but is, in reality, nothing more than the acknowledgment that the initiation of settlement rights as of a particular date has been claimed and a noting of the land office records to reflect the existence of that claim, and the acceptance for recordation of a notice of location is not a bar to a subsequent finding that, in fact, no rights were established in the attempted settlement.

Settlement and occupation of the homestead claim will not protect the claim from the effect of a withdrawal where the settler has not filed notice of the claim within the 90 day statutory deadline. See *Gary Lee Slay*[45]*:*

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[42] 43 CFR § 65.3 *Notice of Settlement* (1963)
[43] 43 CFR § 65.15 *Establishment of residence.* (1963)
[44] *Vernard E. Jones*, 76 I.D. 133, June 30, 1969

> Settlement on a homestead claim in Alaska two days prior to a withdrawal of the land does not except the land from the withdrawal where the claimant failed to file his notice of location within 90 days after settlement as required by the Act of April 29, 1950.
>
> The statute is explicit – the homesteader 'shall not be given credit for such residence and cultivation as may have taken place prior to the filing of (A) a notice of the claim in the proper district land office…' 43 U.S.C. § 270-6 (1970). Appellant's stated settlement on the homestead claim two days prior to the withdrawal cannot serve to except the claim from the effect of the withdrawal as there could be no valid existing right in the settler without compliance with the Act of April 29, 1950.

The filing of a location notice and marking of boundaries alone will not establish valid existing rights that will survive a withdrawal. See *John D. Ketscher*[46]*:*

> The filing of a notice of location not supported by actual settlement and occupancy as authorized by 43 U.S.C. § 687a (1970) does not change the status of the public lands; John W. Eastland, 24 IBLA 240 (1976); nor does it establish any rights in the locator as against the United States. Henry E. Reeves, 31 IBLA 242, 255 (1977), and cases therein cited. Rather, it is the acts of improvement and occupancy in compliance with the law which may establish a right to the land. Mary C. Rolen, 24 IBLA 100, 102 (1976). The occupancy and improvement must be such as to demonstrate a substantial, good faith devotion of the land to the intended lawful purpose before the effective date of a withdrawal in order to establish a valid existing right which will survive. Stephen R. Sorenson, 22 IBLA 258 (1975).

Homestead Entry Claims

A *Homestead Entry Application* is typically filed for surveyed lands.[47] An exception can be made where the rectangular system of surveys has yet to be extended to the homestead area and the homesteader has completed all obligations under the homestead laws. These claims may be surveyed as a special or U.S. Survey.

The filing of a *Homestead Entry Application* will segregate the lands from the public domain. See *Albert A. Howe*[48]*:*

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[45] *Gary Lee Slay*, IBLA 75-147, January 14, 1975.

[46] *John D. Ketsher/Alfred L. DeCicco,* IBLA 77-357/77-358, September 21 1977.

[47] 43 CFR § 65.8 *Applications for entry.* (1963)

[48] *Albert A. Howe*, IBLA 76-676, September 15, 1976. A concurring opinion notes that segregation of the lands result due to the entry application is a result of the "Doctrine of Relation Back". However, this doctrine may not apply to "prevent a withdrawal by the United States from attaching to land subject only to a homestead

> The filing by a qualified applicant of a homestead application to enter unappropriated surveyed lands in Alaska segregates the land covered by the application from appropriation. Such an application will be considered to have created a valid existing right which is protected from the effect of a subsequent withdrawal which is subject to valid existing rights.
>
> It has long been the rule in this Department that a homestead application to enter land subject thereto is equivalent to an actual entry so far as the rights of the applicant are concerned and while pending, reserves the land from other disposition. Rippy v. Snowden, 47 L.D. 321 (1920); Goodale v. Olney, 12 L.D. 324 (1891). See also R. B. Whitaker et al., 63 I.D. 124 (1956)."

Segregation of the land by the filing of a *homestead entry application* does not require prior settlement, occupation or improvement of the land. See *Consla v. Wetherelt*[49]*:*

> Where a homestead in Alaska is initiated by an application for allowed entry, the filing of the application creates a valid existing right which is protected from the effect of a subsequent withdrawal which is subject to valid existing rights.
>
> …where, in Alaska, the homestead is initiated by an application for allowed entry, the homesteader need not have made acts of settlement in order to preserve his rights against subsequent withdrawals. The filing by a qualified applicant of a homestead application to enter lands in Alaska segregates the lands applied for from appropriation, and such an application will be considered to have created a valid existing right which is protected from the effect of a subsequent withdrawal which is subject to valid existing rights.

In *Luker v. Sykes*, the Alaska Supreme Court has ruled that the homesteader's rights are established upon filing of his application for entry. Unfortunately, they did not distinguish between the two applications filed as noted in the BLM abstract. [50]

> Under the now-repealed homestead laws, a party established a claim to land not when the federal authorities allowed entry but rather when the party took the steps necessary to have entry recognized. " '[Entry] means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by *filing his claim*' in the appropriate land office. In Walker's case, that "inceptive right" was acquired when he filed his application for entry.

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application if there is a clear expression in the language of the withdrawal that such an inchoate right is not excepted from the effect of the withdrawal."

[49] *John Anthony Consla v. Robert L. Wetherelt*, IBLA 77-83, June 6, 1977.

[50] *Luker v. Sykes citing Hillstrand v. State*, 395 P.2d 74, 76 (Alaska, 1964) (quoting *Chotard v. Pope*, 25 U.S. 586, 588 (1827) & *United States v. 348.62 Acres of Land in Anchorage Recording Dist.* 10 Alaska 351, 364 (D. Alaska 1943) see also Hastings & D.R. Co. v. Whitney, 132 U.S. 357, 363 (1889).

> Completing the application requirements and "*fil[ing] his application* in the United States Land Office" was "all that [an applicant] could possibly do to …[make] a lawful homestead entry".

Homestead Case File

The typical Alaska homestead case file[51] will contain an abstract summarizing the actions taken in processing a homestead entry and will contain a variety of forms. These may include:

- Notice of Location of Settlement or Occupancy Claim in Alaska
- Homestead Entry Application
- Notice of Allowance
- Homestead Entry Final Proof (Claimant and Witnesses)
- Certificate
- Patent

Working the process backwards starting with the final patent several of the key steps in the process along with citations are provided as follows:

Patent

"A patent operates as a deed of the government. 'As a deed its operation is that of a quitclaim…it passes only the title the government has…on the date of the patent'. 63A Am. Jur.2d, *Public Lands* § 77, at 575 (1984). It follows as a general rules that government patents are 'without any covenants of warranty whatever;'"[52] The Alaska courts hold that the issuance of a federal patent is the same as though they had issued a quitclaim deed, only conveying the interest held by the United States and subject to prior existing rights.[53] However, it is the end of the homesteader's journey to acquire title and the "valid existing rights" were established far earlier in the process.

In the 1980's, DOT&PF pursued the argument that a "valid existing right" was not established until a patent was issued. This position was beneficial from the DOT&PF perspective, as a larger window of opportunity would exist in which the State could claim a PLO based right-of-way. Three cases were appealed to the Supreme Court that in part, considered this assertion.

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[51] Case files can be ordered on-line from the National Archives at https://eservices.archives.gov/orderonline Case files generally cost $50.00 and can be delivered electronically.

[52] *North Star Terminal and Stevedore Co., Inc. v. State*, 857 P.2d 335 (Alaska 1993)

[53] *City of Anchorage v. Nesbett*, 530 P.2d 1324, Alaska, January 24, 1975 citing *Wilson Cypress Co. v. Del Pozo y Marcos* 236 U.S. 635 (1915)

The State initially failed to convince the Court with this argument in the *State v. Alaska Land Title*[54] case. In a subsequent *Petition for Rehearing*, the State argued: *"*…as against the United States, a homesteader did not acquire valid existing rights until he had completed all of the requirements of the homestead laws.*"* A rehearing was not granted.

The State's argument was finally put to rest in a 1984 decision relating to the Old Glenn Highway.[55] The court seems to have grown tired of the State's position stating: "In advancing its claim the State once again repeats the arguments this court previously rejected in State v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983) and Resource Investments v. State, 687 P.2d 280, (Alaska , 1984)." In addition, the court said *"*As we have noted, PLO 601 was promulgated pursuant to 43 U.S.C. § 141. 43 U.S.C. § 142 states that 'there shall be excepted from the force and effect of any withdrawal made under the provisions of …section 141… all lands which are, on the date of such withdrawal, embraced in any lawful *homestead*… *entry*…'". Reflecting back to the *Resource Investments* citation, the court referred to a U.S. Supreme Court decision[56] and said *"*The United States Supreme Court recognized that an unperfected homestead entry was within an excepted category of 'existing valid claims' excluded from the terms of a government withdrawal order.*"*

Certificate

The homestead *Certificate* is the document whereby the federal government concludes that the homesteader has complied with the terms and conditions of the Homestead Acts and is now eligible to receive patent. The *Certificate* also identifies the reservations and rights-of-way to which the patent will be subject. The *Certificate* is just an interim administrative step on the way to issuance of a patent and has no unilateral effect on the public domain status.

Homestead Entry Final Proof

Upon completion of the residence, cultivation and habitable house requirements, the homesteader submits a *Final Proof* form testifying under oath as to their compliance with the Homestead Act requirements. Additional *Final Proof* forms are to be submitted by two witnesses that can attest to the claimant's compliance. If a field examination finds that the Final Proof is not in compliance, they will issue a Final Proof Rejected decision. As a result, the homestead entry may be rejected, the claimant may file a relinquishment, or the homesteader may continue the entry and defer filing the *Final Proof* until such a time that they meet the compliance requirements. If the entry is rejected or relinquished, the lands may be returned to

[54] *State v. Alaska Land Title Ass'n*, 667 P.2d 714, Alaska 1983.

[55] *State, Dept. of Transp. & Public Facilities v. First Nat. Bank of Anchorage* 689 P.2d 483, October 12, 1984.

[56] *Stockley v. United States*, 260 U.S. 532, 544, 43 S. Ct. 186, 189, 67 L.Ed. 390, 395 (1923)

the public domain and made available for other entries or withdrawals. A rejection of final proof may also be appealed which may generate more detail regarding homestead entry activities.[57]

Notice of Allowance

Upon receipt of a *Homestead Entry Application*, the Land Office will verify that the lands claimed are in fact open for homestead entry, adaptable to agricultural use and non-mineral in character and then may or may not issue the *Notice of Allowance*. If the lands are valuable for coal, oil or gas, the entry may be allowed but the patent when issued will be impressed with a reservation of such minerals.[58] It has been argued that it is this *Notice of Allowance* that fixes the date by which the rights to the land are vested in the homesteader and which segregates the land from the public domain. This issue was resolved in *Luker v. Sykes* in holding that "…it was error to conclude that Walker had a claim to such a patent only upon the BLM's approval of his entry. Under the now-repealed homestead laws, a party established a claim to land not when the federal authorities allowed entry but rather when the party took the steps necessary to have entry recognized."

Segregation of Land from the Public Domain

The following cases hold that the land is segregated from the public domain and the rights to the land are vested in the homestead entryman as of the "date of entry". The larger question revolves around what constitutes the "date of entry" and what action triggers it.

1996: *Fitzgerald v. Puddicombe*[59] - "Homesteads pass from the public domain to the private as of the date of entry."

1961: *Hamerly v. Denton*[60] - "When a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain. It has been appropriated to the use of the entryman, and until such time as the entry may be cancelled by the government or relinquished, the land is not included in grants made by Congress under 43 U.S.C.A § 932. Consequently, a highway cannot be established under the statute during the time that the land is subject of a valid and existing homestead claim."

1889: *Hastings Etc. Railroad Co. v. Whitney*[61] - "So long as a homestead entry, valid upon its face, remains a subsisting entry of record whose legality has been passed upon by the land

[57] 43 CFR 101.13 Appeal or further showing when proof is rejected (1954-1964)
[58] *Homesteading in Alaska*, Dept. of the Interior, Bureau of Land Management, August 1963
[59] *Fitzgerald v. Puddicombe*, 918 P.2d 1017, Alaska, April 26, 1996
[60] *Hamerly v. Denton*, 359 P.2d 121, Alaska, January 27, 1961.
[61] *Hastings Etc. Railroad Co. v. Whitney*, 132 U.S. 357, 1889

authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and precludes it from subsequent grant by Congress."

Settlement or Occupancy

When discussing the homesteading process, some references tend to use the terms "settlement" and "entry" interchangeably. Settlement and occupancy do not in themselves constitute a "valid entry" under the law. The previously mentioned *Act of April 29, 1950* and its implementing regulations discuss the requirement for a settler on unsurveyed lands to file a *Notice of Settlement* to protect their claims. The homesteader claiming surveyed lands could also file a *Notice of Settlement* or go directly to making an application for a homestead entry. This can cause confusion when reviewing the BLM abstracts where there are more than one entry for "Application Filed". This term may be used to reference the filing of a *Notice of Location of Settlement or Occupancy* or the *Homestead Entry Application*. Where a review of the BLM on-line abstract for a simple homestead case that contains only a single "Application Filed" may be sufficient to reach a conclusion regarding the effect of a highway ROW authority, in many cases it will be necessary to obtain and review the entire case file. The following references provide various views on settlement and occupancy.

1999: Glenn Highway/DeLucia Homestead[62] - This action represents an anomaly in BLM's view regarding the rights vesting in a homesteader solely through settlement and occupation. The Blavka's are successors in interest to the original homestead entry and patent of Daniel DeLucia. The BLM letter to Senator Stevens states that DeLucia filed his homestead application on October 31, 1950. This date is confirmed in the BLM on-line abstract system. The DeLucia homestead should have been subject to a 300-foot wide PLO ROW based on PLO No. 601, effective August 10, 1949. The BLM township survey was performed between August 20, 1949 and August 5, 1950. The letter notes that the surveyor found DeLucia's house to be within the PLO ROW and so limited the PLO ROW to 50-feet from centerline adjoining the DeLucia homestead rather than the typical 150-feet called for in the PLO. "Quite clearly the surveyor recognized the DeLucia claim as a prior right in his effort to survey the Glenn Highway in compliance with PLO No. 601." BLM noted that they were unable to find a copy of the homestead application at their offices or the National Archives, but opined that based on the survey record, the Blavka's had a valid claim upon which to challenge the State's assertion to the full 300-foot wide Glenn Highway ROW. BLM provided no legal authority for their position.

[62] Letter from Bureau of Land Management to Senator Ted Steven, July 13, 1999 regarding Blavka property.

1993: *Shultz v. Department of Army, U.S.*[63] - "Under Alaska law, land is withdrawn from the public domain when a homesteader enters his homestead, not when he files his claim or receives the patent." The preceding is from *Schultz* footnote 17. A subsequent Alaska Superior Court case[64] noted that "This footnote indicates that the actual date of physical (emphasis added) entry of the land is the operative date, not the date of application or the issuance of the notice of allowance. Under *Shultz*, which undoubtedly revolves around a misunderstanding of the meaning of 'entry', a claimant can acquire a right in federal land without even so much as submitting an application. Thus, absolutely no 'official action' of any kind would be required to effect a valid homestead entry under *Schultz*."

1985: *Dillingham Commercial Co. Inc. v. City of Dillingham*[65] – "Felder's first valid entry under the homestead law was made in 1940. D.C. Co. admits that until then Felder was only a squatter, but claims that the land was nevertheless withdrawn from the public domain. We disagree with D.C. Co.'s conclusion. The Hamerly court explicitly required official action in order to withdraw lands from the public domain. In the paragraphs quoted above, the court referred to entry 'under the homestead laws'."

1958: *44 L.D. Rights-of-way*[66] – "We would also like to call your attention to the fact that some of the right-of-way applications are for unsurveyed lands that are embraced within a homestead settlement claim, notice of which has been filed in the Land Office on Standard Form No. 4-1154 (Notice of Location or Settlement or Occupancy Claim in Alaska). In such cases, the rule seems to be well established, that a mere settler on unsurveyed lands has no right as against the Government, and that lands embraced within such settlement claims may be appropriated by the Government. It is to be further noted that, in Alaska, settlement claims may be made on surveyed lands and that the foregoing rule has also been applied to settlement claims on surveyed lands, where only a notice of settlement has been filed in the Land Office, and where no allowance of entry has been granted by the Land Office." This paragraph in the DOI memo cites *United States v. Hanson*, (167 Fed. 881 – 1909). As stated in Volume 93 of the *United States Circuit Courts of Appeals Reports*, *Hanson* held that "The mere occupation of unsurveyed public land, although with the bona fide intention of acquiring title thereto under the homestead law when it shall be surveyed, gives the settler no rights as against the united States, and Congress may at any time before the initiation of homestead rights reserve the land for any public purpose."

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[63] *Shultz v. Department of Army, U.S.*, 10 F.3d 649, November 30, 1993.
[64] *Blanchard v. Heimbuch*, 3PA-94-814 CI, *Memorandum Opinion and Order*, September 1, 1995.
[65] *Dillingham Commercial Co. Inc. v. City of Dillingham*, 705 P.2d 410, Alaska, August 16, 1985
[66] *44 L.D. Rights-of-way*, U.S. Department of the Interior, Office of the Solicitor, Anchorage Field Office, September 30, 1958

1895: *Shiver v. United States*[67] - "A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of pre-emption. But this is only a privilege conferred on the settler to purchase lands in preference to others… His settlement protects him from intrusion or purchase by others, but confers no right against the government."

1889: *Hastings Etc. Railroad Co. v. Whitney* - "In the language of the act of Congress, this homestead claim had 'attached' to the land,…Of all the works in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate[68] right to the land was initiated."

1875: *Shepley v. Cowan*[69] - "…the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States."

Homestead Entry Application

A valid homestead entry as evidenced by an application filed at the federal land office is a key action that will segregate land from the public domain and vest rights in the entryman. In the following case references, those words that indicate the importance of the filing for a homestead entry application have been underlined.

2015: *Luker v. Sykes* – This is the most recent Alaska case regarding homestead entries and should have answered most of the questions regarding the date by which a homestead claim is segregated from the public domain. Unfortunately, the Court is required to rely upon the evidence produced at trial and in this situation; the history of the homestead process in question was limited to the BLM case abstract system as opposed to a review of the entire homestead case file. For further discussion, see the *Luker v. Sykes* section within this paper.

2014: *Hansard Mining, Inc. v. McLean*[70] - This case involved a conflict between a federal homestead patent and federal mining claims. "The consequence of relation back is that the claimant's rights…date from the time the claim was made, not from the time the patent was issued." (Citing *James Barlow Fam. Ltd. P'ship v. David M. Munson, Inc.,* 132 F.3d 1316, 1320, 10th Cir. 1997) "…the Homestead Act permitted a qualified person to enter unappropriated

[67] *Shiver v. United States*, 159 U.S. 491 (1895)

[68] An inchoate interest is "An interest in real estate which is not a present interest, but which may ripen into a vested estate, if not barred, extinguished, or divested", Black's Law Dictionary, 6th Edition

[69] *Shepley v. Cowan*, 91 U.S. 330, 1875

[70] *Hansard Mining, Inc. v. McLean,* 335 P.3d 711 (Mont. 2014)

public lands for the purpose of establishing a homestead. Entry was effected by making an application at the proper land office…"

2002: *Lee v. Masner*[71] - This case involved an RS-2477 assertion over a federal homestead patent. The Appellants argued that under the doctrine of "relation back", title relates back to the time the homesteader first took possession of the land. The Colorado Supreme Court disagreed and held that "…a homesteader's rights in land patented by him relate back to the time the homestead entry is properly filed with the appropriate government office." "The term 'entry' as used in the context of acquisition of rights in land under federal homestead law, means: 'An entry under the United States land laws for the purpose of acquiring title to a portion of public domain under the homestead laws, consisting of an affidavit of the claimant's right to enter, a formal application for the land, and payment of money required.' *Blacks Law Dictionary* 627 (4th ed. 1957)"

1976: *Albert A. Howe IBLA 76-676*[72] - "The filing by a qualified applicant of a homestead application to enter unappropriated surveyed lands in Alaska segregates the land covered by the application from appropriation. Such an application will be considered to have created a valid existing right which is protected from the effect of a subsequent withdrawal which is subject to valid existing rights."

1961: *Hamerly v. Denton* – In explaining those periods of time whereby a homestead entry prevented the application of an RS-2477 ROW, the court noted the dates of the valid homestead entries: "The road involved in this case crossed land which was the subject of various homestead claims beginning in 1925 and ending in 1958 with the issuance of a homesite patent to Hamerly. The first entry was made by Murphy who filed his application for a homestead on November 28, 1925…The second entry was made by King who filed his application for a homestead on August 10, 1942…Hamerly filed a second homestead entry on January 11, 1956…"

1922: *Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries* (Circular No. 541)[73] - "How Homestead Entries Are Made. A homestead entry may be made by the presentation to the land office of the district in which the desired lands are situated of an application properly prepared on blank forms prescribed for that purpose…" In contrast to the entry procedure, the Circular also describes "How Claims Under the Homestead Law Originate…Settlement is initiated through the personal act of the settler placing improvements

[71] *Lee v. Masner*, 45 P.3d 794 (Colo. App. 2002)
[72] *Albert A. Howe IBLA 76-676*, 26 IBLA 386, Decided September 15, 1976. Cited in *Luker v. Sykes*.
[73] As published in *Decisions of the Department of the Interior In Cases Relating to The Public Lands*, Volume 48, February 1, 1921-April 30, 1922. Pages 389 - 411

upon the land or establishing residence thereon; he thus gains the right to make entry for the land as against other persons."

1907: *Bergstrom v. Alaska Cent. Ry. Co. et al.*[74] – "Homestead Entry. Before a homestead entryman in Alaska can obtain a vested and exclusive right to his homestead on the public domain, his entry must be completed in the United States land office. The filing of a notice with the recorder, and occupation and improvement, do not convey vested rights therein…On June 2, 1904, within less than 60 days after his entry upon the tract, he filed for record in the recording district in which the land was situated his notice of location. Up to the time of the commencement of this action no notice had been filed in the United States land office for that land district. Whatever may be his right to the land, it rests solely upon his entry or settlement, the staking, improvement, and residence thereon, and the recording of the notice in the recording office. But the original entry of the homesteader practically amounts to nothing more than a declaration of intention, and, while he thereby obtains an inchoate title, he acquires no vested rights against the government and no ownership in the land…Before he can obtain any vested right against the government, all the prerequisites for the acquisition of the title as provided by law must have been complied with. A mere occupation and improvement do no convey vested rights, nor do the homestead or pre-emption rights attach until entry is in the land office." (Citing *Shepley v. Cowan,* 91 U.S. 330 and other opinions)

1890: *Sturr v. Beck*[75] - "A claim of the homestead settler, such as Smith's, is initiated by an entry of the land, which is effected by *making an application* at the proper land office, …"

1866: Witherspoon v. Duncan[76] - "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property." (Citing, 71 U.S. 210 (1866))

1827: *Chotard v. Pope*[77] – "The term entry, as applied to appropriations of land, was probably borrowed from the State of Virginia, … It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, *by* filing his claim in the office of an officer known in the legislation of several States by the epithet of an entrytaker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States."

[74] *Bergstrom v. Alaska Cent. Ry. Co. et al.*, Third Division, Valdez, November 14, 1907, No. 103
[75] *Sturr v. Beck*, 133 U.S. 541, 1890
[76] *Witherspoon v. Duncan*, 71 U.S. 210 (1866)
[77] *Chotard v. Pope*, 25 U.S. 586 (1827)

Homestead Q&A

1. Q: Did a homesteader require government approval prior to settling on public lands?

   A: **No**. See *Vernard E. Jones*, (I.D. 1969) "Although prior approval by the land office is not needed in order to settle upon land in Alaska, a settler is required by the act of April 29, 1950, … within 90 days after settling upon land, to file in the appropriate land office a notice of location or settlement." Until the notice was filed, no credit could be given for residency or cultivation. Prior to 1950, actual residence could initiate the "residency" clock, however, until a notice had been filed, the settler had no protection against other claimants.

2. Q: Does a settler whose claim is solely by occupation and possession maintain any rights as against the government before they file a *Notice of Location of Settlement* or a *Homestead Entry Application* with the Land Office?

   A: **No**. *Dillingham* (1985) citing *Hamerly* (1961) holds that official action is required in order to withdraw lands from the public domain. Prior to filing an application with the Land Office, the settler is merely a "squatter".

3. Q: Does a settler who is only in possession of public lands by occupation maintain any rights as against others who would assert a claim?

   A: **No**. *Dillingham* (1985) citing *City of Miami v. The Sirocco. Co.* (Fla. 1939) (RS-2477) "…Appellee and all its predecessors in title were nothing more than squatters and had acquired no legal status whatever as to the lands in question at the time of appropriation by the City…In this case, no formal or legal entry was filed or was shown to be of record at the time the City appropriated for streets and highways. Those acquiring title subsequently took subject to the City's claim."

4. Q: Does a settler who is in possession of public lands by occupation maintain any rights against subsequent homestead claimants who file their entry with the Land Office?

   A: **No**. See *United States v. Bagnell Timber Co.* (8 Cir. 1910) "One who takes possession of a tract of public land with a view to becoming an entryman under the homestead law, except as to the limited statutory time allowed him preceding actual entry at the land office, is a mere 'squatter' having no rights in the land as against the government or others." Also see *United States v. 348.62 Acres of Land, Etc.* (D. Alaska 1943) "As between conflicting claims to public lands, he whose initiation is first in time, if adequately followed up, is deemed first in right, and, if his claim is finally, approved, his right relates back to the date of its initiation to the exclusion of any intervening claim."

5. Q: Can a settler establish their homestead rights solely by the filing of a *Notice of Location of Settlement or Occupation*?

A: **No**. See *Vernard E. Jones*, (I.D. 1969) "The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the act performed in occupying, possessing and improving land and their relationship to the requirements of the law under which the settler seeks to obtain title." See *Donald E. White (*IBLA 1974) "…in order for one who files a notice of location of a homestead settlement claim to acquire any rights in the land, he must go on the land and perform some act or acts of possession such as placing improvements thereon within the six months from the date of filing the notice."

6. Q: Can a settler establish their homestead rights by the filing of a *Notice of Location of Settlement or Occupancy* and marking the corners of his claim?

   A: **Yes**. *Robert A. Bice Jr.* (IBLA 1975) "A homestead notice of location filed for lands open to location is acceptable for recordation. Where a homestead settler has marked the corners of his claim by posts prior to a withdrawal subject to valid existing rights, the claim survives the withdrawal if the location notice requirements have been satisfied." With regard to Headquarters and Trade and Manufacturing sites, occupation and improvements are required along with the filing of a Location Notice to vest valid existing rights that will prevent the imposition of a withdrawal. "However, with respect to homestead settlement claims it has long been the position of the Department that a settlement right is created by one who goes upon the public land with the intention of making it his home under the settlement laws and does some act in execution of such intention sufficient to give notice thereof to the public.'"

7. Q: Can BLM void an entry where the settler has filed a *Notice of Location of Settlement or Occupation,* marked the corners of the claim and made improvements to the land?

   A: **Yes**. *Henry E. Reeves* (IBLA 1977) "Even the acceptance by the BLM of a claimant's notice of location for recordation creates no rights in the claimant as against the United States, nor does it preclude a subsequent finding that the land claimed was not open to entry (emphasis added) and that no rights were established either by the filing and recordation of the notice or by the claimant's settlement and improvement of the land."

8. Q: Is it necessary for BLM to issue an "Entry Allowed" decision before the homesteader's rights are secured and the land is segregated from the public domain?

   A: **No**. *Luker v. Sykes (2015)* "Under the now-repealed homestead laws, a party established a claim to land not when the federal authorities allowed entry but rather when the party took the steps necessary to have entry recognized."

9. Q: Is the homesteader required to file an application with the Land Office to secure his rights and segregate his claim from the public domain?

   A: **Yes**. *Luker v. Sykes* (2015) " '[Entry] means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim' in the appropriate land office. In Walker's case, that "inceptive right" was acquired when he filed his application for entry. Completing the application requirements and "fil[ing] his application in the United States Land Office" was "all that [an applicant] could possibly do to …[make] a lawful homestead entry". At that point, the lands at issue became "subject to individual rights of a settler…[T]he portion covered by the entry [was then segregated from the public domain…and until such time as the entry may be cancelled by the government or relinquished,…"

   Also see *Albert A. Howe* (IBLA 1976) "The filing by a qualified applicant of a homestead application to enter unappropriated surveyed lands in Alaska segregates the land covered by the application from appropriation. Such an application will be considered to have created a valid existing right which is protected from the effect of a subsequent withdrawal which is subject to valid existing rights."

10. Q: Will the filing of a *Homestead Entry Application* for surveyed public lands without acts of occupation and improvement vest rights in the applicant and segregate the land from the public domain?

    A: **Yes**. See *Richard T. Pope* (IBLA 1976) "The filing by a qualified applicant of an application for an allowed homestead entry of land which is open and available to such entry at the time of filing will operate to segregate the land from subsequent appropriation and invest the applicant with sufficient interest therein to preserve the land from the effect of a subsequent withdrawal which is made subject to valid existing rights."

    Also see *Consla v. Wetherelt* (IBLA 1977) "…an entry initiated by settlement will survive a subsequent withdrawal only if the settler has undertaken at least some acts of use, occupancy, and development prior to the withdrawal. However, where, in Alaska, the homestead is initiated by an application for allowed entry, the homesteader need not have made acts of settlement in order to preserve his rights against subsequent withdrawals."

11. Q: The BLM Historical Index indicates multiple entries by various parties on a specific parcel of land over time. Is it always the date of the first entry that will be used to evaluate the effect of an RS-2477 or PLO right-of-way?

    A: **No**. Valid entries may expire, be relinquished or cancelled potentially returning the land to the "unreserved " public domain and making it available for subsequent homestead entry. See *Luker v. Sykes* (2015) "The superior court was correct in concluding that 'the

critical entry for purposes of determining whether a section line applies is [the]…entry that resulted in the issuance of a patent.'"

12. Q: Once a homesteader has obtained a patent, his rights are said to go back to the date of the original application by the doctrine of "Relation Back". From the date that the claimant secures a valid existing right by filing his application in the Land Office and the land is segregated from the public domain, can the government withdraw the claimed land for another purpose?

    A: **Yes**. (But not under RS-2477 or highway PLO authorities) See *Albert A. Howe* (IBLA 1976) "The doctrine of relation back is evoked only to protect the rights of the applicant and someone in privity with him -- not strangers -- in order to preclude intervening rights of other claimants...this doctrine may be invoked to prevent a withdrawal by the United States from attaching to land subject only to a homestead application if there is a clear expression in the language of the withdrawal that such an inchoate right is not excepted from the effect of the withdrawal."

    Note: While this suggests that a subsequent withdrawal by the government can defeat a homesteader's "valid existing rights", the requirement that RS-2477 can only apply to "unreserved lands" and that PLO rights-of-way are subject to "valid existing rights" represent clear expressions that the homesteader's existing rights are protected from those actions. See *Resource Investments v. State DOT&PF* (1984) "…the United States Supreme Court recognized that an unperfected homestead entry was within an excepted category of "existing valid claims" excluded from the terms of a government withdrawal order. The court stated: [T]here is excepted from the operation of the order 'existing valid claims.' Obviously this means something less than a vested right, such as would follow from a complete final entry, since such a right would require no exception to insure its preservation. The purpose of the exception, evidently, was to save from the operation of the order claims which had been lawfully initiated, and which, upon full compliance with the Land Laws, would ripen into a title. For the same reason, it seems apparent that the Secretary of the Interior intended to except pre-patent homestead entries from the operation of PLO 601."

Homestead Entry Analysis

The following is a review of seven homestead case files that were collected for the Iditarod Trail RS-2477 litigation[78]. All of the entries were on unsurveyed lands therefore

[78] *Dickson v. State of Alaska*, Case No. 3AN-12-07260CI, Alaska Superior Court, 2016. Note that testimony and photographic evidence presented at trial indicated conflicts regarding Cowart's and Sassara's dates of actual settlement as opposed to the dates cited in the BLM record. The level of detail generated at a trial may far exceed the level of detail generally reviewed for a typical homestead entry evaluation. This Homestead Entry Analysis exercise is limited to data found in the BLM record.

requiring that the claimant file a *Notice of Location of Settlement or Occupation* form. The last row represents the data from the homestead case file for Elbridge B. Walker, the subject homesteader in the 2015 Alaska Supreme Court case *Luker v. Sykes.* The *Luker* case is discussed in detail later within this paper.

The dates shown in the table below are consistent with the dates cited in the BLM on-line abstract system "ACRES". Each column titled "Abstract Reference" indicates the text from the BLM abstract associated with the date. There are certain inconsistencies in how the data is presented. Not all abstracts would cite the date where "actual residence" commenced, generally noted as the "Location Date". Location Notice and Homestead Entry form dates are sometimes taken from the date of the applicant's signature and sometimes from the BLM Land Office date stamp. The table is intended to illustrate the variety of dates published for homestead actions and the generic manner in which the BLM on-line abstract refers to all applications. The key date vesting the homesteader's rights will be in the Location Notice column.

Segregation of Homestead Entry from Public Domain Analysis

Claimant Name	Settlement Date	Location Notice	Abstract Reference	Residence Date	Abstract Reference	Entry Application	Abstract Reference	Patent No.
Bartel, Kenneth L.	Aug-59	6/12/59	Application Filed	9/12/59	Location Date	10/8/1964	Application Filed	50650505
Cann, James Milton		4/6/59	Application Filed	2/20/60	Location Date	10/21/64	Application Filed	50650518
Cowart, Benjamin H.	11/21/58	11/25/58	Application Filed	11/21/58	Location Date	9/23/64	Application Filed	50650462
Iiams, Lueata E.	2/20/61	2/23/61	Application Filed	4/29/61	Location Date	2/18/63	Application Filed	50650422
Novelli, Steven J.	8/29/60	8/30/60	Application Filed	8/29/60	Location Date	9/14/62	Application Filed	50650421
Sassara, Charles J.	10/25/58	11/3/58	Application Received	3/15/59	No Reference	6/29/64	No Reference	50670044
Ungerman, Kenneth A.	2/3/1959	2/3/59	Application Filed	5/26/59	Location Date	12/28/59	Application Filed	50650452
Walker, Elbridge B.	10/22/58	10/27/58	Application Filed	1/31/59	No Reference	07/10/61	Application Filed	1234207

Settlement Date: Date homestead claimant entered onto land and posted claim.
Location Notice: Date of filing for Notice of Location of Settlement or Occupation.
Residence Date: Date "actual residence" established per Homestead Entry Final Proof.
Entry Application: Date of filing for Homestead Entry Application.

The Q&A review indicates that neither the filing of a Location Notice nor actual occupation and settlement would be sufficient to segregate the land from the public domain. Prior to patent and as both acts are required; the latter of those two dates would serve to segregate the lands. However, once patent has been issued, the "Relation Back" legal doctrine will vest the homesteader's rights – and segregate the land from the public domain as of the date of the first application that led to patent. That application may either be the initial Notice

of Location of Settlement and Occupancy for un-surveyed lands or the Homestead Entry Application for surveyed lands.

The Q&A cites the 1975 IBLA case *Robert A Bice Jr.* suggesting that merely filing the Location Notice and marking the claim boundaries is all that is necessary to establish the homesteader's "valid existing rights." While the homesteading regulations require a settler on unsurveyed lands to mark their corners, the date that the posting activity occurred is not generally noted in the case file. The date of residency is typically stated both in the applicant's final proof and in the BLM homestead report.

Much of this paper discusses the homestead process and requirements for obtaining a patent. While this may be good background material, it is not intended to provide an argument to invalidate an issued patent. In the 2015 Alaska Supreme Court case Luker v. Sykes, the appellee argued that multiple failed entries, as he perceived were indicated in the BLM abstract, were evidence that the homestead had been abandoned. The court ruled that while these arguments may have been relevant to challenge the homestead prior to patent, they were not sufficient to show that the patent was defective. Once the patent is issued, our concern is only to determine the date by which the claim was segregated from the public domain.

Additional On-line References

- *Homesteading & The Homestead Act in Alaska*, Alaska Public Lands Information Centers http://www.alaskacenters.gov/homestead.cfm
- *Homesteading in Alaska*, Bureau of Land Management, August 1963 https://archive.org/details/HomesteadinginAlaska
- *History of Alaska Homesteading,* Bureau of Land Management https://www.blm.gov/download/file/fid/11863

Luker v. Sykes

Introduction:

The Alaska Supreme Court issued an opinion in the case *Luker v. Sykes*[79] in 2015. The case discussed whether Sykes has a right to access his property across his neighbor's lots. The ruling considered both the application of an express easement and a section line easement based on RS-2477[80] across the Luker property. This paper only addresses the section line easement. The purpose of this paper is to discuss the level of research that may be necessary to determine the status of an RS-2477 based section line easement.

An RS-2477 section line easement can only be applied over "…federal public lands, not reserved for public uses…" A valid homestead entry has been found to segregate lands from the public domain, thereby preventing imposition of a subsequent RS-2477 section line easement. The question in this case is whether the effective date of the section line easement, generally the approval date of the federal township survey, preceded the homestead entry or whether the prior existing homestead entry prevented application of the section line easement.

The property in question is located to the northeast of Fairbanks at approximately milepost 21 and to the south of Chena Hot Springs Road. The homestead claim is primarily located within the northeast one-quarter of Section 32, Township 1 North, Range 4 East, Fairbanks Meridian. Portions of the homestead extend to the north and east into Sections 28, 29 and 33.

Sykes argued that he was entitled to use the north 33-feet of Tax Lots 3318 and 3353[81] based on an express easement or an RS-2477 section line easement. The section line easement in question is located along the northerly line of Section 33 and the northerly line of the Elbridge Walker homestead (See Figure 1).

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[79] *Luker v. Sykes*, 357 P.3d 1191, WL 6087341, Alaska, October 16, 2015.

[80] The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976. For a more detailed discussion of RS-2477 and section line easements, see *Highway Rights-of-Way in Alaska 2013,* John F. Bennett, PLS, SR/WA published on the Alaska Society of Professional Land Surveyors website at https://www.alaskapls.org/wp-content/standards2013/Highways-2013.pdf

[81] TL 3318 is crossed by the west half and TL 3353 is crossed by the east half of the "Subject SLE" as shown on Figure 1.

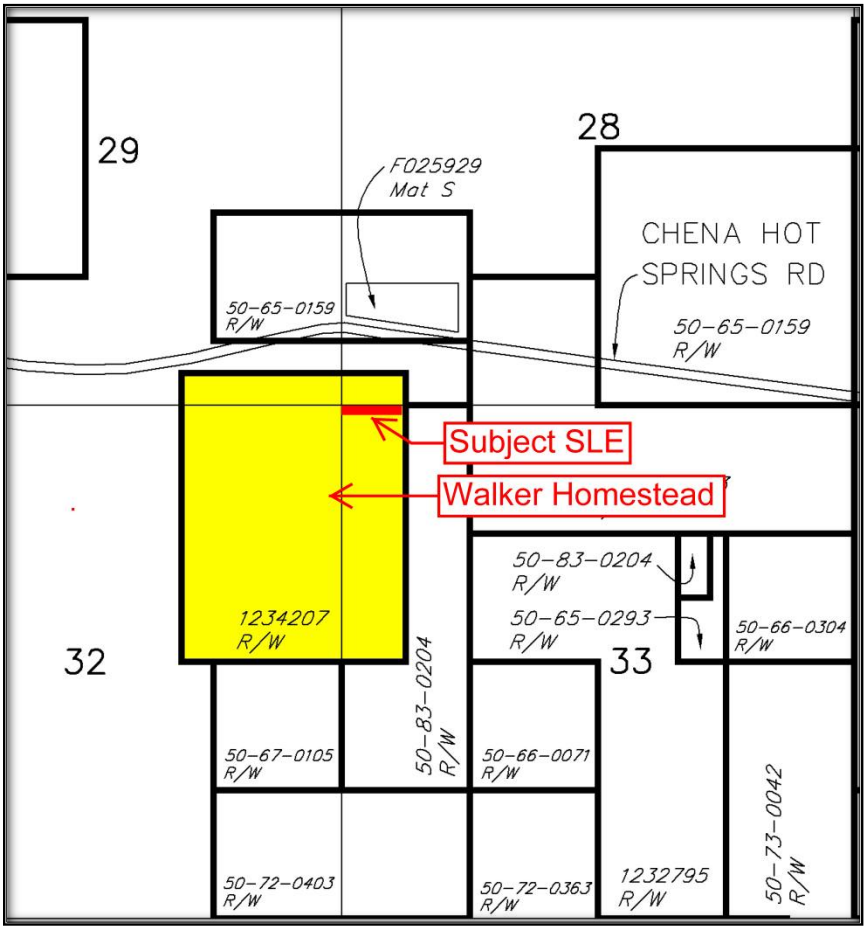

Figure 1 - Walker Homestead Location

Case Background:

George Luker first contacted Northern Region DOT&PF Right of Way office regarding a conflict over blocked access to his property in January of 2002[82]. Given the ambiguities of right-of-way research, members of the public would often request assistance from DOT&PF on these issues. At this time, it was determined that the road in question was not under DOT&PF jurisdiction and he was referred to DNR for evaluation of an RS-2477 trail easement. Subsequently it was apparent that the access conflict between neighbors also included the subject SLE. In February, the superior court heard the case *Tubbs v. Luker*[83]. "The focus of that case was a temporary restraining order and a preliminary injunction, sought by the Tubbs, to force the Lukers to remove barriers and signs blocking access to the Tubbs' property."[84] The witnesses for Luker included a professional land surveyor who testified that no section line

[82] Email exchange between George W. Luker II and John F. Bennett, DOT&PF Northern Region Right of Way Chief, January 4, 2002.

[83] *Tubbs v. Luker*, Case 4FA-02-259CI, Feburary 22, 2002.

[84] *Sykes v. Luker*, *Memorandum Decision*, Case 4FA-06-2646CI, March 8, 2012

easement existed because the entry date for the initial homestead was prior to the federal survey. The court issued the preliminary injunction along with the statement: "The Defendants [the Lukers] have provided evidence to support a conclusion that no section-line easement exists and the court so finds."[85] A final decision was never issued, as the Tubbs did not pursue their lawsuit to conclusion. The case was dismissed in August of 2002.

In October of 2004, Jilu Luker recorded a 22-page document[86] that consisted of a collection of letters, BLM abstracts, historical index, plats and testimony from the previously referenced *Tubbs v. Luker* case. It appears that the purpose of this filing was to place on record the Luker's continuing assertion that no section line easements existed within the bounds of the Walker homestead.

The following November, Sykes recorded a 34-page *Affidavit of Cossette L. Kimmel*.[87] Kimmel testified that she had resided on various homesteads and locations along Chena Hot Springs Road since 1957 and was knowledgeable of activities in the area. She and her husband sold their property at 20.5 mile Chena Hot Springs Road to George and Jilu Luker in 1999[88]. Kimmel and her husband acquired their interest in this property at a land auction from the Frontier International Land Corporation[89], whose President and Chairman of the Board of Directors was Dr. Dwane J. Sykes. Kimmel's affidavit attests that the Luker's were made aware of the existing SLE as follows:

> f. Furthermore, at the time of that 1999 sale my husband and I personally told Mr. and Mrs. Luker that both our auction parcels Ref. 7-4 and 7-3, purchased by them, were subject to roadway easements over the north 33 feet adjoining the section line…
>
> g. We further personally stressed to Mr. and Mrs. Luker that they could not close, block, lock or restrict travel over our long-existing entry road from Grange Hall Road within the north 33-foot right-of-way over our two 2.5 acre parcels sold to them, nor over the un-constructed 33-foot right-of-ways adjoining the section lines of our TL 3318 and their own TL 3208…
>
> 36. Shortly after the Walkers entered their homestead at 20 mile CHSR, Mrs. Walker became gravely ill. Leaving no one on his homestead, Mr. Walker took

[85] Ibid.
[86] Document 2004-024186-0 recorded on 10/25/2004, Fairbanks Recording District.
[87] Document 2001-026914-0 recorded on 11/29/2004, Fairbanks Recording District.
[88] Warranty Deed Kimmel to Luker, Book 1155 Page 11, recorded on 8/6/1999, FRD.
[89] Warranty Deed Frontier International Land Corp. to Donald C. and Cossette L. Kimmel, recorded in Book 93, Page 532 on November 25, 1977, FRD.

> his wife and young children outside to the lower 48 states for some years, where Mrs. Walker eventually died.
>
> 37. When Mr. Walker later returned, he discovered his house had been totally ransacked, even the walls and coverings striped out, and it was unusable and unlivable. In heart-broken discouragement and despair, he left and again abandoned his homestead for some time…

In November of 2011, Sykes made contact with the Right of Way section requesting that DOT&PF issue a letter attesting to the validity of section line easements over the Walker homestead patent.[90] Sykes provided data taken from the BLM online abstract system (ACRES) suggesting that there had been three separate entries (See Figure 2) by Walker prior to patent being issued. Syke's FAX stated the following:

> I was fortunate to locate a 1953-70 CHSR homesteader, personally familiar with this Walker homesteader, able to testify to the exact reasons and circumstances for Mr. Walker's three above-said entries, interruptions and re-entries. The Undisputed Facts and relevant portions of 11/19/2004 Recorded Affidavit of Cossette Kimmel enclosed with its copies of certified copies of the relevant BLM records, etc.
>
> Mr. Walker's own beliefs can be deducted from the BLM Case Abstract, i.e. Mr. Walker, himself, must have believed in his own mind, that his first entry became official abandoned, vacated and invalid. Otherwise, he would not have officially filed the second new entry. Same thing in his own mind for the second entry becoming invalid neccssitating [*sic*] the third and final entry.
>
> I purchased this homestead from original homesteader Walker, recorded Apr. 13, 1973[91], and partitioned it in 1974, sold parcels and still own several parcels. There are no vacations.

In response[92], DOT&PF advised Sykes that as his SLE question did not relate to a facility under their jurisdiction, no formal position would be taken on its validity. DOT did comment on a printout of the BLM Historical Index (HI) that was provided with Syke's FAX. They noted that many of the HI transactions included a "REL", "CANC" or "EXP" comment to identify those that had been relinquished, cancelled or expired. However, the comment associated with Walker's initial homestead application dated October 27, 1958 said, "SEE PAT 1234207 11/19/1963"

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[90] FAX from Dr. Dwane J. Sykes to John F. Bennett, DOT&PF Northern Region Right of Way Chief, November 29, 2011.

[91] Judicial Foreclosure Deed to Patricia Sykes, Book 273, Page 360, Recorded April 13, 1973, FRD.

[92] FAX from John F. Bennett, Right of Way Chief, DOT&PF to Dwane Sykes, December 1, 2011.

instead of providing any indication that the entry had been relinquished, cancelled or expired. The DOT&PF response to Sykes questioned whether BLM considered Walker's initial entry to have been relinquished or closed or if BLM allowed Walker's earlier claim to be continued. DOT further recommended that Sykes perform additional research with BLM or obtain a legal opinion.

CUSTOMER DATA

Cust ID:	000046772
Customer Name:	WALKER ELBRIDGE B
Customer Address:	Withheld

ADMINISTRATIVE/STATUS A

Date	Code Description:	Remarks
27-OCT-1958	001 Application Filed	--
10-JUL-1961	244 Final Proof Filed	--
10-JUL-1961	001 Application Filed	--
17-JUL-1961	244 Final Proof Filed	--
29-AUG-1961	244 Final Proof Filed	--
28-AUG-1963	176 Authorization Issued	ENTRY ALLOWED
19-NOV-1963	879 Patent Issued	--
19-NOV-1963	970 Case Closed	TITLE TRSF
27-AUG-1992	996 Converted To Prime	--

Figure 2 – BLM "ACRES" On-Line Abstract

A complaint regarding the disputed section line easement was filed in superior court on October 17, 2006.[93] Both parties represented themselves. Over the next 6 years leading to *Final Judgment*, the record indicates that 11 superior court judges were involved in some trial event with seven either recusing themselves, being pre-emptively disqualified by the plaintiff or defendant or administratively re-assigned. *CourtView*[94] indicates that 38 motions were filed by the parties most of which were filed by Sykes. While these statistics may seem excessive for a case with relatively low public impact, the opening paragraph in the *Memorandum Decision* appears to offer some insight:

> This is a relatively simple case involving right-of-way and easement disputes which despite its simplicity – has spanned decades and consumed an inordinate amount of resources. The court lays responsibility for the delays and costs of finally bringing the case to trial squarely on the prolixity and dilatory tactics of Dwane Sykes.

[93] *Sykes v. Luker*, Case 4FA-06-2646CI, Final Judgment issued on March 8, 2012.
[94] Alaska Courts Public Access Website https://records.courts.alaska.gov/eaccess/home.page.3

The court also noted that with Sykes requesting over a half million dollars in compensatory damages and punitive damages that could result in an award in excess of one million dollars, that "Anyone would be hard pressed to characterize this case as primarily about access. The court finds it is primarily about money." The *Memorandum Decision* is also fairly blunt in questioning the veracity of both party's testimony, their defiance of court orders and their delaying tactics.

As in the 2002 *Tubbs v. Luker* case, the 2006 *Sykes v. Luker* case also had the benefit of testimony from a professional land surveyor regarding section line easement evaluation. However, in this case, the surveyor testified on behalf of Sykes for the proposition that a section line easement did in fact exist. The basis of the court's finding appears to be based again on the BLM on-line abstract for the Walker homestead.

> Walker made three entry claims for the property: 27 October 1958, 10 July 1961, and finally in 28 August 1963. The first two entries were not successful; the last entry, after the filing of the U.S. Survey, ultimately resulted in the issuance of a patent to the Walkers. The court finds the critical entry for purposes of determining whether a section line easement applies is the last entry that resulted in the issuance of a patent. Here, that successful entry was after the U.S. survey and therefore is subject to the section line right-of-ways.

Regarding the easement issues, the court found Sykes' testimony and evidence more credible than that of the Lukers. With regard to the claim for damages, the court found that the Lukers' testimony was more credible and persuasive. As the court determined that the major issue in the litigation was damages, the Lukers were found to be the prevailing parties. On that basis, the rules of the court would have awarded the Lukers attorney's fees. However, as neither party were represented by counsel, both assumed their own costs.

Supreme Court:

Jilu Luker and Dwane Sykes both appealed the superior court's decision to the Alaska Supreme Court in May of 2012. Once again, both parties represented themselves.

The court references several cases that provide the basis for RS-2477 trail and section line easements in Alaska. They note that the critical element in this case is the date by which the public lands transitioned from unreserved status, required for imposition of an RS-2477 right-of-way, to reserved status.

> The parties agree that the property at issue was "reserved for private uses" once Elbridge Walker acquired the right to homestead on it. The Lukers contend this occurred in 1958, upon Walker's first application for patent. Sykes contends it

> did not occur until 1963, when the BLM, as the federal agency charged with administering the homestead laws, allowed Walker's entry.

The Supreme Court noted that the lower court was correct in concluding that the critical entry date for determination of the existence of a section line easement is the entry that resulted in the issuance of a patent. However, the decision goes on to say that, the superior court erred in its conclusion that the 1963 BLM "Notice of Allowance" was the critical event that established a valid entry for Walker.

> Under the now-repealed homestead laws, a party established a claim to land not when the federal authorities allowed entry but rather when the party took the steps necessary to have entry recognized. " '[Entry] means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim' in the appropriate land office. In Walker's case, that "inceptive right" was acquired when he filed his application for entry. Completing the application requirements and "fil[ing] his application in the United States Land Office" was "all that [an applicant] could possibly do to …[make] a lawful homestead entry".[95] At that point, the lands at issue became "subject to individual rights of a settler…[T]he portion covered by the entry [was then segregated from the public domain…and until such time as the entry may be cancelled by the government or relinquished, the land [was] not included in grants made by Congress under [RS 2477]."[96]

The court then disposes of Sykes' assertion that Walker's multiple "failed" entries are a result of his abandonment of his homestead. The court states that while such evidence might have been relevant in challenging Walker's homestead entry prior to patent, it was insufficient to show that his patent from BLM was defective.[97]

The Alaska Supreme Court reversed the superior court's finding that the Luker's property is burdened by an RS-2477 section line easement for the following reason:

> When section lines were later created in April 1962 upon the federal authorities' acceptance of the survey, Walker had already established his claim to the land, which had therefore ceased to be "public land, not reserved for public uses."

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[95] *Luker v. Sykes* citing *Hillstrand v. State*, 395 P.2d 74, 76 (Alaska, 1964) (quoting *Chotard v. Pope*, 25 U.S. 586, 588 (1827) & *United States v. 348.62 Acres of Land in Anchorage Recording Dist.* 10 Alaska 351, 364 (D. Alaska 1943) see also Hastings & D.R. Co. v. Whitney, 132 U.S. 357, 363 (1889).

[96] *Luker v. Sykes* citing *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961)

[97] See *State, Dept. of Transp. & Public Facilities v. First Nat. Bank of Anchorage*, 689 P.2d 483, Alaska 1984 - "Once the patent is issued, any defects in the preliminary steps required by the homestead laws are cured. When Pippel received his patent, his 1946 entry became presumptively valid." "The government should not be permitted retroactively to invalidate the deliberate actions of its officers after they have been reasonably relied on for 34 years."

The court found that Walker's homestead was not subject to the section line easements because both of his "application filed" dates preceded the survey approval date. The court states that Walker's application for homestead entry and final proof, both filed on July 10, 1961 met the requirements of the homestead laws and "At that point, the land became 'subject to individual rights of a settler…'"

We believe the court reached the correct conclusion but for the wrong reason. Once Walker's patent was issued on November 19, 1963, the doctrine of "relation back" vested his rights and segregated these lands from the public domain on the date of his initial application. Walker first filed his Notice of Location on October 27, 1958, nearly 3 ½ years prior to the approval of the township survey plat. At the time of plat approval, the lands were reserved by Walker's entry and not subject to imposition of a section line easement.

The court also suggests that the applicant could obtain patent subject to a later survey upon filing of the homestead entry application and final proof and that in some cases the patent could be issued without any survey at all. We believe that this is a misinterpretation of 48 U.S.C. § 371 (1958) by the court as we have yet to see a case where a patent has been issued for a homestead claim without benefit of a survey to define the location, size and shape of the patented lands. The statute cited by the court provides a mechanism to deal with situations where the public surveys have yet to be extended to the homestead area. Rather than have the homesteader who has met all the requirements to obtain a patent wait until the public land survey system has been extended, a provision under 48 U.S.C. § 359 can be triggered. This provision would allow a special survey (U.S. Survey) to be obtained at the expense of the claimant.

If the second "application filed" date noted in the abstract and used by the Court was dated after the township survey approval date, would the court have ruled that the homestead was in fact subject to the section line easement? That conclusion would have been in error but without going beyond the abstract and reviewing the case file documents, one might never know.

Walker Homestead Case File:

The Walker homestead case file was requested from the National Archives and was scanned and delivered electronically. The PDF file consisted of 80 pages.

The file indicates that the "Application Filed", date stamped by BLM on October 27, 1958 was in fact a *Notice of Location of Settlement or Occupancy Claim in Alaska*[98]. Walker

[98] BLM Form No. 4-1154 (July 1957)

claimed occupancy as of October 22, 1958 and qualified his homestead description as "…what will be when surveyed." At this stage of initial settlement, he could not file a *Homestead Entry Application* until the township survey had been completed. On March 24, 1959, BLM issued a letter to Walker accepting his claim for "recordation" in the BLM records. This action assigned a serial number to the claim, and advised Walker that there were no conflicts of record. In addition, the letter stated that his Location Notice was approved as of the date of its filing and that he may now "proceed to perfect his claim in accordance with the applicable regulations."

A note submitted by Walker on February 21, 1959 states, "as of Jan 31 we moved onto our homestead and took up residents (sic)." On October 3, 1960, after the section corner monuments had been established but prior to approval of the township survey plat, Walker filed an *Application for Amendment of Claim*[99]. Walker recognized that the pre-survey location of his homestead was in error resulting in his house falling outside of his claim boundaries.

On July 10, 1961, Walker filed his *Homestead Entry Application*[100] and his *Homestead Entry Final Proof*[101]. The BLM on-line abstract notes two additional "Final Proof Filed" entries on July 17, 1961 and August 29, 1961. These are the two witness affidavits[102] required to verify the residency, cultivation and improvements made by the entryman. On August 28, 1963, after BLM had performed an examination of the homestead, an "Entry Allowed" decision was issued for the Walker homestead. While the township survey was approved on April 16, 1962, the decision notes, "On September 21, 1962, the plat of survey embracing the lands in the claim was officially filed in this office. The regulations contained in 43 CFR 101.6(c) require that upon the filing of the official plat of survey, the claim must be adjusted to conform to the public survey." The *Certificate*[103] approving issuance of the homestead patent was dated November 14, 1963. Patent No. 1234207 was issued on November 19, 1963.

Although the Homestead regulations provided for a "Leave of Absence"[104] for a year or less due to sickness, there is no evidence in the Walker file that one was ever requested or that there was ever any indication of intent to abandon his homestead entry. None of this was evident because the parties to the case and the courts appear to have never reviewed the homestead case file.

[99] BLM Form No. 4-005 (July 1958)
[100] BLM Form No. 4-007 (November 1958)
[101] BLM Form No. 4-369 (July 1958)
[102] BLM Form No. 4-369a (April 1958)
[103] BLM Form No. 4-1195 (August 1961)
[104] 43 CFR § 65.16 Leave of absence. Title 43 Revised as of January 1, 1963

Conclusion:

The case law discussed in this paper establishes the rules by which a homestead entryman can obtain a vested right against the government. Prior to patent, the homesteader's rights cannot be vested by occupation and settlement alone and they cannot be vested by solely filing an application for entry and then failing to comply with the settlement requirements. Once patent is issued, the homesteader's rights vest by "relation back" to that date when they have made the first valid entry that led issuance of the patent. Prior activities such as settlement, occupation, possession and posting may protect a homesteader's rights as against other claimants, but a valid homestead entry *by application* must be made before the homesteader's rights are protected against the imposition of a federal action and the land is segregated from the public domain. To establish a valid entry, the homesteader must file a *Notice of Location of Settlement or Occupation* or a *Homestead Entry Application* at the Land Office.

In Walker's case, when he commenced his settlement in 1958, he could only file a *Notice of Location of Settlement or Occupation* because the land had not yet been surveyed. When the survey plat was filed with the land office on September 21, 1962, Walker had up to 3 months[105] after that date to file his *Homestead Entry Application.* However, Walker had filed his application for homestead entry more than a year prior to the plat filing because once the monuments had been set, he then knew the true relationship between his claim and the section lines. Once he had met all his homestead requirements under the Doctrine of "Relation Back"[106], his rights vested back to the date of his October 27, 1958 Notice of Location which would be considered as the date the lands were segregated from the public domain. While this doctrine may not protect the homestead entryman's interest against every type of federal action or withdrawal[107], the Public Land Orders establishing highway rights-of-way in Alaska were subject to "valid existing rights" and the RS-2477 based section line easements could only apply to "unreserved" public lands.

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[105] 43 CFR § 166.15 Initiation of settlement claims. Title 43 Revised as of January 1, 1963.

[106] Relation back is a legal doctrine that considers an act performed at one time to have taken place at an earlier time. See *Knapp v. Alexander-Edgar Lumber Company,* U.S. Supreme Court, April 5, 1915. "The homesteader has a preferential right to the land, and in order to give effect to this according to the spirit of the laws it must be and is held that when he has fulfilled the conditions imposed upon him and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act, so as to cut off intervening claimants."

[107] See *Albert A. Howe*, IBLA 76-676, September 15, 1976. "However, I would not conclude that this doctrine may be invoked to prevent a withdrawal by the United States from attaching to land subject only to a homestead application if there is a clear expression in the language of the withdrawal that such an inchoate right is not excepted from the effect of the withdrawal."

Why had the issue of multiple homestead applications as noted in the BLM abstract for *Luker v. Sykes* not been addressed in Alaska's prior key cases relating to rights-of-way? A review of *Hamerly v. Denton* (1961 RS-2477 Trail), *Girves v. Kenai Peninsula Borough* (1975 RS-2477 SLE), *Resource Investments v. State* (1984 PLO) and *DOT&PF v. First National Bank of Anchorage* (1984 PLO) indicates that all of these cases related to homestead entries on surveyed lands. Where the lands were already surveyed, the entryman was only required to file a single application for homestead entry as the notice of location of settlement was most commonly used to initiate a claim on un-surveyed lands.

The key lesson learned in this case was that without a review of the original homestead file, there is a risk that facts necessary for an accurate evaluation of a section line easement will be overlooked.

Other Federal Land Disposals

There are federal land disposals other than homesteads that may require evaluation of an RS-2477 or Public Land Order right-of-way. The initial intent of this project was to address all federal land disposal authorities in Alaska including Homesteads, Headquarters Sites, Homesites, Small Tracts, Trade & Manufacturing Sites, Federal Townsites, Federal Mining Claims and Native Allotments. A paper discussing Highway Rights-of-Way and Alaska Native Allotments was prepared on July 29, 2014. The focus of this paper was to be on Homesteads, however, similarities with Homesites, Headquarters Sites and Trade and Manufacturing Sites led to their discussion in this section.

Homesites and Headquarters Sites

A Homesite is essentially a homestead limited to 5 acres with no cultivation requirement and a reduced residence requirement. To qualify for patent under the Homesite Act[108], a person must first file a notice of location in the appropriate land office. Then, within the following 5 years, he must live on the land in a habitable house for at least 5 months during each of 3 years. Upon complying with these terms, the applicant may purchase the land at a cost of $2.50 per acre. A settler on unsurveyed lands is not required to pay the cost of the survey.

A Headquarters Site was for commercial and industrial land use and designed to provide a headquarters for fishermen, trappers, guides and others. A maximum of 5 acres could be obtained under the Headquarters Site Act[109]. A notice of location must be filed in the land office and application to purchase must be made within 5 years. The applicant must show that he is engaged in a productive industry and that he has established a headquarters in connection with that industry. The land may be purchased for $2.50 per acre and if the land is unsurveyed, the applicant must pay the cost of the survey.

The regulations governing disposition of Headquarters and Homesites can be found at 43 CFR § 64 (1963).

Lands subject to Homesite or HQ Site settlement must be vacant, unappropriated and unreserved as well as non-mineral in character. A BLM adjudication handbook[110] identifies the requirements for location to include the following:

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[108] *Act of May 26, 1934* (48 Stat. 809) – Homesite Act – This authority was repealed by the Federal Land Policy and Management Act of October 21, 1976 (FLPMA) with an October 21, 1986 effective date.

[109] *Act of March 3, 1927* (43 USC 687a) – Headquarters Site – Also repealed by FLPMA.

[110] *Settlement Claims and PLO 1613 Handbook/Bureau of Land Management,* Instruction Memorandum No. AK 87-197, April 2, 1987, Chapter II – 2563 Homesites or Headquarters.

The notice must be filed within 90 days after initiation of settlement and occupancy. If it is not, no credit shall be given for occupancy prior to the filing of the notice or application to purchase, whichever is earlier. Settlement and occupancy means staking the land, and beginning improvement or using the land. The initial act of settlement must be followed within a reasonable time by further acts of settlement and improvement. The five-year period allowed to "prove up" begins on the date the claimant files the notice with BLM. The mere filing of a Notice of Location does not segregate the land; acts of settlement and occupancy are needed to protect a persons right.

Trade & Manufacturing Sites

The Trade and Manufacturing Site Act[111] provides a means of obtaining title to lands for establishment of a business enterprise. An applicant should file a notice of location in the land office before making any substantial investment in the land. Notice must be filed within 90 days after making occupancy. A T&M site may include only as much acreage as is occupied and used by the applicant and cannot exceed 80 acres. Upon showing that all of the land applied for is being occupied for productive industry, within 5 years of the initial location, the claimant can apply to purchase the land for $2.50 per acre. If the land is unsurveyed, the applicant must pay for the cost of survey.

The requirements for location of a T&M site as stated in the BLM adjudication handbook[112] are the same as stated above for Headquarters and Homesites. The regulations governing disposition of Trade & Manufacturing sites can be found at 43 CFR § 81 (1963).

HQ/Home/T&M Site Pre-Patent Rights Q&A

1. Q: Does the filing of a location notice for headquarters/homesite/T&M site differ from that of a homestead?

   A: **No**. The headquarters/homesite/T&M site programs derive their basic authority from the *Act of May 14, 1898* that extended the homestead laws to Alaska and they use the same *Notice of Location of Settlement or Occupancy Claim* as would be used for a homestead.

2. Q: Can a settler establish their headquarters/homesite/T&M site rights that will prevent the effect of a withdrawal solely upon the filing of a *Notice of Location of Settlement or Occupation*?

[111] The statutory authority for Trade and Manufacturing Sites is Section 10 of the Act of May 14, 1898 (30 Stat. 413), as amended August 23, 1958 (72 Stat. 730; 43 U.S.C. 687a). The 1898 Act extended the homestead laws to the District of Alaska. The Authority for T&M sites was also repealed by FLPMA in 1976 effective October 21, 1976.

[112] *Settlement Claims and PLO 1613 Handbook*, Chapter I – 2562 Trade and Manufacturing Sites.

A: **No**. See *John D. Ketscher* (IBLA 1977 HQ & Homesites) "The filing of a notice of location for a headquarters site or a homesite does not create any rights in the land, and the filing of a notice will not prevent a withdrawal from attaching to the land if, prior to the effective date of the withdrawal, the locator fails to perform the requisite acts of use, occupancy and development necessary to establish a valid existing right in the claim.

Also see *Margaret L. Klatt* (IBLA 1975 T&M Site) "The mere filing of a notice of location for a trade and manufacturing site creates no rights in the land, 'the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of law under which the settler seeks to obtain title.'"

3. Q: Will the marking of boundaries of a headquarters/homesite/T&M site meet the requirements for use and occupancy?

   A: **No.** See *John D. Ketscher* (IBLA 1977 HQ & Homesites) "Marking of boundaries of the claim does not constitute use and development."

   Also see *Lough & Blackburn* (IBLA 1976 T&M Site) "The Board has held that the marking of the boundary lines and the posting of the corners of the tract does not constitute occupation or possession."

4. Q: Does a homesite settler whose claim is solely by occupation and possession maintain any rights as against the government before they file a *Notice of Location* with the Land Office?

   A: **No**. See *Knute P. Lind* (IBLA 1975 HQ & Homesites) "A claimant's occupancy of a homesite prior to a withdrawal does not establish a 'valid existing right,' excepted by the withdrawal, under the Act of April 29, 1950, where claimant did not file his notice of location within 90 days after occupancy, nor did he file a notice of location or purchase application prior to the withdrawal."

   Also see *Kennicott Copper Corporation* (IBLA 1972 T&M Site): "A claimant's occupancy of a trade and manufacturing site prior to a withdrawal does not establish a 'valid existing right' excepted by the withdrawal where credit for his occupancy prior to the withdrawal cannot be given under the act of April 29, 1950, because the claimant did not file a notice of location or purchase application prior to the withdrawal."

The cases cited in the Q&A indicate that after April 29, 1950[113], a person initiating a claim for a Homesite/Headquarters Site[114] or Trade & Manufacturing Site[115] must file a notice of the claim at the Land Office within 90 days. Failure to do so, even with substantial use and occupation will not result in a "valid existing right" that can defeat the application of an RS-2477 or PLO based right-of-way.

Prior to 1950, there was not a 90-day deadline in which to file an application. However, similar to a homestead claim, a *Notice of Location of Settlement or Occupancy* must be paired with the acts of use and improvement to establish the rights of the settler as against the government. Unlike a homestead entry on surveyed lands, a claimant of a Homesite, Headquarters Site or T&M Site cannot merely file an application to purchase and establish a "valid existing right" without demonstrating use and occupancy.

HQ/Home/T&M Site Post-Patent Rights

Q: If a federal right-of-way is issued over land subject to an unperfected homesite entry, will the patent be subject to the right-of-way?

A: **No**. The legal doctrine of "relation back" holds that the entryman's rights date from the time the claim was made, not from the time the patent was issued. "The approval or grant of the right-of-way over entered, but unpatented land ripens to a vested right only if and when the entry fails. Such allowed entries segregate the land retroactively to the date of application with the effect that all subsequent applications must be rejected". "Since the grant for this right-of-way was made subject to valid existing rights and title to the land subsequently passed to the applicant who held the land at the time the right-of-way was granted, the grant is hereby declared null and void."[116]

Examples

Only one T&M site case file was available for review at the time of this report. The BLM "ACRES" on-line abstract the Gus A. Benson T&M Site indicated an "Application Filed" date of August 15, 1958 that matched the Notice of Location application. The Notice of Location cited the same date for settlement or occupancy. This was followed by a "Purchase Apln Received"

[113] *Act of April 29, 1950, as amended, 43 U.S.C. § 687a-1. P.L. 493* "To require settlers on public lands in Alaska to record notice of their settlement claims in the land office for the district in which the lands are situated, and for other purposes."

[114] See *43 CFR § 64.6a Notice of initiation of claim.*

[115] See *43 CFR § 81.1a Notice of initiation of claim.*

[116] BLM Decision dated July 26, 1985 for F-12039, Project No. F-037-2(2) Moody to McKinley Park, Parcels 15 and 16. This Decision relates to a Trade & Manufacturing Site F-034868 patented to Stephen E. Jones as No. 50-71-0136 on April 30, 1974.

entry dated November 26, 1959. Oddly, the actual *Application for the Purchase of Trade & Manufacturing Site* was date stamped by BLM on November 16, 1959. Patent No. 1226539 was issued to Benson on April 25, 1962. Once patented, Benson's rights related back to his date of valid entry.

A Homesite entry for the Boundary Lodge is located on the Top of the World highway near the Canadian border. This case involves the application of a PLO 601 highway withdrawal that was effective on August 10, 1949. Boundary Lodge (U.S. Survey No. 3001) had documented occupancy dating back to 1938 with a Homesite application dated 2/9/50 or about 6 months after the effective date of PLO 601. A prior review presented in the 2013 edition of *Highway Rights-of-Way in Alaska* gave weight to the early occupation in a section titled "Date of Occupation vs. Application. The conclusion at the time was that the Homesite claim was not subject to the PLO ROW due to the date of occupation preceding PLO 601. A new review would conclude that the entryman's rights were established and the land segregated from the public domain as of the date of the Homesite application by the doctrine of "relation back". As the effective date of the PLO precedes the date of application, the Homesite claim would be subject to a highway easement.

Alaska Case Law

The HQ/T&M/Homesite claims were extensions of the Homestead laws. *Dillingham*[117] discussed the Felder homestead with occupation dating to the late 1920's and the initial application to enter filed in April of 1940. The court held the following:

> Felder's first valid entry under the homestead law was made in 1940. D.C. Co. admits that until then Felder was only a squatter, but claims that the land was nevertheless withdrawn from the public domain. We disagree with D.C. Co.'s conclusion. The *Hamerly*[118] court explicitly required official action in order to withdraw lands from the public domain. In the paragraph quoted above, the court referred to entry "*under the homestead laws.*"

Hillstrand[119], citing the 1827 U.S. Supreme Court decision in *Chotard v. Pope*[120] stated the following:

> In homestead law the term 'entry' is usually used to designate the initiatory proceedings taken for the acquisition of a portion of the public lands. As was said in Chotard v. Pope, 'It [entry] means that act by which an individual acquires

[117] *Dillingham Commercial Company, Inc. v. City of Dillingham*, 705 P.2d 410, Alaska, August 16, 1985.
[118] *Hamerly v. Denton,* 359 P.2d 121, Alaska, January 27, 1961.
[119] *Hillstrand v. State*, 395 P.2d 74, Alaska, September 8, 1964.
[120] *Chotard v. Pope*, 25 U.S. 586, U.S. Supreme Court, January 1827.

> an inceptive right to a portion of the unappropriated soil of the country, by filing his claim' in the appropriate land office.

Conclusion

As stated in the Homestead Entry review, once a patent has been issued, the claimant's rights relate back to the date of the initial application that led to patent. A full review of the relevant case file is recommended.

Note that there will always be an exception to the rule. While it is believed that this conclusion will apply to most Headquarters, Trade & Manufacturing and Homesite claims, special circumstances could result in an alternate conclusion. An example would be a Homesite claim filed within a National Forest. On its face, it would appear that a Homesite claim could not be filed within a National Forest, as those lands would not be considered unreserved. However, there was a provision where a Homesite initially permitted by the Forest Service could go to patent upon the Forest Service releasing the Homesite area from their jurisdiction.