

[ CLICK HERE AND TYPE COMPANY NAME ]

## FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
John Bennet, PLS	Bob Kean (or Shelley)
COMPANY:	DATE:
Kean & Associates	10/21/98
FAX NUMBER:	TOTAL NO. OF PAGES INCLUDING COVER:
<del>451-4500</del> 5400	15
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
345-2098	98124asc
RE:	YOUR REFERENCE NUMBER:
Section line easement determination	

URGENT     FOR REVIEW     PLEASE COMMENT     PLEASE REPLY     PLEASE RECYCLE

## NOTES/COMMENTS:

John, I have included all the information that I have including several maps of the area. Canyon Road has been there since the 50s and is a prescriptive easement. It is the same road that leads to the Miller's homestead and the famous RS2477 easement case.

Our client is Sally Compere who just purchased the S1/2 SE 1/4 of Section 30. Topography prevents access from most other locations. The real estate company (who claims the title co.) claims they sold the property based on the existance of the sectionline easement from Canyon Road. Ms Compere wanted us to survey in the driveway up the easement from Canyon Road to the SW corner of her property. I suggested she double check that there is indeed a section line easement. The papers will explain the rest of the story. See if you can confirm there is or is not a sectionline easement!?

A side issue in regard to Canyon Road. One item that I noticed on the deed is reservation no. 3, which reserves to the State for Feds the right to build roads ... and appurtenant structures. I believe this reservation is still in effect although it was repealed in 1959. A 1962 case asserted that patentees received the land with full knowledge of the reservation. The legislature appears to have passed a law which required the state to compensate anyone who suffered a taking. Canyon Road has been maintained by the City with occasional grants from the legislature. Does this constitute a taking, a right-of-way or does there have to some official act from DNR or DOT!? Canyon Road is our access. You drove it when you came to our house/office.

*This is in advance for your help. This is a critical one for the client. It's here only once*

October 21, 1998

P5-90/D:\...98124asc\easements.doc

Sally Compere  
1512 Kepner Drive  
Anchorage AK 99504

**DRAFT**

Dear Sally:

As you requested, we have investigated the existence of a section line easement on Mr. Rohaley's homestead which is comprised of Govt. Lot 4, and the SE1/4 SW1/4 of Sec. 30 and Govt. Lot 1, and the NE1/4 NW1/4 of Sec. 31, T12N, R2W., S.M. From all the information we have accumulated and investigated to date there is every indication that there is NOT an a section line easement between Sections 30 and 31 to your property from Canyon Rd. However, we cannot say this with absolute certainty for the reasons discussed below.

In order for a section line easement to exist across a homestead, the survey establishing the section line must have been completed and the plat approved or filed prior to the homesteader's entry. The plat of the survey of Sections 30 and 31 was approved 9-26-55.

The next step is to determine whether Mr. Rohaley's date of entry was before or after that date. We obtained the "serial pages" associated with Mr. Rohaley's patent from the BLM's Public Room. This is basically a chronological listing of actions taken. A copy is attached. You will note that it does not simply say "date of entry was ...."; we must deduce this from the information given. On 4-8-54 the application was received and on 5-24-54 the location notice was approved. If we interpret the latter date as the BLM's date of acceptance of Mr. Rohaley's claim, there is NO section line easement. (Entry pre-dates the plat approval date).

However, if you proceed down the list, you will note that on 9-10-56, the application for the homestead and all the final proofs were filed and that entry was allowed on 12-12-56. If this is in fact the date of entry, then a section line easement DOES exist. Therein lies the quandary.

To resolve this, we consulted with a BLM employee who has dealt with section line easement determinations in the past to clarify which entry on the serial page constituted the date of entry. He said that from the BLM's point of view, date of entry is generally the date of the acceptance of the application. One item we have to validate is whether the area was open for entry at the time of the application. Since this case will required all the information available to fully respond, we have ordered the case file which has to be retrieved from the archives in Washington, D.C. and will take about 2 weeks to arrive here. It may or may not shed light on the situation but will have to be reviewed to complete the investigation.

We also obtained the serial pages for the two homesteads that your parcels are part of. Mr. Hocker's application was filed 9-13-56 and Mr. Spaulding's, on 5-11-59. These two

homesteads are clearly subject to section line easements since their date of entry. It is interesting to note that Mr. Spaulding's serial page gives a date for "entry allowed" but Mr. Hocker's does not. In comparing the three listings, you begin to appreciate how nebulous "date of entry" is.

We would be happy to pursue this matter further on your behalf. We also feel that in this case you should obtain a second opinion. There are several experts in this field who have published papers describing this complex issue; they are: John Bennet, PLS, Dan Beardsley, P.J. Sullivan or John Sedwick, who is a judge.

Sincerely,

Robert T. Kean, PLS

Form 4-1813  
(Feb. 1967)

Anchorage 026431

# The United States of America

To all to whom these presents shall come, Greeting:

WHEREAS, a certificate of the Land Office at Anchorage, Alaska, is now deposited in the Bureau of Land Management, whereby it appears that pursuant to the act of Congress of May 20, 1862 (12 Stat. 399),

and the acts supplemental thereto, the claim of Donald L. Rohaley Rohaley has been established and that the requirements of law pertaining to the claim have been met, for the following-described land:

**Second Meridian, Alaska.**

**T. 12 N., R. 2 W.,**

**Sec. 30, Lot 4, subject,**

SE 1/4 SW 1/4

**Sec. 31, Lot 1, subject,**

NE 1/4 NW 1/4

The area described contains 143.46 acres, according to the official plat of the survey of the said land, on file in the Bureau of Land Management:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, DOES HEREBY GRANT unto the said claimant and to the heirs of the said claimant the tract above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to (1) any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; (2) the reservation of a right-of-way for ditches or canals constructed by the authority of the United States, in accordance with the act of August 30, 1890 (26 Stat., 391, 43 U. S. C. sec. 945), and (3) the reservation of a right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or by any State created out of the Territory of Alaska, in accordance with the act of July 24, 1947 (61 Stat., 418, 48 U. S. C. sec. 321d). There is also reserved to the United States a right-of-way for the construction of railroads, telegraph and telephone lines, in accordance with section 1 of the act of March 12, 1914 (38 Stat., 306, 48 U. S. C. sec. 305)

Reserving unto the United States, its permittees or licensees, the right to enter upon, occupy and use, any part or all of said lands for the purposes provided in the Act of June 10, 1920 (41 Stat. 1063) and subject to the conditions and limitations of Section 24 of said Act, as amended by the Act of August 25, 1935 (49 Stat. 846).

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat., 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the ~~21st~~ day of ~~November~~ in the year of our Lord one thousand nine hundred and ~~fifty-seven~~ and of the Independence of the United States the one hundred and ~~eighty-second~~.

For the Director, Bureau of Land Management.

By Ruth W. Talley  
Acting Chief, Patent Section.

Donald L. ROHALEY  
Appl. Filed Apr. 4, 1954  
Pat. Issued Nov. 13, 1957  
(SEAL)

Patent Number 1176384

Form 100 (Rev. 7-1983)

Class of entry and uses: *Sec. 2289*

Class No.: *026411*

Homestead Entry - Sec. 2289

Owner and address:  
 Donald L. Rohalcy  
 Seafarmer Apt. #6 *Box 1615*  
 Anchorage, Alaska

Description of land:  
*Lot 6, Section 30*  
 Section 30  
*Lot 1, NW 1/4*  
 Section 31, T. 12N., R. 27., Seward Meridian.  
 183.46  
 containing 180 acres.

DATE	ACTION TAKEN
4/8/56	Application received with \$16.00 fees & commissions. Receipt #139966 issued.
4/2/56	<i>Location Notice forms filed &amp; triplicate. Proceeded application was entered.</i>
5-24-54	<i>Location Notice approved</i>
1-10-55	<i>Petition for Free Survey rec'd</i>
6-22-56	<i>Field by field, etc.</i>
6-29-56	<i>Field filed</i>
6-29-56	<i>Homestead entry, final proof forms mailed applicant</i>
8-10-56	<i>Appl. in file, 7 all final proof filed w/ 7.00 fee etc. on</i>
12-14-56	<i>Entry allowed Dec 12-56; public credit</i>
12-18-56	<i>7 reports - 30, further investigation needed.</i>
1-31-57	<i>Proof of public credit</i>
4-20-57	<i>7.00 received.</i>

3-57

PAT. # 1176384

DATED 11-13-57 ISSUED  
AND MAILED  
CASE CLOSED

2-21-60  
PATENTED CASES TRANSFERRED TO  
ELM WASHINGTON

1961 Case Trans to Director

WEST, OF THE SEWARD MERIDIAN, ALASKA.

NORTH

The extension survey shown on this plat was executed by Edward T. Hutchison, July 26 to August 28, 1954 under special instructions for Group 78, Alaska, dated May 1, 1950 and approved July 10, 1950.

UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
Washington, D.C. September 28, 1955

9/26/55

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the

TOWNSHIP 12 NORTH, RANGE 2 WEST, OF THE

Copy of Serial Page

Homestead Loc not. - sec. 2289 Ser. No. 026431

Donald L. Rohaley, Box 1615, Anchorage, Ak.

Lot 4, SE1/4 SW1/4 Section 30 and Lot 1, NE1/4 NW1/4 Section 31, T2N, R12W, SM

Containing 143.46 acres

4/8/54 Application received with \$16.00 fees & commissions Receipt 139944 issued.  
4/22/54 Location notice forms filed in triplicate. Homestead application was in error  
5/24/54 Location notice approved  
1/10/55 Petition for free survey fr'd  
6/22/56 Field \_\_\_?\_ Rec'd cc-  
6/29/56 Plat filed  
6/29/56 Homestead Entry, Final Proof Forms mailed applicant  
9/10/56 Ap[pl. for Hd, & all final proofs filed w/\$27.80 files etc. \_\_\_?\_  
12/14/56 Entry allowed Dec 12-56 Public. ordered  
12/18/56 \_\_\_?\_ reports no further investigation needed.  
1/31/57 Proof of public. Rec'd.  
10/30/57 T.C. issued.  
11/13/57 Patent 1176384 issued.  
2/29/60 Patented cases transferred to BLM Washington, DC  
?/3/61 Case Trans. To Director



LAT. 61°09'49" NORTH  
LONG 149°43'06.5" WEST

SURVEYED BY

6

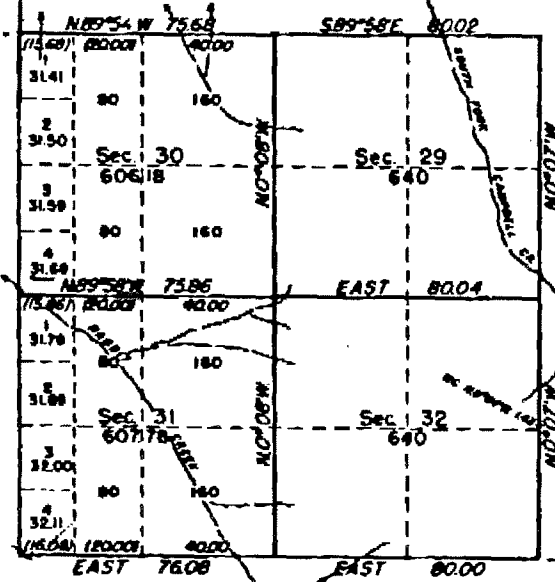
HAROLD RADCLIFFE  
1950

T.12 N., R.3 W.

19

20

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BUREAU OF LAND MANAGEMENT

# FIELD NOTES

OF

A PORTION OF THE SOUTH BOUNDARY

AND

A PORTION OF THE SUBDIVISIONAL LINES

OF

TOWNSHIP 12 NORTH, RANGE 2 WEST

*Secs. 29 to 32 in original*

Of the SEWARD Meridian,

In the State of ALASKA TERRITORY OF ALASKA

### EXECUTED BY

EDWARD T. HUTCHISON, CARTOGRAPHER (CADASTRAL)

Under special instructions dated May 1, 1950, which provided  
for the surveys included under Group No. 12, approved July 10, 1950  
and assignment instructions dated July 7, 1954

Survey commenced July 23, 1954

Survey completed August 28, 1954



10

# INDEX DIAGRAM

Township 12 N., Range 2 W.

6	5	4	3	2	1
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24
25	26	27	28	29	30
31	32	33	34	35	36

*Handwritten annotations in the table:*

- Row 5, Column 1: *8*
- Row 5, Column 2: *6*
- Row 5, Column 3: *7*
- Row 5, Column 4: *4*
- Row 5, Column 5: *5*
- Row 6, Column 1: *4*
- Row 6, Column 2: *3*
- Row 6, Column 3: *2*

SUBDIVISION OF A PORTION OF T. 12 N., R. 2 W., S.N.

Chains  
 Land, mountainous.  
 Soil, light loam to rock.  
 No timber; undergrowth, alder and berry bush.

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From the cor. of Secs. 29, 30, 31 and 32.  
 N. 89° 58' W., on true line bet. Secs. 30 and 31.  
 Descend 783 ft. over steep W. slope through dense alder undergrowth.

8.50 Enter spruce, aspen and birch timber; bears N. and S.  
 40.00 Point for the  $\frac{1}{2}$  sec. cor. of Secs. 30 and 31.  
 Set an iron post, 28 ins. long, 2 $\frac{1}{2}$  ins. diam., 27 ins. in the ground, with brass cap mxd.

S 50  
 ————  
 S 31  
 1954

from which

A spruce, 12 ins. diam., bears N. 65° E., 0.62 chs. dist., mxd.  
 $\frac{1}{2}$  S30 BT.

A spruce, 14 ins. diam., bears S. 29° W., 0.49 chs. dist., mxd.  
 $\frac{1}{2}$  S31 BT.

Thence descend 235 ft. over moderate W. slope through heavy spruce timber.

72.36 Most southerly cor. of frame house, 16x16 ft., bears NORTH 5.11 chs. dist.  
 72.44 Center of Rabbit Creek, 30 lks. wide, 2 ft. deep, course NW.  
 74.73 Same creek, curving from NE, to NW.  
 75.85 The cor. of Secs. 29, 30, 31 and 32 on the W. bdy. of the Tp., which is monumented with an iron post, 2 $\frac{1}{2}$  ins. diam., set, mxd. and witnessed as described in the official record of T. 12 N., R. 2 W., in 1950.

Land heavily rolling.  
 Soil, black loam along creek; light loam remainder.  
 Timber, spruce, birch and aspen; undergrowth, alder and devil club.

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From the cor. of Secs. 29, 30, 31 and 32.  
 N. 9° 08' W., bet. Secs. 29 and 30.  
 Ascend 401 ft. over steep SW. slope through dense alder undergrowth.

12.00 Leave alder undergrowth; thence over barren ground.  
 26.85 Top of ridge, bears NW. and SE.; thence descend 140 ft. over moderate W. slope through scattered mountain hemlock.  
 40.00 Point for the  $\frac{1}{2}$  sec. cor. of Secs. 29 and 30.  
 Set an iron post, 28 ins. long, 2 $\frac{1}{2}$  ins. diam., 27 ins. in the ground with brass cap mxd.

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**CERTIFICATE OF CADASTRAL ENGINEER**

I, Edward T. Hutchison, HEREBY CERTIFY upon honor that, in pursuance of special instructions bearing date of the 1st day of May, 1950, I have surveyed A Portion of the South Boundary and a Portion of the Subdivisional Lines of Township 12 North, Range 2 West

of the Seward Meridian, in the State of Territory of Alaska, which are represented in the foregoing field notes as having been executed by me and under my direction; and that said survey has been made in strict conformity with said instructions, the Manual of Instructions for the Survey of the Public Lands of the United States, and in the specific manner described in the foregoing field notes.

March 29, 1955  
Juneau, Alaska

Edward T. Hutchison  
Edward T. Hutchison  
Cartographer (Cadastral)

**CERTIFICATE OF APPROVAL**

BUREAU OF LAND MANAGEMENT,

Washington, D. C., SEP 26 1955, 19

The foregoing field notes of the survey of A Portion of the South Boundary and a Portion of the Subdivisional Lines of Township 12 North, Range 2 West, Seward Meridian

executed by Edward T. Hutchison, Cartographer (Cadastral)

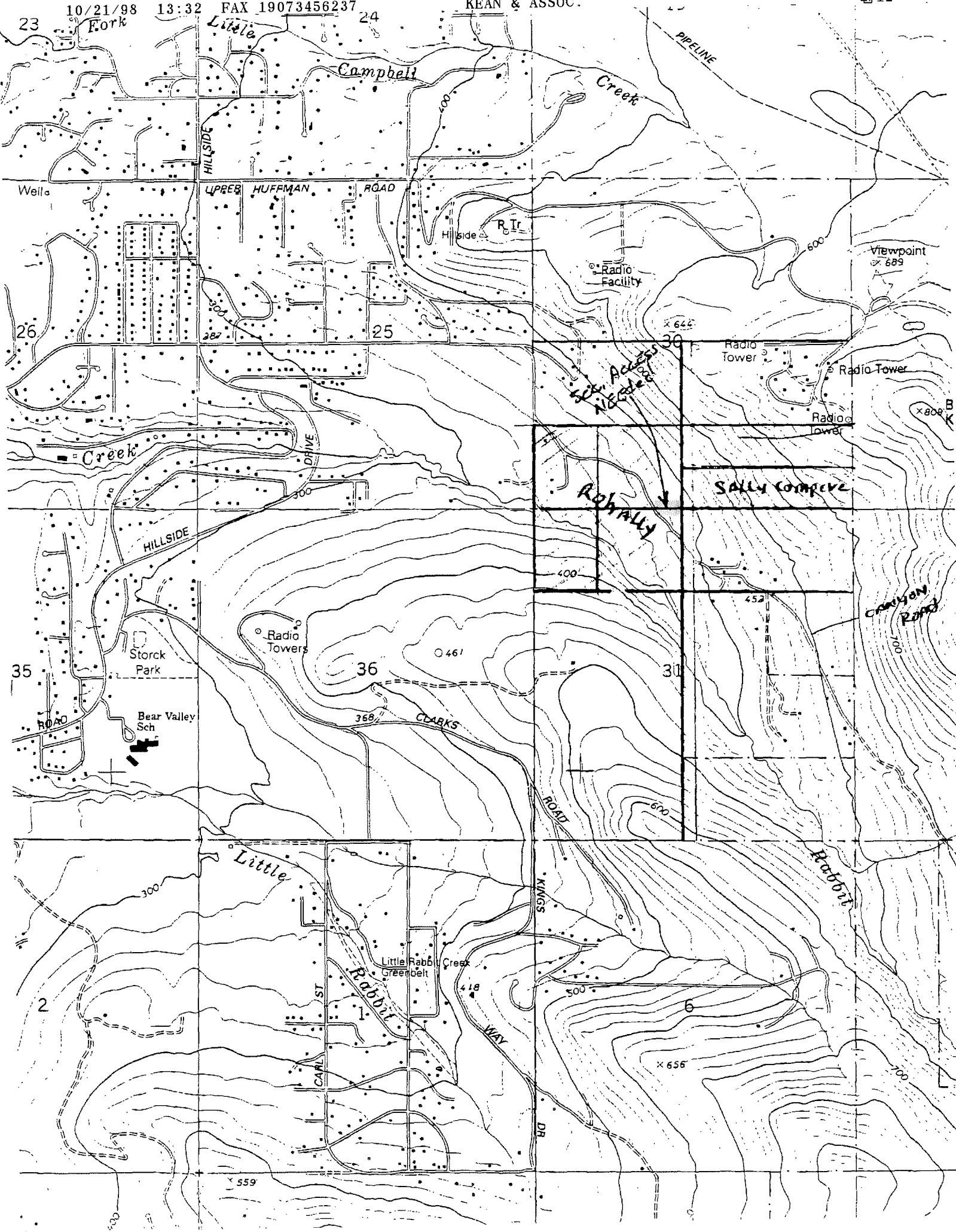
having been critically examined and found correct, are hereby approved.

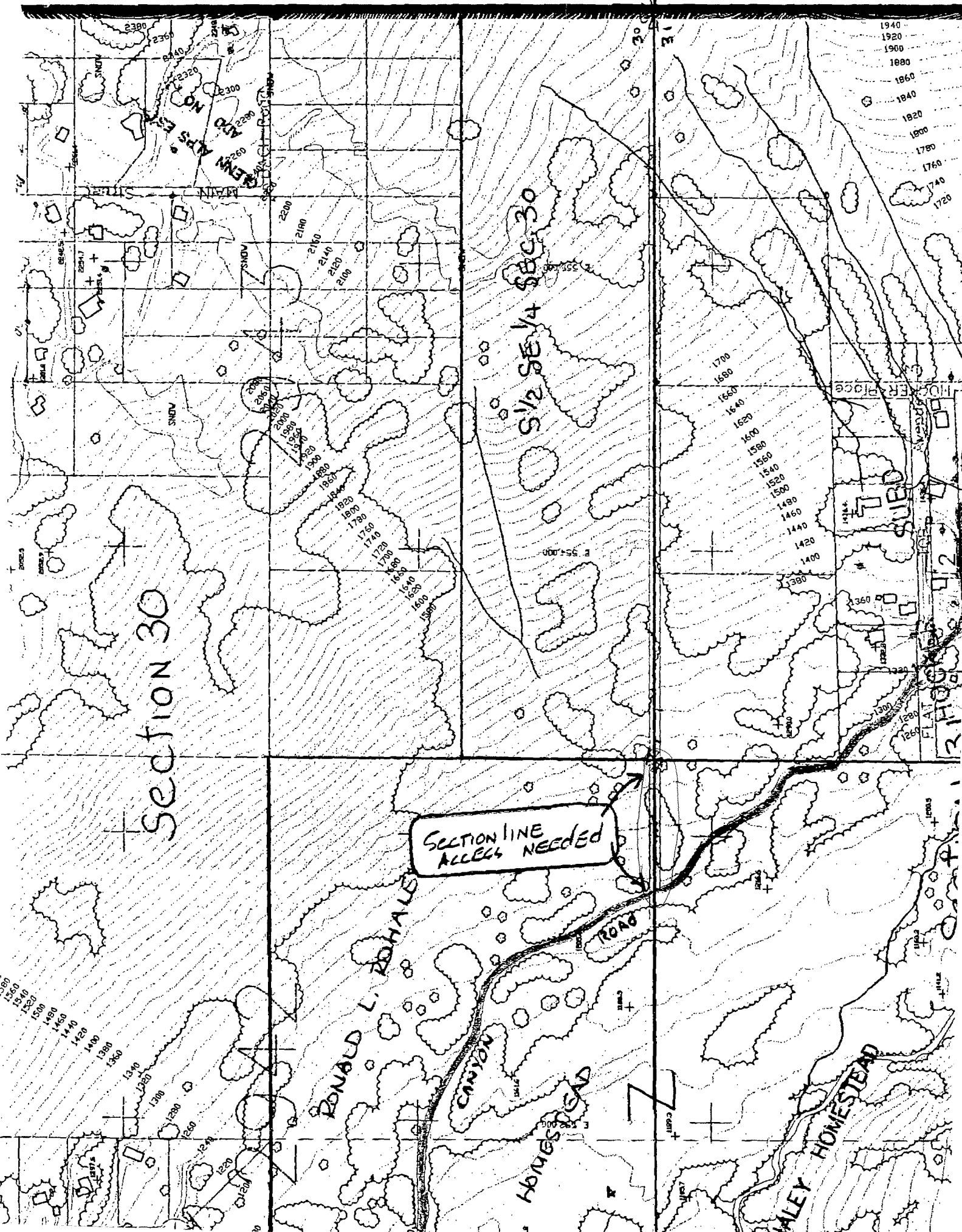
[Signature]  
Chief, Division of Cadastral Engineering  
Acting Cadastral Engineering Staff Officer

**CERTIFICATE OF TRANSCRIPT**

I CERTIFY that the foregoing transcript of the field notes of the above-described surveys in T. 12 N., R. 2 W., S.M., Alaska, is a true copy of the original field notes.

[Signature]  
Chief, Division of Cadastral Engineering.





# STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

*NORTHERN REGION, RIGHT OF WAY*

TONY KNOWLES, GOVERNOR

2301 PEGER ROAD  
FAIRBANKS, ALASKA 99709-5399

FAX: (907) 451-5411  
TDD: (907) 451-5407

October 22, 1998

Re: Section Line Easement  
Evaluation

Kean & Associates  
14510 Ahtena Circle  
Anchorage, AK 99516  
Attn: Bob Kean, PLS

Dear Bob,

With the information you have provided, I have evaluated the status of the section line easement between Sections 30 and 31, T. 12 N., R. 2W., S.M. and have reached the conclusion that it does not exist.

As you have stated in your draft letter to Ms. Compere, the analysis requires that three questions be answered:

- 1) Q: Had the section line been officially established?  
A: Yes - the BLM rectangular plat for the section line in question was accepted on 9/26/55.
- 2) Q: Was the section line easement law available to be applied on 9/26/55?  
A: Yes - the Territorial legislation accepting the section line easement grant was effective between 3/21/53 and 3/24/74.
- 3) Q: Was the land in question unreserved federal lands while the easement grant was effective and after the survey was officially accepted?  
A: No - the easement grant was still effective, however, the land in question had been reserved by Donald Rohaley's homestead entry (4/8-22/54) prior to official acceptance of the survey.

All three questions must be answered in the affirmative for a section line easement to exist. You question whether the critical date to determine when the land went from unreserved status to reserved status was the application date in April of 1954 or the "Entry allowed" date of December 1956. If the critical date was after the survey acceptance date of 9/26/56, a section line easement would exist.

I have heard a lot of discussion in the last couple of years regarding what constitutes the date of reservation. This is due to the fact that there are typically several dates listed on the serial pages



after the filing of the location application that suggest that the land is not reserved until some official action is taken by BLM.

A good discussion of this issue came up in a Superior Court Memorandum Opinion in 1995 (Blanchard v. Heimbuch - Case No. 3PA-94-814 CI). The case involved an RS-2477 trail easement in the Mat-su area, however, the analysis of reserved land status is the same as for section line easement situations. I will summarize some of the relevant issues in this letter, however, I have also attached a full copy of the decision.

At issue was whether the reserved status of the land allowed or precluded the application of an RS-2477 trail easement. The Blanchards asserted that the lands were withdrawn only upon the issuance by BLM of a "notice of allowance" authorizing an entry. The Heimbuchs, however, assert that the issuance of the notice is irrelevant to the public land status and that the key date is the filing of the application. The Heimbuch's assertion is consistent with federal law, which states that patent, once issued, relates back to the date of filing of the application of entry. The Court stated that there are a few cases indicating that the issuance of the notice of allowance has some legal significance. "However, the better view is that the issuance of the notice is but a ministerial duty which merely confirms the existence of a valid entry." The Court cites the Schultz (federal) RS-2477 case that suggests that the actual date of physical entry is the operative date and not the date of application or the issuance of the notice of allowance. The Court then rests on established State case law regarding RS-2477 easements. "Because the Hamerly court unquestionably used the dates of application as the dates of withdrawal from public land status, the "official action" referred to by the Dillingham court must be the filing of the application. That interpretation is confirmed by the litany of cases cited earlier and is the interpretation adopted by this court."

Granted, this case never went to the Supreme Court for affirmation or denial, however, the decision is based on an analysis of existing case law and in the absence of a hearing by the Supreme Court, is worthy of consideration. I asked one of our AG's once about briefs that cited Superior Court decisions as well as Supreme Court cases. They said it was commonly done particularly where there were no Supreme Court cases on point and where the issuing judge was held in reasonably high regard. That is, you wouldn't want to cite a Superior Court decision by a judge that was commonly regarded as an idiot.

Also, as a caveat on determining reserved land status, older claims may or may not be represented accurately in the BLM serial pages. Mining and homestead entry claims were commonly recorded in the federal magistrate's office prior to the availability of the current Recorder's Office or BLM lands offices (Approximately prior to 1910 I think). I have also seen relinquishments of homestead entries filed in the same books, so a complete evaluation of the reserved land status of an old claim could become quite complex. For our purposes, we usually don't go that far into detail. Typically, the land status can become reserved and unreserved several times prior to patent. Several of those windows may have allowed for the application of a section line easement or a Public Land Order right of way. We generally only need to prove that one of the windows was open, not all of them. Also, as our primary PLO's began in the mid-1940's and the section line easement acceptance legislation commenced in 1923, we pretty much limit our research on land status to BLM.

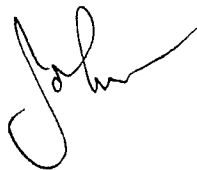
With regard to the '47 Act Reservation noted on Rohaley's patent I have the following comments:

The '47 Act (July 24, 1947) provided that federal lands entered upon for homestead purposes would have a reservation for road rights-of-way placed into the patent for future use by the federal government or any state created out of the Territory of Alaska. This reservation was not placed in patents after statehood and reservations placed into patents could not be utilized by the State after 1966. Patentees received their land subject to a future highway right-of-way whose width and location would be specified at a later date. No compensation was required for the use of the right of way unless the taking included crops or damages to structures. The reservation could be exercised only once. The reservation was exercised by the filing of a "Notice of Utilization" that specified the width and location of the proposed right-of-way.

The legislation that you mentioned that required the state to compensate anyone suffering a taking was probably the Right of Way Act of 1966. The legislature considered the '47 Act to be "fine print" that would be overlooked by the patentee until such a time that the State came to exercise the public's right. The Right of Way Act of 1966 did not apply retroactively to any "Notices of Utilization" that had been previously filed, it just prevented the filing of these notices after the effective date of the legislation. To determine whether Canyon road right-of-way is based on a "'47 Act" reservation, you would either have to run title on the property or check with the Anchorage DOT office for evidence that a "Notice of Utilization" had been filed. In the absence of a '47 Act utilization, you would have to look further to determine whether the basis for Canyon road is by acquisition, prescription or some other method.

I hope this is of some help.

Sincerely,



John F. Bennett, PLS, SR/WA  
Right of Way Engineer  
Northern Region