

A SUMMARY OF 147 ACT OPINIONS

Alaska Department of Law

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

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

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

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

EFFECTIVE DATES

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

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

EFFECT OF REPEAL

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

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

NATURE OF THE RESERVATION

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

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

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

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

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

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

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

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

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

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

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

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

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

COMPENSATION

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

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

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

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

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

"FIRST TAKE"

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

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

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

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

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