From: Khachadoorian, Rebekah V (DOT)
To: John Bennett
Cc: Fuglestad, Eric P (DOT); Karen Tilton; Quigley, Ryan L (DOT); Gard, Krysta M (DOT)
Subject: RE: "47 Act
Date: Wednesday, June 21, 2017 1:50:02 PM

Hi John,

Well, I think I have let this percolate long enough. I struggle to connect the decision and case number as well, especially in this instance, where the concern at hand (entry pre-statehood and patent post statehood) is not addressed in the Hillstrand case. Maybe there was an interim decision during the process of appeal that has since been lost to the ether. Researching an old case brief on Microfiche sounds like an exciting time! (Not really…) And while researching is one aspect of our profession that I enjoy immensely, leaving no stone unturned, having spent some time in a previous life at an Iowa law library, I can definitely think of more exciting things to do with my time. Something tells me though, that I likely won't have complete resolution unless I do.

In my particular case, Clarence Kinney entered prior to statehood, 9/29/1958, and was patented afterwards, 4/12/1961, ACRES abstract attached. The State served a NOU which was recorded on 11/14/1961, attached. I think I had a dyslexic moment earlier as I thought the NOU was served prior to patent. While the NOU may be invalid due to patent date at least it was served afterwards, though in a comparison of affected parcels, it appears that serving NOUs prior to patent was not an issue considered at the time. The Microfiche attachment contains the correspondence about the invalid NOUs at the time. This shows that someone erred when writing the incorrect instrument by which the ROW was acquired. All other NOUs deemed invalid were reacquired from the property owners. There is no doubt in my mind that had someone not made a mistake the problem would have been resolved then, unfortunately we do not have that luxury. However, I did some checking and currently DOT is clearing up to the monumented line. This definitely helps support a prescriptive claim to that line.

I really appreciate your time and knowledge on this.

Enjoy your day!

Becky Khachadoorian, PLS
ROW Engineer Assistant
Central Region DOT
(907) 269-0705

From: John Bennett [mailto:JBennett@rmconsult.com]

Sent: Monday, June 12, 2017 8:45 AM
To: Khachadoorian, Rebekah V (DOT)
Cc: Fuglestad, Eric P (DOT); Karen Tilton; Quigley, Ryan L (DOT); Gard, Krysta M (DOT)
Subject: RE: '47 Act

Becky, that May 21, 1962 "Intra-Departmental Correspondence" memo is interesting in that it came just 4 days after the mysterious May 17, 1962 Decision No. 246. So something must have happened at that time. I sent a note to our Fairbanks Court Law Librarian citing that decision and she responded with :

Good Morning John,

I believe what you are looking for is Supreme Court Opinion #246 which is Case#437 Hillstrand v State dated September 8, 1964 (395 P2d 74).
Do you have access to Westlaw?

Christina

I then asked her how Decision No. 246 is cross referenced with Supreme Court Case No. 437. I thought it would be an easy answer but she then suggested that I come down to the law library and look at the case briefs on microfiche. So she is suggesting that there is a difference between a case no. and an opinion no. Not sure I buy that yet but I might look into that just for curiosity's sake. Hillstrand is definitely the case that held that you couldn't apply a '47 act reservation to a parcel that was entered prior to the effective date of the '47 Act. (See attached)

I think you already may have the 10.4.74 AGO memo by AAG LeBlond. This was a Fairbanks situation where an NOU was served prior to patent and then the '47 Act was repealed prior to patent. Basically he says that serving the NOU prior to patent has no effect. Ultimately the patent issued in 1972 included no '47 Act Reservation.

Below, you note the attached memo with a list of affected properties. Did you send me that one? Either I'm not sure which one it is or misplaced it. So the state served the NOU prior to patent which according to LeBlond would not have created a '47 Act ROW. Was the patent issued prior to repeal with the reservation inserted? The state surveyed and monumented the NOU defined ROW and subdivisions acknowledged but did not dedicate that ROW. Maybe it ultimately cannot be a ROW based on the '47 Act but evidence supporting an assertion of a prescriptive easement to the monumented line.

Also, after re-reading some of this stuff, I'm less comfortable with my 4th bullet point below. I'm thinking the right is not created by virtue of a valid entry falling after the effective date of the '47 Act but it also requires that the patent be issued prior to repeal. This would allow the 3rd bullet point to still be good as far as I understand. That is, if a valid entry came after the effective date of the '47 Act, then patent was issued prior to repeal but without a '47 Act reservation, there likely would still be a '47 Act reservation that an NOU could have been served on up until the 1966 Act. But if the same situation was to occur except that the patent wasn't issued until after repeal, then I now believe there would be no '47 Act availability.

Wow, this discussion did absolutely nothing to wake me up on a Monday morning… JohnB

From: Khachadoorian, Rebekah V (DOT) [mailto:rebekah.khachadoorian@alaska.gov]
Sent: Thursday, June 08, 2017 4:19 PM
To: John Bennett
Cc: Fuglestad, Eric P (DOT); Karen Tilton; Quigley, Ryan L (DOT); Gard, Krysta M (DOT)
Subject: RE: '47 Act

Hi John,

Thank you for your response, definitely some food for thought.

The ’62 AGO memo you sent is different from the one I’m looking for. I attached a memo I found that references the opinion that I am hoping to find. It makes me feel better knowing that it’s not just me frustrated by a potentially erroneous citation! I feel like something is out there somewhere as the cited date seems to be supported by the memo I found, but I’ll be darned if I can find it either.

I appreciate the explanations and I follow how you came to the conclusions. The only one that causes me fits is the last one. However I can follow the line of thinking and without the benefit of case law or another authoritative document, holding entry over patent makes sense.

As an aside, on other projects I have worked on and researched the ROW I have found several patents that were issued with the ’47 Act reservation and entry was prior to enactment.

All of this brings me to another question…

In the case I’m looking at, the State served the NOU prior to patent. This is along the Parks Highway and the corridor was monumented with concrete mons along the edge of ROW. Subdivisions were eventually platted on each side of the Parks and accepted, but did not dedicate, the ROW consistent with the NOU. The NOU also impacts an unsubdivided remainder of the original patented parcel. This wouldn’t even be an issue had a mistake not been made back in the 60s after the attached memo circulated and a list of affected properties was created. Whoever created the list showed this parcel acquisition as a warranty deed. This is likely the only reason we didn’t go back and get a ROW easement from the entryman as we did on the other NOUs deemed invalid at the time. I have done a thorough search of the historic books for a warranty deed and came up with nothing aside from the original NOU. This search was aided completely by your OCR work, what a helpful and timesaving tool that is! At any rate, how would you handle a situation such as the above?

Enjoy your day!

Becky Khachadoorian, PLS
ROW Engineer Assistant
Central Region DOT
(907) 269-0705

From: Quigley, Ryan L (DOT)
Sent: Wednesday, June 07, 2017 12:37 PM
To: 'John Bennett'; Khachadoorian, Rebekah V (DOT)
Cc: Fuglestad, Eric P (DOT); Karen Tilton
Subject: RE: '47 Act

And I stand by those words! What struck me today was the realization that Interior wrote the '47 Act then were probably high fiving each other as ARC was transferred into BPR. "Got ridda that problem!"

Ryan Quigley PLS|CFedS
DOT&PF Right of Way Engineering
(907) 269-0561

From: John Bennett [mailto:JBennett@rmconsult.com]
Sent: Wednesday, June 07, 2017 8:23 AM
To: Khachadoorian, Rebekah V (DOT) <rebekah.khachadoorian@alaska.gov>
Cc: Quigley, Ryan L (DOT) <ryan.quigley@alaska.gov>; Fuglestad, Eric P (DOT) <eric.fuglestad@alaska.gov>; Karen Tilton <ktilton@rmconsult.com>
Subject: RE: '47 Act

Becky, I've attached what might be the 1962 AGO memo that you referenced. The reference to the May 17, 1962 Decision No. 246 drives me nuts. There is a decision No. 246 dated August 16, 1962 but it doesn't appear to have anything to do with the '47 Act or ROW. See attached Starr v. Hagglund. I wonder if it was a typo or what but I can't seem to find anything close to it.

The April 1965 "A Summary of '47 Act Opinions" that cites Decision No. 246, on page 4 says "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." So if a patent was issued after the effective date of the '47 Act but they accidentally left the '47 Act reservation out of the patent, they are saying that it is still effective. Makes sense as it is a prior existing right just like PLOs and SLEs that aren't mentioned in a patent.

So looking at the text of the '47 Act: "In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska…there shall be expressed that there is reserved…" It seems that there are two actions taking place, one by the entryman and one by the federal employee. The entryman is taking up, entering or locating the lands which if occurring during the period of time that the '47 Act was effective, would impress the ROW across the land and require the federal employee to place

the reservation on the patent before it is issued. But as already said, if the reservation is erroneously left off, it should still be effective. Which action creates the ROW, the insertion of the reservation into the patent or the establishment of a valid entry? I'm leaning toward the entry.

I've attached another 1968 AGO memo regarding a Gerold King. This is interesting in that it says that if the entry was accomplished prior to the '47 Act, it would not be subject to the reservation. This makes sense in that if a homesteader has made a valid entry, his rights are established and should not be subject to a law passed after his entry. But the way the '47 Act was written I suspect that it was applied to most patents issued after the '47 Act was in place without regard to entry date. (That would be interesting to look at.)

I've just re-read the November 10, 1994 memo to Jim Sharp and it appears that I have restated above a couple of items in that memo. I concluded that a NOU filed prior to patent should still have been valid unless the entry preceded the effective date of the '47 Act. I may have been overly aggressive in that conclusion. I'm now thinking it should be more like what the AGO said in 1969 regarding protracted section line easements. He said they existed but they couldn't be used until confirmed by survey. In that same sense, I thinking the right to impose a '47 Act ROW may exist prior to patent but it just can't be used until the patent is issued.

In your case I'm thinking back to where I mentioned the two separate actions of the entryman and the federal employee. The right to impose the '47 Act reservation was met as the land was entered upon during the effective dates of the '47 Act. But with the repeal at statehood, the federal employee was prevented from inserting a '47 Act reservation into the patent. But then the fact that the reservation did not get inserted into the patent should not affect the valid existing rights of the public. So what created the public's rights under the '47 Act? The insertion of the reservation in the patent or the act of entry onto the lands? I can't help but think that there is an IBLA decision out there that might shed some light on this. But until then I'm leaning toward the following:

- If a valid entry occurs prior to the '47 Act (July 24, 1947), and that entry goes to patent, there can be no '47 act reservation.
- A NOU cannot be imposed prior to patent, only after patent is issued.
- If an entry is subject to the '47 Act, but the patent is issued without the '47 Act reservation, the '47 act reservation is still valid.
- If an entry is subject to the '47 Act, but patent is not issued until after '47 Act repeal (July 1, 1959), the '47 Act reservation is still valid.

I've probably got this issue totally wrapped around the axle now. I feel the need to quote Ryan in his 10/6/15 email to me…"Stupid '47 Act!"

JohnB

John F. Bennett, PLS, SR/WA *Senior Land Surveyor – Right of Way Services*

R&M CONSULTANTS, INC. | 212 Front Street, Ste. 150 | Fairbanks, Alaska 99701
907.458.4304 direct | 907.687.3412 mobile

Facebook | LinkedIn | rmconsult.com

Innovating Today for Alaska's Tomorrow

From: Khachadoorian, Rebekah V (DOT) [mailto:rebekah.khachadoorian@alaska.gov]
Sent: Tuesday, June 06, 2017 1:51 PM
To: John Bennett
Cc: Quigley, Ryan L (DOT); Fuglestad, Eric P (DOT)
Subject: '47 Act

Hi John,

This is Becky down in Central Region DOT RWE. I have been researching the applicability of the '47 Act on a specific property that was entered prior to statehood (9/29/1958) and patented afterwards (4/12/1961). There has been quite the discussion in our office about this and Ryan and Eric suggested I ask you.

Based on everything I have read and seen; it seems to me that the '47 Act does not apply in this situation. The Dept. of Law in May of 1962 apparently sent a memo stating this opinion, though I can't find a copy of that memo. The 1965 DOL Summary of '47 Act Opinions supports this view and calls out "(May 17, 1962) See, Decision No. 246, Alaska Supreme Ct." which I also can't find. To muddy the waters a bit, Ryan found a memo from you to Jim Sharp in 1994 that potentially disagrees with the above. It appears to be only one piece of communication in a chain which I don't have.

There definitely seems to be two sides of this issue. The entryman could be subject to the '47 Act because he entered before it was repealed and therefore subject to the rules and regulations in place on the date of his entry or the entryman could not be subject because he was patented after repeal and the language of the '47 Act says entered and patented which the entryman only satisfies one of those conditions.

That is the background information, now for the questions. First, do you happen to have the above mentioned documents that I couldn't find? And mostly what is your take on when the '47 Act does or does not apply?

I really appreciate any insight you can give!

Enjoy your day!

Becky Khachadoorian, PLS
ROW Engineer Assistant
Central Region DOT
(907) 269-0705