#26.4

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

ALASKA LAND TITLE ASSOCIATION, SECURITY TITLE & TRUST COMPANY OF ALASKA, ALASKA TITLE GUARANTY COMPANY, BROKERS TITLE COMPANY, LAWYERS TITLE INSURANCE AGENCY, INC., SAFECO TITLE AGENCY, INC., FAIRBANKS TITLE AGENCY, KACHEMAK BAY TITLE AGENCY, VALLEY TITLE & ESCROW COMPANY, FIRST AMERICAN TITLE INSURANCE CO., TRANSAMERICA TITLE INSURANCE CO.; HANSEN ASSOCIATES, an Alaska Limited Partnership, RICHARD L. BOYSEN, and JACK WHITE COMPANY,

Plaintiffs,

v.

STATE OF ALASKA, Department of Transportation and Public Facilities, THEODORE M. PEASE, JR., and CLAIRE V. PEASE, and MUNICIPALITY OF ANCHORAGE,

Defendants.

Regional R/W Agent	
Negotiations	
Encroachments	
Engineering	
Title	
Appraisals	
Relocation	
Return to: Shari	
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No. 3AN79-951 Civil

MEMORANDUM OF DECISION

This case is a suit for declaratory relief and the plaintiffs, the State of Alaska and the Peases have moved for summary judgment. The facts are that in 1978 the State of Alaska widened Rabbit Creek Road, a local road off the Seward Highway approximately nine miles south of Anchorage, from a road having a bed of less than 66 feet to a road having a bed of 100 feet in width. Mr. and Mrs. Pease are adjoining landowners to Rabbit Creek Road and own the underlying fee to the centerline. They seek compensation from the State of Alaska or the title insurance company which insured their title for the taking of a strip 17 feet in width from their property for the widening of Rabbit Creek Road.

The Peases acquired by warranty deed Lot 191, Section 33, T 12N, R3W, Seward Meridian, Anchorage Recording District on August 18, 1960 which parcel was separated from the public domain on October 4, 1955 by patent number 115 1722 which provides a "reservation of a right-of-way for roads . . . constructed or to

be constructed by or under the authority of the United States or by any State created out of the Territory of Alaska, in accordance with the act of July 21, 1947 (61 Stat. 418, 48 U.S.C. sec. 321d)" and "This patent is subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located along the south and east boundaries of said land."

There are no facts in dispute. The other parties, Mr. Boysen, Hansen Associates and Jack White Company own property which may be affected by easements for through and feeder roads. In this memorandum of decision the case concerning the Peases will be considered first, a decision reached on the ownership of the 17 foot wide strip along Rabbit Creek Road and will be used for illustrative purposes in deciding questions relating to other parcels.

The relevant history of statutes, public land orders (P.L.O.) and department orders (D.O.) affecting rights-of-way for roads like Rabbit Creek Road includes:

1. P.L.O. 601 dated August 10, 1949 under the authority of Executive Order No. 9337 [43 U.S.C. § 141] withdrew from entry certain lands and reserved those lands for highway rights-of-way as follows:

a. the public lands 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.

b. through roads are the Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, and Tok Cut-off.

c. feeder roads are 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 Spring Road.

d. local roads are all roads not classified as through or feeder roads established or maintained under the jurisdiction of the Secretary of the Interior.

e. Paragraph 6 reads:

> 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.

2. P.L.O. 757 dated October 16, 1951 provides:

> 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 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.

3. D.O. 2665 dated October 16, 1951 under the authority of section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a) established the width of the public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior as follows:

a. 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.

b. feeder roads (with an extensive listing) shall extend 100 feet on each side of the center line thereof.

c. local roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

d. the order provided specifically:

> 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 mineral 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 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.

It should be noted that D.O. 2665 is issued under the authority of 48 U.S.C. 321a; however, section 321a is only the general grant of authority by Congress to the Secretary for the Interior to administer the roads in Alaska. Section 321d is the specific

authority for the Secretary to reserve easements for roads and, therefore, D.O. 2665 by implication is based upon the authority of 321d, Public Law 229, ch. 313 approved July 24, 1947.

4. The effect of P.L.O. 757 and D.O. 2665 was to return to the public domain and make available for entry all land within 100 feet of the center line of feeder roads and 50 feet of the center line of local roads reserving an easement for feeder and local roads of 100 feet and 50 feet on each side of the center line respectively.

5. P.L.O. 1613 dated April 7, 1958 revoked P.L.O. 601 as amended by P.L.O. 757. Therefore, the withdrawal for through roads was no longer in effect; however, an easement for through roads was created extending 150 feet on each side of the center line for through roads designated in P.L.O. 757 and section one of P.L.O. 1613.

6. On June 30, 1959 the United States conveyed by quit-claim deed its interest in highways to the State of Alaska which deed was recorded October 2, 1969.

7. Sec. 2, Ch. 92, SLA 1966, Right of Way Act of 1966 provides:

> Taking of Property Under Reservation Void. After the effective date of this Act [April 14, 1968], 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.

8. Public Law 229, ch. 313, approved July 24, 1947 provides:

> The act entitled "An Act providing for the transfer of the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alaska to the Department of the Interior, and for other purposes, approved June 30, 1932 (47 Stat. 446), [footnote: 5 U.S.C.A. §§ 123, 485; 48 U.S.C.A. §§ 321a-321e, 322-327] is hereby amended by adding at the end thereof the following new section:

> "Sec. 5. 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 any State created out of the Territory of Alaska. When a right-of-way reserved under the provisions of this Act 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."

The Alaska Supreme Court cases which directly relate to the questions in this case are: Hahn v. Alaska Title Guaranty Co., 557 P.2d 143 (Alaska 1976) which holds that the federal register is a public record within the meaning of the language of a title insurance policy; and State, Dept. of Highways v. Green, 586 P.2d 595 (Alaska 1978) which gives an exhaustive history of the subject before the court without mentioning the Alaska Right-of-Way Act of 1966.

The Peases have moved for summary judgment on their cross-claim against the State of Alaska and on their counterclaim against Transamerica Title Insurance Company. The Peases are entitled to summary judgment against Transamerica Title Insurance Company under the authority of Hahn v. Alaska Title Guaranty Co., 557 P.2d 143 (Alaska 1976) and they are granted such summary judgment establishing the liability of their insurer subject to the provision that if the State must pay for the strip, then the Peases shall collect from the State and not their title insurer.

The plaintiffs have moved for summary judgment against the State of Alaska on the grounds that the State is without authority to exercise jurisdiction over easements allegedly reserved to the State by P.L.O. 601 as amended by P.L.O. 757 and

P.L.O. 1613 and D.O. 2665. The title insurance companies and the other plaintiffs have standing to bring this case and are real parties in interest; there is a justiciable controversy and the plaintiffs' pecuniary interest is affected. See Jefferson v. Asplund, 458 P.2d 995 (Alaska 1969).

There is no statute of limitations problem; the land is not taken until staked. D.O. 2665(c).

The State asserts that the withdrawals and easements established by the various P.L.O.'s and D.O.'s are dedications of property to the public which cannot be transferred to private ownership until abandoned. There is no evidence of fact or law to support the State's contention. The withdrawals and easements will be treated as designations by a land owner setting aside certain portions of its property.

It is necessary to view this case in its historical perspective. Pursuant to P.L.O. 601 land was withdrawn for through, feeder, and local roads in strips ranging from 300 feet to 50 feet on each side of the center line. These strips were never surveyed, the Bureau of Land Management did not know what land was withdrawn and patents were issued conveying land which allegedly had been withdrawn. The record is replete with letters explaining the problems created and the hardships which resulted.

In response to the problems created by withdrawals, the Secretary of the Interior revoked P.L.O. 601 in stages: first, P.L.O. 757 in 1951, and then P.L.O. 1613 in 1958 and substituted easements. D.O. 2665 and P.L.O. 1613. The establishment of easements did not solve all of the problems; however, entrymen and the government could determine the boundaries of parcels by measuring from the center line of the existing roads even though the roads were not surveyed.

The predecessor in interest to Mr. and Mrs. Pease was granted a two and one-half acre parcel subject to a 33-foot easement for Rabbit Creek Road and a blanket reservation for easements created pursuant to 61 Stat. 413, 43 U.S.C. sec. 932, the

authority for D.O. 2665. The Right-of-Way Act of 1966 precludes the State from taking without compensation any land pursuant to the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418.

The State argues that it already had the easement reserved by 61 Stat. 418, 48 U.S.C. sec. 321d before the effective date of the Right-of-Way Act of 1966 and, therefore, the Act does not apply. The State is wrong; it did not secure the easement until the right-of-way was staked by the terms of D.O. 2665.

It is realized that State, Dept. of Highways v. Green, 586 P.2d 595 (Alaska 1978) does not discuss the Right-of-Way Act of 1966; nevertheless, the Act does apply to the case at bar and would apparently be applicable in the Green case; the State should have brought it to the court's attention even if the appellees failed to do so.

Therefore, the plaintiffs and Mr. and Mrs. Pease are entitled to summary judgment establishing the fact that the State or anyone claiming through the State, including the Municipality of Anchorage, may not occupy land reserved for highway or other purposes pursuant to 61 Stat. 418, 48 U.S.C. sec. 321d without compensation which the State was not occupying on April 14, 1966.

This ruling means that unless the easement was specifically reserved in the patent or was occupied by the State or municipality or staked by the State before April 14, 1966, the underlying fee holder is entitled to just compensation when the State or municipality asserts its right to utilize the strip between the previously occupied, staked, or specifically designated in the patent distance from the center line and 50, 100 or 150 feet from the center line depending upon the type of road. The State's argument that the plaintiffs by this lawsuit are seeking to divest the State of its interest in all the roads of the state is not understood and is clearly not the fact.

The plaintiff Hansen Associates is not correct in asserting that its property is free from the easement designated in D.O. 2665 because its predecessor in interest entered the property before D.O. 2665 was issued. The Hansen property had not been patented as of October 16, 1951 and between a mere entryman and the government, the entryman may not be heard to complain when the government reserves an easement. Shiver v. United States, 159 U.S. 491, 16 S.Ct. 54 (1895); Wilber v. United States, 53 F.2d 717 (C.A.D.C. 1931).

It is unnecessary to decide the effect of the quitclaim deed, its later recordation and the status of land whose owners recorded their deeds or patents earlier than the recordation of the quitclaim deed in light of the above determinations. In addition, it is unnecessary to deal with the doctrine of estoppel as it may apply in this case.

And in order to fully adjudicate the issues presented in this case, it is necessary to comment on the plaintiffs' contentions that Hahn v. Alaska Title Guaranty Co., 557 P.2d 143 (Alaska 1976) was incorrectly decided. The authorities and argument cited by the plaintiffs are persuasive and the Alaska Supreme Court is requested to review its decision.

The attorneys for the plaintiffs shall prepare, serve and submit a judgment consistent with this decision.

DATED at Anchorage, Alaska, this 7th day of May, 1980.

Victor D. Carlson
Superior Court Judge