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December 24, 1992

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465-3603

Public land order
Rights-of-way and
the Old Seward Highway
Dowling to Hoffman

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In your memo of October 9, 1992, you have requested an answer to the following question:

> Does the promulgation of PLO 757 and D.O. 2665 create a right-of-way by utilizing a reservation created by the Act of July 24, 1947?

The question you have raised calls into question the relationship between PLO 957, D.O. 2665 and the Act of July 24, 1947, (48 U.S.C.A. § 321(d) (1952) (the '47 Act).

The '47 Act requires to be reserved 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 . . . .

a right-of-way "for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures. . ." to be constructed by the United States or any state created out of the territory of Alaska.

The '47 Act has been held to create a right-of-way "without limitation" as to the initial choice of either the federal government or the State of Alaska. However, once the right-of-way has been selected and defined, the right-of-way becomes fixed and cannot later be expanded to accommodate additional improvements to the roadway. See Hillstrand v. State of Alaska, 181 F. Supp. 219, (1960). In other words, a governmental agency gets one chance, but only one chance, to utilize a '47 Act reservation.

The '47 Act has been held by the Alaska Supreme court to be inapplicable to public lands sold or leased under the Small Tracts Act (Act of June), 1938, 43 U.S.C.A. § 682(a) (1964). See State v. Crosby, 410 P.2d 724 (1966). In Crosby, the court held that the purpose of the '47 Act was to remedy those situations when the executive branch that was conveying public land to an individual was not empowered under law to reserve a right-of-way in the conveyance. Hence, the '47 Act did not apply to the Small Tract Act because this Act did empower the Secretary of Interior to reserve right-of-ways. Crosby, 410 P.2d at 727-8.

D.O. 2665 and the '47 Act

The relationship between D.O. 2665 and the '47 Act is this: DO.O. 2665 rests on the authority of 48 U.S.C. § 321(a), not § 321(d). There is no connection at all between D.O. 2665 and a

'47 Act right-of-way (48 U.S.C.A. § 321(d). Section 321(d) and § 321(a) are two entirely different statutes of 321(a) was enacted 15 years before § 321(d). In addition, the subject matter of § 321(a) and § 321(d) "differ markedly." See State v. Green, 586 P.2d 595, 601 (1978). Section 321(a) governs the transfer of road construction and maintenance functions to the Secretary of Interior while Section 321(d) requires certain right-of-way reservations to be included in "all patents for lands hereafter taken up, entered or located in Alaska. Green, 586 P.2d at 601.

The conclusion from this analysis is that D.O. 2665 and the '47 Act are two entirely distinct sources of highway rights-of-way and bear no relationship to each other in the sense implied by your question, i.e., the promulgation of D.O. 2665 does not operate to "utilize" a '47 Act right-of-way reservation. In fact, by its terms, D.O. 2665 creates a right-of-way only across "public lands." See Section 1 of D.O. 2665. If land were patented to an individual before the date of PLO 601, the right-of-way created by D.O. 2665 would not affect it.[1] On the other hand, if land over which a public road passed at the time D.O. 2665 was issued was public land at the date of issuance, such land would be affected by a D.O. 2665 easement even if such land were subsequently conveyed without any

[1] D.O. 2665 operated to change the withdrawals created by PLO 601 into easements. Hence the date PLO 601 was issued (August 10, 1948) is important for determining a D.O. 2665 easement. See Alaska Land Title Assn. v. State, 667 P.2d 714, 720 (1983).

mention in the patent of the D.O. 2665 right-of-way.[2] See Alaska Land Title Assn. v. State, 667 P.2d at 726-7.

PLO 757 and the '47 Act

The authority for PLO 757, which amended PLO 601, stems from E.O. 9337 of April 24, 1943. Like D.O. 2665, PLO 757 has no connection with a '47 Act roadway; it is a separate and distinct authority for a reserved right-of-way. E.O. 9337 granted the Secretary of Interior the general power to withdraw or reserve public lands. In order to PLO 757 withdrawal to be effective, the named roads withdrawn by PLO 757 must have either crossed public lands as of the date of PLO 601 or else have been subsequently constructed over public land.[3] As with D.O. 2665, a PLO 757 withdrawal does not operate to "utilize" a '47 Act right-of-way reservation. By its terms, PLO 757 creates a withdrawal for highway purposes only across "public lands."

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[2] This would also be the case if a new road were staked after the date of D.O. 2665 but before the land over which the new road was to cross was conveyed or "entered" under a homestead law.

[3] PLO 757 amended PLO 601 by adding the new roads to PLO 601's list of through roads. PLO 757 also released PLO 601's feeder and local roads from a "withdrawn" classification noting in the text that D.O. 2665 created easements in their place. See Alaska Land Title Assn., 667 P.2d at 720.

Conclusion

Neither D.O. 2665 nor PLO 757 operate to "utilize" a '47 Act reservation. The issue is one of apples and oranges: Both D.O. 2665 and PLO 757 are separate and distinct sources for the creation of highway rights-of-way, separate and distinct from a "47 Act reservation.

It may be, in a given case, that a patent was subject to a '47 Act reservation and then, say, the Old Seward Highway was extended across the patented land. If the land had been patented prior to PLO 601, no public land order reservation or right-of-way would attach. Assuming that the '47 Act Reservation had not previously been utilized, when the Seward highway was first extended across the patented parcel, this would constitute the first (and only) utilization of this '47 Act Reservation as held in Hillstrand v. State of Alaska, 181 F. Supp. 219 (1960).

JBM/bap