



interest from its inception to the present. In 1949, Public Land Order (PLO) 601 was issued by the Secretary of the Interior. PLO 601, inter alia, withdrew one hundred (100) feet on each side of the feeder roads in Alaska, including the Elliot Highway, from all forms of appropriation under public land laws. On October 19, 1951, PLO 757 amended PLO 601 so as to omit any reference to the feeder road system in Alaska. However, on the same day, the Secretary of Interior issued PLO 2665 which reestablished, in effect, federal policy regarding rights-of-way or easements on feeder roads located on public lands. Section 2 of PLO 2665 established a one hundred (100) foot wide easement for feeder roads including the Elliot Highway. Section 3(b) of PLO 2665 states:

"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. (emphasis added)

Later, in 1958, PLO 1613 revoked PLO 601. However, PLO 2665 relating to feeder roads remained unaffected.

Defendants argue that when read together, the foregoing public land orders do not grant the Federal Government an easement of one hundred (100) feet on each side of the Elliot Highway. In particular, defendants point to the revocation language of PLO 1613. However, PLO 1613 revoked PLO 601 which by PLO 757 did not contain references to feeder roads such as the Elliot road. Instead, PLO 2665 was issued to govern rights-of-way on feeder roads in Alaska, and PLO 2665 was not affected by PLO 1613. Thus, it is clear that in 1951, the Federal Government through the issuance of PLO 2665, acquired an easement interest in land located one hundred (100) feet on both sides of the Elliot Highway

In 1959, the Federal Government through the Secretary of Commerce transferred this easement interest to the State of

**Alaska via Section 21(a) of the Omnibus Act. 48 U.S.C. Prec.**

**§21(a).** Defendants admit that the Commerce Department transferred to the State the Secretary's interests in lands in Alaska, but point to three specific problems with the conveyance

First, defendants argue that despite the conveyance, they are entitled to an unfettered interest in their property as bona fide purchasers for value. Defendants point out that while the Secretary of Commerce deeded an easement on either side of the Elliot Highway in 1959, the deed was not recorded until October 21, 1969. During that time, defendants predecessor in title, Vifquain, obtained a homestead patent in 1965 and transferred the land in 1968 to William Ollikainen, who thereafter recorded his deed on October 10, 1968. Defendants claim that since they purchased the land for value and without notice of the State's interest, by traditional property law priority concepts, they should be entitled to the land free and clear.

There is a major flaw in this argument. As indicated above, PLO 2665 established the Federal Government's easement interest in the Elliot Highway. Section 3(b) provided that the feeder roads together with the accompanying easements shall extend "over and across the public lands". While not as explicit as the reservation of public lands contained in PLO 601, the meaning of the foregoing portion of §3(b) of PLO 2665 is clear. Public land in which homesteaders could obtain patents was pre-empted in favor of the feeder road rights-of-way.

It is settled law that property which is withdrawn from the public domain cannot be acquired under the general land laws. For example, it is stated in CJS Public Lands §163

at 811

"The withdrawal (of land by the government) prevents, however, the subsequent acquisition, under the general land laws, of any interest in the lands by persons having no interest therein at the time of the withdrawal . . ."

The United States Supreme Court in Federal Power Commission v. Oregon, 349 US 435, 99 LE 1215, 1226 1955), repeated this rule as follows:

"It is a familiar principle of public land law that statutes providing for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other use."

In this case, it is clear that the Secretary of Interior withdrew one hundred (100) feet on either side of the Elliot Highway by PLO 2665. If this land is the same that is the subject of the dispute, defendants' predecessor in title did not have good title to transfer to defendants. It is well settled that the doctrine of bona fide purchaser without notice does not apply if there is an absence of title in the vendor. Bradbury v. Green, 251 P.2d 807, 809 (Okla. 1952). Thus, defendants cannot argue that they should prevail based on the State's delay in recording its deed and their alleged BFP status.

The second problem related to the Secretary of Commerce's conveyance of federal highway interests to Alaska concerns a jurisdictional issue. PLO 2665 states in part

"Section 1(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 . . ." (emphasis added).

The Alaska Omnibus Act gave the Secretary of Commerce the power to deed to the State all lands pertaining to roads in Alaska owned by the Department of Commerce. In order for plaintiff to successfully contend that the Commerce Secretary granted easement lands reserved by PLO 2665, the State must

show a connection between the interests of the Interior and Commerce Departments with respect to the Alaskan roadways.

The necessary link appears to be 48 U.S.C. §321(a) and 23 U.S.C. §103. The former statute gave the Interior Secretary jurisdiction over the construction and maintenance of roads in Alaska. This provision was in effect when PLO 2665 was issued in 1951. However, 48 U.S.C. §321(a) was repealed by Public Law 89-70, effective July 1, 1959. The note in the United States Code Annotations accompanying the repeal refers to 23 U.S.C. §103, part of the Federal Aid Highways Act. The Secretary of Commerce has jurisdiction over this legislation which is concerned with establishing a nationwide system of highways. Presumably, a shift in jurisdiction over Alaska roads and easements for the Interior to the Commerce Department occurred with the Federal-Aid Highways Act, but, if so, it occurred between the lines. The State should establish this connection to confirm the viability of the deed it relies upon.

Defendants third objection raised by the conveyance from the Secretary of Commerce to the State concerns the description in the deed of the Elliott Highway. Plaintiff, in Appendix A, page 7 of its Supplement Memorandum filed July 23, 1976, maintains that the following description in the deed corresponds to the Elliot road:

"From junction with FAP Route 61 and FAS Route 670 at Fox approximately 10 miles north of Fairbanks northwesterly through Livengood; thence southwesterly to intersection of FAS Routes 6803 and 6804; thence northwesterly to the Yukon River and southwesterly to Tanana.

Defendants argue that the foregoing description is vague and the Court must agree. In order to establish that the provision of the deed in fact transferred the Elliot Highway to the State, plaintiff must adduce corroborating evidence to this effect

Otherwise, the Court is forced to adjudicate important property rights on the basis of route descriptions directions which are somewhat confusing

In sum, if plaintiff can show that the Secretary of Commerce assumed jurisdiction of the Alaska road systems, in particular the feeder roads, from the Department of the Interior, and if plaintiff can prove that the deed description in the Commerce Department's conveyance to the State corresponds to the Elliot Highway, then the Court will be satisfied that the State has an unfettered easement on one hundred 100) feet of each side of the Elliot Highway. PLO 2665.

Satisfaction of the chain of title problems, however does not end the case. The above analysis assumed that the State and defendants were controverting the same piece of property. As their second main argument, defendants claim that PLO 2665 reserved easements on either side of the old Elliot Highway and that the State is basing its case on the location of the present Elliot Highway. Defendants contend that Vifquain's homestead patent is east of the old Elliot road and, therefore, is not affected by the Secretary of Commerce's deed to the State. Plaintiff argues that Elliot Highway has not changed its course in the area in question since the issuance of PLO 2665 and, thereby, covers part of defendants' land which contains the controverted signpost. After listening to the oral arguments in this matter and considering the evidence, the Court concludes that the State has not discharged its burden of proving by a preponderance that the right-of-way claimed by the State affects defendants' land.

Since PLO 2665 was issued in 1951, the State must prove that the Elliot Highway ran in the same course in 1951 as it does

today. During oral arguments, the State offered three documents to prove its case. The first is a road map drawn in 1964 and filed with the Bureau of Land Management in Fairbanks. The second set of documents consist of two quad maps drawn by the U. S. Geological Survey. The third document is an aerial photograph of the pertinent section of the Elliot Highway taken in 1961. The State claims that each document shows that the curve in the Elliot, which now bisects defendants' property, existed when PLO 2665 was issued in 1951.

Defendants' rebutted this contention with evidence of their own. First and most important, when plaintiff's witness, Lee Saylor, was asked where the Elliot Highway ran in 1951, he could not give a definitive answer. Saylor stated that he did not have sufficient map evidence to answer the question, but that he had "no reason to believe (the road) changed between 1951 and 1954" The year 1951 refers to the date when PLO 2665 was issued. The year 1954 ostensibly refers to the date when the first U. S. Geological map of the pertinent area was drawn. Saylor depended on this geological map and a revised map issued in 1971 to corroborate his belief that the Elliot Highway has not changed location with respect to defendants' property. The geological maps appear to indicate that the general contours of the Elliot around defendants' land have not changed between 1954 and 1971. However, the maps are not reliable indices. For example, measuring the point on each map in which the trail from Dome Camp meets the Elliot Highway to the southern boundary of quadrant 1, gives a slightly larger distance for the 1954 map over the 1971 map. Also, a careful look at the 1954 geological survey indicates that the Elliot dips more westerly around defendants' land than on the 1971 map

Despite the uncertainty of where the Elliot Highway ran in 1951 and the unreliability of the U. S. Geological surveys, plaintiff would have the court consider the 1961 aerial photo and the 1964 road map as determinative of its position. It is noteworthy that both the aerial photograph and the map were made long after PLO 2665 was issued. This is important since Section 4 of PLO 2665 requires the Federal Government to file maps in the local land office showing the location of roads and easements. Furthermore, as noted by defendants' counsel, the road map was filed with BLM not as a general notice instrument as contemplated by Section 4 of PLO 2665, but to secure additional easements along the Elliot Highway. The one map apparently filed in conformity with PLO 2665 shows the Elliot Highway running east of defendants' land. Although this latter map is only a "status map" and therefore subject to error, it appears just as reliable as the State's evidence in determining where the Elliot was located in 1951. Furthermore, defendants' BLM map corresponds to the old telephone and telegraph line which runs east of defendants' land. In the aerial photo, this telephone line appears as an old dirt road and it is entirely conceivable that the Elliot Highway conformed to this route when PLO 2665 was issued

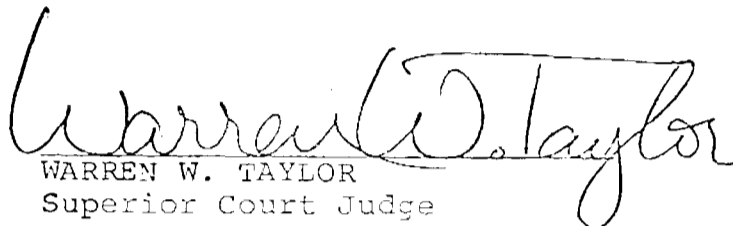
Thus, by weighing the evidence, it appears that the State has not proved by a preponderance the exact location of the Elliot Highway in 1951. This being the case, plaintiff's Forcible Entry and Detainer suit is dismissed without prejudice. If the State wishes to reopen the case, it should be prepared to show in a more convincing manner that the Elliot Highway has not changed position around defendants' land since 1951



and satisfy the Court on the chain of title questions raised above.

IT IS SO ORDERED.

DATED at Fairbanks, Alaska, this 9<sup>th</sup> day of December, 1976.

  
WARREN W. TAYLOR  
Superior Court Judge