T.F.

Asst A. Marty Roth's #10.A
Interpretation of
OLO's & E.O.'s etc

ACQUISITION OF RIGHTS OF WAY WIDTHS

The various Statutes, Public Land Orders and Department Orders effecting the acquisition of rights of way in Alaska are as follows:*

R.S. 2477 (43 U.S.C. 932)

43 Stat. 446 (48 U.S.C. 321a) June 30, 1932

61 Stat. 418 (48 U.S.C. 321d) July 24, 1947

Public Land Order 601 August 10, 1949

Public Land Order 757 October 16, 1951

2665 Amendment 1 July 17, 1952

2665 Amendment 2 September 15,

Public Land Order 1613 April 7,

Public Law 86-70 (Omnibus Act) June 25, 1959

1. R.S. 2477, grants rights of way for the construction of highways over public lands not reserved for public uses. The grant becomes effective upon the establishment of the highway in accordance with State or other applicable laws. The statute does not specify any width for rights of way so established and unless maps or definite locations showing the widths of the right of way appropriated are filed and recorded in the proper recording district or Bureau of Land Management land office, the width would be limited, as against subsequent valid claims, to that recognized by the Courts, which is 66 feet or 33 feet on each side of the center line in the Territory of Alaska. Presumably, this is based on common usage or sufficient width, the only actual authority for such widths existing in the Alaska statutes, for section line rights of way.

In connection with this authority, then, the mere filing of a plat as prescribed above, would be an appropriation of the right of way indicated thereon, without any further action on the part of the State. Posting of notice of right of way width when survey stakes are set would have same effect.

2. The Act of June 30, 1932, authorizes the construction of roads and highways over the vacant and unappropriated public lands under the jurisdiction of the Department of the Interior. This statute like R.S. 2477, does not specify the width of the right of way which may be established thereunder. Therefore, unless maps were filed in the proper land offices, as contemplated by the 1932 Act, showing the width of the right of way appropriated, the right of way would also be limited to 66 feet or 33 feet on each side of the center line of the road or highway, as against valid claims or entry initiated subsequent to this Act but prior to Public Land Order No. 601 of August 10, 1949.

* Pertinent to this Memorandum Brief

The Act of July 24, 1947 (61 Stat. 418, 48 U.S.C. 321d), amended the Act of June 30, 1932, by adding the reservation for rights of way over "lands taken up, entered or located" after July 24, 1947. Since this Act did not specify widths, it remained, in that respect, similar to R.S. 2477. However, a right of way of any width could be acquired over such lands by merely setting it by some sort of notice, either constructive or actual insofar as new roads are concerned, and since it did not limit the reservation to new roads only, there could be no doubt that it effects subsequent settlements on existing roads. Until the promulgation of the first Public Land Order setting right of way widths for existing roads, compensation was required for all crops and improvements located within new takings.

3. On August 10, 1949, the Secretary promulgated the first of several Public Land Orders, No. 601, providing for the withdrawal from all forms of settlement, the following strips of land in Alaska:

> 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 (named therein);
>
> 100 feet on each side of the center line of all feeder roads (named therein);
>
> 50 feet on each side of the center line of all local roads

This Order does not, by its language, purport to establish highway rights of way as such, but is a mere withdrawal of lands along the enumerated existing highways and classes of highway. There does not appear to be any intent to establish any future rights of way in this Order.

Since this Order was promulgated subsequent to the Act of 1947, there is some question as to its effect on lands previously settled but subject to the Act. There can be no doubt that lands settled prior to the Act could not be effected by the Order since it also states, "Subject to valid existing rights and to existing surveys. . ."

The cases all hold that once a claim is made for public lands under the law, the claim acts as a segregations of that land from the public domain for the benefit of the claimant (entryman) and there can be made no order subsequent to that claim, effecting any rights the entryman may have. Therefore, a withdrawal order promulgated subsequent to an entry, is invalid as against that entry. In connection with this point what then is the effect of this Order and subsequent orders on lands settled after the Act of 1947 but prior to the Order?

The Act of 1947 does not set out any procedure by which a specific amount of land may be acquired for the purposes set forth in the Act. There is no requirement for giving notice to the interested party of the amount being taken nor is there set out any other requirement. Since, then, there is no form of notice, the entryman had no way of determining which land on an existing road he could utilize for his own purposes prior to this Order. Many built improvements or planted crops within a few feet of the highway shoulders. Apparently, the greater majority of these remained outside the 33 foot line, but inside the areas described in Public Land Order 601.

It is this writer's opinion that the public land orders do not effect lands subject to the Act of 1947, and settled prior to the orders on the grounds that it would be unconstitutional as being "ex post facto" in nature. Now, then, the only situations with which we should be concerned are those where the lands along existing roads (at time of the orders) are settled subsequent to their promulgatory dates.

Now we are left with one more important phase of this general situation: What effect would the orders have on the rights of a party who constructs improvements or plants crops within the designated right of way after the date of the order when his land is subject to the 1947 Act? All along I have been asserting that the orders were constructive notice to all interested parties that the lands encompassed by the orders, were being thereafter utilized for highway rights of way. However, Public Land Order 601, is expressly limited to withdrawal of public lands (unsettled, unreserved) abutting on the then existing center lines in the widths according to the classification denoted for each no reference being made to the 1947 Act. It is therefore, not apparently intended to establish a right of way width for the entire length of each such highway, but merely for the public lands which abut such highway. It is then, my opion that insofar as those lands entered prior to this Order are concerned, the entryman or homesteader has every right to compensation when damage results to his improvements or crops placed within the areas described in P.L.O. 601.

4. Public Land Order 757, October 16, 1951, was an amendment to Order 601, to the extent that it revised the list of routes along which 600 foot strips were withdrawn by adding other routes. Therefore, it did not change anything in Order 601.

5. Departmental Order No. 2665, dated October 16, 1951, was promulgated in contemplation of the two previous Public Land Orders (601 and 757); and 48 U.S.C. 321a.

The purpose of this order is stated as follows:

> "(Sec. 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)."

The purpose stated under (a) (1) in the foregoing Sec. 1, above, is somewhat confusing. It expressly refers to public highways established or maintained under the jurisdiction of the Secretary of the Interior, in Alaska. However, does it mean that the uniform system will thereafter be maintained at the stated widths; or does it mean that the Secretary is utilizing the rights of way widths in the orders where subject to the 1947 Act?

* Emphasis Supplied

In the face of the question of constitutionality I cannot justify the theory that this order would effect prior rights, even where those rights are subject to the 1947 Act. Therefore, my opinion is that it merely is a statement of policy and uniformity. Since (a) (2) under this section also refers to "public lands", I feel that the intention is definitely to establish future rights of way across such lands.

This is further evident in the language used in Section 3 of this Order:

> (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, 1940, as amended by Public Land Order No. 757 of October 16, 1951. That order operated 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.*

Both (a) and (b), above, make particular note and use the expression "public lands." Those words, therefore, indicate that the intent was to restrict the withdrawal of rights of way lands to public or vacant lands. No one would be in a better position than the secretary to know which lands could validly be effected by withdrawal orders (601 and 747). The law is well settled that there can be no withdrawal made on lands segregated from the public domain.

Amendment No. 1 to Order 2665 (July 17, 1952) and Amendment No. 2 thereto, (September 15, 1956), stated no new policy but merely reclassified all or parts of specific highways.

6. Public Land Order No. 1613 was issued on April 7, 1958. This Order (Sec. 1) was a revocation of Nos. 601 and 757 insofar as the through roads named in the two prior orders were concerned. The lands were reclassified from withdrawals (reservations) to easements, and easements for those roads were established at 300 feet widths. Sec. 5 of 1613 also uses the term "public lands."

Those lands embraced in Orders 601 and 757 which were on such through roads were to be offered for sale by the Secretary. To this writer's knowledge, this was never done.

7. Finally, Public Law 86-70 (Omnibus Act), of June 25, 1959, by Section 21(d)(7), repealed the Act of 1932 and the Act of 1947 (48 U.S.C. 321a-d), effective July 1, 1959. Therefore, as of July 1, 1959, it would appear that newly settled lands not abutting existing roads, could not be effected by any of the Orders. Where lands have been restored by Order 1613 new settlers on the existing highways effected by that Order, would acquire title to the lands over which the established easements traverse, but could not interfere with the right of way of those highways.

* Emphasis supplied

CONCLUSIONS

(a) For all lands settled prior to July 24, 1947, the entire portion to be acquired for the right of way in the case of new or relocated roads, must be acquired by purchase. Where these lands are located on existing roads and the right of way is to be widened or adjusted slightly so as to partially or entirely include such existing road, all acquisitions outside the 66 ft right of way must be purchased.

Accordingly, then, the right of way width for all roads existing prior to the 1947 Act as to lands abutting thereon and settled prior to that Act, is 66 feet unless the contrary can be shown.

As to all lands settled prior to the 1947 Act, the above Public Land Orders have no effect.

(b) For all lands subject to the 1947 Act, but settled prior to August 10, 1949, (P.L.O. 601), the right of way may be obtained by Notice of Utilization for these portions outside the 66 foot width, but crops and improvements thereon must be purchased.

Since no withdrawals were made prior to the Public Land Orders, the entryman whose rights predated the Order would be subject to a 66 foot right of way when abutting a road. All others are subject to the withdrawal order, so that right of way widths will be 600 feet, 300 feet, 200 feet and 100 feet depending upon the road or centerline which existed or was surveyed prior to August 10, 1949.

P.L.O. 757, October 16, 1951, merely changed some right of way widths and instituted no new changes.

(c) Since departmental Order 2665, October 16, 1951, did not effect prior existing rights, it too, left the right of way widths at 66 feet where settled prior to P.L.O. 601. For all lands settled subsequent to 2665, the rights of way are those stated in that order.

Amendment No. 2 to Order 2665, September 15, 1956, increased the right of way of several roads or portions of roads by redesignating them as "through roads". It also deleted certain roads from that list.

(d) P.L.O. 1613 revoked the withdrawals on through roads as established by Nos. 601 and 757. It established a 300 foot easement on those roads for highway purposes. There is, therefore, a 300 foot easement on all through roads in Alaska where such through roads have been designated by the various Orders.

(e) The repeal of the Act of 1947 by the Omnibus Act (Sec. 21(d)(7)) on July 1, 1959, has once again restored the public lands to the status enjoyed in the other states. The withdrawals and easements for rights of way, however, remain in effect but do not have any effect where entirely new roads are concerned.