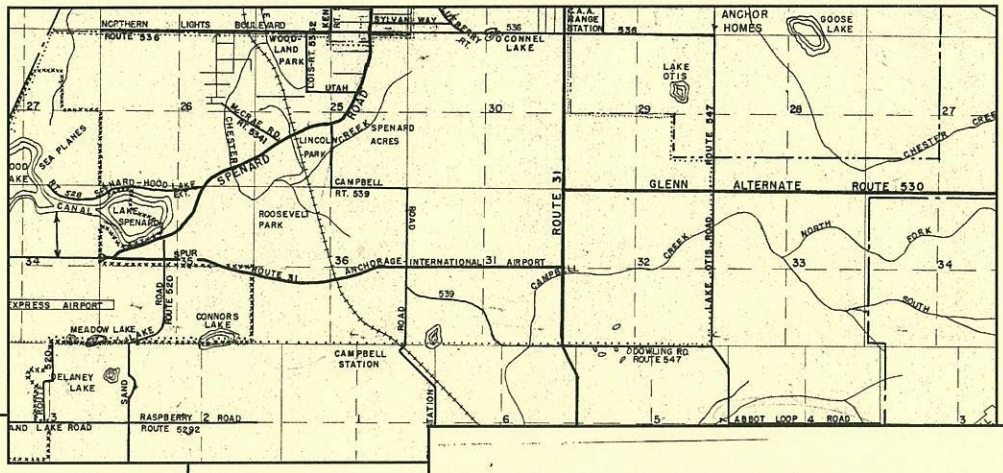
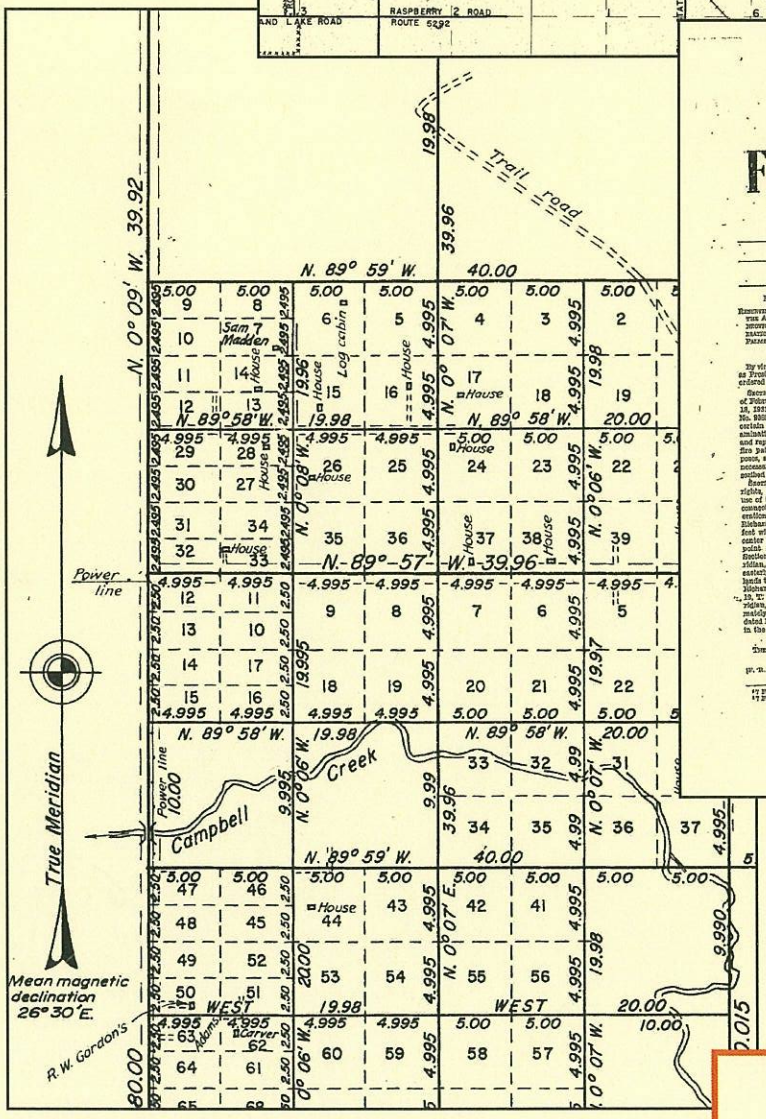
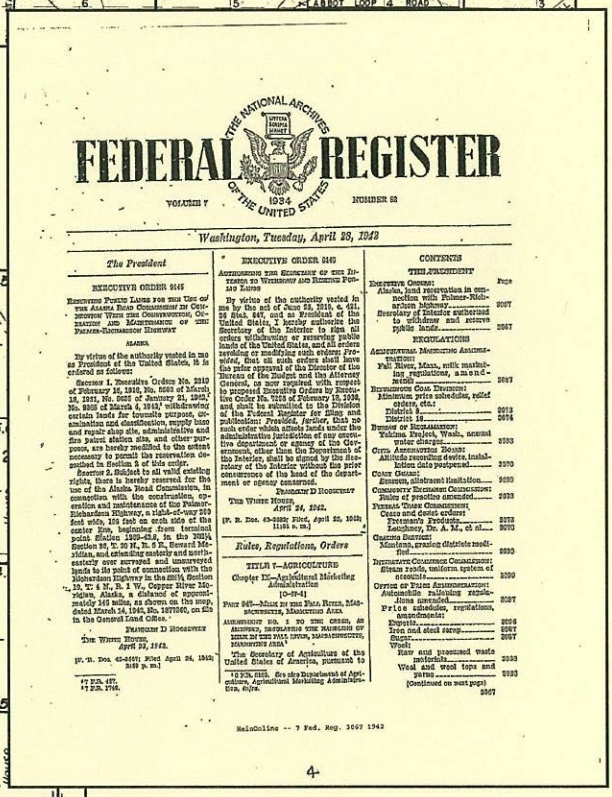
Introduction to Public ROW Research







THE NATIONAL ARCHIVES

FEDERAL REGISTER

OF THE UNITED STATES

VOLUME 7 — 1942 — NUMBER 82

Washington, Tuesday, April 28, 1942

The President

EXECUTIVE ORDER 9145

EXECUTIVE ORDER 9146

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AMENDMENT NO. 2 TO THE ORDER, AS AMENDED, REGULATING THE HANDLING OF MILK IN THE FALL RIVER, MASSACHUSETTS, MARKETING AREA

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Prepared By James H. Sharp, PLS
for the Student Strand
Alaska Survey and Mapping Conference 2010

Introduction to Public ROW Research

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Contents

Chapter 1

Public Right of Way Definition

We'll refer to the Public as the aggregate of citizens of a state, nation or municipality. Right of Way is a term used to describe a right of one party to pass over the land of another. Public Right of Way (hereafter called Public ROW) then will, simply, be the right of the public to pass over the land of another.

The land interest is often confused in a discussion of Right of Way. I like to separate the two. The common form of interest over and across the land of another is usually an easement interest, but sometimes fee ownership separates it from the adjoining lands. For the purpose of passage it usually doesn't matter what the underlying interest is. The ownership of the underlying interest becomes important when you want to erect a sign, sell the gravel or any other use that is not directly related to passage.

Often confusing is exactly what can the Public ROW be used for. For instance, can it be used to bury an oil pipeline regardless of who owns the underlying right? It is often argued that if the oil were transported in a truck, that would be a legitimate use of the ROW. So you be the judge of the difference when it is transported in a pipeline. I am not going to attempt to clarify other uses in this short discussion. This discussion will look very simply at the ground rules for a Public ROW to attach to land.

What's affected?

Much of the Public ROW in Alaska is the result of Legislation implemented by the Federal Government. The Territory of Alaska was responsible for some of it. The State of Alaska was and is responsible for most of the rest of it. Public ROW was and continues to be created by State Legislation affecting State lands.

How is it affected?

The land that the Public ROW crosses is burdened by the right of passage. Keep in mind that the rights generally attach while the land is public. When the land is taken up or reserved it is no longer unreserved un-appropriated public land. The term **"unreserved, unappropriated public land"** is one that I will mention over and over again. I want you to remember this term because it is essential for a Public ROW, as we are discussing here, to attach.

Who owns the rights?

The Federal Legislation that created many of the Public ROWs made the Federal Government the owner. Or should I simply say the manager, because the public really owns the right, but the public can't effectively manage the right. At Statehood most of the Public ROWs that the Federal Government managed (usually through the Alaska Road Commission or later the Bureau of Public Roads) were transferred to Alaska with the Omnibus Act. Most of the major Public ROWs in Alaska today are managed by the Department of Transportation and Public Facilities or the Department of Natural Resources.

Adverse Possession

It is important here to make a statement regarding adverse possession. Prescriptive Right of Way is a common term you will see relating to highway rights of way. This occurs where a public road or trail exists without the benefit of a bona fide right of way for the statutory period of time. Several different situations can occur that cause this to take place. For instance a road is planned and constructed across federal land but a piece was entered. The road gets built and is used for many years, however a portion of the road was without a defined right of way. A prescriptive right of way will attach and the rights will extend to the limit of use, which may include snow storage or clearing for sight distance beyond the footprint of the road.

There is another side to adverse possession that you should be aware of. The sovereign is protected from adverse possession. The sovereign includes the Federal Government, State of Alaska, Municipalities, Cities, Boroughs, etc. The Alaska Legislature extended this protection Native Corporation land for the reason that it is not reasonable to settle a boundary through this method of adverse possession when the owner owns so much land that they can't be responsible to police it all.

Chapter 2

Revised Statute 2477

Introduction

The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) The Federal offer for road easements over public lands was made through the following:

> "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The above referenced Section 8 of the 1866 Mining Law was redesignated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932)

On ASPLS web site

Highway Rights of Way in Alaska

(Prepared by John F. Bennett, PLS, SR/WA, Right of Way Engineering Supervisor for the Alaska Department of Public Transportation and Public Facilities, Northern Region)

rev. 11/1/93

I. Introduction

The following is a compilation of notes relating to highway rights of way in Alaska. It is not to be construed as a comprehensive or complete statement and analysis of the legislation and legal issues upon which these rights of way are based.

The discussion in this paper is primarily limited to those highway rights of way established by State or Federal legislation and under the jurisdiction of the predecessors of the Department of Transportation and Public Facilities. Rights of way created by condemnation, conveyance, prescription, dedication, permitting by the State of Alaska and recent federal acts such as ANCSA, ANILCA, FLPMA, are not covered.

The primary intent of this presentation is to provide the land professional with an understanding of the process by which many of the highway rights of way in Alaska were established as well as some guidelines and sources of information which can be used to determine whether a particular property is impacted by these rights of way.

Daniel W. Beardsley, SR/WA and Attorney at Law is acknowledged for providing portions of the case law summaries and analyses as well as for "firing me up" to put this collection of right of way information to print.

II. History

The Department of Transportation and Public Facilities is the primary management authority for highways in Alaska. Therefore, it is appropriate to review the history of the agency for whose benefit many of the rights of way to be discussed were established.

Prior to the establishment of the Alaska Road Commission, there were several pieces of Federal legislation dating back to 1900 relating to the appropriation of funds for the War Department to construct military roads in Alaska. The Act of April 27, 1904 (P.L. 188 - 33 Stat. 391) was of particular interest in that it provided for mandatory service of the male population in the construction and maintenance of public roads. Specifically, it required that "all male persons between eighteen and fifty years of age who have resided thirty days in the district of Alaska, who are capable for performing labor on roads or trails...to perform two days' work of eight hours each in locating, constructing, or repairing public roads or trails...or furnish a substitute,...or pay the sum of four dollars per day for two days' labor."

The roots of what is now the Department of Transportation and Public Facilities began with the Act of January 27, 1905 (P.L. 26 - 33 Stat. 391) which established the Alaska Road Commission under the direction of the Secretary of War. "The said board (of road commissioners) shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of said district to any town, mining or other industrial camp or settlement, or between any such towns, camps, or settlements therein."

In 1917 the Territorial legislature created a territorial Board of Road Commissioners and appropriated funds for road construction. On May 3, 1917 (Ch. 36, SLA 1917 Section 13) the legislature also addressed rights of way..."The Divisional Commission shall classify all public Territorial roads and trails in the divisions as wagon roads, sled road, or trails...The lawful width of right of way of all roads or trails shall be sixty feet (60).

Pursuant to the Act of June 30, 1932 (P.L. 218 - 47 Stat. 446)(48 USC 321a), Congress transferred administration over the roads and trails in Alaska to the Secretary of the Interior and authorized the construction of roads and highways over the vacant and unappropriated public lands under the jurisdiction of the Department of the Interior. This statute did not specify the width of the rights-of-way which may be established.

The Secretary of the Interior's jurisdiction over the Alaskan road system ended on June 29, 1956 when Congress enacted section 107(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), which transferred the administration of the Alaskan Roads to the Secretary of Commerce. The Commerce department operated the system as the Bureau of Public Roads.

On April 1, 1957 the Territory of Alaska enacted the Alaska Highway & Public Works Act of 1957 in order to create a Highway Division to carry out a planning, construction, and maintenance program.

The transfer of the Department of Interior's jurisdiction to the Department of Commerce was reiterated on August 27, 1958, when Congress revised, codified, and reenacted the laws relating to highways as Title 23 of the U. S. Code. (P.L. 85-767, Sect. 119 - 72 Stat. 898).

The Alaska Omnibus Act, enacted on June 25, 1959 (P.L. 86-70 - 73 Stat. 141), directed the Secretary of Commerce to convey to the State of Alaska all lands or interests in lands "owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." 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. Although not all of the conveyed rights of way were considered "constructed", the system mileage of the rights of way included 2,200 miles classified as "primary" system routes, 2,208 miles of "secondary class A" routes, and 990 miles of "secondary class B" routes for a total of 5,399 miles of rights of way.

vacation should follow similar guidelines as that for a section line easement. The proposed rewrite to 11 AAC 53, DNR's surveying regulations is purported to deal with the issue of vacation of RS 2477 trails as well as section line easements.

RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976. However, the application of the RS 2477 grant was effectively eliminated by a series of public land orders which eventually withdrew all federal public lands in Alaska. (See section III b. *RS 2477 - Section Line Easements - discussion on lands not reserved for public uses.*)

Surveyors with an interest in the RS 2477 issue are advised to recognize that the State and Federal positions differ significantly and are currently in a state of flux. Check with BLM and DNR for the latest information regarding the RS 2477 issue.

b. Section Line Easements

The offer of a right of way for highways across unreserved, unappropriated Federal lands provided in the aforementioned Mining Law of 1866 is also the basis for Section line rights of way. The position of Federal agencies suggests that section line easements cannot exist on Federal lands as the construction requirement of the RS 2477 grant was not fulfilled. The State position on section line easements is outlined in the 1969 Opinions of the Attorney General No. 7 dated December 18, 1969 entitled Section Line Dedications for Construction of Highways.

The acceptance of the offer became effective on April 6, 1923, when the Territorial legislature passed Chapter 19 SLA 1923 which provided that "A tract of 4 rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways..."

The section line easement law remained in effect until January 18, 1949. On this date the legislature accepted the compilation of Alaska law which also repealed all laws not included. By failing to include the 1923 acceptance, the section line easement law was therefore repealed.

On March 26, 1951, the legislature enacted Ch. 123 SLA 1951 which stated that "A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways..." The 1953 law was amended on March 21, 1953 by Ch. 35 SLA 1953, to include "a tract 4 rods wide between all other sections in the Territory..." (See Alaska Statute AS 19.10.010 Dedication of land for public highways.)

For a section line easement to become effective, the section line must be surveyed under the normal rectangular system. On large areas such as State or Native selections, only the exterior boundaries are surveyed, therefore no section line easements could attach to interior section lines unless further subdivisional surveys were carried out. The 1969 Opinion of the Attorney General regarding section line easements states that an easement can attach to a protracted survey, if the survey has been approved and the effective date has been published in the Federal Register. The location of the easement is however subject to subsequent conformation with the official public land survey and therefore cannot be used until such a survey is completed.

Land surveyed by special survey or mineral survey are not affected by section line easements since such surveys are not a part of the rectangular net. However, the location of a special or mineral survey which conflicts with a previously established section line easement cannot serve to vacate the easement.

Acceptance of the RS 2477 offer can only operate upon "public lands, not reserved for public uses". Therefore, if prior to the date of acceptance there has been a withdrawal or reservation by the Federal government, or a valid homestead or mineral entry, then the particular tract is not subject to the section line dedication. The offer of the RS 2477 grant was still available until its repeal by Title VII of the Federal Land Policy and Management Act (90 Stat. 2793) on October 21, 1976. However, prior to the repeal, the application of new section line easements was effectively eliminated by a series of public land orders withdrawing Federal lands in Alaska. Public Land Order 4582 of January 17, 1969 withdrew all public lands in Alaska not already reserved from all forms of appropriation and disposition under the public land laws. PLO 4582 was continued in force until passage of the Alaska Native Claims Settlement Act on December 18, 1971. While repealing PLO 4582, ANCSA also withdrew vast amounts of land for native selections, parks, forests and refuges. A series of PLO's withdrew additional acreage between 1971 and 1972. PLO 5418 dated March 25, 1974 withdrew all remaining unreserved Federal lands in Alaska. Therefore it is noted that as of March 25, 1974, there could be no new section line easements applied to surveyed Federal lands.

The Alaska Supreme Court has decided that a utility may construct a powerline on an unused section line easement reserved for highway purposes under AS 19.10.010 Use of rights-of-way for utilities. Alaska Administrative Code 17 AAC 15.031 Application for Utility Permit on Section Line Rights-of-way provides for permitting by the Department of Transportation. The process for vacating a section line easement is provided in the DNR Administrative Code 11 AAC 53. A section line vacation requires approval from the Departments of Transportation and Natural Resources and the approval of a platting authority, if one exists in the area of the proposed vacation.

CHAPTER 18.

AN ACT

[S. B. 57]

To amend Section Eight Hundred Eighty Four (884) of the Compiled Laws of Alaska 1913, relative to proof of service of summons or of deposit thereof in the Post Office.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Section 884 of the Compiled Laws of Alaska 1913 be and the same hereby is amended to read as follows:

"Section 884. Proof of the service of the summons or of the deposit thereof in the post office, shall be as follows: Proof of service of summons.

"First. If the service or deposit in the post office be by the marshal or his deputy, the certificate of such officer; or,

"Second. If by any other person, his affidavit thereof; or,

"Third. In case of publication, the affidavit of the publisher of the newspaper, the manager, the foreman, or the principal clerk showing the same; or,

"Fourth. The written admission of the defendant in case of service otherwise than by publication; the certificate, affidavit, or admission must state the time and place of service; and in case of deposit in the post office, the time and place thereof."

Approved April 4, 1923.

CHAPTER 19.

AN ACT

[S. B. 8]

To dedicate for highway purposes a tract four rods wide along each section line.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. A tract of four rods wide between each section of land in the Territory of Alaska is hereby

Tract of land on section lines dedicated for highway purposes.

dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.

Approved April 6, 1923.

CHAPTER 20.

AN ACT

[S. B. 17]

To repeal Section 500 Compiled Laws of Alaska, requiring husband to join with wife in conveying the wife's property.

Be it enacted by the Legislature of the Territory of Alaska:

Sec. 500 Compiled Laws Repealed.

Section 500 of the Compiled Laws of Alaska is hereby repealed.

Approved April 6, 1923.

CHAPTER 21.

AN ACT

[S. B. 23]

To amend Section 1112 of the Compiled Laws of Alaska providing for the adjournment of sales of property on execution.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That Section 1112 of the Compiled Laws of Alaska is hereby amended so as to read as follows:

Postponement of sale of property on execution by marshal for advantage of all concerned.

"If, at the time appointed for the sale, the marshal should deem it for the advantage of all concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the sale not exceeding one week next after the day appointed, and so from

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Washington, Tuesday, April 28, 1942

The President

EXECUTIVE ORDER 9145

RESERVING PUBLIC LANDS FOR THE USE OF THE ALASKA ROAD COMMISSION IN CONNECTION WITH THE CONSTRUCTION, OPERATION AND MAINTENANCE OF THE PALMER-RICHARDSON HIGHWAY

ALASKA

By virtue of the authority vested in me as President of the United States, it is ordered as follows:

SECTION 1. Executive Orders No. 2819 of February 16, 1916, No. 5502 of March 18, 1931, No. 9035 of January 21, 1942,[1] No. 9085 of March 4, 1942,[2] withdrawing certain lands for townsite purpose, examination and classification, supply base and repair shop site, administrative and fire patrol station site, and other purposes, are hereby modified to the extent necessary to permit the reservation described in Section 2 of this order.

SECTION 2. Subject to all valid existing rights, there is hereby reserved for the use of the Alaska Road Commission, in connection with the construction, operation and maintenance of the Palmer-Richardson Highway, a right-of-way 200 feet wide, 100 feet on each side of the center line, beginning from terminal point Station 1369-42.8, in the NE¼ Section 36, T. 20 N., R. 5 E., Seward Meridian, and extending easterly and northeasterly over surveyed and unsurveyed lands to its point of connection with the Richardson Highway in the SE¼ Section 19, T. 4 N., R. 1 W., Copper River Meridian, Alaska, a distance of approximately 145 miles, as shown on the map, dated March 14, 1942, No. 1877260, on file in the General Land Office.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
April 23, 1942.

[F. R. Doc. 42-3667; Filed April 24, 1942; 2:59 p. m.]

[1] 7 F.R. 457.
[2] 7 F.R. 1746.

EXECUTIVE ORDER 9146

AUTHORIZING THE SECRETARY OF THE INTERIOR TO WITHDRAW AND RESERVE PUBLIC LANDS

By virtue of the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, and as President of the United States, I hereby authorize the Secretary of the Interior to sign all orders withdrawing or reserving public lands of the United States, and all orders revoking or modifying such orders: *Provided*, that all such orders shall have the prior approval of the Director of the Bureau of the Budget and the Attorney General, as now required with respect to proposed Executive Orders by Executive Order No. 7298 of February 18, 1936, and shall be submitted to the Division of the Federal Register for filing and publication: *Provided, further*, that no such order which affects lands under the administrative jurisdiction of any executive department or agency of the Government, other than the Department of the Interior, shall be signed by the Secretary of the Interior without the prior concurrence of the head of the department or agency concerned.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
April 24, 1942.

[F. R. Doc. 42-3682; Filed, April 25, 1942; 11:04 a. m.]

Rules, Regulations, Orders

TITLE 7—AGRICULTURE

Chapter IX—Agricultural Marketing Administration

[0-47-1]

PART 947—MILK IN THE FALL RIVER, MASSACHUSETTS, MARKETING AREA

AMENDMENT NO. 1 TO THE ORDER, AS AMENDED, REGULATING THE HANDLING OF MILK IN THE FALL RIVER, MASSACHUSETTS, MARKETING AREA[1]

The Secretary of Agriculture of the United States of America, pursuant to

[1] 6 F.R. 6166. See also Department of Agriculture, Agricultural Marketing Administration, *infra*.

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THE PRESIDENT

REGULATIONS

(Continued on next page)

Reference No. 957

Federal Register Data

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PLO No. 601
Date Signed: 8/10/49
Filed Date: 8/15/49

[Public Land Order 601]

ALASKA

RESERVING PUBLIC LANDS FOR HIGHWAY PURPOSES

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Executive Order No. 9143 of April 23, 1942, reserving public lands for the use of the Alaska Road Commission in connection with the construction, operation, and maintenance of the Palmer-Richardson Highway (now known as the Glenn Highway), is hereby revoked.

Public Land Order No. 385 of July 31, 1947, is hereby revoked so far as it relates to the withdrawal, for highway purposes, of the following-described lands:

(a) A strip of land 600 feet wide, 300 feet on each side of the center line of the Alaska Highway (formerly the Canadian Alaskan Military Highway) as constructed from the Alaska-Yukon Territory boundary to its junction with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 600 feet wide, 300 feet on each side of the center line of the Gulkana-Slana-Tok Road as constructed from Tok Junction at about Mile 1319 on the Alaska Highway to the junction with the Richardson Highway near Gulkana, Alaska.

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for highway purposes:

THROUGH ROADS

Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.

FEEDER ROADS

Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok Eagle Road, Ruby-Long-Foorman Road, Nome-Solomon Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.

LOCAL ROADS

All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

With respect to the lands released by the revocations made by this order and not rewithdrawn by it, this order shall become effective at 10:00 a. m. on the 35th day after the date hereof. At that time, such released lands, all of which are unsurveyed, shall, subject to valid existing rights, be opened to settlement under the homestead laws and the homesite act of May 26, 1934, 48 Stat. 809 (48 U. S. C. 461), only, and to that form of appropriation only by qualified veterans of World War II and other qualified persons entitled to preference under the act of September 27, 1944, 58 Stat. 747, as amended (43 U. S. C. 279–284). Commencing at 10:00 a. m. on the 126th day after the date of this order, any of such lands not settled upon by veterans shall become subject to settlement and other forms of appropriation by the public generally in accordance with the appropriate laws and regulations.

OSCAR L. CHAPMAN,
Under Secretary of the Interior.

AUGUST 10, 1949.

[F. R. Doc. 49-6642; Filed, Aug. 15, 1949; 8:48 a. m.]

ALASKA

NOTICE FOR FILING OBJECTIONS TO ORDER RESERVING PUBLIC LANDS FOR HIGHWAY PURPOSES

For a period of 60 days from the date of publication of the above entitled order, persons having cause to object to the terms thereof may present their objections to the Secretary of the Interior. Such objections should be in writing, should be addressed to the Secretary of the Interior, and should be filed in duplicate in the Department of the Interior, Washington 25, D. C. In case any objection is filed and the nature of the opposition is such as to warrant it, a public hearing will be held at a convenient time and place, which will be announced, where opponents to the order may state their views and where the proponents of the order can explain its purpose, intent, and extent. Should any objection be filed, whether or not a hearing is held, notice of the determination by the Secretary as to whether the order should be rescinded, modified or let stand will be given to all interested parties of record and the general public.

OSCAR L. CHAPMAN,
Under Secretary of the Interior.

AUGUST 10, 1949.

[F. R. Doc. 49-6641; Filed, Aug. 15, 1949; 8:48 a. m.]

Published 8/16/49
Vol. 14 No. 157
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Reference No. 1138

Federal Register Data

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Volume: 16
Page: 10749 & 10750

PLO No. 757
Date Signed: 10/16/51
Filed Date: 10/19/51

[Public Land Order 757]

ALASKA

AMENDMENT OF PUBLIC LAND ORDER NO. 601 OF AUGUST 10, 1949, RESERVING PUBLIC LANDS FOR HIGHWAY PURPOSES

By virtue of the authority vested in the President and pursuant to Executive Order 9337 of April 24, 1943, it is ordered as follows:

The sixth paragraph of Public Land Order No. 601 of August 10, 1949, reserving public lands for highway purposes, commencing with the words "Subject to valid existing rights", is hereby amended to read as follows:

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for highway purposes.

Easements having been established on the lands released by this order, such lands are not open to appropriation under the public-land laws except as a part of a legal subdivision, if surveyed, or an adjacent area, if unsurveyed, and subject to the pertinent easement.

OSCAR L. CHAPMAN,
Secretary of the Interior.

OCTOBER 16, 1951.

[F. R. Doc. 51-12074; Filed, Oct. 19, 1951; 9:02 a. m.]

Converted from WLD to Esmt

Reference No. 1139

Federal Register Data

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No. : 205 Page: 10752

SECRETARIAL ORDER No. 2665
Part Affected: Hwy Rights-of-Way
Date Signed: 10/16/51

Office of the Secretary

[Order 2665]

Rights-of-Way for Highways in Alaska

October 16, 1951.

Section 1. *Purpose.* (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U. S. C. 321a).

Sec. 2. *Width of public highways.* (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.

(2) For feeder roads: Abbert Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram road, Steese Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasilla Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Slana to Nabesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Eureka Road, North Park Boundary to Kantishna Road, Paxson to McKinley Park Road, Sterling Landing to Ophir Road, Iditarod to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 100 feet on each side of the center line thereof.

(3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

Sec. 3. *Establishment of rights-of-way or easements.* (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

Sec. 4. *Road maps to be filed in proper Land Office.* Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public.

Oscar L. Chapman,
Secretary of the Interior.

[F. R. Doc. 51-12680; Filed, Oct. 19, 1951; 8:46 a. m.]

Reference No. 1238

Federal Register Data

Published: 7/24/52
No. : 144

Volume: 17
Page: 6795

SECRETARIAL ORDER No. 2665
Part Affected: Hwy Rights-of-Way
Date Signed: 7/17/52

[Order 2665, Amdt. 1]

ALASKA

RIGHTS-OF-WAY FOR HIGHWAYS

The right-of-way or easement for highway purposes covering the lands embraced in local roads established over the public lands in Alaska by section 2 (a) (3) and section 3 (b) of Order No. 2665 of October 16, 1951 (16 F. R. 10752), is hereby reduced, so far as it affects the Otis Lake Road, to 30 feet on each side of the center line thereof over the following-described lands only:

SEWARD MERIDIAN

T. 13 N., R. 3 W.,
Sec. 21, N½SW¼ and SW¼SW¼.

OSCAR L. CHAPMAN,
Secretary of the Interior.

JULY 17, 1952.

[F. R. Doc. 52-8071; Filed, July 23, 1952; 8:47 a. m.]

Reference No. 1573

Federal Register Data

Published: 9/21/56
No. : 184

Volume: 21
Page: 7192

SECRETARIAL ORDER No. 2665
Date Signed: 9/15/56
Filed Date: 9/20/56

Office of the Secretary

[Order 2565, Amdt. 2]

ALASKA

RIGHTS-OF-WAY FOR HIGHWAYS

SEPTEMBER 15, 1956.

1. Section 2 (a) (1) is amended by adding to the list of public highways designated as through roads, the Fairbanks-International Airport Road, the Anchorage-Fourth Avenue-Post Road, the Anchorage International Airport Road, the Copper River Highway, the Fairbanks-Nenana Highway, the Denali Highway, the Sterling Highway, the Kenai Spur from Mile 0 to Mile 14, the Palmer-Wasilla-Willow Road, and the Steese Highway from Mile 0 to Fox Junction; by re-designating the Anchorage-Lake Spenard Highway as the Anchorage-Spenard Highway, and by deleting the Fairbanks-College Highway.

2. Section 2 (a) (2) is amended by deleting from the list of feeder roads the Sterling Highway, the University to Ester Road, the Kenai Junction to Kenai Road, the Palmer to Finger Lake to Wasilla Road, the Paxson to McKinley Park Road, and the Steese Highway, from Mile 0 to Fox Junction, and by adding the Kenai Spur from Mile 14 to Mile 31, the Nome-Kougarok Road, and the Nome-Teller Road.

FRED A. SEATON,
Secretary of the Interior.

[F. R. Doc. 56-7583; Filed, Sept. 20, 1956; 8:45 a. m.]

Reference No. 1684

Federal Register Data

Published: 4/11/58
No. : 72

Volume: 23
Page: 2376 - 2378

PLO No. 1613
Date Signed: 4/07/58
Filed Date: 4/10/58

[Public Land Order 1613]

[225901]

ALASKA

REVOKING PUBLIC LAND ORDER NO. 601 OF AUGUST 10, 1949, WHICH RESERVED PUBLIC LANDS FOR HIGHWAY PURPOSES, AND PARTIALLY REVOKING PUBLIC LAND ORDER NO. 386 OF JULY 31, 1947

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, and the act of August 1, 1956 (70 Stat. 898) it is ordered as follows:

1. Public Land Order No. 601 of August 10, 1949, as modified by Public Land Order No. 757 of October 16, 1951, reserving for highway purposes the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof, within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway, is hereby revoked.

2. Public Land Order No. 386 of July 31, 1947, so far as it withdrew the following-described lands, identified as items (a) and (b) in said order, under the jurisdiction of the Secretary of War for right-of-way purposes for a telephone line and an oil pipeline with appurtenances, is hereby revoked:

(a) A strip of land 50 feet wide, 25 feet on each side of a telephone line as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 20 feet wide, 10 feet on each side of a pipeline as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

3. An easement for highway purposes, including appurtenant protective, scenic, and service areas, over and across the lands described in paragraph 1 of this order, extending 150 feet on each side of the center line of the highways mentioned therein, is hereby established.

4. An easement for telephone line purposes in, over, and across the lands described in paragraph 2 (a) of this order, extending 25 feet on each side of the telephone line referred to in that paragraph, and an easement for pipeline purposes, in, under, over, and across the lands described in paragraph 2 (b) of this order, extending 10 feet on each side of the pipeline referred to in that paragraph, are hereby established, together with the right of ingress and egress to all sections of the above easements on and across the lands hereby released from withdrawal.

5. The easements established under paragraphs 3 and 4 of this order shall extend across both surveyed and unsurveyed public lands described in paragraphs 1 and 2 of this order for the specified distance on each side of the centerline of the highways, telephone line and pipeline, as those center lines are definitely located as of the date of this order.

6. The lands within the easements established by paragraphs 3 and 4 of this order shall not be occupied or used for other than the highways, telegraph line and pipeline referred to in paragraphs 1 and 2 of this order except with the permission of the Secretary of the Interior or his delegate as provided by section 3 of the act of August 1, 1956 (70 Stat. 898), provided: that if the lands crossed by such easements are under the jurisdiction of a Federal department or agency, other than the Department of the Interior, or of a Territory, State, or other Government subdivision or agency, such permission may be granted only with the consent of such department, agency, or other governmental unit.

7. The lands released from withdrawal by paragraphs 1 and 2 of this order, which, at the date of this order, adjoin lands in private ownership, shall be offered for sale at not less than their appraised value, as determined by the authorized officer of the Bureau of Land Management, and pursuant to section 2 of the act of August 1, 1956, supra. Owners of such private lands shall have a preference right to purchase at the appraised value so much of the released lands adjoining their private property as the authorized officer of the Bureau of Land Management deems equitable, provided, that ordinarily, owners of private lands adjoining the lands described in paragraph 1 of this order will have a preference right to purchase released lands adjoining their property, only up to the centerline of the highways located therein. Preference right claimants may make application for purchase of released lands at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph not claimed by and sold to preference claimants may be sold at public auction at not less than their appraised value by an authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the office in the Territory in which their title to their private lands is recorded. Such notice shall give the preference claimant at least 60 days in which to make application to exercise his preference right; and if the application is not filed within the time specified, the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to pay for the lands within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

Federal Register Data

Published: 4/11/58
No. : 72
Volume: 23
Page: 2376 - 2378
PLO No. 1613
Date Signed: 4/07/58
Filed Date: 4/10/58

8. The lands released from withdrawal by paragraphs 1 and 2 of this order, which at the date of this order, adjoin lands in valid unperfected entries, locations, or settlement claims, shall be subject to inclusion in such entries, locations and claims, notwithstanding any statutory limitations upon the area which may be included therein. For the purposes of this paragraph entries, locations, and claims include, but are not limited to, certificates of purchase under the Alaska Public Sale Act (63 Stat. 679; 48 U. S. C. 364a–e) and leases with option to purchase under the Small Tract Act (52 Stat. 609; 43 U. S. C. 682a) as amended. Holders of such entries, locations, and claims to the lands, if they have not gone to patent, shall have a preference right to amend them to include so much of the released lands adjoining their property as the authorized officer deems equitable, provided, that ordinarily such holders of property adjoining the lands described in paragraph 1 of this order will have the right to include released lands adjoining such property only up to the centerline of the highways located therein. Allowances of such amendments will be conditional upon the payment of such fees and commissions as may be provided for in the regulations governing such entries, locations, and claims together with the payment of any purchase price and cost of survey of the land which may be established by the law or regulations governing such entries, locations and claims, or which may be consistent with the terms of the sale under which the adjoining land is held. Preference right claimants may make application to amend their entries, locations, and claims at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph, not claimed by and awarded to preference claimants, may be sold at public auction at not less than their appraised value by the authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the appropriate land office, or if the land is patented, in the Territory in which title to their private land is recorded. Such notice shall give the claimant at least 60 days in which to make application to exercise his preference right, and if the application is not filed within the time specified the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to make any required payments within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

9. (a) Any tract released by Paragraph 1 or 2 of this order from the withdrawals made by Public Land Orders Nos. 601, as modified, and 386, which remains unsold after being offered for sale under Paragraph 7 or 8 of this order, shall remain open to offers to purchase under Section 2 of the act of August 1, 1956, supra, at the appraised value, but it shall be within the discretion of the Secretary of the Interior or his delegate as to whether such an offer shall be accepted.

(b) Any tract released by Paragraph 1 or 2 of this order from the withdrawals made by Public Land Orders Nos. 601, as modified, and 386, which on the date hereof does not adjoin privately-owned land or land covered by an unpatented claim or entry, is hereby opened, subject to the provisions of Paragraph 6 hereof, if the tract is not otherwise withdrawn, to settlement claim, application, selection or location under any applicable public land law. Such a tract shall not be disposed of as a tract or unit separate and distinct from adjoining public lands outside of the area released by this order, but for disposal purposes, and without losing its identity, if it is already surveyed, it shall be treated as having merged into the mass of adjoining public lands, subject, however, to the easement so far as it applies to such lands.

(c) Because the act of August 1, 1956 (70 Stat. 896; 48 U. S. C. 420–420c) is an act of special application, which authorizes the Secretary of the Interior to make disposals of lands included in revocations such as made by this order, under such laws as may be specified by him, the preference-right provisions of the Veterans Preference Act of 1944 (58 Stat. 747; 43 U. S. C. 279–284) as amended, and of the Alaska Mental Health Enabling Act of July 28, 1956 (70 Stat. 709; 48 U. S. C. 46–3b) will not apply to this order.

10. All disposals of lands included in the revocation made by this order, which are under the jurisdiction of a Federal department or agency other than the Department of the Interior may be made only with the consent of such department or agency. All lands disposed of under the provisions of this order shall be subject to the easements established by this order.

11. The boundaries of all withdrawals and restorations which on the date of this order adjoin the highway easements created by this order are hereby extended to the centerline of the highway easements which they adjoin. The withdrawal made by this paragraph shall include, but not be limited to the withdrawals made for Air Navigation Site No. 7 of July 13, 1954, and by Public Land Orders No. 386 of July 31, 1947, No. 622 of December 15, 1949, No. 808 of February 27, 1952, No. 975 of June 18, 1954, No. 1037 of December 16, 1954, No. 1059 of January 21, 1955, No. 1129 of April 15, 1955, No. 1179 of June 29, 1955, and No. 1181 of June 29, 1955.

ROGER ERNST,
Assistant Secretary of the Interior.

APRIL 7, 1958.

[F. R. Doc. 58-2689; Filed, Apr. 10, 1958; 8:45 a. m.]

Omnibus Act

Deed Book 70 Page 242
Juneau Recording District

BOOK 0167 PAGE 573

TALKEETNA

QUITCLAIM DEED

BOOK 371 PAGE 12
Anchorage Recording District

BOOK 0969 PAGE 001
PALMER

KNOW ALL BY THESE PRESENTS that the Secretary of Commerce, United States Department of Commerce, Grantor, under and pursuant to the authority contained in Section 21 of the Act approved by the President on June 25, 1959 (73 Stat. 141), does hereby devise, release, and quitclaim unto the State of Alaska, Grantee, its successors and assigns, subject to the condition set forth below, all rights, title, and interest of the Department of Commerce in and to all of the real properties listed in Schedules A, B, and C, attached hereto and made parts hereof, which properties are now owned, held, administered, or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads in Alaska, and which said Schedules are more fully identified as follows:

Schedule A--Highways, consisting of 60 pages.

Schedule B--Improved Real Property, consisting of 54 pages.

Schedule C--Unimproved Real Property, consisting of 62 pages.

TO HAVE AND TO HOLD the premises, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining unto the said Grantee, its successors and assigns, forever, subject, however, to the condition that if the said Grantor or the head of any other Federal agency determines and publishes notice thereof in the Federal Register within 120 days next following the date of this deed that all or any part of the above premises or any interests therein are needed for continued retention in Federal ownership for purposes other than or in addition to road purposes, the Grantor may enter and terminate the estate hereby quitclaimed in those portions of the premises concerning which said determinations are made, by notifying the Governor of the State of Alaska of such termination by registered letter or letters mailed within one year next following the date of this deed. By acceptance of this deed, the Grantee agrees to the above condition without waiving any rights it may otherwise have to refer any dispute to the Claims Commission authorized by Section 46 of the Act approved by the President on June 25, 1959 (73 Stat. 141).

IN WITNESS WHEREOF the Grantor has hereunto set his hand and seal this 30th day of June 1959.

Frederick H. Mueller
ACTING Secretary of Commerce

JUNEAU
Serial No. 6-2494

STATE BUSINESS
NO FEE

RETURN TO:
STATE OF ALASKA DOT/PF
P.O. BOX 196900
ANCHORAGE, AK 99519-6900
RIGHT OF WAY BRANCH

BOOK 0969 PAGE 002

BOOK 0167 PAGE 574

Deed Book 7 c Page 1121
Juneau Recording Dist.

- 2 -

BOOK 371 PAGE 13
Anchorage Recording District

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA

I, E A Freeman, a Notary Public in and for the District of Columbia, do hereby certify that on this 30th day of June, 1959, before me personally appeared Frederick B. Dent, being to me personally well known and known by me to be the Acting Secretary of Commerce, and acknowledged that the foregoing instrument bearing date of June 30, 1959, was executed by him in his official capacity and by authority in him vested by law, for the purposes and intents in said instrument described and set forth, and acknowledged the same to be his free act and deed as Acting Secretary of Commerce.

Witness my hand and seal this 30th day of June, 1959.

E A Freeman
Notary Public

My commission expires 1-14-61.

The foregoing property is hereby accepted by the State of Alaska, through its Governor, Honorable William A. Egan, State of Alaska

William A Egan

STATE OF ALASKA

I, Hugh J Wade, a Notary Public in and for the said ~~and State~~, hereby certify that William A Egan, whose name as Governor is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he, in his capacity as such Governor of Alaska, executed the same voluntarily on this day.

Given under my hand and seal of office this 2nd day of July, 1959.

Hugh J Wade
Notary Public

(SEAL)

My commission expires 4/23/61.

RECORDED - FILED
REC. DIST.
DATE 12-4-1959
TIME 3:17 P.M.
Recorded by Dept of State
Address

BOOK 0167 PAGE 575

BOOK 321 PAGE 14
Anchorage Recording District

BOOK 0969 PAGE 003

SCHEDULE A

HIGHWAYS

REGION 10

BUREAU OF PUBLIC ROADS

BOOK 0969 PAGE 004

BOOK 0167 PAGE 576

BOOK 27 PAGE 45
Anchorage Recording District

STATE OF ALASKA

APPROVED FEDERAL-AID SYSTEM

Primary

Secondary "A"

Secondary "B"

July 1, 1959

Primary System

Federal-Aid Primary Route numbers have been established as follows:

1. The primary system established consists of the principal highways, either existing or scheduled for early contract construction, and a projected ferry and highway system through the southeastern section.

2. Projected expansions of the system generally will be constructed and maintained as secondary roads until traffic volume dictates reclassification to a Primary Route.

3. Beginning in the southwest portion of the State, south-north routes were given odd numbers and west-east routes were given even numbers.

Secondary System

The Secondary System established consists of two classifications identified as follows:

Class "A" - Principal secondary roads serving as main arteries and requiring improvements within the foreseeable future.

Class "B" - Secondary roads of the type normally constructed and maintained by states or counties.

For ease in geographical location and assignment of secondary route numbers, the State has been divided into 9 zones, identified on a marked Alaska map E.

Class "A" routes were assigned 3-digit numbers, the first digit indicating the zone location. Odd numbers were assigned to south-north routes and even numbers to west-east routes.

Class "B" routes were assigned 4-digit numbers; the first digit indicating the zone location. South-north routes were assigned odd numbers; west-east routes assigned even numbers. A zero as the last digit indicates an isolated route not connected to any principal system.

As in the primary system, low numbers were assigned to the southern and western areas of each zone, progressing to the higher numbers in the northern and eastern areas.

BOOK 0167 PAGE 578

BOOK 391 PAGE 17
Anchorage Recording District

STATE ALASKA

FEDERAL-AID PRIMARY HIGHWAY SYSTEM
AS APPROVED FEBRUARY 26, 1957
AND SUBSEQUENTLY AMENDED

BOOK 0969 PAGE 006

FAP Route Number	Description
11	From Kodiak Naval Air Station through Kodiak to the Coast Guard LORAN Station.
21	From the port of Homer via Ninilchik, Soldotna and Coopers Landing to FAP Route 31, and a spur from Soldotna through Kenai to Wildwood Station.
31	From the port of Seward via Moose Pass, Portage, Birdwood and Anchorage to Elmendorf Air Force Base, with a spur to Anchorage International Airport.
35	From FAP Route 42 at Palmer through Wasilla, Willow and Talkeetna to FAP Route 52 at Cantwell with spurs to Talkeetna and Summit Airfields.
37	From the junction of FAP Routes 61 and 62 at Fairbanks via Ester and Nenana to FAP Route 52 at McKinley Park Station with a spur to FAP Route 62; International Airport Spur.
42	From FAP Route 31 Spur at Anchorage International Airport via Spenard and Palmer to FAP Route 71 at Glennallen.
46	From FAP Route 71 at Gulkana Junction to FAP Route 62 at Tok

STERLING Hwy

SEWARD Hwy

IN PART THE PARKS Hwy

GLENN Hwy

✠ Sec. 19.10.010. Dedication of land for public highways.

A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a part by the original survey.

✠ Sec. 19.10.015. Establishment of highway widths.

(a) It is declared that all officially proposed and existing highways on public land not reserved for public uses are 100 feet wide. This section does not apply to highways that are specifically designated to be wider than 100 feet.

(b) Notwithstanding (a) of this section, a municipality may designate the width of a road that is not a part of the state highway system if the municipality maintains the road.

✠ Sec. 19.30.400. Identification and acceptance of rights-of-way.

(a) The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities.

(b) The Department of Natural Resources shall conduct the necessary research to identify rights-of-way that have been accepted by public users under former 43 U.S.C. 932 and that have not been previously identified and shall annually report to the legislature by the first day of each regular session of the legislature on rights-of-way that have been identified and that are not listed in this section.

(c) The rights-of-way listed in (d) of this section have been accepted by public users and have been identified to provide effective notice to the public of these rights-of-way. The failure to include or identify a right-of-way under (d) of this section does not relinquish any right, title, or interest the public has in a right-of-way.

(d) The following rights-of-way are identified by the name of the right-of-way and the identification number the right-of-way has been assigned by the Department of Natural Resources in the Historic Trails Database, known as the "RST" number, which contains a complete description of the right-of-way:

RIGHT-OF-WAY NAME RST NUMBER

Cobb Lakes Trail 0001

Taylor - Humboldt 0002

Chapter 3

Methods of Research

Determine the Entry date:

Begin with Federal ownership as unreserved, unappropriated Federal land. Usually we look at when a property was entered or reclassified. Since Statehood a number of questions had to be resolved in order to determine precisely when the land was taken up. Alaska even had to have a significant court decision just to confirm that publication in the Federal Register was constructive notice. It probably seemed fairly simple to the Federal Government in 1959, when they passed their rights in many Public ROWs to the new State of Alaska, how to determine and manage them. But, it took a number of court decisions to solidify how many of the nuances applied.

Some of the web sites that have been found to be very useful for retrieving data, maps and other information follow:

http://www.dot.state.ak.us/creg/dot-cadastral/
At this site you can find a directory "BLM_Indexes". These indexes provide a short cut to a listing of parcels along many state roads where Public ROW applies. While they are not guaranteed to be 100% accurate the list properties by their description at the time and provide some valuable information relative to entry date, individual or agency information and patent information.

http://www.blm.gov/alis/ – possibly need to go to wayback machine
When this site works you can tract down the serial page for a homestead entry. This is the really important information needed to determine the precise date that property was entered. The entry date is the date that will provide your basis for determining if a Public ROW applies. Sometimes the entry date can be a day before a PLO widened a right of way. Much of the newer Right of Way mapping that the DOT&PF possesses has accurately addressed the size and type of Public ROW that may affect particular lands. However, older ROW maps may have been produced without the benefit of some of the litigation that has occurred or opinions prepared by the Attorney General's Office to help resolve certain questions.

blm.gov/sdms Spatial data management system

http://www.glorecords.blm.gov/
At this site you can retrieve copies of patents. Keep in mind many patents have never been recorded in a Recorder's Office. It is important to understand that Title Companies in Alaska are very familiar with records at the Recorder's Office. Their research and expertise doesn't extend into unrecorded Federal records and even less into the legislation providing for Public ROW.

http://plats.landrecords.info/
From this site you can get all sorts of maps. Federal rectangular surveys and DOT&PF ROW plans are some of the most helpful.

http://alaskapls.org/
At this site you can find posted under Standards, Chapter 3, Highways a very useful whitepaper prepared by John Bennett. It describes what we refer as 17 Act ROW and the basis for Section Line Easements while we were a Territory. Also, the Legislative links will get you to the Alaska Statutes that create Public ROW.

Determine what Public ROW could have affected the land at entry:

The Legislation provided in Chapter 2 while not including everything affecting Alaska does address all the significant Public ROW. You must not only determine what applies but where it applies. A road may have moved since its original construction. If it is a state highway be aware that The DOT&PF may have old mapping and field notes that will help with positioning the original rights.

Verify that the rights are still in effect

You will need to see if any vacation of the Public ROW has occurred. Another thing to look for is if the ROW was moved by agreement. Keep in mind that an easement can be moved simply by the owner of the right and the owner of the underlying land agreeing to a change. Hopefully, where this may have occurred a document was recorded. Also keep in mind that you are obliged when properly doing this research that documents used in your determinations are valid. For instance an agreement of record was actually signed by the proper parties.

Chapter 4

Significant Alaska Legal decisions validating or affecting the way we apply the Legislation.

ALASKA LAND TITLE

Federal Register provided

Constructive notice

To implement

PLO Right of Way

Alaska Supreme Court

STATE of Alaska,
Appellant/Cross-Appellee,

v.

ALASKA LAND TITLE ASSOCIATION; Security Title and Trust Company of Alaska; Alaska Title Guaranty Company; Brokers Title Company; Lawyers Title Insurance Agency, Inc.; Safeco Title Agency, Inc.; Fairbanks Title Agency; Valley Title and Escrow Company; First American Title Insurance Company; Transamerica Title Insurance Company; Hansen Associates, an Alaska Limited Partnership; Richard L. Boysen; and Jack White Company, Appellees/Cross-Appellants,

and

Theodore M. Pease, Jr., and Claire V. Pease, Appellees.

TRANSAMERICA TITLE INSURANCE COMPANY, Appellant,

v.

Theodore M. PEASE, Jr., and Claire V. Pease, Appellees.

Nos. 5407, 5408.

Supreme Court of Alaska.

May 27, 1983.

Appellees and Cross-Appellants Petition for Rehearing Denied July 8, 1983.

Appellants and Cross-Appellees Petition for Rehearing Granted July 8, 1983.

As Amended July 8, 1983.

Action was brought for declaratory judgment by association representing various title insurance companies, individual title insurance companies, and several landowners against State, municipality, and others. The Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., entered judgment against State and title insurance company, and appeal was taken. The Supreme Court, Matthews, J., held that: (1) trial court erred in declaring that State could not take or utilize any portion of property owner's land for local road which was in excess of 33 foot easement; (2) trial court erred in declaring that neither State nor municipality could take any portion of landowner's property for through road which was in excess of easement widths specified in their respective patents without just compensation; and (3) publication in Federal Register imparted constructive notice and served to preclude subsequent innocent purchaser status.

Affirmed in part, reversed in part, and remanded.

Rabinowitz, C.J., dissented in part and filed opinion.

1. Public Lands ⇐135(1)

Right-of-Way Act of 1966, which precludes State from taking privately owned property by election or exercise of reservation to State and that Act shall not be construed to divest State of any right-of-way or other interest in real property which was taken by State, before effective date of Act, by election or exercise of its right to take property through a reservation, was not applicable to State's claim of 50 foot road easement along south boundary of landowner's property, in that easement in question was established by departmental order under authority of statute to which Right-Of-Way Act was inapplicable. 48 U.S.C. (1958 Ed.) §§ 321a, 321d.

2. Public Lands ⇐135(1)

Staking requirement of subsection of department of interior order providing that reservation and rights of way or easements will attach as to all new construction involving public roads in Alaska when survey stakes have been set on ground and notices have been posted at appropriate points along route of new construction specifying type and width of roads was not applicable to road affecting landowner's property, in that road was an existing road when order was promulgated, while subsection by its express terms only applies to new construction.

3. Public Lands ⇐64

Before highway may be created, there must be either some positive act on part of appropriate public authorities of state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

4. Public Lands ⇐135(1)

Staking requirement of department of interior order was inapplicable to certain highway, in that highway was in existence by time of homestead entry of landowners' predecessor. 48 U.S.C. (1958 Ed.) § 321d.

5. Public Lands ⇐135(1)

Trial court erred in declaring that neither State nor municipality could take any portion of landowner's property for through road which was in excess of easement which was specified in their respective patents without just compensation.

6. Public Lands ⇐135(1)

Trial court properly determined that certain landowners were entitled to declaration against State and municipality that neither State nor municipality could take any portion of their properties for through road which was in excess of easement which was specified in their respective patents without just compensation, where landowner's property was entered in 1945, so that it was not hereafter entered for purposes of statute under which mandatory reservation was limited to patents for land hereafter taken up, or located in territory of Alaska. Pickett Act, §§ 1, 2, 43 U.S.C. (1970 Ed.) §§ 141, 142; 48 U.S.C. (1958 Ed.) § 321d.

7. Insurance ⇐426.1

Title insurance company was liable to property owners under policy for value of 17 foot strip taken pursuant to interior department order, in that publication of public land order in Federal Register imparted constructive notice of order as to land it affected.

8. Public Lands ⇐138

Public land orders, which appeared in Federal Register, imparted constructive notice of conflicting deed or encumbrance, thereby preventing property owner from claiming innocent purchaser status.

9. Estoppel ⇐62.2(2)

Because publication of land orders in Federal Register imparted constructive notice of easements which they created, that notice made reliance unreasonable, and thus State was not estopped from claiming any easements under orders here involved.

10. Public Lands ⇐135(1)

By operation of law, land conveyed by the United States is taken subject to previously established rights of way where instruments of conveyance are silent as to the existence of such rights of way.

11. Public Lands ⇐135(1)

No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because patent contains an implied bylaw condition that it is subject to such a right-of-way, and thus statute of limitations expressed by statute providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents did not apply. 43 U.S.C.A. § 1166.

Jack McGee, Asst. Atty. Gen., Wilson Condon, Atty. Gen., Juneau, for appellant/cross-appellee.

David A. Devine and Michael W. Price, Groh, Eggers, Robinson, Price & Johnson, Anchorage, for appellees/cross-appellants.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MATTHEWS, Justice.

This is an action for a declaratory judgment brought by an association representing various title insurance companies, individual title insurance companies, and several landowners against the State of Alaska, the Municipality of Anchorage,

dore and Clair Pease. Nine claims for relief were presented.

The first claim sought a determination that a title insurance policy issued by Transamerica Title Insurance Company to the Peases excluded from coverage any rights-of-way created pursuant to certain Interior Department Orders, namely, Public Land Orders 601, 757, 1613, and Departmental Order 2665.

The second claim for relief sought a declaration that claimed easements for "local roads" as defined in DO 2665 could not be used by the State or municipal governments because of the Alaska Right of Way Act of 1966.

The third related to "feeder roads" as defined in PLO 601 and DO 2665, seeking a declaration that rights-of-way for such roads could not be utilized because of the Alaska Right of Way Act of 1966.

The fourth claim for relief concerned property owned by plaintiff Hansen Associates along the Seward Highway. It alleged that the original patentee had made a homestead entry prior to the effective date of the first order involved, PLO 601, and sought a declaration that no through road easement under PLO 601 or any of its successors could be claimed.

The fifth claim for relief referred to a quitclaim deed given on or about April 7, 1959, conveying the United States' interests in the highways in Alaska to the State. The deed was recorded October 2, 1969. This claim sought a declaration that the quitclaim deed would have no effect on bona fide purchasers for value who purchased and recorded prior to the State's recording of the quitclaim deed.

The sixth claim for relief alleged that the failure of the United States or the State to record PLOs 601, 757, and 1613 and DO 2665 in a State recording office rendered any easements that might otherwise have been created by those orders void as against subsequent innocent purchasers for value who first duly recorded their interests.

The seventh claim alleged a theory of estoppel against the State and Municipality, claiming that for twenty years they had allowed property owners to develop property on which they now claim an easement pursuant to PLOs 601, 757, and 1613 and DO 2665, that no notice of such claims had been given, and that individual property owners would be prejudiced if the State and the Municipality were now permitted to utilize such easements.

The eighth claim sought a declaration that no easement could be taken by the State or the Municipality for a local, feeder, or through road under the authority of PLOs 601, 757, and 1613 or DO 2665 because of the Right of Way Act of 1966.

The ninth claim alleged that prior to the quit-claim deed from the United States to the State of April 7, 1959, the United States had patented to private landowners property which included rights-of-way now claimed by the State. A declaration was sought that these patents were conclusive as against the State and that the patents could not be vacated or annulled because of the six year statute of limitations set forth in 43 U.S.C. § 1166.

The Peases cross-claimed against the State, alleging that the State unlawfully claimed a 50 foot road easement along the south boundary of their property whereas only a 33 foot easement was described in the patent from the United States to their predecessor-in-interest. They sought just compensation for the 17 foot difference in the approximate sum of $3,000.00 plus interest from the date of taking. The Peases also counterclaimed against Transamerica, alleging that if the State was entitled to a full 50 foot right-of-way Transamerica would be obliged under the title policy to compensate them for the value of the 17 foot strip.

Before answering, the State filed a motion for a more definite statement requesting legal descriptions of property across which the complaint alleged that the State was claiming rights-of-way. In response, the plaintiffs described the property owned by Hansen Associates along the Seward Highway, with respect to the fourth claim for relief, and property owned by plaintiff

Richard L. Boysen which also lay along the Seward Highway, with respect to the seventh claim. The State then answered the complaint, placing in controversy all the legal theories of the plaintiffs.

The State, all plaintiffs, and the Peases moved for summary judgment as to all claims. The court denied the State's motion, granted the plaintiffs' motion as to the second, third, and eighth claims, and granted the Peases' motion as to their cross-claim and counterclaim. Following entry of a memorandum of decision reflecting these actions the court entered a declaratory judgment containing four numbered paragraphs, which proceed from the abstract to the particular. They are:

1. The State of Alaska and the Municipality of Anchorage are claiming highway easements for local, feeder, and through roads in excess of easement widths specified in patents issued to Alaska property owners. Said easements are claimed by the State or the Municipality pursuant to authority derived from Public Land Orders 601, 757, 1613 and Department Order 2665. For the reasons set forth in the Memorandum of Decision dated May 7, 1980, the court hereby awards Plaintiffs a summary judgment against the State of Alaska and the Municipality of Anchorage declaring that the State and the Municipality may not take or utilize property for local, feeder, or through roads in excess of the widths set forth in the patents to the affected properties without just compensation to the owners of the affected properties unless such local, feeder, or through roads were occupied and staked by the State of Alaska or the Municipality of Anchorage prior to April 14, 1966, or were specifically designated in the patents to the affected real properties.

2. The Plaintiffs Hanson [sic] Associates and Richard L. Boysen are hereby awarded a summary judgment against the State of Alaska and the Municipality of Anchorage declaring that neither the State nor the Municipality can take any portion of their properties for the through road presently known as the Old Seward Highway which is in excess of the easement widths specified in their respective patents without just compensation.

3. The Defendants Pease are hereby awarded a summary judgment on their cross-claim against the State of Alaska declaring that the State may not take or utilize any portion of the Peases' land for the local road presently known as Rabbit Creek Road which is in excess of the 33-foot easement width specified in the patent to the Peases' property without just compensation. The Peases' property is described as Lot 191, Section 33, Township 12 North, Range 3 West, Seward Meridian, Anchorage Recording District, Third Judicial District, State of Alaska.

4. The Defendants Pease are hereby awarded a summary judgment on their counterclaim against Transamerica Title Insurance Company declaring that Transamerica is liable under its title insurance policy issued to the Peases for the taking by the State of Alaska of a 17-foot strip of land for the local road known as Rabbit Creek Road, which 17-foot strip of land was in excess of a 33-foot easement specified in the Peases' patent. However, since the State of Alaska must compensate the Peases for the taking or utilization of said additional 17-foot easement, the Peases shall collect just compensation from the State of Alaska, and upon receipt of said just compensation the Peases shall not be entitled to recover damages from Transamerica Title Insurance Company for said taking of the additional 17-foot strip of property.

The State has appealed from this judgment. The plaintiffs have cross-appealed, claiming that the superior court should have granted them judgment on their fourth, fifth, sixth, seventh, and ninth claims for relief. In addition, Transamerica Title has appealed from the judgment against it in favor of the Peases.

I

THE STATE'S APPEAL AS TO THE PEASES' PROPERTY

We turn first to the appeal of the State as it relates to the Peases' property.

The patent to the 2.5 acre Pease parcel was issued on October 4, 1955, pursuant to the Small Tract Act of 1938, 43 U.S.C. §§ 682a–682e (1938), *repealed by* Pub.L. No. 94–579, Title VII, § 702 (1976). The lot was leased to the Peases' predecessor-in-interest on May 1, 1958. The patent contains two relevant reservations. One is a blanket reservation for roads "constructed or to be constructed by or under authority of the United States or by any State created out of the Territory of Alaska, ..." This reservation was made pursuant to 48 U.S.C. § 321d, ch. 313, 61 Stat. 418 (1947), *repealed by* Pub.L. No. 86–70, § 21(d)(7), 73 Stat. 146 (1959), which provides in part:

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

The other relevant reservation in the patent reserves a 33 foot right-of-way for roadway purposes along the south and east boundaries of the tract. Rabbit Creek Road lies on the south boundary of the Peases' property. As this case has been presented all parties have assumed that Rabbit Creek Road was in existence as a local road at all times relevant to the various orders hereafter discussed. We make the same assumption.

In 1978 the State widened Rabbit Creek Road from 66 feet to 100 feet. The road occupied a 33 foot strip on the Peases' property before widening and a 50 foot strip after widening. The State claimed a 50 foot easement on each side of the center line of Rabbit Creek Road, citing PLOs 601 [1] and 757,[2] and DO 2665 [3] as authority for widening the road without compensating the Peases for taking the extra 17 feet.

PLO 601, effective August 10, 1949, withdrew "the public lands in Alaska lying within ... 150 feet on each side of the center line of all ... through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, ... from all forms of appropriation under the public land laws, ..." and reserved them "for highway purposes." [4]

The Secretary of the Interior promulgated PLO 757 and DO 2665 on October 19, 1951. 16 Fed.Reg. 10,749, 10,752 (1951). DO 2665 was filed first. *Id.* at 10,752. It established, among other things, easements, rather than withdrawals, of 50 feet on each

1. 14 Fed.Reg. 5048 (1949).

2. 16 Fed.Reg. 10,749 (1951).

3. 16 Fed.Reg. 10,752 (1951).

4. 14 Fed.Reg. 5048 (1949). The quoted language is from the sixth paragraph of PLO 601. The sixth paragraph in full states:

> Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws, and reserved for highway purposes:
>
> Through Roads
>
> Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.
>
> Feeder Roads
>
> Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok Eagle Road, Ruby-Long-Poorman Road, Nome-Solomon Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.
>
> Local Roads
>
> All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

Id. at 5048–49 (1949).

side of the center line of each local road and of 100 feet as to each feeder road.[5] PLO 757 amended the sixth paragraph of PLO 601, *see* note 4 *supra*, increasing the withdrawal for the Seward Highway [the Anchorage-Potter-Indian Road in PLO 601] from 100 feet to 150 feet on each side of the center line. 16 Fed.Reg. 10,749, 10,750 (1951). PLO 757 repealed the general withdrawal for local and feeder roads contained in the sixth paragraph of PLO 601, thus effecting a revocation of the 601 withdrawals as to them. However, PLO 757 acknowledged that DO 2665 had already established easements as to feeder and local roads and did not purport to revoke them. The final paragraph of PLO 757 states:

> Easements having been established on the lands released by this order, such lands are not open to appropriation under the public land laws. . . .[6]

5. 16 Fed.Reg. 10,752 (1951). DO 2665 provides:

> Rights-of-Way for Highways in Alaska
>
> Section 1. *Purpose.* (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a).
>
> Section 2. *Width of public highways.* (a) The width of the public highways in Alaska shall be as follows:
>
> (1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.
>
> (2) For feeder roads: Abbott Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram road, Steese Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasiula Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Slana to Nabesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Eureka Road, North Park Boundary to Kantishna Road, Paxson to McKinley Park Road, Sterling Landing to Ophir Road, Iditarod to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 100 feet on each side of the center line thereof.
>
> (3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.
>
> Section 3. *Establishment of rights-of-way or easements.* (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.
>
> (b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands. . . .
>
> (c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads. . . .
>
> Section 4. *Road maps to be filed in proper Land Office.* Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public.

Id.

6. 16 Fed.Reg. 10,749, 10,750 (1951). The text of PLO 757 so far as it is relevant here states:

> The sixth paragraph of Public Land Order No. 601 of August 10, 1949, reserving public lands for highway purposes, commencing with the words "Subject to valid existing rights", is hereby amended to read as follows:
>
> Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes and public lands in Alaska lying within . . . 150 feet on each side of the center line of the . . . Seward-Anchorage Highway . . . are hereby withdrawn from all forms of appropriation under the public-land laws including the mining and mineral-leasing laws, and reserved for highway purposes.
>
> Easements having been established on the lands released by this order, such lands are

Thus one effect of PLO 757 and DO 2665 was to substitute easements for the withdrawals made in PLO 601 as to local and feeder roads.

The State's claim to the full 50 feet, from the center line, of Rabbit Creek Road is in all relevant respects identical to the claim that it successfully asserted in *State, Department of Highways v. Green*, 586 P.2d 595 (Alaska 1978). In *Green*, as in the Peases' claim, the patents were issued by the United States under the Small Tract Act and contained blanket roadway easements under 48 U.S.C. § 321d as well as specific 33 foot easements. The local road in question in both cases was built before DO 2665 was promulgated, and the lease as well as the patent was issued after promulgation of DO 2665. We held in *Green* that DO 2665 was issued pursuant to 48 U.S.C. § 321a, as distinct from 48 U.S.C. § 321d; that DO 2665 was applicable to patents issued under the Small Tract Act; and that the 50 foot right-of-way established by DO 2665 was effective even though only a 33 foot right-of-way was expressed in the patent. 586 P.2d at 600–03.

The superior court reasoned that *Green* was not controlling because of the provisions of the Right-of-Way Act of 1966, ch. 92 S.L.A. 1966.[7] Sections 2 and 3 contain the operative provisions of the Right-of-Way Act of 1966. Section 2 precludes the State from taking "privately owned property by the election or exercise of a reservation to the state acquired under [48 U.S.C. § 321d]," and section 3 provides that the Act shall not be construed to divest the State of "any right-of-way or other interest in real property which was taken by the state, before the effective date of this Act, by the election or exercise of its right to take property through a reservation acquired under [48 U.S.C. § 321d]." The effective date of the Right-of-Way Act of 1966 was April 14, 1966.

> not open to appropriation under the public-land laws except as a part of a legal subdivision, if surveyed, or an adjacent area, if unsurveyed, and subject to the pertinent easement.
>
> *Id.* at 10,749–50.

7. The Right-of-Way Act of 1966 states:

> Section 1. PURPOSE. This Act is intended to alleviate the economic hardship and physical and mental distress occasioned by the taking of land, by the State of Alaska, for which no compensation is paid to the persons holding title to the land. This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions to many citizens of the State of Alaska, and which, if not curtailed by law, will continue to adversely affect citizens of this state. Those persons who hold title to land under a deed or patent which contains a reservation to the state by virtue of the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, are subject to the hazard of having the State of Alaska take their property without compensation because all patents or deeds containing the reservation required by that federal Act reserve to the United States, or the state created out of the Territory of Alaska, a right-of-way for roads, roadways, tramways, trails, bridges, and appurtenant structures either constructed or to be constructed. Except for this reservation the State of Alaska, under the Alaska constitution and the constitution of the United States, would be required to pay just compensation for any land taken for a right-of-way. It is declared to be the purpose of this Act to place persons with land so encumbered on a basis of equality with all other property holders in the State of Alaska, thereby preventing the taking of property without payment of just compensation as provided by law, and in the manner provided by law.
>
> Section 2. TAKING OF PROPERTY UNDER RESERVATION VOID. After the effective date of this Act, no agency of the state may take privately-owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, and taking of property after the effective date of this Act by the election or exercise of a reservation to the state under that federal Act is void.
>
> Section 3. PROSPECTIVE APPLICATION. This Act shall not be construed to divest the state of, or to require compensation by the state for, any right-of-way or other interest in real property which was taken by the state, before the effective date of this Act, by the election or exercise of its right to take property through a reservation acquired under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418.
>
> Section 4. SHORT TITLE. This Act may be cited as the Right-Of-Way Act of 1966.
>
> Section 5. EFFECTIVE DATE. This Act takes effect on the day after its passage and approval or on the day it becomes law without such approval.

[1] The court erred in applying the Right-of-Way Act of 1966 to the Pease case. It is applicable only to interests taken by the State under a blanket reservation created pursuant to 48 U.S.C. § 321d. We held in *Green* that easements established by DO 2665 were established under the authority of section 321a, not section 321d.[8] *Green*, 586 P.2d at 600 n. 17. Further, we held in *State, Department of Highways v. Crosby*, 410 P.2d 724 (Alaska 1966) that § 321d did not apply at all to patents issued under the Small Tract Act. *Id.* at 728.

[2] The superior court also concluded in its Memorandum of Decision that the easement which otherwise would have been created under DO 2665 on Rabbit Creek Road did not come into being "until the right-of-way was staked by the terms of DO 2665." This statement refers to subsection 3(c) of DO 2665, which provides:

> The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.[9]

The superior court's conclusion that the staking requirement of section 3(c) was applicable to Rabbit Creek Road is erroneous. Section 3(c) by its express terms only applies to new construction. Rabbit Creek Road was an existing road when the order was promulgated. As to existing roads, subsection 3(b) of the order establishes a 50 foot easement in the present, rather than the future, tense and contains no call for additional action in order to fix the easement. It states:

> A right-of-way or easement for highway purposes covering the lands embraced in the ... local roads equal in extent to the width of such roads as established in section 2 of this order, *is hereby established* for such roads over and across the public lands.

16 Fed.Reg. 10,752 (1951) (emphasis added). Subsection (3) of section 2 of DO 2665 set the width of local roads at 50 feet on each side of the center line. Thus, these two sections of DO 2665 established a 50 foot easement for Rabbit Creek Road.

8. A memorandum from the Chief Counsel of the Bureau of Land Management to the Director of the Bureau, dated February 7, 1951, explains well the extent of the authority granted to the Secretary of the Interior under § 321a. The memorandum states in part:

> Prior to the issuance of Public Land Order No. 601 ..., nearly all public roads in Alaska were protected only by easements. Right-of-way easements were acquired under section 2477 of the Revised Statutes (43 U.S.C. sec. 932) by the construction of roads. This section granted a right-of-way for the construction of highways over public lands not reserved for public uses.
>
> Section 2 of the Act of January 27, 1905 (33 Stat. 616), incorporated with amendments into 48 U.S.C. secs. 321–323, established a Board of Road Commissioners in the then Territory of Alaska to function under the jurisdiction of the Secretary of War. This section provided:
>
> "Sec. 2. * * * The said board shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails * * *. The said board shall prepare maps, plans, and specifications of every road or trail they may locate and lay out, * * *."
>
> Section 3 of the Act of August 24, 1912 (37 Stat. 512, 48 U.S.C. secs. 23 and 24), under which Alaska was organized as a Territory, provided that the authority of the legislature of the Territory should not extend to certain statutes of the United States including the Act of January 27, 1905, *supra*, and the several acts amendatory thereof.
>
> Section 2 of the Act of June 30, 1932 (47 Stat. 446, 48 U.S.C. sec. 321a), provides:
>
> "Sec. 2. The Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska heretofore administered by said board of road commissioners under the direction of the Secretary of War; * * *."
>
> The authority of the Secretary of the Interior conferred by the above-cited acts to "locate, lay out, construct and maintain" public roads in Alaska clearly implies the right to fix the width of the roads. This width is not fixed by any statute.

9. 16 Fed.Reg. 10,752 (1951). For the full text of DO 2665, *see* note 5 *supra*.

[3] The history of the promulgation of DO 2665 also demonstrates that the staking requirement applies only to new construction, not existing roads. In territorial days road easements were created across public land under 43 U.S.C. § 932, *repealed by* Pub.L. No. 94–579, Title VII, § 706(a) (1976), a statute remarkable for its brevity, which provided:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

This blanket grant had to be accepted. A common method of acceptance was the building of a road by a public authority.[10] But other methods of acceptance were also recognized. As we stated in *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961) with respect to 43 U.S.C. § 932:

> [B]efore a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Id. at 123 (footnote omitted). In *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975), we held that enactment by the territorial legislature of a law dedicating a four rod strip along all section lines for roadway purposes was a positive act of acceptance of the section 932 grant. *Id.* at 1225–26.

When acceptance of the section 932 grant occurred by construction of a road by an appropriate public authority, a question remained regarding the width of the right-of-way thereby created. It was held that the width was not confined necessarily to the traveled portion of the roadway, but that "local laws, customs and usages" would control. *City of Butte v. Mikosowitz*, 39 Mont. 350, 102 P. 593, 595–96 (1909); *see also Ball v. Stephens*, 68 Cal.App.2d 843, 158 P.2d 207, 209 (1945).

One purpose of DO 2665 was to define as a matter of local law or usage the width of roadway easements which had been created by the construction of roads and which would be created in the future by the construction of new roads. The memorandum of February 7, 1951, from the chief counsel of the Bureau of Land Management to the Bureau's director[11] makes this clear:

> Notwithstanding that section 2477 of the Revised Statutes (43 U.S.C. § 932) does not fix the width of the rights-of-way granted by it, the width when fixed by a positive act of the proper State or Territorial authorities has been held valid. *Costain v. Turner* (1949) [72 S.D. 427], 36 N.W.2d 382; *Butte v. Mikosowitz* (1909) [39 Mont. 350], 102 P. 593. In both cases, the width fixed included an area in excess of the beaten path or track. The reasons which sustain the conclusion reached in those cases support the conclusion that in the case of public highways in Alaska constructed or maintained under the jurisdiction of the Secretary of the Interior, the width of the highways may be fixed by that official.

The memo goes on to suggest the publication of an order, which was to become DO 2665, in terms which make it clear that the staking requirement only applies to new construction and not to existing roads:

> The following procedure is suggested for the establishment of highway easements of prescribed widths in Alaska:
>
> (1) The issuance of an order by the Secretary of the Interior to be published in the Federal Register fixing the width for existing roads and the width for new construction, including changes in the location of existing roads, and extensions of such roads. *In the case of new construction, the order can only be effective when the survey stakes have been set on the ground.*

(Emphasis added).

Further, the Superior Court's conclusion that the staking requirement applies to ex-

10. *See Clark v. Taylor*, 9 Alaska 298, 303 (D.Alaska 1938); *Ball v. Stephens*, 68 Cal. App.2d 843, 158 P.2d 207, 209 (1945); *Moulton v. Irish*, 67 Mont. 504, 218 P. 1053, 1054 (1923).

11. An excerpt from this memorandum is quoted at note 8 *supra*.

isting roads as well as to roads to be constructed in the future is in conflict with our holding in *Green, supra.* The local road in question there was constructed before the promulgation of DO 2665. As to the Green parcel, we held that the 50 foot right-of-way was fixed as of the promulgation of the order. *Green,* 586 P.2d at 604.

For these reasons we conclude that the State's appeal with respect to the adverse judgment on the cross-claim of the Peases is well-founded. The third paragraph of the declaratory judgment is therefore reversed. Since the first paragraph of the judgment includes the situation presented in the Pease case, it too must be reversed.

II

THE STATE'S APPEAL AS TO HANSEN'S PROPERTY

The discussion in this section concerns the plaintiff's eighth claim for relief, which is reflected in the second and third paragraphs of the judgment. This discussion is also relevant to the second claim for relief relating to feeder roads. Because specific facts concerning the Hansen parcel require that it be treated differently, we exclude it from this discussion and focus instead on the Boysen property.

This aspect of the case involves an additional public land order that was not involved in the discussion of the Pease case. This order, PLO 1613, was promulgated April 7, 1958. 23 Fed.Reg. 2376, 2378 (1958). PLO 1613 revoked PLO 601 which, as modified by PLO 757, had withdrawn and reserved for highway purposes 150 feet on each side of the Seward Highway. *Id.* at 2376. PLO 1613 converted the 150 foot Seward Highway right-of-way to an easement of the same width.[12]

The Boysen parcel consists of some 80 acres joining the Seward Highway. The patent was issued to Boysen's predecessor on May 15, 1952, under the Homestead Act. The homestead entry was made January 2, 1951. The patent contains a blanket reservation for road rights-of-way as required by 48 U.S.C. § 321d. *See* page 718 *supra.*

Setting aside the possible effect of the section 321d reservation, the homestead entry of Boysen's predecessor in January 1951 fixes the date from which the property rights of the owners of the parcel are to be measured.[13] As of that date, PLO 601 had withdrawn 100 feet of land from each side of the center line of the Seward Highway. 14 Fed.Reg. 5048 (1949).

The superior court was apparently of the view that unless the State had fully occupied or staked this 100 feet before the effective date of the Right-of-Way Act of 1966, that act eliminated the withdrawal. We disagree.

[4] The Seward Highway was in existence by the time of the homestead entry. The superior court apparently imposed the staking requirement because of section 3 of DO 2665.[14] For the reasons we have expressed with respect to the Peases' property, the superior court's conclusion concerning the applicability of the staking require-

12. 23 Fed.Reg. 2376, 2377 (1958). PLO 1613 provides in pertinent part:

> 1. Public Land Order No. 601 of August 10, 1949, as modified by Public Land Order 757 of October 16, 1951, reserving for highway purposes the public lands of Alaska lying ... within 150 feet on each side of the center line of the ... Seward-Anchorage Highway ... is hereby revoked.
>
> ....
>
> 3. An easement for highway purposes, including appurtenant protective, scenic and service areas, over and across the lands described in paragraph 1 of this order, extending 150 feet on each side of the center line of the highways mentioned therein, is hereby established.
>
> ....
>
> 5. The easements established under paragraphs 3 and 4 of this order shall extend across both surveyed and unsurveyed public lands described in paragraphs 1 and 2 of this order for the specified distance on each side of the center line of the highways ... as those center lines are definitely located as of the date of this order.

Id. at 2376–77.

13. *See* part III *infra.*

14. Subsection (a)(1) of section 1 of DO 2665 recognizes expressly the 150 foot withdrawal for the Seward Highway expressed in PLO 757. *See* note 5 *supra.*

ment to the Seward Highway is erroneous. The Seward Highway was not new construction in 1949, when PLO 601 was promulgated, or in 1951, when DO 2665 was promulgated. It had a fixed location and the boundaries of its right-of-way were ascertainable by referring to the applicable PLO and measuring from its center line.

In addition, the 100 foot right-of-way first created by PLO 601 does not depend for its existence on the reservation placed in the patent under section 321d. PLO 601 was issued pursuant to Executive Order 9337, 8 Fed.Reg. 5516 (1943), under which the President of the United States delegated his authority to the Secretary of the Interior under 43 U.S.C. § 141, ch. 421, § 1, 36 Stat. 847 (1910), *repealed by* Pub.L. No. 94–579, Title VII, § 704(a) (1976), authorizing withdrawal of public lands in Alaska for specified public purposes.[15] As previously noted, the Right-of-Way Act of 1966 applies only to rights-of-way acquired under section 321d reservations.

[5] For the above reasons the second paragraph of the judgment as it relates to the Boysen property must be reversed. The preceding discussion also requires, as did our discussion in part I concerning the Peases' property, reversal of the first paragraph of the judgment. We do not reach the question whether a full 150 foot easement became fixed across the Boysen property by operation of the section 321d patent reservation and promulgation of PLO 757, and thus may be unaffected by the Right-of-Way Act of 1966. This question was not specifically addressed by the superior court nor is it presented in the briefs before us.

III

THE ROSS–APPEAL AS TO THE HANSEN PROPERTY

The patent for the Hansen parcel was issued to Hansen's predecessor-in-interest on June 1, 1950, under the Homestead Act. The homestead entry was made on January 23, 1945, before the promulgation of any of the land orders previously discussed, and before passage of 48 U.S.C. § 321d. The patent to the Hansen property does not contain a section 321d reservation.

The PLO 601 withdrawal was expressly subject to "valid existing rights." 14 Fed. Reg. 5048 (1949). Homestead entries have been held to give rise to valid existing rights,[16] although those rights may not in all cases take priority over intervening government acts.[17] Here, however, there is no doubt of the intention to except prior homestead entries from PLO 601. 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 ...." Since entry was in 1945, and the first withdrawal occurred in 1949, Hansen's predecessor-in-interest, as an entryman, had rights superior to the withdrawals.

[6] Section 321d has no effect on the Hansen property. The mandatory reservation required by this statute was limited to "patents for lands *hereafter* taken up, entered, or located in the Territory of Alaska, ..." (emphasis added). Since the Hansen land was entered in 1945, it was not "hereafter" entered and thus was excluded from the operation of that statute. This is consistent with the absence of the section 321d reservation in the Hansen patent, and also consistent with its presence in the patents to the other two parcels of land involved in this appeal where entry occurred after July

15. The State and the plaintiffs have agreed that PLO 601 is based on Executive Order 9337 which, "in turn, rests on" 43 U.S.C. § 141. We thus have no occasion to consider whether Executive Order 9337 delegated authority to make withdrawals in addition to those authorized by 43 U.S.C. § 141.

16. *Stockley v. United States*, 260 U.S. 532, 540, 43 S.Ct. 186, 188, 67 L.Ed. 390, 394 (1923); *Korf v. Itten*, 64 Colo. 3, 169 P. 148, 150–51 (1917).

17. *Wilbur v. United States ex rel. Stuart*, 53 F.2d 717, 720 (D.C.Cir.1931).

24, 1947, the date on which section 321d was adopted.

Thus, for reasons different from those articulated by the superior court, the second paragraph of the declaratory judgment is affirmed as to the Hansen parcel.

IV

TRANSAMERICA'S LIABILITY

[7] In count I of the complaint, Transamerica sought a declaration absolving it of liability to the Peases under its title insurance policy. The superior court, following *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (Alaska 1976), found Transamerica conditionally liable to the Peases for the value of the 17 foot strip arising from DO 2665. In *Hahn* we held that the publication of a public land order, there PLO 601, in the Federal Register imparted constructive notice of the order as to the land it effected. Under the terms of the title policy there involved, the title insurance company was found to be liable. *Id.* at 146. We agree that *Hahn* is squarely controlling.

Transamerica, however, contends that *Hahn* should be overruled. We have considered Transamerica's arguments in support of this position and we are not persuaded that *Hahn* is unsound in any respect. We therefore decline to overrule it. Thus, Transamerica is liable under its policy to the Peases. Paragraph 4 of the declaratory judgment so far as it relates to Transamerica's liability to the Peases is affirmed.

V

CROSS-APPEAL AS TO FIFTH, SIXTH, SEVENTH AND NINTH CLAIMS FOR RELIEF

The plaintiffs claim that the superior court should have granted summary judgment in their favor on their fifth, sixth, seventh and ninth claims for relief. The court made no ruling as to these claims. We review them in accordance with the principle that any ground may be urged on appeal to support a judgment even if it was not accepted by the court in rendering judgment. *Moore v. State*, 553 P.2d 8, 21 (Alaska 1976); *Ransom v. Haner*, 362 P.2d 282, 285 (Alaska 1961).

The fifth and sixth claims are similar because to prevail, a property owner [18] must establish status as a "subsequent innocent purchaser . . . in good faith for a valuable consideration" as that term is used in AS 34.15.290. An innocent purchaser must lack "actual or constructive knowledge" of the conflicting deed or encumbrance that the purchaser seeks to avoid. *Sabo v. Horvath*, 559 P.2d 1038, 1043 (Alaska 1976). *Sabo* held that as between two grantees, a prepatent grantee's deed that was recorded before the patent was issued is a "wild deed" and does not give constructive notice to a post-patent grantee who duly records. *Id.* at 1044.

The question here is whether public land orders, which appear in the Federal Register, impart constructive notice, thus preventing the property owner from claiming innocent purchaser status. We have in part IV of this opinion re-affirmed the holding of *Hahn v. Alaska Title Guarantee Co.*, 557 P.2d 143 (Alaska 1976) that publication of a land order in the Federal Register is constructive notice of the order as that term is used in a title insurance policy. That holding is controlling here.

[8] The distinction between *Sabo* and this appeal is that *Sabo* concerns private deeds and this appeal involves a conflict between a government regulation and a patent. Regulations published in the Federal Register take on the character of law. *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3, 7 (3d Cir.1964); *United States v. Messer Oil Corp.*, 391 F.Supp. 557, 561–62 (W.D.Pa.1975). All persons are presumed to know the contents of the law. *See Ferrell v. Baxter*, 484 P.2d 250, 265 (Alaska 1971). In *United States v. Messer Oil Corp.*, the district court indicated that regu-

18. In this somewhat abstract context the term "property owner" should be considered to be a property owner situated as is the plaintiff Boysen. for Hansen has prevailed on other grounds.

lations published in the Federal Register were sufficient notice to allow conviction of a criminal violation. 391 F.Supp. at 562. If Federal Register notice is sufficient for this purpose, it is sufficient notice to a landowner regarding easements that the federal government has reserved across his land. Thus, the publication of the land orders in the Federal Register imparted constructive notice and served to preclude subsequent innocent purchaser status.

In the seventh claim, plaintiffs contend that the State is estopped from claiming any easements under the orders here involved. The State responds that constructive notice defeats the estoppel claim.

[9] Estoppel requires "the assertion of a position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice." *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97, 102 (Alaska 1978) (footnote omitted). Plaintiffs claim that the State has asserted by conduct that it claims no easements by allowing the owners to develop their property inconsistently with the easements, and by not recording the land orders. They assert that reasonable reliance on that assertion has taken place. Because we have already found that publication of the land orders imparts constructive notice of the easements which they create, that notice makes plaintiffs' reliance unreasonable. Thus, the estoppel claim lacks merit.

The ninth claim of plaintiffs is based on the fact that the property owners' patents involved here did not expressly refer to any land order easements. Because of this the plaintiffs contend that the property conveyed was conveyed free from such easements. They argue further that as a result suit was required to be brought against the property owners to vacate the patents, and that the time for such a suit is, in all cases now before us, barred by the six year statute of limitations contained in 43 U.S.C. § 1166.[19]

The premise of this argument is that a patent which does not say that it is issued subject to a public easement operates to transfer the property free from the easement. We rejected this premise in *Green*. We held there that an unexpressed DO 2665 easement was effective. *Green*, 586 P.2d at 603.

Similarly, in *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975), we affirmed a trial court ruling that a right-of-way not expressed in a patent was effective:

> At the outset Girves notes that neither her "Notice of Allowance", nor her patent contained any express reservation of rights-of-way in favor of any public body. However, the absence of an express reservation of easement does not preclude the borough from showing that a right-of-way was established prior to the issuance of these documents.

Id. at 1224 (footnote omitted). We cited as authority for that statement *State v. Crawford*, 7 Ariz.App. 551, 441 P.2d 586 (1968). That case aptly states:

> [I]t is also clear from cases decided under 43 U.S.C. § 932 that a subsequent patentee takes subject to previous right-of-ways [sic] established under the grant contained in that federal statute [Citations omitted.] No contrary authority has come to our attention.... The silence of the patents does not preclude the State from showing the full extent of its right-of-way established prior to the time when the patents were issued to plaintiff's predecessors.

Id. at 590.

[10, 11] The above and other authorities [20] establish that, by operation of law,

19. 43 U.S.C. § 1166 provides:
> Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents.

20. *Bird Bear v. McLean County*, 513 F.2d 190, 192-93 (8th Cir.1975); *Ball v. Stephens*, 68 Cal.App.2d 843, 158 P.2d 207, 210 (1945); *Nicolas v. Grassle*, 83 Colo. 536, 267 P. 196, 197 (1928); *Flint & P.M. Ry. v. Gordon*, 41 Mich. 420, 2 N.W. 648, 655 (1879); *Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864, 874 (1946); *Verdier v. Port Royal R.R.*, 15 S.C. 476, 481 (1881); *Costain v. Turner County*, 72 S.D. 427,

land conveyed by the United States is taken subject to previously established rights-of-way where the instrument of conveyance is silent as to the existence of such rights-of-way. No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because the patent contains an implied-by-law condition that it is subject to such a right-of-way.[21] Thus the statute of limitations expressed by 43 U.S.C. § 1166 does not apply.

VI

CONCLUSION

The first paragraph of the judgment is REVERSED. The second paragraph of the judgment is AFFIRMED as to Hansen and REVERSED as to Boysen. The third paragraph of the judgment is REVERSED. The fourth paragraph of the judgment is AFFIRMED as to the Peases' claim against Transamerica. The case is REMANDED for further proceedings consistent with the foregoing.

RABINOWITZ, Chief Justice, dissenting in part.

I find that I am unable to agree with the court's conclusion that the State of Alaska or the Municipality of Anchorage is entitled to claim highway easements in excess of those reserved when the parcels in question were conveyed by patent from the federal government. Before discussing the grounds for my disagreement with the court's ruling, however, I believe that it will be useful to set forth what I consider to be the significant facts.

The principal question in this appeal is whether the state [1] must compensate three landowners for portions of their parcels taken to widen existing roads. The landowners—Theodore and Claire Pease, Richard Boysen, and a limited partnership called Hansen Associates—are the successors in interest to persons who originally acquired the parcels by patent from the federal government. The federal government expressly reserved highway easements or rights-of-way in the Pease and Boysen patents; there were no easements or rights-of-way reserved in the Hansen patent. In each case the state claims a highway easement greater than that reserved in the patent, resting its claims on various now-repealed federal directives which provided arguably that the easements claimed by the state should have been expressly reserved when the parcels were conveyed by patent.[2]

36 N.W.2d 382, 383 (1949); *Wells v. Pennington County*, 2 S.D. 1, 48 N.W. 305, 308 (1891); *Sullivan v. Condas*, 76 Utah 585, 290 P. 954, 957 (1930).

21. Indeed, when the Secretary of the Interior declared these rights-of-way, they vested in the public and there is authority that thereafter the Secretary could not revoke them. In *Walcott Township v. Skauge*, 6 N.D. 382, 71 N.W. 544 (1897), the court, in discussing 43 U.S.C. § 932, stated:

> Highways once established over the public domain under and by virtue of this act, the public at once became vested with an absolute right to the use thereof, *which could not be revoked by the general government*, and whoever thereafter took the title from the general government took it burdened with the highway so established.

Id. at 546 (emphasis added); *accord Bird Bear v. McLean County*, 513 F.2d 190, 192 (8th Cir. 1975); *Wenberg v. Gibbs Township*, 31 N.D. 46, 153 N.W. 440, 441 (1915); *Gustafson v. Gem Township*, 58 S.D. 308, 235 N.W. 712, 713 (1913). *Cf. City of Butte v. Mikosowitz*, 39 Mont. 350, 102 P. 593, 596 (1909) (grant of a roadway under 43 U.S.C. § 932 is to the public, and governmental entities have "supervision and control thereof as trustee for the public, . . ."). That the rights-of-way were established by administrative action rather than public user does not put them on a different footing. *See United States v. Rogge*, 10 Alaska 130, 152–53 (D.Alaska 1941), *aff'd* 128 F.2d 800 (9th Cir.1942).

1. Although the right of the Municipality of Anchorage to claim undisclosed easements is also at issue, I will refer only to the state's rights, for convenience's sake, as the legal issues are the same as to both the state and the municipality.

2. The Pease patent reserved a right-of-way of unspecified location and width under the authority of 48 U.S.C. § 321d, and also reserved a separate 33-foot right-of-way along the south and east boundaries of the parcel. The Peases concede that the state is entitled to the 33-foot right-of-way, and the Alaska Right-of-Way Act of 1966, ch. 92, 1966 Temporary and Special Acts and Resolutions, requires the state to

In my view, the state's reliance upon undisclosed easements, decades after the lands were patented,[3] is foreclosed by both federal and state statutes of limitations governing suits to set aside patents.[4] In addition, I think the landowners are entitled to the protection of Alaska's recording act.[5] Thus, I do not agree with the court's ruling that the state need not compensate the landowners for taking easements which were not expressly reserved in the patents.[6]

In my view, the dispositive legal issue in this appeal should be framed as follows: if the federal government mistakenly issues a patent which purports to convey clear title to lands which should have been withheld for highway easements, is there a time after which the patent may not be challenged notwithstanding the mistake? Because Congress has supplied the answer to this dispositive question in the form of a statute of limitations applicable to suits challenging the validity of patents, I think it is unnecessary to address the array of statutes, Public Land Orders, and Departmental Orders marshalled by the state in defense of the easements that it claims.

Forty-three U.S.C. § 1166 provides that "[s]uits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents."[7] This statute of

compensate the Peases if it uses a section 321d right-of-way notwithstanding the fact that the right-of-way was expressly reserved in the patent. In addition, section 138(b) of the Federal Aid Highway Act of 1970 provides an independent basis for concluding that the state may not claim a section 321d easement. That provision states:

> Any right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures reserved by section 321(d) [sic] of title 48, United States Code (61 Stat. 418, 1947), not utilized by the United States or by the State or territory of Alaska prior to the date of enactment hereof, shall be and hereby is vacated and relinquished by the United States to the end and intent that such reservation shall merge with the fee and be forever extinguished.

Pub.L. No. 91–605, § 138(b), 1970 U.S.Code Cong. & Ad.News 2001, 2029 (uncodified). The state, however, claims yet another easement of fifty feet on the Pease parcel, which is seventeen feet greater than the easement to which the Peases agree the state is entitled. The state claims this fifty-foot easement pursuant to Public Land Orders 601 and 757 and Department Order 2665.

The Boysen patent reserved only a section 321d right-of-way; once again, the state must compensate Boysen if it uses a section 321d right-of-way. The state, however, claims a separate 150-foot easement on the Boysen parcel under the authority of Public Land Order 1613 and Department Order 2665.

As to the Hansen parcel, which is subject to no reserved highway easements or rights-of-way, the state also claims a 150-foot easement under the authority of Public Land Order 1613 and Department Order 2665.

3. The Hansen patent was issued on June 1, 1950; the Boysen patent, on May 15, 1952; the Pease patent, on October 4, 1955. The state did not claim the easements that it now seeks until the mid to late 1970's.

4. 43 U.S.C. § 1166; AS 09.10.230. I do not find it necessary to distinguish or consider the many Alaska cases dealing with the effect of various federal directives, because none of those cases have addressed the statutes of limitations issues.

5. AS 34.15.290.

6. The only federal directive upon which the state relies which was in effect when the Hansen parcel was patented is Public Land Order 601; the remaining directives were not promulgated until after the Hansen patent was issued and cannot, in my view, be applied to alter vested property interests without abridging rights secured by the federal and state constitutions. The withdrawals made by Public Land Order 601 were, however, subject to "valid existing rights," and an entryman's claim is a "valid existing right" which could not be adversely affected by Public Land Order 601. Since the Hansen parcel was entered prior to the promulgation of Public Land Order 601, that parcel is not subject to the withdrawal made by that directive.

7. Admittedly the United States is not a party to this litigation, but this observation does not answer the question of the applicability of the federal statute of limitations. The state, which acquired its interests in federally-created highway easements from the federal government by quitclaim deed, could not have acquired greater rights than its grantor had; the state's rights are merely derivative. A claim that would have been time-barred as to the United States was not revived, nor did the federal statute of limitations cease to run as to viable claims, when the United States transferred its rights to

limitations was enacted because of "the insecurity and loss of confidence of the public in the integrity and value of patent title to public lands, which had been occasioned by conflicting claims ... which had resulted in many suits being commenced to cancel patents." *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 562, 38 S.Ct. 367, 368, 62 L.Ed. 879, 882 (1918). The statute presupposes that the federal government might err and issue a patent to previously reserved lands. As the Supreme Court has explained, "[i]f the act were confined to valid patents it would be almost or quite without use." *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 450, 28 S.Ct. 579, 580, 52 L.Ed. 881, 887 (1908). The well-settled rule is that the running of the statute of limitations "makes the title of the patentee good as against the grantor, the United States." *United States v. Eaton Shale Co.*, 433 F.Supp. 1256, 1269 (D.Colo. 1977). If the landowners' patent titles are good as against the original grantor, the United States, then their titles are good as against the state, which acquired its interests, if any, in the patented lands in 1959 by quitclaim deed from the federal government. In my view the effect of the six-year statute of limitations is to validate a mistakenly issued patent after the limitations period has expired.[8] Thus, I would

the state. Stated differently, a time-barred claim is not revived by assigning it to someone to whom the relevant statute of limitations is not applicable. *See, e.g., Stanczyk v. Keefe*, 384 F.2d 707, 708 (7th Cir.1967) (parents could not revive time-barred claim by assigning it to minor child, against whom statute of limitations did not run); *Smith v. Copiah County*, 232 Miss. 838, 100 So.2d 614, 616 (1958) (assignee's claim is barred if assignor's rights are barred).

Inherent in my conclusion that 43 U.S.C. § 1166 is applicable is the view that a judicial ruling which declares that a portion of the landowners' patented parcels must be conveyed without compensation to the state, in derogation of the patents themselves, is the functional equivalent of a ruling that portions of the patents be "vacated" or "annulled."

8. *See United States v. Winona & St. Peter R.R. Co.*, 165 U.S. 463, 17 S.Ct. 368, 41 L.Ed. 789 (1897); *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 28 S.Ct. 579, 52 L.Ed. 881 (1908). In *Winona* the Court explained:

> Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the government to insist upon the letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the government, *such conveyances should, after the lapse of a prescribed time, be conclusive against the government, and this notwithstanding any errors, irregularities, or improper action of its officers therein.*

165 U.S. at 475–76, 17 S.Ct. at 370–71, 41 L.Ed. at 795 (emphasis added).

Indeed, so strong is the federal policy of ensuring that federal patents convey unassailable title that the validity of even fraudulently-procured patents may not be challenged after the six-year statute of limitations has run. *See, e.g., United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 38 S.Ct. 367, 62 L.Ed. 879 (1918). A patentee who procures a patent by fraud has good title after the six-year period has expired, although the statute of limitations does not begin to run until the fraud is discovered. *Exploration Co. v. United States*, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200 (1918).

In addition, the federal bona fide purchaser doctrine provides that the validity of an erroneously granted patent may not be challenged once the original patentee conveys the parcel to a bona fide purchaser. *See, e.g., United States v. California & Oregon Land Co.*, 148 U.S. 31, 40–41, 13 S.Ct. 458, 461–462, 37 L.Ed. 354, 359–60 (1893); *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 313, 8 S.Ct. 131, 133, 31 L.Ed. 182, 185 (1887). Bona fide purchase from a patentee is a perfect defense to a suit to set aside a patent. *See, e.g., Wright-Blodgett Co. v. United States*, 236 U.S. 397, 35 S.Ct. 339, 59 L.Ed. 637 (1915), which involved a patent obtained by fraud:

> [T]he respect due a patent, the presumption that all the preceding steps required by the law had been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction.... And, *despite satisfactory proof of fraud in*

hold that the federal statute of limitations, 43 U.S.C. § 1166, bars the state's claim to undisclosed easements.[9]

As an independent basis for ruling that the landowners' parcels are free of the easements claimed by the state, I would hold further that the state's claims are barred by AS 09.10.230, which provides in pertinent part:

> No person may bring an action to set aside, cancel, annul, or otherwise affect a patent to lands issued by this state or the United States, or to compel a person claiming or holding under a patent to convey the lands described in the patent or a portion of them to the plaintiff in the action, or to hold the lands in trust for or to the use and benefit of the plaintiff, or on account of any matter, thing, or transaction which was had, done, suffered, or transpired before the date of the patent unless commenced within 10 years from the date of the patent.[10]

This statute, which clearly evinces the legislature's intent that patents be considered conclusive evidence of the title they purport to convey after ten years from the date of issuance, has been the law of the territory and state of Alaska for the better part of a century. In my view it is appropriate to give effect to this long-standing state policy of promoting public confidence in the stability and marketability of patent titles.[11]

obtaining the patent, as the legal title has passed, bona fide purchase for value is a perfect defense.

Id. at 403, 35 S.Ct. at 341, 59 L.Ed. at 640 (citations omitted) (emphasis added).

9. I find the authorities relied upon by the court, *see ante* n. 19, inapposite for two reasons. First, those authorities simply do not address the statute of limitations issue.

Second, many of those authorities involve situations in which, at the time the patent in question was issued, the patented lands had previously been conveyed to or reserved for some third party, such as a railroad or a state. In such situations courts have sometimes concluded that the prepatent interests prevailed over the patentees' claims. In the case at hand, however, the state is not claiming, and cannot claim, that it acquired the easements or rights-of-way prior to the issuance of the patents in question and that the patents were therefore issued in derogation of the state's rights. The claim is not that the federal government had conveyed away parts of the patented parcels to anyone prior to issuing the patents; rather, the gist of the claim is that the federal government mistakenly conveyed by patent, lands that it intended to keep for itself.

In *Cramer v. United States*, 261 U.S. 219, 67 L.Ed. 622, 43 S.Ct. 342, (1923), the Court made precisely this distinction. *Cramer* involved a suit brought by the United States to set aside a patent granted to a railroad covering lands occupied by Indians. The Court distinguished between suits brought by the government to cancel patents and revest title in itself and suits brought so that the parcels could be vested in third parties whose rights had accrued prior to patent. The Court noted that the six-year statute of limitations applies to the former kind of case, but not to the latter:

> The suit is not barred by [now 43 U.S.C. § 1166], limiting the time within which suits may be brought by the United States to annul patents.
>
> The object of that statute is to extinguish any right the *government* may have in the land which is the subject of the patent, not to foreclose claims of third parties. Here the purpose of the annulment was not to establish the right of the United States to the lands, but to remove a cloud upon the possessory rights of its wards. As stated by this court in *United States v. Winona & St. Peter R.R. Co.*, 165 U.S. 463, 475 [17 S.Ct. 368, 370], 41 L.Ed. 789, 795, ... the statute was passed in recognition of "the fact that when there are no adverse individual rights, and only the claims of the government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the Land Department should be open for consideration." After the lapse of the statutory period, the patent becomes conclusive against the government, but not as against claims and rights of others ....

Id. at 233–34, 43 S.Ct. at 346, 67 L.Ed. at 628 (emphasis in original). *See also United States v. Krause*, 92 F.Supp. 756, 766 (W.D.La.1950); *Capron v. Van Horn*, 258 P. 77 (Cal.1927).

10. *See Monroe v. California Yearly Meeting of Friends Church*, 564 F.2d 304, 306 n. 2 (9th Cir.1977).

11. Although the question of the applicability of AS 09.10.230 was not raised below, we have repeatedly stated that "[u]pon appeal, a correct decision of the superior court will be affirmed regardless of whether we agree with the reasons advanced." *Fireman's Fund Am. Ins. Cos. v. Gomes*, 544 P.2d 1013, 1017 n. 12 (Alaska 1978); *Carlson v. State*, 598 P.2d 969, 973 (Alaska 1979); *A & G Constr. Co. v. Reid Bros. Logging Co.*, 547 P.2d 1207, 1211 n. 1 (Alaska 1976).

Finally, I do not agree with the court's holding that Boysen and the Peases are charged with constructive notice of federal directives published in the Federal Register and thus are unable to claim bona fide purchaser status under Alaska's recording act, AS 34.15.290.

Forty-four U.S.C. § 1507 provides that persons are charged with notice of documents filed for publication in the Federal Register "except in cases where notice by publication is insufficient in law." Thus, the pertinent question is whether published notice of federal directives such as Public Land Orders is "insufficient in law" to bind Boysen and the Peases, who did not have actual knowledge of the published directives when they purchased their parcels.[12]

The answer to this question is supplied by federal law,[13] and, as the court notes, there are a number of situations in which notice in the Federal Register is sufficient to bind persons who did not know of the publication. In my view, however, this appeal involves a situation in which notice by publication is "insufficient in law" within the meaning of 44 U.S.C. § 1507.

Our task is to determine whether Congress intended that the sufficiency of published notice of federal directives affecting Alaska real property is to be tested by looking to state law[14] or by applying an independent body of federal common law designed to supplant the state's conveyancing rules.[15] Congress did not address this question when enacting the predecessor to 44 U.S.C. § 1507, but, in my view, had it done so it would not have concluded that lands whose private title began with a patent from the federal government should be subject to different conveyancing standards than neighboring parcels whose title originated elsewhere. I find it difficult to believe that that Congress could have intended to displace established conveyancing law in every state in the union and create a chaotic system in which each state is required to apply different standards to patented parcels than to parcels whose chain of title did not begin with a federal patent. In short, I think that the sufficiency of notice for purposes of 44 U.S.C. § 1507 should be determined by applying state law standards. Since the law of this state does not charge a grantee with notice of prepatent transactions and documents[16] or of instruments not recorded in the chain of title,[17] I would conclude that Boysen and the Peases did not have constructive notice of the easements claimed by the state and thus are protected by AS 34.15.290.

12. Under AS 34.15.290 Boysen and the Peases must prevail as bona fide purchasers unless they are charged with constructive notice of the existence of easements which were not recorded in their chains of title.

Our ruling in *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (Alaska 1976) does not dispose of this issue because the parties in *Hahn* did not argue, and we did not consider, whether a notice published in the Federal Register might be "insufficient in law."

13. *See, e.g., Ritter v. Morton*, 513 F.2d 942, 946 (9th Cir.1975) (per curiam), *cert. denied*, 423 U.S. 947, 96 S.Ct. 362, 46 L.Ed.2d 281 (1975); *United States v. Boyd*, 458 F.2d 1252, 1254 (6th Cir.1972).

14. *See, e.g., Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172 (1946). Congress is, of course, free to adopt state rules as federal law. *See generally* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 470–71, 491–94 (2d ed. 1973). The classic example of such an incorporation of states' legal doctrine into federal law is the Federal Tort Claims Act, under which the liability of the United States—a federal question—is determined by applying state substantive law. *See* 28 U.S.C. § 2674; *see also, e.g., Otteson v. United States*, 622 F.2d 516 (10th Cir.1980).

15. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).

16. *See File v. State*, 593 P.2d 268, 270 (Alaska 1979) ("patent is the highest evidence of title").

17. *See Sabo v. Horvath*, 559 P.2d 1038 (Alaska 1976).

GREEN

Un-entered small tract lot

Could be subject to

PLO Right of Way

Alaska Supreme Court

STATE of Alaska, DEPARTMENT OF HIGHWAYS, Appellant,

v.

Gordon E. GREEN, Viola Green, A. Lee Goodman, Joan D. Goodman, Appellees.

No. 3184.

Supreme Court of Alaska.

Sept. 1, 1978.

State brought eminent domain action seeking portions of two lots for use in planned widening of road, claiming 50 foot right-of-way on either side of road's center line. Property owners claimed that express provisions in patents to subject lots limited State's right-of-way to 33 feet. After consolidation of cases, the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, J., granted summary judgment in favor of property owners on liability issues, and State brought appeal. The Supreme Court, Rabinowitz, J., held that: (1) in absence of some indication that Congress intended right-of-way reservations under Small Tract Act to be exclusive or that rights-of-way reserved pursuant to Act are incompatible with other potentially applicable rights-of-way, various discretionary rights-of-way must be allowed to operate together; (2) accordingly, since 50-foot right-of-way created by secretarial order was not irreconcilable with 33-foot right-of-way created by regulations under Small Tract Act under which predecessor patentees originally occupied property, lot was subject to 50-foot right-of-way; (3) general right-of-way reservation in secretarial order applied to other lot in question only if effective date of Small Tract Act lease was preceded by both construction of road and issuance of secretarial order, and (4) material issues of fact existed as to whether 50-foot right-of-way actually was appropriated prior to date other lot was leased, precluding summary judgment.

Reversed and remanded in part.

1. Public Lands ⇐114(1)

While administrative regulation under Small Tract Act, providing that unless otherwise provided in classification order, leased land was subject to a right-of-way not to exceed 33 feet in width along boundaries of tract, may be read restrictively, its apparent objective was to provide rights-of-way for "access streets or roads" and for public utilities, not to eliminate other potentially applicable reservations. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

2. Public Lands ⇐114(1)

In absence of some indication that Congress intended right-of-way reservations under the Small Tract Act to be exclusive or that rights-of-way reserved pursuant to said Act are incompatible with other potentially applicable rights-of-way, the various discretionary rights-of-way must be allowed to operate together. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

3. Administrative Law and Procedure ⇐413

An administrative agency's interpretation of its own regulation is normally given effect unless erroneous or inconsistent with regulation.

4. Statutes ⇐219(1)

An administrative agency's interpretation of a statute is not binding upon courts since statutory interpretation is within judiciary's special competency, but where statute is ambiguous, some weight may be given to administrative decisions interpreting it.

5. Public Lands ⇐114(1)

Thirty-three-foot right-of-way appearing in patent to lot previously leased under Small Tract Act was more specific than general right-of-way reservation contained in secretarial order No. 2665 issued by Secretary of Interior establishing 50-foot right-of-way on either side of center line for local roads; however, since there was no serious conflict between the two overlapping rights-of-way, there was no need to resort to rule of construction favoring specific provisions over general provisions. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed. § 682a et seq.

6. Statutes ⇐194

Rule of construction favoring specific provisions over general provisions need not be invoked unless it is impossible to give effect to both provisions.

7. Statutes ⇐223.4

Where one statute deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible, but if there is any conflict, the latter will prevail regardless of whether it was passed prior to general statute, unless it appears that legislature intended to make general act controlling.

8. Public Lands ⇐114(1)

As a general rule, where language of a public land grant is subject to reasonable doubt, such ambiguities are to be resolved strictly against grantee and in favor of government.

9. Public Lands ⇐114(1)

Public land grants must be evaluated in light of rules and aids of statutory construction.

10. Administrative Law and Procedure ⇐412

Administrative regulations which are legislative in character are interpreted using same principles applicable to statutes.

11. Administrative Law and Procedure ⇐412

In case of administrative regulations which deal with same subject, their provisions should be considered together.

Statutes ⇐223.1

Prior statutes relating to same subject matter are to be compared with new provision, and if possible by reasonable construction, both are to be so construed that effect is given to every provision in all of them.

Statutes ⇐223.1

In some circumstances, interpretation of one statutory provision is properly influenced by content of another provision addressing similar purposes or objects; guiding principle is that if it is natural and reasonable that members of legislature would think about another statute and have their impressions derived from it influence their understanding of act whose effect is in question, then court called upon to construe act in question should also allow its understanding to be influenced by impressions derived from other statute.

14. Public Lands ⇐114(3)

Property owned pursuant to patent which was issued by federal government to current owners' predecessors in interest who originally occupied property pursuant to Small Tract Act lease, and which patent expressly limited State's right-of-way for roadway and public utilities purposes to 33 feet on either side of center line, was subject to 50-foot right-of-way provided by secretarial order No. 2665, which was issued after small tract classification order No. 22 making certain property, including subject lot, available for small tract disposition, but before issuance of lease and subsequent patent. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

15. Public Lands ⇐114(3)

Prior to issuance of a Small Tract Act lease or patent providing for a 33-foot right-of-way, appropriation of a roadway on lands classified as small tracts and operation of secretarial order No. 2665 establishing a 50-foot right-of-way for local roads were sufficient to establish a 50-foot right-of-way. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

16. Public Lands ⇐114(3)

Once lease to a particular parcel of land was issued under the Small Tract Act, lease separated land from other small tracts and lessee took property subject to both general right-of-way reservations which applied at time of lease and specific right-of-way reservations which applied through lease's provisions. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

17. Public Lands ⇐114(3)

General 50-foot right-of-way reservation provided by secretarial order No. 2665 for local roads applied to subject lot only if effective date of Small Tract Act lease to

lot, providing for a 33-foot right-of-way, was preceded by both construction of road and issuance of secretarial order, that is, until Department of Interior acted to bring road into existence, there was no basis for Secretary's reservation of rights-of-way. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

18. Public Lands ⇐114(3)

Where lease to subject lot under Small Tract Act providing for a 33-foot right-of-way was dated June 30, 1950, and secretarial order No. 2665 establishing 50-foot right-of-way reservation for local roads did not become effective until October 20, 1951, secretarial order did not operate to establish 50-foot right-of-way on lot. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

19. Public Lands ⇐114(3)

By issuing small tract lease containing a specific, discretionary right-of-way reservation, Secretary of Interior intended to preclude subsequent operation of general discretionary reservation in secretarial order No. 2665 establishing a 50-foot right-of-way on either side of center line of local road. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

20. Public Lands ⇐114(3)

Lease of lot pursuant to Small Tract Act did not permit acquisition during lease term of general rights-of-way which were not applicable to leased land prior to effective date of lease, and, accordingly, interest transferred by lease and option to purchase was not intended to be subject to unilateral reduction between date lease was executed and date option was exercised. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

21. Judgment ⇐181(15)

In eminent domain action in which State sought portions of subject lots for use in planned widening of road, genuine issue of fact existed as to whether 50-foot right-of-way had actually been appropriated prior to date of Small Tract Act lease to property providing for 33-foot right-of-way, precluding summary judgment. Small Tract Act, § 1 et seq., 43 U.S.C. (1976 Ed.) § 682a et seq.

22. Judgment ⇐185.2(1)

Once movant for summary judgment has satisfied his burden of establishing absence of genuine issues of material fact and its right, on basis of undisputed facts, to judgment as a matter of law, nonmovant was required, in order to prevent summary judgment, to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict movant's evidence and thus demonstrate that a material issue of facts exists. Rules of Civil Procedure, rule 56(c).

23. Judgment ⇐185.2(4)

Mere assertions of fact in pleadings and memoranda are insufficient for denial of motion for summary judgment. Rules of Civil Procedure, rule 56(c).

Eugene Wiles, Robert L. Eastaugh and Stephen M. Ellis, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for appellant.

Murphy L. Clark, Anchorage, for appellees Green.

David B. Loutrel, Croft, Thurlow, Loutrel & Duggan, Anchorage, for appellees Goodman.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION

RABINOWITZ, Justice.

The state brought eminent domain actions [1] in the superior court seeking portion

1. The state's complaints were filed July 9, 1974. Initially, the complaints sought a 50-foot right-of-way and a 20-foot slope easement (for lateral support of the roadway). The state filed amended complaints on November 12, 1974. The amended complaints omitted the slope easement and instead sought to acquire:

(1) an estate in fee simple for the 50 foot ... right-of-way on both the Green and Goodman parcels (excluding minerals lying more than 100 vertical feet below the roadway's surface), and

(2) a temporary construction easement over and over additional portions of the Green and Goodman properties.

of the lots owned by the Greens and Goodmans[2] for use in the planned widening of Tudor Road in Anchorage. The state claimed a right-of-way extending 50 feet on either side of Tudor Road's center line. The Greens and Goodmans argued that express provisions in the patents to their lots limited the state's right-of-way to 33 feet on either side of the center line. After the state had amended its complaints, the parties stipulated to consolidation of the cases for determining liability issues and also stipulated to resolution of right-of-way issues by summary judgment if the parties could agree upon the facts.[3] Subsequently, both the state and the property owners moved for summary judgment. The superior court granted summary judgment in favor of the Greens and Goodmans on all liability issues.[4] The state then brought this appeal.

A brief history of the Green and Goodman parcels is necessary to an understanding of the parties' contentions in this appeal. The lots were originally owned by the United States and were among lands withdrawn "from all forms of appropriation under the public-land laws"[5] by the Secretary of the Interior in 1942. Pursuant to that withdrawal order, the lands were reserved for use by the War Department.[6] In 1949 the Secretary of the Interior, acting pursuant to executive order, terminated War Department jurisdiction but provided that certain described lands, including the property which was eventually conveyed to the Greens and Goodmans, "shall not become subject to the initiation of any rights or to any disposition under the public land laws until it is so provided by a order of classification . . . opening the lands to application under the Small Tract Act . . . ."[7] Such a classification order was issued the following year;[8] under that order, lots 11 (Green) and 12 (Goodman) were made available for small tract disposition.

The Goodmans and Greens contended that their predecessor patentees first occupied the lots pursuant to Small Tract Act leases and subsequently received patents to the land from the federal government.[9] The patents contained substantially identical reservations, including the following language:

> The reservation of a right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under any authority of the United States or by any state created out of the territory of Alaska in accordance with the Act of July 24, 1947 (61 Stat. 418, 47 [48] U.S.C., § 321[d]).

The following typewritten language was added to the printed patent form:

> This patent is subject to a right-of-way not exceeding thirty-three (33) feet in width, for roadway and public utilities

2. The Kerkoves and Urbaneks answered the state's complaint and alleged that "they are owners of a substantial property interest" in the Goodman parcel. They have not appeared in this appeal.

3. Five separate actions originally were consolidated; two of these involved the Green and Goodman properties. The parties' stipulation expressly reserved compensation and damages issues for separate trial or determination "on an individual basis."

4. The superior court ordered summary judgment for the property owners on July 26, 1976. Final judgment was entered on September 21, 1976, for the Greens, on September 27, 1976, for the Goodmans, and on October 28, 1976, for the Kerkoves and Urbaneks.

5. Public Land Order 5 (June 26, 1942).

6. *Id.*

7. P.L.O. 615 (November 8, 1949; published in Federal Register, November 16, 1949).

8. Small Tract Classification No. 22 (March 23, 1950).

9. The Goodmans allege that their predecessor patentee occupied lot 12 on April 21, 1950, and received a patent on April 28, 1952. The Green parcel (lot 11) was leased from the United States on September 1, 1952, and patent was granted on December 1, 1953.

purposes, being located along the north and west boundaries of said land.[10]

After the issuance of Small Tract Classification Order No. 22 but before issuance of patents to lots 11 and 12, the Secretary of the Interior issued Secretarial Order No. 2665 [11] establishing the width of public highways in Alaska which were under the jurisdiction of the Secretary of the Interior. For "local roads"—all roads not classified as "through roads" or "feeder roads"—the width set by Secretarial Order No. 2665 was 50 feet on each side of the road's center line. Tudor Road was not among the named "through" or "feeder" roads.[12]

In light of this administrative order and the chronology of events relating to these lands, appellant State of Alaska takes the position that the Green and Goodman parcels were subject to a 100 foot right-of-way for Tudor Road. Specifically, the state argues that the planning and construction of Tudor Road by the United States effectively appropriated land lying in the right-of-way and reserved such right-of-way to the United States. Prior to issuance of patents to lots 11 (Green) and 12 (Goodman), the 100 foot right-of-way reservation for local roads established by Secretarial Order No. 2665 became effective. Thus, reasons the state, a right-of-way extending 50 feet from the Tudor Road center line onto portions of lots 11 and 12 was validly reserved prior to the time private parties acquired vested rights in the lots through issuance of the patents. As an alternative to its motion for summary judgment, the state asserted that a genuine issue of material fact existed with respect to the Goodman property, *i. e.*, that the date of Tudor Road's construction must be established before the respective rights of the parties could be determined.

The Greens argue that their property was unaffected by the Secretary's 100 foot right-of-way designation because regulations under the Small Tract Act had segregated these parcels from the operation of general right-of-way provisions prior to the date of issuance of Secretarial Order No. 2665. Thus, only easements reserved by authority of the Small Tract Act apply. The Goodmans reiterate the Greens' position, but they further contend that their predecessor patentee had acquired vested rights under his lease pursuant to Small Tract Classification No. 22. Since the patent was obtained by operation of the same lease provisions, vested patent rights relate back to the date of lease for purposes of determining the applicable right-of-way.

10. The quoted language appeared in the patent to the Goodmans' property. The typewritten language in the patent to the Greens' property stated that the right-of-way was located along the north and east boundaries of lot 11.

11. Secretarial Order No. 2665 reads, in part:

RIGHTS-OF-WAY FOR HIGHWAYS IN ALASKA

Section 1. *Purpose.* (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands of such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a).

Sec. 2. *Width of Public Highways.* (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. [Other highways listed] shall extend 150 feet on each side of the center line thereof.

. . . . .

(3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

12. The relevant chronology is as follows:

Small Tract Classification Order No. 22	March 23, 1950
Alleged date of "entry" on Goodman parcel pursuant to Small Tract Order No. 22	April 12, 1950
Secretarial Order No. 2665	October 20, 1951 (date of publication in Federal Register)
Date of patent to Goodmans' predecessor	April 28, 1952
Lease date of Green parcel under Small Tract Order No. 22	September 1, 1952
Date of patent to Greens' predecessor	December 1, 1953

use the issues regarding the Green and
man parcels differ somewhat, we shall
ss the two parcels separately.

e state argues that Tudor Road had
appropriated by the United States pri-
any interest vesting in the Greens'
cessor patentee. Thus, the state con-
, Secretarial Order No. 2665 estab-
l a 50 foot right-of-way for Tudor
in the same manner as it did for other
roads."

Greens do not dispute the federal
nment's appropriation of Tudor Road
extent of the actual roadway and
ng shoulder.[13] The Greens also ac-
edge that their predecessor in interest
ot in possession of lot 11 until after
iginal construction of Tudor Road.[14]
lition, they agree with the state that
arial Order No. 2665 is valid within
per sphere of application; but they
l that neither the statutory authority
which Secretarial Order No. 2665 is
nor the order itself is applicable to
lassified under the Small Tract Act.

Greens rely principally on this court's
in *State, Department of Highways*
sby, 410 P.2d 724 (Alaska 1966), to
t their contention that 48 U.S.C.
(1946) and Secretarial Order No.
ere inapplicable to lands classified
the Small Tract Act.[15] In *Crosby*
rt determined that another statute,
48 U.S.C. § 321d (1952), was not applicable to lands leased or sold pursuant to the Small Tract Act. The court relied upon congressional intent as reflected in the legislative history of the Act of July 24, 1947, codified as 48 U.S.C. § 321d (1952), and concluded:

> [T]he 1974 Act, in speaking of lands "taken up, entered, or located," had reference only to those public land laws where discretionary authority on the part of a government officer or agency to impose reservations for rights-of-way was absent, and was not intended to apply to those laws where such authority existed.[16]

The Small Tract Act gave the Secretary of the Interior discretionary authority to sell or lease small tracts "under such rules and regulations as he may prescribe", and the Secretary had issued regulations prescribing a 33 foot right-of-way without providing for the right-of-way requirements contained in 48 U.S.C. § 321d (1952). Accordingly, the general right-of-way reservation in 48 U.S.C. § 321d (1952) did not apply and only the discretionary right-of-way applicable specifically to Small Tract Act lands was operative.

In the case at bar, the state does not rely upon 48 U.S.C. § 321d (1952); instead, it bases its argument exclusively on 48 U.S.C. § 321a (1952) and Secretarial Order No. 2665.[17] The statute involved in *Crosby* was

Greens devote a substantial portion of
rief to the argument that the state's
n is incorrect because appropriation of
r a roadway does not reserve a right-of-
eyond the width of the roadway and
g shoulder as actually established by
liture of funds or construction of the
As we understand the briefs, however,
te does not argue that the 50 foot right-
was appropriated by the United States.
l, the state contends that once Tudor
as appropriated, Secretarial Order No.
nerated to establish a 50 foot right-of-
regardless of Tudor Road's original

relevant chronology for the Greens'
v is as follows:

rial Order No. 2665	October 20, 1951 (date of publication in the Federal Register)
Application for small tract lease by the Greens' predecessor in interest	August 26, 1952
Lease issued to the Greens' predecessor in interest	September 1, 1952
Patent issued to the Greens' predecessor in interest for lot 11	December 1, 1953

15. Act of June 1, 1938, 52 Stat. 609, 43 U.S.C. § 682a (1964). The Small Tract Act was made applicable to Alaska by the Act of July 14, 1945, 59 Stat. 467.

16. *State, Dept. of Highways v. Crosby*, 410 P.2d 724, 727 (Alaska 1966).

17. The Greens acknowledge that Secretarial Order No. 2665 was issued pursuant to the Act of June 30, 1932, c. 320, § 2, 47 Stat. 446, 48 U.S.C. § 321a (1946). That section directed the Secretary of the Interior to "execute or cause

enacted July 24, 1947; the statute which authorized Secretarial Order No. 2665 had been enacted 15 years earlier on June 30, 1932. In addition, the subjects addressed by § 321a differ markedly from those addressed by § 321d. Section 321a governs the transfer of road construction and maintenance functions to the Secretary while section 321d requires certain right-of-way reservations to be included in "all patents for lands hereafter taken up, entered, or located in the Territory of Alaska." The *Crosby* decision held that right-of-way reservations under 48 U.S.C. § 321d (1952) did not apply to small tracts because Congress intended § 321d to operate only if no discretionary authority was available to reserve rights-of-way when public lands were "taken up, entered, or located." *Crosby* did not conclude that right-of-way reservations under the Small Tract Act were exclusive or that additional discretionary right-of-way reservations were precluded.

[1] Neither the Greens nor the Goodmans have cited any authority indicating the Secretary's intention to exclude other potentially applicable right-of-way reservations. Administrative regulations under the Small Tract Act stated:

> Unless otherwise provided in the classification order, the leased land will be subject to a right-of-way of not to exceed 33 feet in width along the boundaries of the tract for street and road purposes and for public utilities. The location of such access streets or roads may be indicated on a working copy of the official plat . . .[18]

Thus, while the regulation may be read restrictively ("Unless otherwise provided in the classification order . . . not to exceed 33 feet in width"), its apparent objective was to provide rights-of-way for "access streets or roads" and for public utilities, not to eliminate other potentially applicable reservations. As the state emphasizes, this language and the parallel language of the lease [19] suggest the Secretary's concern with reserving access for other lots within the boundaries of the small tract lease area.[20] Such provisions do not indicate that other rights-of-way should be precluded. Nor does the language of the Small Tract Act or its legislative history show Congress' intention to preclude operation of all right-of-way reservations except those specifically applying to small tracts.

[2-4] In the absence of some indication that Congress intended right-of-way reservations under the Small Tract Act to be exclusive or that rights-of-way reserved pursuant to the Small Tract Act are incompatible with other potentially applicable rights-of-way, we conclude that the various discretionary rights-of-way must be allowed

to be executed all laws pertaining to the construction and maintenance of roads . . . in Alaska."

Under the provisions of 48 U.S.C. § 321a (1946), all appropriations made and available for expenditure by the board of road commissioners under the Secretary of the Army were transferred to the Secretary of the Interior "to be thereafter administered in accordance with the provisions of sections 321a-321d of this title." *Id.* The board of road commissioners was also "directed to turn over" property for the use of the Secretary of the Interior in constructing and maintaining roads and other works. *Id.*

Section 321a was repealed by Pub.L. 86-70, § 21(d)(7), June 25, 1959, 73 Stat. 146, effective July 1, 1959.

We note that both this court and the federal courts have treated Secretarial Order No. 2665 as valid, although no direct challenge to its validity has been raised. *See Myers v. United States*, 210 F.Supp. 695 (D.Alaska 1962); *Myers v. United States*, 378 F.2d 696, 180 Ct.Cl. 521 (1967).

18. 43 C.F.R. § 257.16(c) (1954).

19. The lease for lot 11 provided, in part:

> (m) That this lease is taken subject to the rights of others to cross the leased premises on, or as near as practicable to, the exterior boundaries thereof, as a means of ingress or egress to or from other lands leased under authority of this act. Whenever necessary, the Regional Administrator may make final decision as to the location of rights-of-way. It has been determined that the land leased herein is subject to a 33-foot right-of-way along the north and west boundaries.

20. It should be noted that the case at bar involves rights-of-way for a bordering "local" road rather than rights-of-way for streets or utilities serving interior lots.

to operate together.[21] Thus, unless the 50 foot right-of-way created by Secretarial Order No. 2655 is irreconcilable with the 33 foot right-of-way created by regulations[22] under the Small Tract Act, the Green's property is subject to the 50 foot right-of-way.

The Greens also argue that even if Secretarial Order No. 2665 applies to land conveyed pursuant to the Small Tract Act, the order establishing a 50 foot right-of-way and the administrative regulation establishing a 33 foot right-of-way must be construed together. The Greens contend that only by limiting the right-of-way to 33 feet in width will both the order and the regulation be permitted to operate without nullification of one or the other; in addition, the Greens argue, the 33 foot right-of-way is more specific and should control when applicable reservations are in conflict. The state counters by saying that the 50 foot right-of-way established by Secretarial Order No. 2665 is consistent with the 33 foot right-of-way established by administrative regulation because the purposes served by the two rights-of-way are different.

[5–7] While we agree with the Greens that the 33 foot right-of-way reservation is more specific, it does not follow that the 50 foot right-of-way may not operate. That is, language of the administrative regulation, classification order and small tract patent show a progressively narrower focus on the Greens' lot; thus, the 33 foot right-of-way reservation appearing in the patent is more specific than the general right-of-way reservation contained in Secretarial Order No. 2665. Nevertheless, the rule of construction favoring specific provisions over general provisions need not be invoked unless it is impossible to give effect to both provisions. As Professor Sutherland explains:

> Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, *the two should be harmonized if possible*; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.[23] (emphasis added)

We think there is no serious conflict between the two overlapping rights-of-way and no need to resort to the rule of construction favoring specific provisions over general provisions.

[8–13] The Greens correctly point out that the 50 foot right-of-way makes the 33

. The Department of the Interior also contemplated the possibility of non-exclusive, overlapping rights-of-way from more than one source. The Assistant Solicitor, Department of the Interior stated:

> [T]here could be an overlapping of rights-of-way over a tract of land as where a right-of-way generally provided for under the act of 1947 . . . and specifically referred to in a reservation designating a certain width, could intersect or cross an access boundary road reserved under authority of 43 C.F.R. 257.17(b).

Memorandum of Opinion of the Solicitor, Department of the Interior, I–59–2242.10 (Oct. 9, 1959). Although the memorandum is addressed to the express reservation of rights-of-way considered in Crosby, it is significant because it reflects the Department of the Interior's position that the 33 foot right-of-way appearing in small tract patents is not exclusive. An administrative agency's interpretation of its own regulation is normally given effect unless plainly erroneous or inconsistent with the regulation. 1A C. Sands, Sutherland Statutory Construction § 31.06, at 362 (4th ed. 1972). *See Udall v. Tallman*, 380 U.S. 1, 4, 85 S.Ct. 792, 795, 13 L.Ed.2d 616, 619 (1965); *Burglin v. Morton*, 527 F.2d 486, 490 (9th Cir. 1975), *cert. denied*, 425 U.S. 973, 96 S.Ct. 2171, 48 L.Ed.2d 796 (1976). An administrative agency's interpretation of a statute is not binding upon courts since statutory interpretation is within the judiciary's special competency but where the statute is ambiguous, some weight may be given to administrative decisions interpreting it. *Union Oil Co. of Cal. v. Department of Revenue*, 560 P.2d 21, 23 (Alaska 1977).

22. Regulations promulgated pursuant to the Small Tract Act stated:

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

43 C.F.R. § 257.16(c) (1954).

23. 2A C. Sands, Sutherland Statutory Construction § 51.05, at 315 (4th ed. 1973) (footnotes omitted).

foot reservation superfluous to the extent of overlap. However, no actual conflict exists between the two provisions. The primary purpose of both reservations is to protect rights-of-way and that purpose is served with regard to the 33 foot provision even if the actual right-of-way is larger than 33 feet. The other purposes of the reservation specifically applicable only to small tracts, street and utility access to interior lots, are not impaired if the Tudor Road right-of-way is 50 feet. However, the converse is not true; the purposes to be served by the larger reservation for local roads cannot be served as readily by a 33 foot right-of-way.[24]

[14] In light of the foregoing considerations, we conclude that the superior court erred in granting the Greens' motion for summary judgment. Since there are no genuine issues of material fact with respect to the Green property, the state's motion for summary judgment should have been granted.

To the extent that the right-of-way width affecting the Goodmans' lot is dependent upon applicability of Secretarial Order No. 2665, our conclusions with respect to the Greens' property apply. However, the dispute between the state and the Goodmans centers on issues different from those discussed in connection with the Greens' lot. The relevant chronology for lot 12 is the primary reason for such divergence.[25]

The Goodmans contend that their predecessor patentee had received a small tract lease to lot 12 prior to construction of Tudor Road; therefore, when lot 12 was leased, the United States had not appropriated any portion of the roadway. The Goodmans further maintain that the original lease of lot 12 created vested rights in the lessee and that neither subsequent construction of Tudor Road nor issuance of Secretarial Order No. 2665 was effective to create a valid 50 foot right-of-way.

The state argues that the Goodmans' predecessor patentee acquired no vested interest in lot 12 until issuance of the patent

24. Other rules of construction also favor this outcome:

> As a general rule, where the language of a public land grant is subject to reasonable doubt such ambiguities are to be resolved strictly against the grantee and in favor of the government.

3 C. Sands, Sutherland Statutory Construction § 64.07, at 137 (4th ed. 1974) (footnotes omitted). *See generally Id.* §§ 63.02, 63.03. Public grants must also be evaluated in light of other rules and aids of statutory construction. *Id.* § 63.10, at 103.

Administrative regulations which are legislative in character are interpreted using the same principles applicable to statutes. 1A C. Sands, Sutherland Statutory Construction § 31.06, at 362 (4th ed. 1972). *See generally Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971). In the case of administrative regulations which deal with the same subject, their provisions should be considered together:

> Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision in all of them.

2A C. Sands, Sutherland Statutory Construction § 61.02, at 290 (4th ed. 1973) (footnote omitted). In some circumstances, the interpretation of one provision is properly influenced by the content of another provision addressing similar purposes or objects. *State v. Bundrant*, 546 P.2d 530, 545 (Alaska 1976), *appeal dismissed*, 429 U.S. 806, 97 S.Ct. 40, 50 L.Ed.2d 66. *See also Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1245 (Alaska 1974). As Professor Sutherland explains:

> The guiding principle . . . is that if it is natural and reasonable . . . that members of the legislature . . . would think about another statute and have their impressions derived from it influence their understanding of the act whose effect is in question, then a court called upon to construe the act in question should also allow its understanding . . . to be influenced by impressions derived from the other statute

2A C. Sands, Sutherland Statutory Construction § 51.03, at 298–99 (4th ed. 1973).

25. The relevant chronology for the Goodmans' property is as follows:

Small Tract Classification No. 22	March 23, 1950
Alleged "entry" of the Goodmans' predecessor patentee pursuant to small tract lease	April 12, 1950
Secretarial Order No. 2665	October 20, 195 (date of publication in Federal Register)
Patent issued to the Goodmans' predecessor patentee for lot 12	April 28, 1952

in 1952. Thus, since it is undisputed that construction of Tudor Road had commenced prior to issuance of the patent to lot 12, the appropriation of Tudor Road and the operation of Secretarial Order No. 2665 combined to establish a 50 foot right-of-way. In the alternative, the state contends that summary judgment should not have been granted because a genuine issue of material fact exists with respect to whether construction of Tudor Road was begun prior to the issuance of a small tract lease for lot 12.

[15] Although the parties have focused on the question whether the patentee's rights relate back to the date when the small tract lease was issued, we believe the matter may be resolved by examining the effects of the lease on general right-of-way provisions as implemented by Secretarial Order No. 2665. We already have concluded that the Small Tract Act and Small Tract Classification No. 22 did not segregate all small tracts from the operation of other discretionary right-of-way reservations. Accordingly, prior to issuance of a lease or patent, appropriation of a roadway on lands classified as small tracts and operation of Secretarial Order No. 2665 were sufficient to establish a 50 foot right-of-way. Our disposition of the state's appeal with regard to the Greens' lot illustrates such a situation.

[16, 17] Once a lease to a particular parcel had been issued, circumstances were different.[25] Essentially, the lease separated the land from other small tracts; the lessee took the property subject to both the general right-of-way reservations which applied at the time of lease and the specific right-of-way reservations which applied through the lease's provisions. Thus, the general right-of-way reservation in Secretarial Order No. 2665 applied to the Goodman property only if the effective date of lease was preceded by both the construction of Tudor Road and the issuance of Secretarial Order No. 2665. That is, until the Department of the Interior had acted to bring Tudor Road into existence, there was no basis for the Secretary's reservation of rights-of-way. Once construction of Tudor Road had begun, however, the full administrative authority granted by 48 U.S.C. § 321a (1952) became operative and the lessee of lot 12 took his lease subject to such authority. The Secretary did not exercise that authority until he issued Secretarial Order No. 2665 in October 1951.[27] Thus, prior to October 19, 1951, no general right-of-way reservation for Tudor Road had been established. If the order became effective with respect to Tudor Road before issuance of the lease, we think the property was subject to the 50 foot right-of-way; this conclusion is consistent with our determination that the Small Tract Act and Small Tract Classification No. 22 did not segregate all small tracts from the operation of general, discretionary right-of-way reservations. However, if the general reservation became effective after the lease had been issued, we believe the Secretary must have intended that subsequent general reservations would not apply and that his discretionary reservation in the lease would operate instead of such later reservations. Any other construction either would make the general reservation entirely inapplicable to small tracts, a result which is not supported by legislative or administrative materials before this court, or would make small tract leases and the patents derived from such leases completely vulnerable to subsequent right-of-way acquisition during the term of the lease, a result which is inconsistent with Congress' apparent intention to transfer property interests through the Small Tract Act.[28]

25. With respect to leases of other public lands in Alaska, the United States has been treated as having the same rights and obligations as any other lessor. *See Standard Oil Co. of Cal. v. Hickel*, 317 F.Supp. 1192 (D.Alaska 1970) *aff'd.* 450 F.2d 493 (9th Cir. 1970).

27. Secretarial Order No. 2665 was issued on October 16, 1951; it was published in the Federal Register on October 20, 1951.

28. The potential multiplication of rights-of-way under Secretarial Order No. 2665 is illustrated by considering the right-of-way applicable to a "new" local road pursuant to section 3(c) of Secretarial Order No. 2665, which provides:

> (c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) [establishing rights-of-way covering lands embraced in feeder roads and local roads] will attach as to

[18] In the case at bar, the lease to the Goodman property is dated June 30, 1950 [29] and Secretarial Order No. 2665 did not become effective until October 20, 1951. Thus, when the lease was executed, the 50 foot right-of-way had not been established and the second requirement noted above was not met. We therefore conclude that Secretarial Order No. 2665 did not operate to establish a 50 foot right-of-way on lot 12.

The state also contends that the express provisions of the lease to lot 12 reserved power in the federal government to designate rights-of-way after the date of lease. The state points out that the lease contained the following language:

> It is further understood and agreed:
>
> (l) That nothing contained in this lease shall restrict the acquisition, granting, or use of permits or rights-of-way under existing laws.
>
> (m) That this lease is taken subject to the rights of others to cross the leased premises on, or as near as practicable to, the exterior boundaries thereof, as a means of ingress or egress to or from other lands leased under authority of this act. Whenever necessary, the Regional Administrator may make final decisions as to the location of rights-of-way. It has been determined that the land leased herein is subject to a 33-foot right-of-way along the north and west boundaries.

The state argues that such language and the placement of the 33 foot right-of-way provision in paragraph (m) show the continuing "paramount power" of the United States "to establish rights-of-way until the patent issued."

[19, 20] While we agree that the lease's effects are best evaluated by examining the terms of the lease agreement, we are not persuaded that the lessee of lot 12 obtained only an interest subject to the unlimited power of the federal government to reserve rights-of-way. As we view the Secretary's use of the specific right-of-way reservation in the lease and his use of the separate discretionary reservation in Order No. 2665 the Secretary made no attempt to "acquire grant or use" a right-of-way other than the one to which the lease and patent both referred. That is, by issuing the small tract lease containing a specific, discretionary right-of-way reservation the Secretary intended to preclude subsequent operation of the general discretionary reservation in Order No. 2665. Even if Secretarial Order No. 2665 is regarded as an attempt by the Secretary to acquire a right-of-way after the date of lease, we note that the order was not in existence until after the date on which a lease to lot 12 was issued. The only relevant "existing law" at the time of the lease was 48 U.S.C. § 321a (1952) and section 321a contained no reference to such reservations. As discussed above, the administrative authority contained in section 321a to reserve rights-of-way was not effective until after both construction of Tuda Road and issuance of Secretarial Order No. 2665.[30]

all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

Assuming that the lease provides for a 33 foot right-of-way, construction of a local road not in existence at the time of lease presumably could proceed within the expressly reserved width. Once in existence, the new road might qualify as a "local road" under Secretarial Order No. 2665, §§ 2(a)(3) and 3(c). The applicable right-of-way then would expand to 50 feet. If the Secretary subsequently reclassified the local road to a feeder road or through road, the right-of-way would expand still further. *See* Secretarial Order No. 2665. We do not believe that the United States intended to grant such an illusory property interest.

29. The Goodmans originally alleged that their predecessor patentee had entered lot 12 pursuant to a small tract lease as early as April 1, 1950. The state countered by arguing that Small Tract Classification Order 22 did not become effective until April 13, 1950. The date which appears on the lease to the Goodman tract is June 30, 1950.

30. Small Tract Classification No. 22 specifically provided:

> Leases will contain an option to purchase the tract at or after the expiration of one year

CROSBY

The State cannot claim

A 47 Act Right of Way

Through Small Tracts

this gives the sovereign the right to take land that was already entered

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Alaska Supreme Court

STATE of Alaska, DEPARTMENT OF HIGHWAYS, Appellant,

v.

Warren CROSBY and Cathryn Crosby, Appellees.

No. 584.

Supreme Court of Alaska.

Feb. 3, 1966.

State's action for right-of-way. The Superior Court, Third Judicial District, James F. Fitzgerald, J., rendered judgment for landowners, and the state appealed. The Supreme Court, Dimond, J., held that where the property in question had been acquired under the Small Tract Act, reservation for highway purposes included in the patent to the property was ineffective, but that the injunction prohibiting the state from appropriating any portion of the land unless the state instituted a separate condemnation action was inappropriate and should be dissolved where land already was taken, action in effect was condemnation proceeding and issue was award of just compensation to landowners.

Judgment reversed and case remanded.

Rabinowitz, J., dissented in part.

1. Parties ⇐18, 29

"Indispensable party" is one whose interest in controversy before court is such that court cannot render equitable judgment without having jurisdiction over such party. Rules of Civil Procedure, rule 19.

See publication Words and Phrases for other judicial constructions and definitions.

2. Parties ⇐18, 29

Determination of indispensability of party or lack of it involves discretionary balancing of interests; consideration must be given to possibility of rendering judgment with adverse factual effect on interests of persons not before court, danger of inconsistent decisions, desire to avoid multiplicity of actions, reluctance to enter judgment that will not end litigation, as well as desirability of having some adjudication rather than none, and leaving parties without remedy because of ideal of having all interested persons before court. Rules of Civil Procedure, rule 19.

3. United States ⇐135

United States was not indispensable party to action in which state claimed right-of-way for highway purposes across portion of land which owners' grantor obtained from United States by patent providing that grant of property was subject to reservation of right-of-way for highways. Rules of Civil Procedure, rule 19.

4. Public Lands ⇐114(1)

Where property in question had been acquired under the Small Tract Act, reservation for highway purposes included in patent to property was ineffective. Const. art. 1, § 18, 48 U.S.C.A. § 321d; Small Tract Act, § 1, 43 U.S.C.A. § 682a.

5. Eminent Domain ⇐166

Neither failure of state to institute condemnation action nor landowners' assertion based on theory of trespass changed essential nature of state's action in which state claimed right-of-way for highway purposes on basis of United States patent providing that property was subject to reservation of right-of-way; action still was exercise of power of eminent domain. Const. art. 1, § 18; AS 09.55.240–09.55.460.

6. Eminent Domain ⇐274(5)

Injunction prohibiting state from appropriating any part of land unless state which had brought action for right-of-way on basis of patent reservation instituted a separate condemnation action was inappropriate and should be dissolved where land already was taken, action in effect was condemnation proceeding and issue was award of just compensation to landowners.

Warren C. Clover, Atty. Gen., Juneau, Mary Frank LaFollette and Donald E. Strouse, Asst. Attys. Gen., Anchorage, for appellant.

M. Ashley Dickerson, Anchorage, for appellees.

Before NESBETT, C. J., and DIMOND and RABINOWITZ, JJ.

DIMOND, Justice.

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

> [T]he reservation of a right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or by any State created out of the Territory of Alaska, in accordance with the act of July 24, 1947 (61 Stat., 418, 48 U.S.C. sec. 321d).

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

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

Civil Rule 19, which was adopted from Rule 19, Federal Rules of Civil Procedure, deals with the compulsory joinder of parties.[1] It recognizes the classes of indispensable, necessary and proper parties that were first developed in the equity courts.[2]

[1, 2] An indispensable party is one whose interest in the controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over such party.[3] The determination of indispensability or lack of it involves a discretionary balancing of interests.[4] On the one hand, consideration must be given to the possibility of rendering a judgment that will have an adverse factual effect on the interests of persons not before the court, and to the danger of inconsistent decisions, the desire to avoid a multiplicity of actions, and a reluctance to enter a judgment that will not end the litigation.[5] On the other hand, considera-

1. Civ.R. 19 provides:

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

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

3. Commercial State Bank of Roseville v. Gidney, 174 F.Supp. 770, 780-781 (D.D.C. 1959), aff'd. 108 U.S.App.D.C. 37, 278 F. 2d 871, 872 (1960).

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

5. Ward v. Louisiana Wild Life and Fisheries Comm'n, 234 F.Supp. 252, 256 (E.D. La.1963); Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich.L.Rev. 327, at 338 (1957).

tion must be given to the desirability of having some adjudication if at all possible rather than none, leaving the parties before the court without a remedy because of an "ideal desire to have all interested persons before the court." [6] Courts exist for the determination of disputes, and they have an obligation in particular litigation to make meaningful determinations if at all possible.[7]

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

[3] It is not apparent that the United States has an interest in the matter in controversy which would be adversely affected by the judgment entered by the court below. It is the state, and not the United States, which is constructing the highway and seeking to utilize an asserted right-of-way across appellees' land. Conceivably, the United States could have an interest in effectuating the reservation of a right-of-way in the patent to appellees' land for the benefit of the state, since the United States was the grantor of the land and inserted the right-of-way wording in the patent. This may possibly lead to future litigation by the United States in seeking a judicial declaration that the reservation of the right-of-way is valid and subsisting. But as undesirable as it may be to have the possibility of another suit involving the same issue, it is less desirable to leave the appellees without any remedy at all.[9] We hold that the United States is not an indispensable party to this action.

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

> In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds by the United States hereafter conveying any lands to which it may have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon for roads, roadways, . . . shall not be taken or damaged for public use without just compensation.

6. 3 Moore, Federal Practice § 19.07, at 2154-55 (2d ed. 1964); Gauss v. Kirk, 91 U.S.App.D.C. 80, 198 F.2d 83, 85, 33 A.L.R.2d 1085 (1952); Reed, Compulsory Joinder of Parties in Civil Actions, supra note 5.

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

8. Article I, § 18 of the Alaska Constitution provides:
Eminent Domain. Private property

9. Bourdieu v. Pacific Western Oil Co., 299 U.S. 65, 70-71, 57 S.Ct. 51, 81 L.Ed. 42, 45-46 (1936); Zwack v. Kraus Bros. & Co., 237 F.2d 255, 259 (2d Cir. 1956); Black River Regulating Dist. v. Adirondack League Club, 282 App.Div. 161, 121 N.Y.S.2d 803, 804 (1953), rev'd on other grounds, 307 N.Y. 476, 121 N.E.2d 428 (1954), appeal dismissed, 351 U.S. 922, 76 S.Ct. 780, 100 L.Ed. 1453 (1956).

highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or of any State created out of the Terrritory of Alaska.

The land involved in this action was acquired under the federal Small Tract Act of June 1, 1938 [10] which was made applicable to Alaska in 1945.[11] That statute provides in part:

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

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

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

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

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

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

> Unless otherwise provided in the classification order, the leased land will be subject to a right-of-way of not to exceed 33 feet in width along the boundaries of the tract for street and road purposes and for public utilities.[13]

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

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

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

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

13. 15 Fed.Reg. 6222 (1950) (codified as 43 C.F.R. § 257.10(c) (1954), superseded Jan. 15, 1955).

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

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

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

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

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

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

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

[5] When the state appropriated appellees' land for the constructon of a highway, it was exercising the power of eminent domain. It is true that the state did not utilize condemnation proceedings prescribed by law and by rule.[16] That was because the state mistakenly, but in good faith believed that it could rely upon the reservation of a right-of-way for highway purposes contained in the patent to appellees' land. But neither the failure to institute a condemnation action nor appellees' assertion of a claim based on the theory of trespass changed the essential nature of the state's action in appropriating appellees' property. Such action was still the exercise of the power of eminent domain because private property was being taken by the state for a public use. Since under Art. I, § 18 of the Alaska Constitution private property may not be taken or damaged for public use without just compensation, the fundamental basis of appellees' claim for damages is the constitutional provision mentioned, and the acts of the state in appropriating appellees' land are in the nature of inverse condemna-

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

16. AS 09.55.240-09.55.460; Civ.R. 72.

tion.[17] This appears to have been recognized by appellees when they entered into a stipulation with the state to the effect that on a certain date the state had appropriated, without institution of condemnation proceedings, a portion of appellees' land, and that "the time of just compensation will be as of the date of appropriate taking, October 23, 1962." The trial court was in error in failing to recognize the essential nature of this action as one in condemnation and to proceed accordingly.

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

In speaking of the injunction the trial court said:

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

[6] This statement might be construed as meaning that the state must first institute condemnation proceedings in accordance with statute and rule before it may enter upon and utilize the property that it has already appropriated. We believe that such a requirement is unrealistic. The property has already been taken. It would serve no useful purpose to insist now that the state must initiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be determined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state. Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and since we have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.

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

RABINOWITZ, Justice (dissenting in part).

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

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

> (2) the reservation of a right-of-way for ditches or canals constructed by the authority of the United States, in accordance with the act of August 30, 1890 (26 Stat., 391, 43 U.S.C. sec. 945), and (3) the reservation of a right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or by any State created out of the Territory of Alaska, in accordance with the act of July 24, 1947 (61 Stat. 418, 48 U.S.C. sec. 321d). There is also reserved to the United States a right-of-way for the construction of railroads, telegraph and telephone lines, in accordance with section 1 of the act of March 12, 1914 (38 Stat., 305, 48 U.S.C. sec. 305); * * *

17. Myers v. United States, 323 F.2d 589, 593 (9th Cir. 1963)

BRICE

Section Line Easements

Once established cannot be

Vacated by the 49-51 Grey Area

Alaska Supreme Court

State says the plat doesn't have to be recorded for section line easement to applies

territory forgot to put in section line Easement in 1949 legislation - so it only applies to those that were surveyed 1949-1951

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

LUTHER A. BRICE, SAM R. BRICE, ANDY M. BRICE, LUTHER L. BRICE, and HELENKA M. BRICE,

Appellants,

v.

STATE OF ALASKA, DIVISION OF FOREST, LAND AND WATER MANAGEMENT, STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, STATE OF ALASKA, FAIRBANKS NORTH STAR BOROUGH, LINDA K. JOHNSON, WARREN L. GRIESE, MARY L. JOHNSON, BEA C. BACHNER, SUSAN K. GRIESE, BEATRICE I. HERNING, JEFFREY P. BURTON, GARY L. CRUTCHFIELD, HOWARD C. GUINN, KELLEY EVERETTE, JEAN MURRAY, LOREN E. HITE, LUCILLE M. THAYER, FRANK S. TOWSE, DENNIS E. SUNDERLAND, PAUL HENRY, GEORGE P. McCOY, JOE SULLIVAN, TED D. JOHNSON, WILLIAM A. BAILEY, GUY SATTLEY, DONALD JOHNSON, EDITH SZMYD, ELEANORE L. THORGAARD, KAREN A. JOSEPHS, DANIEL M. WIETCHY, KAREN TONY, and BOB MERRITT,

Appellees.

File No. 7039

O P I N I O N

[No. 2731 - September 23, 1983]

- section line easements
- motion to dismiss
- repeal of statutes

SECTION LINE EASEMENTS, ONCE ESTABLISHED WERE NOT VACATED BY THE 49-51 GREY AREA.

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, Judge.

Appearances: Franklin D. Fleeks, Fairbanks, for Appellants. Larry D. Wood, Assistant Attorney General, Fairbanks, Wilson L. Condon, Attorney General, Juneau, for Appellees.

Before: Burke, Chief Justice, Rabinowitz, Matthews, and Compton, Justices. [Moore, Justice, not participating]

MATTHEWS, Justice.

Luther A. Brice, Sam R. Brice, Andy M. Brice, Luther L. Brice, and Helenka M. Brice appeal a judgment of the superior court dismissing their complaint against the State, the Fairbanks North Star Borough, and various private landowners in the Tungsten Subdivision located in the Fairbanks North Star Borough. The Brices had claimed that no highway easement existed across certain property that they own south of the Tungsten Subdivision. We affirm.

The Brices own property that was entered in 1950 and patented in 1952 by Robert S. Johnson.[1] They purchased this property in 1964 from the Conservative Baptist Home Mission Society, who in turn had acquired it in 1957 from

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1. This property was previously entered in 1943 by Warren Culpepper, who abandoned the entry later that year.

Johnson. The property is described as the northeast one-quarter of the southeast one-quarter of section 22, township one north, range one east, Fairbanks Meridian[2] (hereinafter "the property").[3] The property lies to the south of the Tungsten Subdivision and to the north of Chena Hot Springs Road.

The Tungsten Subdivision contains residential lots that were obtained by lottery in 1981, and certain of the lot owners wish to build an access road to the subdivision from Chena Hot Springs Road. They notified the Brices of this desire in spring 1982, indicating that they planned to build a road along a section line highway easement between sections 22 and 23.

The Brices filed a complaint on April 23, 1982, naming the State, the Fairbanks North Star Borough, and various lot owners in the Tungsten subdivision as defendants. The Brices claimed that no easement existed along the eastern edge of the property (where section 22 joins section 23), and asked that the court bar the construction of any road on the alleged easement. On the same date, the Brices

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2. All references to sections of land are to sections located in T1N, R1E, F.M.

3. The Brices also own property bounding the property here in dispute on the north and east, lying in both sections 22 and 23, but they do not challenge the existence of easements across this property.

moved for a preliminary injunction to prevent the commencement of any work on the road.

The State filed opposition to the preliminary injunction motion and moved to dismiss the Brices' complaint on May 5, 1982. The State argued that the property was burdened with a valid section line highway easement pursuant to 43 U.S.C. § 932 and 19 SLA 1923. The Honorable Gerald J. Van Hoomissen heard arguments on the motions on June 3, 1982. On June 14, 1982, the court granted the State's motion to dismiss under Civil Rule 12(b)(6), without explanation, and entered judgment against the Brices on July 1, 1982. The Brices appeal.

I

The Brices first contend that the court erroneously failed to indicate expressly whether, in deciding to dismiss their complaint, it had considered or excluded matters submitted outside the pleadings. According to the Brices, this error requires a remand of their suit for proper consideration as either a Rule 12(b)(6) motion to dismiss or as a Rule 56 motion for summary judgment.

Civil Rule 12(b) provides that if a Rule 12(b)(6) motion to dismiss for failure to state a claim involves presentation to the court of matters outside the pleadings, and if these outside matters are not excluded by the court, then the motion must be treated as one for summary judgment under Civil Rule 56. We addressed this provision in Martin

v. Mears, 602 P.2d 421 (Alaska 1979), holding that trial courts commit error unless they expressly state whether they have excluded or considered materials outside the pleadings in ruling on a Rule 12(b)(6) motion. Id. at 426. We went on to address the alternatives available on review when such an express declaration has not been made. The reviewing court may either (1) reverse the decision and remand for proper consideration as either a Rule 12(b)(6) motion or a Rule 56 summary judgment motion; (2) review the decision as if it were a Rule 12(b)(6) decision, with accompanying exclusion of the materials external to the pleadings; or (3) review the decision as if it were the grant of summary judgment after conversion of the Rule 12(b)(6) motion to one for summary judgment. Id. at 427. Since the reviewing court has three alternatives and may choose the most appropriate one, see Douglas v. Glacier State Telephone Co., 615 P.2d 580, 591-92 (Alaska 1980), there is no merit to the contention that the court's erroneous failure to state whether it had excluded or considered the external material requires a remand here.

We have concluded that we should treat the dismissal as if it were the entry of summary judgment after conversion of the Rule 12(b)(6) motion into one under Rule 56. As we stated in Douglas, we consider it important that the Brices had a "'reasonable opportunity' to present evidentiary material pertinent to a summary judgment motion,

as required by Civil Rule 12(b)." Douglas, 615 P.2d at 592 (footnote omitted). As our subsequent analysis will show, the only material outside the pleadings that was necessary to the court's decision involved the date of entry on the property in dispute. The Brices do not claim that a factual issue exists concerning this date of entry. Given the narrow scope of the materials outside of the pleadings which were consulted by the superior court, and the Brices' failure to show any prejudice occurring to them as a result of the superior court's unarticulated conversion of the 12(b)(6) motion, we hold that any error under Mears was harmless error.

II

The Brices next assert that the court erred in dismissing their complaint because any easement over the property was vacated in 1949 when the Alaska legislature repealed 19 SLA 1923. According to the Brices, this repeal vacated all easements previously established under that statute.

43 U.S.C. § 932, repealed by Pub. L. No. 94-579, Title VII, § 706(a)(1976), first adopted by Congress in 1866, provided:

> The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

The Alaska territorial legislature accepted this dedication of public lands for highway purposes in 19 SLA 1923,[4] section 1 of which provided:

> A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.[5]

In Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975), we held that acceptance of the federal grant was within the power of the territorial legislature. Id. at 1225; see also State v. Alaska Land Title Association, ___ P.2d ___, Op. No. 2681 at 22 (Alaska, May 27, 1983). Indeed, the parties do not dispute that the 1923 act impressed the public lands in Alaska not otherwise reserved for public uses with section line highway easements. The dispute concerns the repeal of 19 SLA 1923 in 1949.

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4. This statute was reenacted in slightly different form in the 1933 compilation of Alaska laws. 1721 CLA 1933. The reasoning of the subsequent discussion of 19 SLA 1923 also applies to 1721 CLA 1933.

5. Four rods is equivalent to 66 feet. Since the Brices only challenge the easement along the section line between sections 22 and 23 as it applies to the property here in dispute, the disputed easement is 33 feet wide.

There seems little doubt that 19 SLA 1923 was repealed by the compilation of Alaska laws in 1949. The legislature adopted the compilation in 1 SLA 1949, section 1 of which provides in relevant part:

> All acts or parts of acts heretofore enacted by the Alaska Legislature which have not been incorporated in said compilation because of previously enacted general repeal clauses or by virtue of repeals by implication or otherwise are hereby expressly repealed.

19 SLA 1923 was not included in the 1949 compilation. However, the repeal of the statute does not necessarily vacate previously created easements. The grant of 43 U.S.C. § 932 was a continuing one, as was its acceptance by 19 SLA 1923. As lands came into the public domain after 1923, they became impressed with section line highway easements. 1969 Op. Att'y Gen. No. 7 at 6 (Alaska, December 18, 1969). Therefore, the repeal clearly would have some rationale other than vacation of previously accepted easements, that is, to suspend the acceptance for public lands coming into the public domain after the date of repeal.

As the State points out, the repeal was subject to the then-existing general saving statute, found at 19-1-1 ACLA 1949, which provided in pertinent part:

> The repeal or amendment of any statute shall not affect any . . . right accruing or accrued . . . prior to such repeal or amendment; . . . .

When a repeal is not accompanied by a specific saving provision, it is presumed that the legislature intended the general saving statute to apply. 2A C. Sands, Sutherland Statutory Construction § 47.13 (4th ed. 1973). A saving statute preserves rights unless the repealing act reveals an intention not to do so. Alaska Public Utilities Commission v. Chugach Electric Association, 580 P.2d 687, 692 (Alaska 1978), overruled on other grounds, City and Borough of Juneau v. Thibodeau, 595 P.2d 626, 629 (Alaska 1979); 2A C. Sands § 47.13. No such intention is revealed by 1 SLA 1949.[6]

Additionally, as the State notes, to hold that the 1949 repeal of 19 SLA 1923 vacated all previously accepted easements would be to give the repeal retroactive effect.

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6. The Brices contend that this saving statute was intended only to encompass the part of the 1949 compilation entitled the Civil Code, and therefore that it does not apply to statutes regarding highways, which were located elsewhere in the 1949 compilation. However, the terms of the statute itself require rejection of this argument. The statute states in pertinent part:

> The repeal . . . of any statute shall not affect any offense committed . . . prior to such repeal . . . ; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, . . . prosecuted, and punished under the repealing . . . statute . . . .

(Emphasis added.) This saving statute clearly encompassed not only civil but also criminal statutes, which also did not appear in the Civil Code of the 1949 compilation.

The well-settled common law rule, now reflected in AS 01.10.090,[7] is that a law is presumed to be prospective in nature in the absence of clear legislative expression to the contrary. Hill v. Moe, 367 P.2d 739, 742 (Alaska 1961), cert. denied, 370 U.S. 916, 8 L.Ed.2d 498 (1962); 2 C. Sands § 41.04, at 252. There being no such expression in 1 SLA 1949, we do not believe that the repeal of 19 SLA 1923 operated retroactively to vacate previously accepted grants of easements.

Therefore, we hold that section line highway easements established by the grant of 43 U.S.C. § 932 and the acceptance in 19 SLA 1923 were not vacated by the 1949 repeal of 19 SLA 1923. However, this case was not appropriate for disposition under Civil Rule 12(b)(6) because the court of necessity considered matters outside the pleadings. Entry on the disputed property could conceivably have occurred before 1923, and if it had, then 19 SLA 1923 might not have burdened the property with an easement. State v. Alaska Land Title Association, ___ P.2d at ___, Op. No. 2681 at 28. The court thus had to determine when entry took place, and to do so, it had to consider matters outside the

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7. AS 01.10.090 provides:

No statute is retrospective unless expressly declared therein.

pleadings. In so doing, it would find that the land was entered in 1943 by Warren Culpepper, who abandoned the entry later that year, and then entered in 1950 and patented in 1952 by Robert Johnson. Neither the entries nor the patent, however, affected the easement established in 1923, since a patentee takes property subject to a 43 U.S.C. § 932 easement. State v. Alaska Land Title Association, ___ P.2d at ___, Op. No. 2681 at 35; see Girves v. Kenai Peninsula Borough, 536 P.2d at 1224. Thus, treating the court's dismissal of the Brices' complaint as having occurred following conversion of the Rule 12(b)(6) motion to one for summary judgment, we hold that the court correctly dismissed the Brices' complaint. The property is subject to an easement for highway purposes bordering the section line between sections 22 and 23. See note 5 supra.

AFFIRMED.

SIMPSON

Failure of a governmental officer

To not assert a Right of Way

Could not serve to limit

Government rights

its up to the owner to know their rights

Alaska Supreme Court

STATE of Alaska, Appellant,
v.
Vernon Dale SIMPSON, d/b/a Columbia Cleaners, Appellee.
No. 424.

Supreme Court of Alaska.
Dec. 9, 1964.

Action between the state and private landowners involving right to eject landowner from street right-of-way occupied by him. The Superior Court of the First Judicial District, Ketchikan, Walter E. Walsh, J., rendered judgment in favor of landowner and the state appealed. The Supreme Court, Nesbett, C. J., held that failure of municipal and other governmental officers to affirmatively assert governmental rights in dedicated but unused street could not serve as basis for equitable estoppel to assert title against landowners occupying the area under mistaken view as to location of correct property line, in absence of specific representations or affirmative acts misleading landowners, who had constructive notice from references in original conveyance in their chain of title.

Reversed and remanded.

Dedication ⇐39

Failure of municipal and other governmental officers to affirmatively assert governmental rights in dedicated but unused street could not serve as basis for equitable estoppel to assert title against landowners occupying the area under mistaken view as to location of correct property line, in absence of specific representations or affirmative acts misleading landowners, who had constructive notice from references in original conveyance in their chain of title.

George N. Hayes, Atty. Gen., and Michael M. Holmes, Deputy Atty. Gen., Juneau, for appellant.

C. L. Cloudy, Ziegler, Ziegler & Cloudy, Ketchikan, for appellee.

Before NESBETT, C. J., AREND, J., and MOODY, Superior Court Judge.

NESBETT, Chief Justice.

The question is whether appellant state should be held to be equitably estopped from ejecting appellee from the street right of way occupied by him without paying compensation for appellee's improvements located on the right of way.

The property with which we are concerned was originally conveyed by the United States of America to Eugene A. Heath in 1922. In the same year it was subdivided and a plat of the Heath Addition to the City of Ketchikan was filed in the office of the United States Commissioner at Ketchikan. This plat showed a sixty foot right of way for Charcoal Boulevard which is now known as Tongass Avenue.

In 1924 Heath conveyed a portion of the subdivided property to one Ed Fredrickson. This is the original conveyance in the defendant's chain of title.

The following language was contained in at least five conveyances of property made between 1922 and 1924, including that conveyed to Ed Frederickson:

> "Heath addition to the City of Ketchikan according to the subdivisional survey and plat made by A. A. Wakefield on file in the Office of the U. S. Commissioner at Ketchikan, Alaska."

In 1952 a conveyance was executed from Joseph A. Durgin, trustee, to William W. Crow and Vernon Dale Simpson. A part of the property description of this conveyance stated:

> "Thence from point of beginning North 5° 36' East to intersect the new right of way of Tongass Avenue on its seaward side. * * *"

In 1957 Crow conveyed his interest in the property to appellee Simpson.

A portion of the property conveyed to the appellee lies wholly within the boundaries of the street shown as Charcoal Boulevard

on the plat of the Heath addition. At the time the patent was issued to Heath a plank roadway commenced at the east boundary of the survey and extended approximately 792 feet across the front of the survey. The plank roadway crossed in front of the property here in dispute. In 1926 a log bulkhead to support Charcoal Boulevard was constructed by the Territory of Alaska along the front of the property which now belongs to the appellee. The log bulkhead actually extended into the area shown on the original plat as Charcoal Boulevard. The owner of the property at the time the bulkhead was constructed built a boathouse and private sidewalk up to the log bulkhead, which was to the edge of the existing street, and also constructed his dock, used in connection with the boathouse, to the existing street.

According to the statement of Ed Fredrickson, who then owned the property, it was not then known that the right of way for Charcoal Boulevard actually extended twenty feet beyond the edge of the street toward the water which would be into the property occupied by Fredrickson. He stated that it was his understanding that he owned the property up to the street; that he built right up to the street and that he was never notified by anyone that he was occupying the property shown on the plat as right of way for Charcoal Boulevard.

It was stipulated by the parties that the owners of the property in dispute between 1945 and 1952 would testify that they claimed the entire disputed area as their own; that no one on behalf of any city, territory, state or other governmental entity laid any claim to the area during their ownership; that they occupied the entire area to the exclusion of all others; that they had no actual knowledge that the disputed area occupied by them was within the platted right of way of Charcoal Boulevard.

A one story frame building twenty-five feet wide and fifty-five feet long on fixed driven piling along with trade furniture and fixtures as necessary to operate a dry cleaning establishment is presently located on the area in dispute. The front twenty-five feet of the building are located on the right of way. The present stipulated value of all the improvements located on the right of way and the adjoining lot is $28,000. It is agreed that severance of that portion of the building located on the right of way from the remainder would result in the constructive total loss of the entire building.

In the case before us the trial court found that in excess of forty years of nonuser of the right of way by governmental authority coupled with eight significant affirmative acts by that authority caused the property owners to believe they owned the adjoining area in question and in reliance upon that reasonable belief constructed or acquired valuable improvements on the right of way and that it would be inequitable to force appellee off the right of way without paying him just compensation for these improvements; that to do so would violate the constitution and laws of the State of Alaska.

Appellant's argument is that equitable estoppel should only be applied where a governmental body has urged a property owner to construct valuable improvements on dedicated public property and later attempts to oust the property owner without the payment of compensation for improvements made.

Appellee contends that the facts of this case warrant the application of the doctrine of equitable estoppel against appellant and cites as precedent in support of its position a series of decisions of the Supreme Court of Oregon. Appellant interprets the latest of the Oregon decisions as representing a definite trend away from the application of the doctrine.

We shall consider the Oregon authorities as well as others cited by counsel in the following paragraphs.

In City of Portland v. Inman-Poulsen Lumber Co.[1] the mayor and council of the

1. 60 Or. 86, 133 P. 829 (1913).

city encouraged the appellee lumber company in 1890 to construct a large lumber mill in an area which contained dedicated platted streets by advising the lumber company that the city laid no claims to the streets. As a result the lumber mill was constructed. After it burned down in 1906 it was reconstructed on a scale that made it the largest lumber mill in the world. Two years later in 1908 the city for the first time claimed the right to open streets through the property. Opening the streets would have destroyed the mill. It was held that the city was equitably estopped to claim the right to open the streets in view of the representations made by its agents in order to induce the lumber company to construct the mill. However, the estoppel was held to apply only so long as the area was occupied and used for lumber mill purposes. Both parties seem agreed that the strong facts of this case place it in a class by itself. The holding is significant in that it indicates that the Oregon court recognized the doctrine of equitable estoppel and applied it against a municipality where there was a recorded plat and dedicated streets.

Dabney v. City of Portland [2] was decided fifteen years after Inman-Poulsen. The city had failed to use the right of way for forty-seven years, had levied and collected taxes on it from those claiming to own it and had constructed a sidewalk in such a manner as to suggest that the walk marked the limits of the right of way. In reliance thereon Dabney and his predecessors had occupied the area and constructed concrete steps extending about four feet into the street area. The court held that the conduct of the city had caused Dabney to reasonably believe that it had the intention of abandoning the strip of land and that it would amount to a fraud to permit the city to destroy the improvements without paying compensation.

Appellee relied heavily upon this case below and the trial court appears to have agreed with appellee's interpretation of the decision as a persuasively reasoned authority.

Three years later in Killam v. Multnomah County,[3] the deed referred to road restrictions and a recorded plat showed the street dedicated to the municipality. The Oregon court refused to apply equitable estoppel saying that conduct on the part of the city which would have led plaintiff on to do acts which it would be against equity and good conscience to permit the city to disavow was not shown.

In 1951 in City of Molalla v. Coover [4] an area was annexed and a plat recorded which showed dedicated streets. The Oregon Supreme Court again refused to apply equitable estoppel against the city where plaintiff had occupied a part of a dedicated street for nineteen years and had built a barn therein. It was held that failure of municipal officers to affirmatively assert the rights of the city, where dedicated but as yet unused streets are being occupied, cannot serve as a basis for equitable estoppel. The appellee was held to be charged with notice of the recorded plat showing dedicated street areas. Having held that tacit acquiescence by municipal officers could not serve as a basis for equitable estoppel, the court went on to say at page 150 of 235 P. 2d:

> "Whether estoppel may in exceptional cases be predicated upon affirmative action by a city or its officers need not be and is not here decided."

In addition to the facts recited earlier in this opinion, appellee relied upon the following to support its contention that equitable estoppel should be applied because of affirmative acts committed by governmental agents:

> (1) In 1935-36 the Bureau of Public Roads purchased land across the street from the disputed property in order to widen the street, instead of asserting its ownership of the property in dispute.

2. 124 Or. 54, 263 P. 386 (1928).

3. 137 Or. 502, 4 P.2d 323, 325 (1931).

4. 192 Or. 233, 235 P.2d 142, 150 (1951).

The owners of the disputed property were assessed their proportionate share of the cost of the property purchased.

(2) In 1936 the area in dispute was annexed to the City of Ketchikan and since that date the occupants of the disputed property have been assessed taxes on that property.

(3) In 1939 a city ordinance required the laying of copper water lines to property lines. A copper line was duly installed by the city which extended only to the log bulkhead and not beyond.

(4) In 1944 the owner of property adjacent to that here in dispute contracted with the city to trade a narrow strip of land fronting his property to the city if the city would construct a sidewalk on the land. The contract was performed, although the land traded to the city already belonged to it since it was a part of the same dedicated but unoccupied right of way that fronted on appellee's property.

(5) In 1952 appellee was supervised by the Ketchikan City Manager as he remodeled the building on the property in dispute for a dry cleaning plant in a manner which indicated that the City Manager believed that appellee owned the property in dispute.

The parties have also cited and relied upon City of Billings v. Pierce Packing Co.[5] and Town of Chouteau v. Blankenship.[6] In the latter case the court held that mere delay in opening a street created by dedication when the public has not required its use does not constitute abandonment of the street. It was also held that in the absence of a contrary statute title to streets created by dedication is held by the municipality in trust for the public and not in a proprietary capacity. A municipality cannot be divested of title to its streets held in trust for the public by adverse possession. In the case before it the court found that the street created by dedication had not been opened, improved or used for public purposes for over thirty years and that barns, chicken houses and outhouses were built on the area by the owners of adjoining property. The court held that although the doctrine of equitable estoppel might preclude the right of a municipality to assert title to a street, such a doctrine would not be applied except in exceptional cases and with great caution. It was held not to apply in the facts of the case before it. It is of interest to note in Town of Chouteau at 384 where the court mentions that it had in a previous case applied the doctrine of equitable estoppel to a municipality with respect to property held in its proprietary capacity, but that in no case called to its attention had the court ever applied the doctrine to property held in trust for the public. The court, in remarking that exceptional circumstances which would call the doctrine into play were not present in the case before it, said the doctrine would not therefore be applicable, "* * * if in fact it would ever be justified as regards streets."

We are impressed by and shall follow what appears to be the better reasoning and majority rule as set out in the Town of Chouteau and City of Molalla cases. Accordingly, we hold that the right of way dedication along Charcoal Boulevard, now known as Tongass Avenue, was held in trust for the public. The failure of municipal and other governmental officers to affirmatively assert governmental rights where the dedicated but as yet unused street was being occupied by appellee and his predecessors cannot serve as a basis for equitable estoppel.

Appellee and his predecessors had constructive notice of the fact that the seaward side of the Tongass Avenue right of way extended twenty-five feet beyond what appeared to be the front property line, since the original conveyance in their chain of title referred to and incorporated into its

5. 117 Mont. 255, 161 P.2d 636 (1945).

6. 194 Okl. 401, 152 P.2d 379, 171 A.L.R. 87 (1944).

property description the recorded subdivisional survey and plat. In addition, the conveyance by which appellee first obtained any interest in the property specifically referred in the property description to "* * * the new right of way of Tongass Avenue on its seaward side. * * *"

Neither the United States, the Territory of Alaska, the City of Kechikan nor the State of Alaska, nor any of their agents have made any specific representations to appellee or his predecessors in interest that could reasonably lead him or them to believe that the area had been abandoned as a street right of way, or that would mislead them into believing that they owned the disputed area.

The various acts attributable to the several different governments concerned with the property since 1922 are all explained by the fact that those governments and their agents were acting under a mistaken view as to the location of the correct property line. None of the acts relied upon by appellee and classed as "affirmative acts" are in the nature of a representation such as was involved in City of Portland v. Inman-Poulsen Lumber Co.

It is true that appellee and his predecessors in interest have paid taxes on the disputed area since 1936. On the other hand, they have had the rent free use of some 761 square feet of business property for the same period of years.

The judgment below is reversed. The case is remanded to the Superior Court for the entry of findings of fact, conclusions of law and judgment in accordance with the views expressed herein.

Chapter 5

Conclusion

It has been discussed that a Case Book much like what BLM has developed to help surveyors through all of the situations that are not fully addressed in their "Manual of Surveying Instructions" would be helpful. It has not happened to date. We operate as a small community of people knowledgeable of the Legislation, the court cases and the application of those rights to research, analyze, make determinations and produce maps. When all of the parts are completed with the most valid result it is usually easy to understand and get agreement.

Overlooking a valid right such as a Public ROW that affects a parcel of land can create many problems for the landowner, the sovereign and the surveyor. A few knowledgeable people in the determination and application of Public ROW in Alaska and who are agreeable in addition to myself and willing to helping guide surveyors through the process include: Jim Sharp, PLS (jsharp@whpacific.com), Karen Tilton, PLS (ktilton@rmconsult.com) and John Bennett, PLS (johnf.bennett@alaska.gov). If you encounter a situation where you feel more help is needed please don't hesitate to contact one of us.