MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

TO: Jim Sharp
ROW Engineering Supervisor
Central Region

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FILE NO:

TELEPHONE NO: 474-2413

FROM: John F. Bennett PLS, SR/WA
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SUBJECT: '47 Act

I read over some of the '47 Act documents last night, and as usual I ended up with more questions than answers. I believe your question involved whether the '47 Act Notice of Utilization could be effectively used prior to patent. If so, this is what I found.

Affirmative argument: In the April,1965 Department of Law document titled A Summary of '47 Act Opinions, the page 2 section on "Effective Dates" cites that upon July 24, 1947, the act "applied only to lands which were taken up, entered, or located, or otherwise passed into private ownership after this date." It further stated

> That 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 The '47 Act was repealed by an Act of Congress which provided that the repeal take effect on July 1, 1959.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.

This suggests that lands entered or located between July 24, 1947 and July 1, 1959 that subsequently went to patent would be subject to a '47 Act reservation.

Page 4 of the "Summary" discusses the reservation to be placed in the patent document.

> "...(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.

Therefore, even if a patent does not express the '47 Act reservation, lands meeting the previously noted timeframe would still be subject to the reservation. The fact that a valid reservation is not stated in the patent does not preclude its application if it is valid, such as we know to be the case in PLO and section line easement rights of way.

Negative Argument: In October 4, 1974 David LeBlond, an Assistant AG in Juneau submitted a memo to Ross Kopperud when he was an Assistant AG in Fairbanks. The issue specifically dealt with a '47 Act Notice of Utilization that was filed against an entryman in the Fairbanks area.

> The Act had no effect on lands in the public domain but only upon lands patented after its enactment.
>
> It appears to me that no right of way was acquired under the 1961 Notice of Utilization. 48 USC 321 (d) had absolutely no effect except as requiring a reservation of rights of way in patents. Only where such a reservation was made could a right of way be utilized pursuant to the Act. In 1961 Bernard Darling's land was still public domain. There had been no patent and hence no reservation of rights of way. While a right of way might well have been acquired in 1961, it could not be acquired by a purported utilization of right of way reserved under 48 USC 321 (d).
>
> In other words, until the land was patented, there could be no utilization of a right of way pursuant to 48 USC 321 (d). Therefore, the 1961 Notice of Utilization was premature since the land was still pubic domain. Unless Bernard Darling took his patent subject to an existing right of way established on the public domain by some authority other than 48 USC 321 (d), he took it free of any rights of way not specifically reserved. Since 48 USC 321 (d) was repealed before the patent was granted, no rights of way for roads were reserved.

This argument suggests that no reservation attached to lands entered upon or located, but only to those where patent was issued during the effective dates of the '47 Act. It might also suggest that the '47 Act did not in itself create a right, but only required that a reservation be placed in the patent. If the reservation was not placed in the patent for whatever reasons, the land could not be subject to a '47 Act right of way.

Discussion: Our PLO case law has established that homestead entries will give rise to valid existing rights. This has also been recognized in our federal actions where we have obtained a BLM right of way grant over homestead entry. Generally, where that entry leads to patent, the right of way grant is declared "null and void" due to the fact that the homestead entry was a "valid existing right". Therefore, LeBlond's opinion would suggest that a neutral zone was established between the date of entry and the date of patent where right of way could neither be secured by a Notice of Utilization nor a BLM Right of Way grant. I suspect the only method of acquisition that would be acceptable would be the negotiation or condemnation of a right of way easement directly with the entryman.

Given the legislative intent of the '47 Act, I find it hard to believe that they would have allowed this loophole to exist. The House Committee on Public Lands on June 24, 1947 reported that "The Committee on Public Lands unanimously agreed that passage of this legislation will help to eliminate unnecessary negotiations and litigation in obtaining proper rights of way through Alaska."

An April 1, 1958 from the BPR general counsel in Washington D.C. to the Regional Engineer in Juneau stated:

> It is considered that, under the authority of the Act of Congress approved July 24, 1947 (61 Stat. 418; 48 U.S.C. 321d), all entries made on public lands subsequent to said date and all patents based thereon have been and are subject to a reservation in the United States of any and all rights of way, without

limitation as to number or widths, for public highways already constructed or to be constructed on said lands.

Conclusion: If I understood your question correctly, then I agree that a Notice of Utilization filed prior to patent should have been valid, unless the entry preceded the effective date of the '47 Act.