From: Bennett, John F (DOT)
To: "dbeardsley@drydenlarue.com"
Subject: Access Law 2013
Date: Tuesday, November 20, 2012 9:06:00 AM

Thanks Dan, I was afraid you would inform me that the case Kielbasa v. Rutabaga had clearly decided this issue decades ago and that apparently everyone but me knew that. With regard to other authorities I did a review of the Boundary Lodge property on the Top of the World Highway some years back and found the same language between the 1949 and 1950 CFRs with regard to Homesites & Headquarters sites as I did for T&M sites. The Boundary lodge entry was in Feb. of 1950 so it was a few months beyond PLO 601 but our review of the case file indicated occupation prior to PLO 601. Anyway I agree that it's probably too late in my career for enlightenment, complete or otherwise. For the DOT perspective I have decided that the CFR language allows me to give the benefit of the doubt to the land owner particularly when the dates between vesting and the PLO are close. I still hold for the application date on Homesteads as per Hamerly but on the other hand I haven't perused the CFRs for homesteads yet. The older I get, the more I realize how little I know… JohnB

From: Dan Beardsley [mailto:dbeardsley@drydenlarue.com]
Sent: Monday, November 19, 2012 5:08 PM
To: Bennett, John F (DOT)
Subject: RE: Access Law 2013

John,

And how many angels can dance on the head of a pin?

I think you have an exception until proven otherwise regarding the T&M site. It raises a question relative to Dillingham, because IF that same language is found in the CFR for homesteads, and the CFR was not raised to the court in Dillingham, I think the relation back would apply. Someone would have to take it to the Supreme Court to overturn Dillingham should that be the case. What are the odds of that happening?

How many other areas of the land laws would it apply, a good question. Native allotments already go back that far. Pedis Possesseo with respect to staking the claim before recording applies to federal mining claims. It is probably something that an individual in scholarly pursuit of complete enlightenment would investigate. Otherwise I doubt anyone will consider it in our lifetimes.

Dan

From: Bennett, John F (DOT) [mailto:johnf.bennett@alaska.gov]
Sent: Monday, November 19, 2012 3:44 PM
To: Dan Beardsley (dbeardsley@drydenlarue.com)
Subject: Access Law 2013

Dan, I'm re-writing my highway paper and there is one item I have wanted to run by you since our last presentation in 2007. It goes to my misstatement regarding date of occupation vs. date of application

as the date by which a homesteader's rights are established and the lands can be considered reserved. I'm clear on the issue of homestead entry and the requirement for the application to establish the homesteader's rights as per Dillingham and Hamerly. And Dillingham said that occupation (squatter's rights) had a role but only with respect to claims against other entrymen and not the feds. While I have no doubt what the rules are for homestead entries, I'm not so sure they can be applied against entries made by other authorities. The reason I had "occupation" on the brain in 2007 was due to some research into the old Meiers Lake lodge on the Richardson Highway about MP 173 or so. We were looking at it with respect to whether PLO 601 would apply the full 300' ROW against it or maybe not.

The US Survey for the Lodge was a T&M site as opposed to a Homestead. The application was filed with BLM I believe about 44 days after the effective date of PLO 601. So at a glance it would appear to be subject to the ROW. However, the lodge was initially constructed in 1906. And Tatro, the person who eventually received patent had occupied and run the lodge since 1943. The 1949 edition of the CFR's applicable to T&M sites seems to say that occupation date is critical and the application will when filed relate back to the date of occupation. The next edition of the CFR's in 1950 changed that rule and said that the T&M claimant must file a notice of location within 90 days of occupation or they will receive no credit for their claim prior to the date of application. I decided that Tatro filed his application under the 1949 edition of the CFR's and so as his occupation preceded PLO 601, the claim was a prior existing right with respect to PLO 601.

I don't know if there was any similar language in the CFR's for homestead entries, but that issue was settled by our Sup. Ct anyway. Is it fair to say that Dillingham/Hamerly only relates to homestead entries and until there is case law relating to other authorities such as T&M sites, the CFR's that guided the entry and application process would govern? Just curious if I'm heading off in the wrong direction. JohnB

John F. Bennett, PLS, SR/WA | Chief, Right of Way | Alaska Department of Transportation, Northern Region
2301 Peger Road; Fairbanks, AK 99709-5399 | ☎: 907.451.5423 | 🖷: 907.451.5411 | ✉: johnf.bennett@alaska.gov