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3. Public Lands ⇐64

Before highway may be created, there must be either some positive act on part of appropriate public authorities of state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

4. Public Lands ⇐135(1)

Staking requirement of department of interior order was inapplicable to certain highway, in that highway was in existence by time of homestead entry of landowners' predecessor. 48 U.S.C. (1958 Ed.) § 321d.

5. Public Lands ⇐135(1)

Trial court erred in declaring that neither State nor municipality could take any portion of landowner's property for through road which was in excess of easement which was specified in their respective patents without just compensation.

6. Public Lands ⇐135(1)

Trial court properly determined that certain landowners were entitled to declaration against State and municipality that neither State nor municipality could take any portion of their properties for through road which was in excess of easement which was specified in their respective patents without just compensation, where landowner's property was entered in 1945, so that it was not hereafter entered for purposes of statute under which mandatory reservation was limited to patents for land hereafter taken up, or located in territory of Alaska. Pickett Act, §§ 1, 2, 43 U.S.C. (1970 Ed.) §§ 141, 142; 48 U.S.C. (1958 Ed.) § 321d.

7. Insurance ⇐426.1

Title insurance company was liable to property owners under policy for value of 17 foot strip taken pursuant to interior department order, in that publication of public land order in Federal Register imparted constructive notice of order as to land it affected.

8. Public Lands ⇐138

Public land orders, which appeared in Federal Register, imparted constructive notice of conflicting deed or encumbrance, thereby preventing property owner from claiming innocent purchaser status.

9. Estoppel ⇐62.2(2)

Because publication of land orders in Federal Register imparted constructive notice of easements which they created, that notice made reliance unreasonable, and thus State was not estopped from claiming any easements under orders here involved.

10. Public Lands ⇐135(1)

By operation of law, land conveyed by the United States is taken subject to previously established rights of way where instruments of conveyance are silent as to the existence of such rights of way.

11. Public Lands ⇐135(1)

No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because patent contains an implied bylaw condition that it is subject to such a right-of-way, and thus statute of limitations expressed by statute providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents did not apply. 43 U.S.C.A. § 1166.

Jack McGee, Asst. Atty. Gen., Wilson Condon, Atty. Gen., Juneau, for appellant/cross-appellee.

David A. Devine and Michael W. Price, Groh, Eggers, Robinson, Price & Johnson, Anchorage, for appellees/cross-appellants.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MATTHEWS, Justice.

This is an action for a declaratory judgment brought by an association representing various title insurance companies, individual title insurance companies, and several landowners against the State of Alaska, the Municipality of Anchorage, and Theo-

dore and Clair Pease. Nine claims for relief were presented.

The first claim sought a determination that a title insurance policy issued by Transamerica Title Insurance Company to the Peases excluded from coverage any rights-of-way created pursuant to certain Interior Department Orders, namely, Public Land Orders 601, 757, 1613, and Departmental Order 2665.

The second claim for relief sought a declaration that claimed easements for "local roads" as defined in DO 2665 could not be used by the State or municipal governments because of the Alaska Right of Way Act of 1966.

The third related to "feeder roads" as defined in PLO 601 and DO 2665, seeking a declaration that rights-of-way for such roads could not be utilized because of the Alaska Right of Way Act of 1966.

The fourth claim for relief concerned property owned by plaintiff Hansen Associates along the Seward Highway. It alleged that the original patentee had made a homestead entry prior to the effective date of the first order involved, PLO 601, and sought a declaration that no through road easement under PLO 601 or any of its successors could be claimed.

The fifth claim for relief referred to a quitclaim deed given on or about April 7, 1959, conveying the United States' interests in the highways in Alaska to the State. The deed was recorded October 2, 1969. This claim sought a declaration that the quitclaim deed would have no effect on bona fide purchasers for value who purchased and recorded prior to the State's recording of the quitclaim deed.

The sixth claim for relief alleged that the failure of the United States or the State to record PLOs 601, 757, and 1613 and DO 2665 in a State recording office rendered any easements that might otherwise have been created by those orders void as against subsequent innocent purchasers for value who first duly recorded their interests.

The seventh claim alleged a theory of estoppel against the State and Municipality, claiming that for twenty years they had allowed property owners to develop property on which they now claim an easement pursuant to PLOs 601, 757, and 1613 and DO 2665, that no notice of such claims had been given, and that individual property owners would be prejudiced if the State and the Municipality were now permitted to utilize such easements.

The eighth claim sought a declaration that no easement could be taken by the State or the Municipality for a local, feeder, or through road under the authority of PLOs 601, 757, and 1613 or DO 2665 because of the Right of Way Act of 1966.

The ninth claim alleged that prior to the quit-claim deed from the United States to the State of April 7, 1959, the United States had patented to private landowners property which included rights-of-way now claimed by the State. A declaration was sought that these patents were conclusive as against the State and that the patents could not be vacated or annulled because of the six year statute of limitations set forth in 43 U.S.C. § 1166.

The Peases cross-claimed against the State, alleging that the State unlawfully claimed a 50 foot road easement along the south boundary of their property whereas only a 33 foot easement was described in the patent from the United States to their predecessor-in-interest. They sought just compensation for the 17 foot difference in the approximate sum of $3,000.00 plus interest from the date of taking. The Peases also counterclaimed against Transamerica, alleging that if the State was entitled to a full 50 foot right-of-way Transamerica would be obliged under the title policy to compensate them for the value of the 17 foot strip.

Before answering, the State filed a motion for a more definite statement requesting legal descriptions of property across which the complaint alleged that the State was claiming rights-of-way. In response, the plaintiffs described the property owned by Hansen Associates along the Seward Highway, with respect to the fourth claim for relief, and property owned by plaintiff

Richard L. Boysen which also lay along the Seward Highway, with respect to the seventh claim. The State then answered the complaint, placing in controversy all the legal theories of the plaintiffs.

The State, all plaintiffs, and the Peases moved for summary judgment as to all claims. The court denied the State's motion, granted the plaintiffs' motion as to the second, third, and eighth claims, and granted the Peases' motion as to their cross-claim and counterclaim. Following entry of a memorandum of decision reflecting these actions the court entered a declaratory judgment containing four numbered paragraphs, which proceed from the abstract to the particular. They are:

1. The State of Alaska and the Municipality of Anchorage are claiming highway easements for local, feeder, and through roads in excess of easement widths specified in patents issued to Alaska property owners. Said easements are claimed by the State or the Municipality pursuant to authority derived from Public Land Orders 601, 757, 1613 and Department Order 2665. For the reasons set forth in the Memorandum of Decision dated May 7, 1980, the court hereby awards Plaintiffs a summary judgment against the State of Alaska and the Municipality of Anchorage declaring that the State and the Municipality may not take or utilize property for local, feeder, or through roads in excess of the widths set forth in the patents to the affected properties without just compensation to the owners of the affected properties unless such local, feeder, or through roads were occupied and staked by the State of Alaska or the Municipality of Anchorage prior to April 14, 1966, or were specifically designated in the patents to the affected real properties.

2. The Plaintiffs Hanson [sic] Associates and Richard L. Boysen are hereby awarded a summary judgment against the State of Alaska and the Municipality of Anchorage declaring that neither the State nor the Municipality can take any portion of their properties for the through road presently known as the Old Seward Highway which is in excess of the easement widths specified in their respective patents without just compensation.

3. The Defendants Pease are hereby awarded a summary judgment on their cross-claim against the State of Alaska declaring that the State may not take or utilize any portion of the Peases' land for the local road presently known as Rabbit Creek Road which is in excess of the 33-foot easement width specified in the patent to the Peases' property without just compensation. The Peases' property is described as Lot 191, Section 33, Township 12 North, Range 3 West, Seward Meridian, Anchorage Recording District, Third Judicial District, State of Alaska.

4. The Defendants Pease are hereby awarded a summary judgment on their counterclaim against Transamerica Title Insurance Company declaring that Transamerica is liable under its title insurance policy issued to the Peases for the taking by the State of Alaska of a 17-foot strip of land for the local road known as Rabbit Creek Road, which 17-foot strip of land was in excess of a 33-foot easement specified in the Peases' patent. However, since the State of Alaska must compensate the Peases for the taking or utilization of said additional 17-foot easement, the Peases shall collect just compensation from the State of Alaska, and upon receipt of said just compensation the Peases shall not be entitled to recover damages from Transamerica Title Insurance Company for said taking of the additional 17-foot strip of property.

The State has appealed from this judgment. The plaintiffs have cross-appealed, claiming that the superior court should have granted them judgment on their fourth, fifth, sixth, seventh, and ninth claims for relief. In addition, Transamerica Title has appealed from the judgment against it in favor of the Peases.

I

THE STATE'S APPEAL AS TO THE PEASES' PROPERTY

We turn first to the appeal of the State as it relates to the Peases' property.

The patent to the 2.5 acre Pease parcel was issued on October 4, 1955, pursuant to the Small Tract Act of 1938, 43 U.S.C. §§ 682a–682e (1938), *repealed by* Pub.L. No. 94–579, Title VII, § 702 (1976). The lot was leased to the Peases' predecessor-in-interest on May 1, 1953. The patent contains two relevant reservations. One is a blanket reservation for roads "constructed or to be constructed by or under authority of the United States or by any State created out of the Territory of Alaska, . . ." This reservation was made pursuant to 48 U.S.C. § 321d, ch. 313, 61 Stat. 418 (1947), *repealed by* Pub.L. No. 86–70, § 21(d)(7), 73 Stat. 146 (1959), which provides in part:

> 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, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon for roads, roadways, highways, tramways. trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or of any State created out of the Territory of Alaska. . . .

The other relevant reservation in the patent reserves a 33 foot right-of-way for roadway purposes along the south and east boundaries of the tract. Rabbit Creek Road lies on the south boundary of the Peases' property. As this case has been presented all parties have assumed that Rabbit Creek Road was in existence as a local road at all times relevant to the various orders hereafter discussed. We make the same assumption.

In 1978 the State widened Rabbit Creek Road from 66 feet to 100 feet. The road occupied a 33 foot strip on the Peases' property before widening and a 50 foot strip after widening. The State claimed a 50 foot easement on each side of the center line of Rabbit Creek Road, citing PLOs 601 [1] and 757,[2] and DO 2665 [3] as authority for widening the road without compensating the Peases for taking the extra 17 feet.

PLO 601, effective August 10, 1949, withdrew "the public lands in Alaska lying within . . . 150 feet on each side of the center line of all . . . through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, . . . from all forms of appropriation under the public land laws, . . ." and reserved them "for highway purposes." [4]

The Secretary of the Interior promulgated PLO 757 and DO 2665 on October 19, 1951. 16 Fed.Reg. 10,749, 10,752 (1951). DO 2665 was filed first. *Id.* at 10,752. It established, among other things, easements, rather than withdrawals, of 50 feet on each

1. 14 Fed.Reg. 5048 (1949).

2. 16 Fed.Reg. 10,749 (1951).

3. 16 Fed.Reg. 10,752 (1951).

4. 14 Fed.Reg. 5048 (1949). The quoted language is from the sixth paragraph of PLO 601. The sixth paragraph in full states:

> Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws, and reserved for highway purposes:
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> Through Roads
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> Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.
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> Feeder Roads
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> Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok Eagle Road, Ruby-Long-Poorman Road, Nome-Solomon Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.
>
> Local Roads
>
> All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

Id. at 5048–49 (1949).

side of the center line of each local road and of 100 feet as to each feeder road.[5] PLO 757 amended the sixth paragraph of PLO 601, *see* note 4 *supra*, increasing the withdrawal for the Seward Highway [the Anchorage-Potter-Indian Road in PLO 601] from 100 feet to 150 feet on each side of the center line. 16 Fed.Reg. 10,749, 10,750 (1951). PLO 757 repealed the general withdrawal for local and feeder roads contained in the sixth paragraph of PLO 601, thus effecting a revocation of the 601 withdrawals as to them. However, PLO 757 acknowledged that DO 2665 had already established easements as to feeder and local roads and did not purport to revoke them. The final paragraph of PLO 757 states:

> Easements having been established on the lands released by this order, such lands are not open to appropriation under the public land laws. . . .[6]

5. 16 Fed.Reg. 10,752 (1951). DO 2665 provides:

Rights-of-Way for Highways in Alaska

Section 1. *Purpose.* (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a).

Section 2. *Width of public highways.* (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.

(2) For feeder roads: Abbott Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram road, Steese Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasilla Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Slana to Nabesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Eureka Road, North Park Boundary to Kantishna Road, Paxson to McKinley Park Road, Sterling Landing to Ophir Road, Iditarod to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 100 feet on each side of the center line thereof.

(3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

Section 3. *Establishment of rights-of-way or easements.* (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

Section 4. *Road maps to be filed in proper Land Office.* Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public. *Id.*

6. 16 Fed.Reg. 10,749, 10,750 (1951). The text of PLO 757 so far as it is relevant here states:

> The sixth paragraph of Public Land Order No. 601 of August 10, 1949, reserving public lands for highway purposes, commencing with the words "Subject to valid existing rights", is hereby amended to read as follows:
>
> Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes and public lands in Alaska lying within . . . 150 feet on each side of the center line of the . . . Seward-Anchorage Highway . . . are hereby withdrawn from all forms of appropriation under the public-land laws including the mining and mineral-leasing laws, and reserved for highway purposes.
>
> Easements having been established on the lands released by this order, such lands are

Thus one effect of PLO 757 and DO 2665 was to substitute easements for the withdrawals made in PLO 601 as to local and feeder roads.

The State's claim to the full 50 feet, from the center line, of Rabbit Creek Road is in all relevant respects identical to the claim that it successfully asserted in *State, Department of Highways v. Green*, 586 P.2d 595 (Alaska 1978). In *Green*, as in the Peases' claim, the patents were issued by the United States under the Small Tract Act and contained blanket roadway easements under 48 U.S.C. § 321d as well as specific 33 foot easements. The local road in question in both cases was built before DO 2665 was promulgated, and the lease as well as the patent was issued after promulgation of DO 2665. We held in *Green* that DO 2665 was issued pursuant to 48 U.S.C. § 321a, as distinct from 48 U.S.C. § 321d; that DO 2665 was applicable to patents issued under the Small Tract Act; and that the 50 foot right-of-way established by DO 2665 was effective even though only a 33 foot right-of-way was expressed in the patent. 586 P.2d at 600–03.

The superior court reasoned that *Green* was not controlling because of the provisions of the Right-of-Way Act of 1966, ch. 92 S.L.A. 1966.[7] Sections 2 and 3 contain the operative provisions of the Right-of-Way Act of 1966. Section 2 precludes the State from taking "privately owned property by the election or exercise of a reservation to the state acquired under [48 U.S.C. § 321d]," and section 3 provides that the Act shall not be construed to divest the State of "any right-of-way or other interest in real property which was taken by the state, before the effective date of this Act, by the election or exercise of its right to take property through a reservation acquired under [48 U.S.C. § 321d]." The effective date of the Right-of-Way Act of 1966 was April 14, 1966.

not open to appropriation under the public-land laws except as a part of a legal subdivision, if surveyed, or an adjacent area, if unsurveyed, and subject to the pertinent easement.

Id. at 10,749–50.

7. The Right-of-Way Act of 1966 states:

Section 1. PURPOSE. This Act is intended to alleviate the economic hardship and physical and mental distress occasioned by the taking of land, by the State of Alaska, for which no compensation is paid to the persons holding title to the land. This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions to many citizens of the State of Alaska, and which, if not curtailed by law, will continue to adversely affect citizens of this state. Those persons who hold title to land under a deed or patent which contains a reservation to the state by virtue of the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, are subject to the hazard of having the State of Alaska take their property without compensation because all patents or deeds containing the reservation required by that federal Act reserve to the United States, or the state created out of the Territory of Alaska, a right-of-way for roads, roadways, tramways, trails, bridges, and appurtenant structures either constructed or to be constructed. Except for this reservation the State of Alaska, under the Alaska constitution and the constitution of the United States, would be required to pay just compensation for any land taken for a right-of-way. It is declared to be the purpose of this Act to place persons with land so encumbered on a basis of equality with all other property holders in the State of Alaska, thereby preventing the taking of property without payment of just compensation as provided by law, and in the manner provided by law.

Section 2. TAKING OF PROPERTY UNDER RESERVATION VOID. After the effective date of this Act, no agency of the state may take privately-owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, and taking of property after the effective date of this Act by the election or exercise of a reservation to the state under that federal Act is void.

Section 3. PROSPECTIVE APPLICATION. This Act shall not be construed to divest the state of, or to require compensation by the state for, any right-of-way or other interest in real property which was taken by the state, before the effective date of this Act, by the election or exercise of its right to take property through a reservation acquired under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418.

Section 4. SHORT TITLE. This Act may be cited as the Right-Of-Way Act of 1966.

Section 5. EFFECTIVE DATE. This Act takes effect on the day after its passage and approval or on the day it becomes law without such approval.

[1] The court erred in applying the Right-of-Way Act of 1966 to the Pease case. It is applicable only to interests taken by the State under a blanket reservation created pursuant to 48 U.S.C. § 321d. We held in *Green* that easements established by DO 2665 were established under the authority of section 321a, not section 321d.[8] *Green*, 586 P.2d at 600 n. 17. Further, we held in *State, Department of Highways v. Crosby*, 410 P.2d 724 (Alaska 1966) that § 321d did not apply at all to patents issued under the Small Tract Act. *Id.* at 728.

[2] The superior court also concluded in its Memorandum of Decision that the easement which otherwise would have been created under DO 2665 on Rabbit Creek Road did not come into being "until the right-of-way was staked by the terms of DO 2665." This statement refers to subsection 3(c) of DO 2665, which provides:

> The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.[9]

The superior court's conclusion that the staking requirement of section 3(c) was applicable to Rabbit Creek Road is erroneous. Section 3(c) by its express terms only applies to new construction. Rabbit Creek Road was an existing road when the order was promulgated. As to existing roads, subsection 3(b) of the order establishes a 50 foot easement in the present, rather than the future, tense and contains no call for additional action in order to fix the easement. It states:

> A right-of-way or easement for highway purposes covering the lands embraced in the . . . local roads equal in extent to the width of such roads as established in section 2 of this order, *is hereby established* for such roads over and across the public lands.

16 Fed.Reg. 10,752 (1951) (emphasis added). Subsection (3) of section 2 of DO 2665 set the width of local roads at 50 feet on each side of the center line. Thus, these two sections of DO 2665 established a 50 foot easement for Rabbit Creek Road.

8. A memorandum from the Chief Counsel of the Bureau of Land Management to the Director of the Bureau, dated February 7, 1951, explains well the extent of the authority granted to the Secretary of the Interior under § 321a. The memorandum states in part:

> Prior to the issuance of Public Land Order No. 601 . . ., nearly all public roads in Alaska were protected only by easements. Right-of-way easements were acquired under section 2477 of the Revised Statutes (43 U.S.C. sec. 932) by the construction of roads. This section granted a right-of-way for the construction of highways over public lands not reserved for public uses.
>
> Section 2 of the Act of January 27, 1905 (33 Stat. 616), incorporated with amendments into 48 U.S.C. secs. 321–323, established a Board of Road Commissioners in the then Territory of Alaska to function under the jurisdiction of the Secretary of War. This section provided:
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> "Sec. 2. * * * The said board shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails * * *. The said board shall prepare maps, plans, and specifications of every road or trail they may locate and lay out, * * *."
>
> Section 3 of the Act of August 24, 1912 (37 Stat. 512, 48 U.S.C. secs. 23 and 24), under which Alaska was organized as a Territory, provided that the authority of the legislature of the Territory should not extend to certain statutes of the United States including the Act of January 27, 1905, *supra*, and the several acts amendatory thereof.
>
> Section 2 of the Act of June 30, 1932 (47 Stat. 446, 48 U.S.C. sec. 321a), provides:
>
> "Sec. 2. The Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska heretofore administered by said board of road commissioners under the direction of the Secretary of War; * * *."
>
> The authority of the Secretary of the Interior conferred by the above-cited acts to "locate, lay out, construct and maintain" public roads in Alaska clearly implies the right to fix the width of the roads. This width is not fixed by any statute.

9. 16 Fed.Reg. 10,752 (1951). For the full text of DO 2665, *see* note 5 *supra*.

[3] The history of the promulgation of DO 2665 also demonstrates that the staking requirement applies only to new construction, not existing roads. In territorial days road easements were created across public land under 43 U.S.C. § 932, *repealed by* Pub.L. No. 94-579, Title VII, § 706(a) (1976), a statute remarkable for its brevity, which provided:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

This blanket grant had to be accepted. A common method of acceptance was the building of a road by a public authority.[10] But other methods of acceptance were also recognized. As we stated in *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961) with respect to 43 U.S.C. § 932:

> [B]efore a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Id. at 123 (footnote omitted). In *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975), we held that enactment by the territorial legislature of a law dedicating a four rod strip along all section lines for roadway purposes was a positive act of acceptance of the section 932 grant. *Id.* at 1225–26.

When acceptance of the section 932 grant occurred by construction of a road by an appropriate public authority, a question remained regarding the width of the right-of-way thereby created. It was held that the width was not confined necessarily to the traveled portion of the roadway, but that "local laws, customs and usages" would control. *City of Butte v. Mikosowitz*, 39 Mont. 350, 102 P. 593, 595–96 (1909); *see also Ball v. Stephens*, 68 Cal.App.2d 843, 158 P.2d 207, 209 (1945).

One purpose of DO 2665 was to define as a matter of local law or usage the width of roadway easements which had been created by the construction of roads and which would be created in the future by the construction of new roads. The memorandum of February 7, 1951, from the chief counsel of the Bureau of Land Management to the Bureau's director[11] makes this clear:

> Notwithstanding that section 2477 of the Revised Statutes (43 U.S.C. § 932) does not fix the width of the rights-of-way granted by it, the width when fixed by a positive act of the proper State or Territorial authorities has been held valid. *Costain v. Turner* (1949) [72 S.D. 427], 36 N.W.2d 382; *Butte v. Mikosowitz* (1909) [39 Mont. 350], 102 P. 593. In both cases, the width fixed included an area in excess of the beaten path or track. The reasons which sustain the conclusion reached in those cases support the conclusion that in the case of public highways in Alaska constructed or maintained under the jurisdiction of the Secretary of the Interior, the width of the highways may be fixed by that official.

The memo goes on to suggest the publication of an order, which was to become DO 2665, in terms which make it clear that the staking requirement only applies to new construction and not to existing roads:

> The following procedure is suggested for the establishment of highway easements of prescribed widths in Alaska:
>
> (1) The issuance of an order by the Secretary of the Interior to be published in the Federal Register fixing the width for existing roads and the width for new construction, including changes in the location of existing roads, and extensions of such roads. *In the case of new construction, the order can only be effective when the survey stakes have been set on the ground.*

(Emphasis added).

Further, the Superior Court's conclusion that the staking requirement applies to ex-

10. *See Clark v. Taylor*, 9 Alaska 298, 303 (D.Alaska 1938); *Ball v. Stephens*, 68 Cal. App.2d 843, 158 P.2d 207, 209 (1945); *Moulton v. Irish*, 67 Mont. 504, 218 P. 1053, 1054 (1923).

11. An excerpt from this memorandum is quoted at note 8 *supra*.

isting roads as well as to roads to be constructed in the future is in conflict with our holding in *Green, supra*. The local road in question there was constructed before the promulgation of DO 2665. As to the Green parcel, we held that the 50 foot right-of-way was fixed as of the promulgation of the order. *Green*, 586 P.2d at 604.

For these reasons we conclude that the State's appeal with respect to the adverse judgment on the cross-claim of the Peases is well-founded. The third paragraph of the declaratory judgment is therefore reversed. Since the first paragraph of the judgment includes the situation presented in the Pease case, it too must be reversed.

II

THE STATE'S APPEAL AS TO BOYSEN'S PROPERTY

The discussion in this section concerns the plaintiff's eighth claim for relief, which is reflected in the second and third paragraphs of the judgment. This discussion is also relevant to the second claim for relief relating to feeder roads. Because specific facts concerning the Hansen parcel require that it be treated differently, we exclude it from this discussion and focus instead on the Boysen property.

This aspect of the case involves an additional public land order that was not involved in the discussion of the Pease case. This order, PLO 1613, was promulgated April 7, 1958. 23 Fed.Reg. 2376, 2378 (1958). PLO 1613 revoked PLO 601 which, as modified by PLO 757, had withdrawn and reserved for highway purposes 150 feet on each side of the Seward Highway. *Id.* at 2376. PLO 1613 converted the 150 foot Seward Highway right-of-way to an easement of the same width.[12]

The Boysen parcel consists of some 80 acres joining the Seward Highway. The patent was issued to Boysen's predecessor on May 15, 1952, under the Homestead Act. The homestead entry was made January 2, 1951. The patent contains a blanket reservation for road rights-of-way as required by 48 U.S.C. § 321d. *See* page 718 *supra*.

Setting aside the possible effect of the section 321d reservation, the homestead entry of Boysen's predecessor in January 1951 fixes the date from which the property rights of the owners of the parcel are to be measured.[13] As of that date, PLO 601 had withdrawn 100 feet of land from each side of the center line of the Seward Highway. 14 Fed.Reg. 5048 (1949).

The superior court was apparently of the view that unless the State had fully occupied or staked this 100 feet before the effective date of the Right-of-Way Act of 1966, that act eliminated the withdrawal. We disagree.

[4] The Seward Highway was in existence by the time of the homestead entry. The superior court apparently imposed the staking requirement because of section 3 of DO 2665.[14] For the reasons we have expressed with respect to the Peases' property, the superior court's conclusion concerning the applicability of the staking require-

12. 23 Fed.Reg. 2376, 2377 (1958). PLO 1613 provides in pertinent part:

> 1. Public Land Order No. 601 of August 10, 1949, as modified by Public Land Order 757 of October 16, 1951, reserving for highway purposes the public lands of Alaska lying ... within 150 feet on each side of the center line of the ... Seward-Anchorage Highway ... is hereby revoked.
>
> ....
>
> 3. An easement for highway purposes, including appurtenant protective, scenic and service areas, over and across the lands described in paragraph 1 of this order, extending 150 feet on each side of the center line of the highways mentioned therein, is hereby established.
>
> ....
>
> 5. The easements established under paragraphs 3 and 4 of this order shall extend across both surveyed and unsurveyed public lands described in paragraphs 1 and 2 of this order for the specified distance on each side of the center line of the highways ... as those center lines are definitely located as of the date of this order.

Id. at 2376–77.

13. *See* part III *infra*.

14. Subsection (a)(1) of section 1 of DO 2665 recognizes expressly the 150 foot withdrawal for the Seward Highway expressed in PLO 757. *See* note 5 *supra*.

ment to the Seward Highway is erroneous. The Seward Highway was not new construction in 1949, when PLO 601 was promulgated, or in 1951, when DO 2665 was promulgated. It had a fixed location and the boundaries of its right-of-way were ascertainable by referring to the applicable PLO and measuring from its center line.

In addition, the 100 foot right-of-way first created by PLO 601 does not depend for its existence on the reservation placed in the patent under section 321d. PLO 601 was issued pursuant to Executive Order 9337, 8 Fed.Reg. 5516 (1943), under which the President of the United States delegated his authority to the Secretary of the Interior under 43 U.S.C. § 141, ch. 421, § 1, 36 Stat. 847 (1910), *repealed by* Pub.L. No. 94–579, Title VII, § 704(a) (1976), authorizing withdrawal of public lands in Alaska for specified public purposes.[15] As previously noted, the Right-of-Way Act of 1966 applies only to rights-of-way acquired under section 321d reservations.

[5] For the above reasons the second paragraph of the judgment as it relates to the Boysen property must be reversed. The preceding discussion also requires, as did our discussion in part I concerning the Peases' property, reversal of the first paragraph of the judgment. We do not reach the question whether a full 150 foot easement became fixed across the Boysen property by operation of the section 321d patent reservation and promulgation of PLO 757, and thus may be unaffected by the Right-of-Way Act of 1966. This question was not specifically addressed by the superior court nor is it presented in the briefs before us.

III

THE CROSS–APPEAL AS TO THE HANSEN PROPERTY

The patent for the Hansen parcel was issued to Hansen's predecessor-in-interest on June 1, 1950, under the Homestead Act. The homestead entry was made on January 23, 1945, before the promulgation of any of the land orders previously discussed, and before passage of 48 U.S.C. § [illegible]. The patent to the Hansen proper[illegible] does not contain a section 321d reservation.

The PLO 601 withdrawal was expressly subject to "valid existing rights." 14 Fed. Reg. 5048 (1949). Homestead entries have been held to give rise to valid existing rights,[16] although those rights may not in all cases take priority over intervening government acts.[17] Here, however, there is no doubt of the intention to except prior homestead entries from PLO 601. As we have noted, PLO 601 was promulgated pursuant to 43 U.S.C. § 141. 43 U.S.C. § 142 states that "there shall be excepted from the force and effect of any withdrawal made under the provisions of ... section 141 ... all lands which are, on the date of such withdrawal, embraced in any lawful homestead ... entry ...." Since entry was in 1945, and the first withdrawal occurred in 1949, Hansen's predecessor-in-interest, as an entryman, had rights superior to the withdrawals.

[6] Section 321d has no effect on the Hansen property. The mandatory reservation required by this statute was limited to "patents for lands *hereafter* taken up, entered, or located in the Territory of Alaska, ..." (emphasis added). Since the Hansen land was entered in 1945, it was not "hereafter" entered and thus was excluded from the operation of that statute. This is consistent with the absence of the section 321d reservation in the Hansen patent, and also consistent with its presence in the patents to the other two parcels of land involved in this appeal where entry occurred after July

15. The State and the plaintiffs have agreed that PLO 601 is based on Executive Order 9337 which, "in turn, rests on" 43 U.S.C. § 141. We thus have no occasion to consider whether Executive Order 9337 delegated authority to make withdrawals in addition to those authorized by 43 U.S.C. § 141.

16. *Stockley v. United States*, 260 U.S. 532, 540, 43 S.Ct. 186, 188, 67 L.Ed. 390, 394 (1923); *Korf v. Itten*, 64 Colo. 3, 169 P. 148, 150–51 (1917).

17. *Wilbur v. United States ex rel. Stuart*, 53 F.2d 717, 720 (D.C.Cir.1931).

24, 1947, the date on which section 321d was adopted.

Thus, for reasons different from those articulated by the superior court, the second paragraph of the declaratory judgment is affirmed as to the Hansen parcel.

IV

TRANSAMERICA'S LIABILITY

[7] In count I of the complaint, Transamerica sought a declaration absolving it of liability to the Peases under its title insurance policy. The superior court, following *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (Alaska 1976), found Transamerica conditionally liable to the Peases for the value of the 17 foot strip arising from DO 2665. In *Hahn* we held that the publication of a public land order, there PLO 601, in the Federal Register imparted constructive notice of the order as to the land it effected. Under the terms of the title policy there involved, the title insurance company was found to be liable. *Id.* at 146. We agree that *Hahn* is squarely controlling.

Transamerica, however, contends that *Hahn* should be overruled. We have considered Transamerica's arguments in support of this position and we are not persuaded that *Hahn* is unsound in any respect. We therefore decline to overrule it. Thus, Transamerica is liable under its policy to the Peases. Paragraph 4 of the declaratory judgment so far as it relates to Transamerica's liability to the Peases is affirmed.

V

CROSS–APPEAL AS TO FIFTH, SIXTH, SEVENTH AND NINTH CLAIMS FOR RELIEF

The plaintiffs claim that the superior court should have granted summary judgment in their favor on their fifth, sixth, seventh and ninth claims for relief. The court made no ruling as to these claims. We review them in accordance with the principle that any ground may be urged on appeal to support a judgment even if it was not accepted by the court in rendering judgment. *Moore v. State*, 553 P.2d 8, 21 (Alaska 1976); *Ransom v. Haner*, 362 P.2d 282, 285 (Alaska 1961).

The fifth and sixth claims are similar because to prevail, a property owner [18] must establish status as a "subsequent innocent purchaser ... in good faith for a valuable consideration" as that term is used in AS 34.15.290. An innocent purchaser must lack "actual or constructive knowledge" of the conflicting deed or encumbrance that the purchaser seeks to avoid. *Sabo v. Horvath*, 559 P.2d 1038, 1043 (Alaska 1976). *Sabo* held that as between two grantees, a prepatent grantee's deed that was recorded before the patent was issued is a "wild deed" and does not give constructive notice to a post-patent grantee who duly records. *Id.* at 1044.

The question here is whether public land orders, which appear in the Federal Register, impart constructive notice, thus preventing the property owner from claiming innocent purchaser status. We have in part IV of this opinion re-affirmed the holding of *Hahn v. Alaska Title Guarantee Co.*, 557 P.2d 143 (Alaska 1976) that publication of a land order in the Federal Register is constructive notice of the order as that term is used in a title insurance policy. That holding is controlling here.

[8] The distinction between *Sabo* and this appeal is that *Sabo* concerns private deeds and this appeal involves a conflict between a government regulation and a patent. Regulations published in the Federal Register take on the character of law. *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3, 7 (3d Cir.1964); *United States v. Messer Oil Corp.*, 391 F.Supp. 557, 561–62 (W.D.Pa.1975). All persons are presumed to know the contents of the law. *See Ferrell v. Baxter*, 484 P.2d 250, 265 (Alaska 1971). In *United States v. Messer Oil Corp.*, the district court indicated that regu-

18. In this somewhat abstract context the term "property owner" should be considered to be a property owner situated as is the plaintiff Boysen, for Hansen has prevailed on other grounds.

lations published in the Federal Register were sufficient notice to allow conviction of a criminal violation. 391 F.Supp. at 562. If Federal Register notice is sufficient for this purpose, it is sufficient notice to a landowner regarding easements that the federal government has reserved across his land. Thus, the publication of the land orders in the Federal Register imparted constructive notice and served to preclude subsequent innocent purchaser status.

In the seventh claim, plaintiffs contend that the State is estopped from claiming any easements under the orders here involved. The State responds that constructive notice defeats the estoppel claim.

[9] Estoppel requires "the assertion of a position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice." *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97, 102 (Alaska 1978) (footnote omitted). Plaintiffs claim that the State has asserted by conduct that it claims no easements by allowing the owners to develop their property inconsistently with the easements, and by not recording the land orders. They assert that reasonable reliance on that assertion has taken place. Because we have already found that publication of the land orders imparts constructive notice of the easements which they create, that notice makes plaintiffs' reliance unreasonable. Thus, the estoppel claim lacks merit.

The ninth claim of plaintiffs is based on the fact that the property owners' patents involved here did not expressly refer to any land order easements. Because of this the plaintiffs contend that the property conveyed was conveyed free from such easements. They argue further that as a result suit was required to be brought against the property owners to vacate the patents, and that the time for such a suit is, in all cases now before us, barred by the six year statute of limitations contained in 43 U.S.C. § 1166.[19]

The premise of this argument is that a patent which does not say that it is issued subject to a public easement operates to transfer the property free from the easement. We rejected this premise in *Green*. We held there that an unexpressed DO 2665 easement was effective. *Green*, 586 P.2d at 603.

Similarly, in *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975), we affirmed a trial court ruling that a right-of-way not expressed in a patent was effective:

> At the outset Girves notes that neither her "Notice of Allowance", nor her patent contained any express reservation of rights-of-way in favor of any public body. However, the absence of an express reservation of easement does not preclude the borough from showing that a right-of-way was established prior to the issuance of these documents.

Id. at 1224 (footnote omitted). We cited as authority for that statement *State v. Crawford*, 7 Ariz.App. 551, 441 P.2d 586 (1968). That case aptly states:

> [I]t is also clear from cases decided under 43 U.S.C. § 932 that a subsequent patentee takes subject to previous right-of-ways [sic] established under the grant contained in that federal statute [Citations omitted.] No contrary authority has come to our attention.... The silence of the patents does not preclude the State from showing the full extent of its right-of-way established prior to the time when the patents were issued to plaintiff's predecessors.

Id. at 590.

[10, 11] The above and other authorities[20] establish that, by operation of law,

19. 43 U.S.C. § 1166 provides:
> Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents.

20. *Bird Bear v. McLean County*, 513 F.2d 190, 192–93 (8th Cir.1975); *Ball v. Stephens*, 68 Cal.App.2d 843, 158 P.2d 207, 210 (1945); *Nicolas v. Grassle*, 83 Colo. 536, 267 P. 196, 197 (1928); *Flint & P.M. Ry. v. Gordon*, 41 Mich. 420, 2 N.W. 648, 655 (1879); *Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864, 874 (1946); *Verdier v. Port Royal R.R.*, 15 S.C. 476, 481 (1881); *Costain v. Turner County*, 72 S.D. 427,

land conveyed by the United States is taken subject to previously established rights-of-way where the instrument of conveyance is silent as to the existence of such rights-of-way. No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because the patent contains an implied-by-law condition that it is subject to such a right-of-way.[21] Thus the statute of limitations expressed by 43 U.S.C. § 1166 does not apply.

VI

CONCLUSION

The first paragraph of the judgment is REVERSED. The second paragraph of the judgment is AFFIRMED as to Hansen and REVERSED as to Boysen. The third paragraph of the judgment is REVERSED. The fourth paragraph of the judgment is AFFIRMED as to the Peases' claim against Transamerica. The case is REMANDED for further proceedings consistent with the foregoing.

RABINOWITZ, Chief Justice, dissenting in part.

I find that I am unable to agree with the court's conclusion that the State of Alaska or the Municipality of Anchorage is entitled to claim highway easements in excess of those reserved when the parcels in question were conveyed by patent from the federal government. Before discussing the grounds for my disagreement with the court's ruling, however, I believe that it will be useful to set forth what I consider to be the significant facts.

The principal question in this appeal is whether the state[1] must compensate three landowners for portions of their parcels taken to widen existing roads. The landowners—Theodore and Claire Pease, Richard Boysen, and a limited partnership called Hansen Associates—are the successors in interest to persons who originally acquired the parcels by patent from the federal government. The federal government expressly reserved highway easements or rights-of-way in the Pease and Boysen patents; there were no easements or rights-of-way reserved in the Hansen patent. In each case the state claims a highway easement greater than that reserved in the patent, resting its claims on various now-repealed federal directives which provided arguably that the easements claimed by the state should have been expressly reserved when the parcels were conveyed by patent.[2]

36 N.W.2d 382, 383 (1949); *Wells v. Pennington County*, 2 S.D. 1, 48 N.W. 305, 308 (1891); *Sullivan v. Condas*, 76 Utah 585, 290 P. 954, 957 (1930).

21. Indeed, when the Secretary of the Interior declared these rights-of-way, they vested in the public and there is authority that thereafter the Secretary could not revoke them. In *Walcott Township v. Skauge*, 6 N.D. 382, 71 N.W. 544 (1897), the court, in discussing 43 U.S.C. § 932, stated:

> Highways once established over the public domain under and by virtue of this act, the public at once became vested with an absolute right to the use thereof, *which could not be revoked by the general government*, and whoever thereafter took the title from the general government took it burdened with the highway so established.

Id. at 546 (emphasis added); *accord Bird Bear v. McLean County*, 513 F.2d 190, 192 (8th Cir. 1975); *Wenberg v. Gibbs Township*, 31 N.D. 46, 153 N.W. 440, 441 (1915); *Gustafson v. Gem Township*, 58 S.D. 308, 235 N.W. 712, 713 (1913). *Cf. City of Butte v. Mikosowitz*, 39 Mont. 350, 102 P. 593, 596 (1909) (grant of a roadway under 43 U.S.C. § 932 is to the public, and governmental entities have "supervision and control thereof as trustee for the public, . . ."). That the rights-of-way were established by administrative action rather than public user does not put them on a different footing. *See United States v. Rogge*, 10 Alaska 130, 152–53 (D.Alaska 1941), *aff'd* 128 F.2d 800 (9th Cir.1942).

1. Although the right of the Municipality of Anchorage to claim undisclosed easements is also at issue, I will refer only to the state's rights, for convenience's sake, as the legal issues are the same as to both the state and the municipality.

2. The Pease patent reserved a right-of-way of unspecified location and width under the authority of 48 U.S.C. § 321d, and also reserved a separate 33-foot right-of-way along the south and east boundaries of the parcel. The Peases concede that the state is entitled to the 33-foot right-of-way, and the Alaska Right-of-Way Act of 1966, ch. 92, 1966 Temporary and Special Acts and Resolutions, requires the state to

In my view, the state's reliance upon undisclosed easements, decades after the lands were patented,[3] is foreclosed by both federal and state statutes of limitations governing suits to set aside patents.[4] In addition, I think the landowners are entitled to the protection of Alaska's recording act.[5] Thus, I do not agree with the court's ruling that the state need not compensate the landowners for taking easements which were not expressly reserved in the patents.[6]

In my view, the dispositive legal issue in this appeal should be framed as follows: if the federal government mistakenly issues a patent which purports to convey clear title to lands which should have been withheld for highway easements, is there a time after which the patent may not be challenged notwithstanding the mistake? Because Congress has supplied the answer to this dispositive question in the form of a statute of limitations applicable to suits challenging the validity of patents, I think it is unnecessary to address the array of statutes, Public Land Orders, and Departmental Orders marshalled by the state in defense of the easements that it claims.

Forty-three U.S.C. § 1166 provides that "[s]uits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents."[7] This statute of

compensate the Peases if it uses a section 321d right-of-way notwithstanding the fact that the right-of-way was expressly reserved in the patent. In addition, section 138(b) of the Federal Aid Highway Act of 1970 provides an independent basis for concluding that the state may not claim a section 321d easement. That provision states:

> Any right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures reserved by section 321(d) [sic] of title 48, United States Code (61 Stat. 418, 1947), not utilized by the United States or by the State or territory of Alaska prior to the date of enactment hereof, shall be and hereby is vacated and relinquished by the United States to the end and intent that such reservation shall merge with the fee and be forever extinguished.

Pub.L. No. 91-605, § 138(b), 1970 U.S.Code Cong. & Ad.News 2001, 2029 (uncodified). The state, however, claims yet another easement of fifty feet on the Pease parcel, which is seventeen feet greater than the easement to which the Peases agree the state is entitled. The state claims this fifty-foot easement pursuant to Public Land Orders 601 and 757 and Department Order 2665.

The Boysen patent reserved only a section 321d right-of-way; once again, the state must compensate Boysen if it uses a section 321d right-of-way. The state, however, claims a separate 150-foot easement on the Boysen parcel under the authority of Public Land Order 1613 and Department Order 2665.

As to the Hansen parcel, which is subject to no reserved highway easements or rights-of-way, the state also claims a 150-foot easement under the authority of Public Land Order 1613 and Department Order 2665.

3. The Hansen patent was issued on June 1, 1950; the Boysen patent, on May 15, 1952; the Pease patent, on October 4, 1955. The state did not claim the easements that it now seeks until the mid to late 1970's.

4. 43 U.S.C. § 1166; AS 09.10.230. I do not find it necessary to distinguish or consider the many Alaska cases dealing with the effect of various federal directives, because none of those cases have addressed the statutes of limitations issues.

5. AS 34.15.290.

6. The only federal directive upon which the state relies which was in effect when the Hansen parcel was patented is Public Land Order 601; the remaining directives were not promulgated until after the Hansen patent was issued and cannot, in my view, be applied to alter vested property interests without abridging rights secured by the federal and state constitutions. The withdrawals made by Public Land Order 601 were, however, subject to "valid existing rights," and an entryman's claim is a "valid existing right" which could not be adversely affected by Public Land Order 601. Since the Hansen parcel was entered prior to the promulgation of Public Land Order 601, that parcel is not subject to the withdrawal made by that directive.

7. Admittedly the United States is not a party to this litigation, but this observation does not answer the question of the applicability of the federal statute of limitations. The state, which acquired its interests in federally-created highway easements from the federal government by quitclaim deed, could not have acquired greater rights than its grantor had; the state's rights are merely derivative. A claim that would have been time-barred as to the United States was not revived, nor did the federal statute of limitations cease to run as to viable claims, when the United States transferred its rights to

limitations was enacted because of "the insecurity and loss of confidence of the public in the integrity and value of patent title to public lands, which had been occasioned by conflicting claims . . . which had resulted in many suits being commenced to cancel patents." *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 562, 38 S.Ct. 367, 368, 62 L.Ed. 879, 882 (1918). The statute presupposes that the federal government might err and issue a patent to previously reserved lands. As the Supreme Court has explained, "[i]f the act were confined to valid patents it would be almost or quite without use." *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 450, 28 S.Ct. 575, 580, 52 L.Ed. 881, 887 (1908). The well-settled rule is that the running of the statute of limitations "makes the title of the patentee good as against the grantor, the United States." *United States v. Eaton Shale Co.*, 433 F.Supp. 1256, 1269 (D.Colo. 1977). If the landowners' patent titles are good as against the original grantor, the United States, then their titles are good as against the state, which acquired its interests, if any, in the patented lands in 1959 by quitclaim deed from the federal government. In my view the effect of the six-year statute of limitations is to validate a mistakenly issued patent after the limitations period has expired.[8] Thus, I would

the state. Stated differently, a time-barred claim is not revived by assigning it to someone to whom the relevant statute of limitations is not applicable. *See, e.g., Stanczyk v. Keefe*, 384 F.2d 707, 708 (7th Cir.1967) (parents could not revive time-barred claim by assigning it to minor child, against whom statute of limitations did not run); *Smith v. Copian County*, 232 Miss. 838, 100 So.2d 614, 616 (1958) (assignee's claim is barred if assignor's rights are barred).

Inherent in my conclusion that 43 U.S.C. § 1166 is applicable is the view that a judicial ruling which declares that a portion of the landowners' patented parcels must be conveyed without compensation to the state, in derogation of the patents themselves, is the functional equivalent of a ruling that portions of the patents be "vacated" or "annulled."

8. *See United States v. Winona & St. Peter R.R. Co.*, 165 U.S. 463, 17 S.Ct. 368, 41 L.Ed. 789 (1897); *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 28 S.Ct. 579, 52 L.Ed. 881 (1908). In *Winona* the Court explained:

> Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the government to insist upon the letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the government, *such conveyance should, after the lapse of a prescribed time, be conclusive against the government, and this notwithstanding any errors, irregularities, or improper action of its officers therein.*

165 U.S. at 475–76, 17 S.Ct. at 370–71, 41 L.Ed. at 795 (emphasis added).

Indeed, so strong is the federal policy of ensuring that federal patents convey unassailable title that the validity of even fraudulently-procured patents may not be challenged after the six-year statute of limitations has run. *See, e.g., United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 38 S.Ct. 367, 62 L.Ed. 879 (1918). A patentee who procures a patent by fraud has good title after the six-year period has expired, although the statute of limitations does not begin to run until the fraud is discovered. *Exploration Co. v. United States*, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200 (1918).

In addition, the federal bona fide purchaser doctrine provides that the validity of an erroneously granted patent may not be challenged once the original patentee conveys the parcel to a bona fide purchaser. *See, e.g., United States v. California & Oregon Land Co.*, 148 U.S. 31, 40–41, 13 S.Ct. 458, 461–462, 37 L.Ed. 354, 359–60 (1893); *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 313, 8 S.Ct. 131, 133, 31 L.Ed. 182, 185 (1887). Bona fide purchase from a patentee is a perfect defense to a suit to set aside a patent. *See, e.g., Wright-Blodgett Co. v. United States*, 236 U.S. 397, 35 S.Ct. 339, 59 L.Ed. 637 (1915), which involved a patent obtained by fraud:

> [T]he respect due a patent, the presumption that all the preceding steps required by the law had been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction. . . . And, *despite satisfactory proof of fraud in*

hold that the federal statute of limitations, 43 U.S.C. § 1166, bars the state's claim to undisclosed easements.[9]

As an independent basis for ruling that the landowners' parcels are free of the easements claimed by the state, I would hold further that the state's claims are barred by AS 09.10.230, which provides in pertinent part:

> No person may bring an action to set aside, cancel, annul, or otherwise affect a patent to lands issued by this state or the United States, or to compel a person claiming or holding under a patent to convey the lands described in the patent or a portion of them to the plaintiff in the action, or to hold the lands in trust for or to the use and benefit of the plaintiff, or on account of any matter, thing, or transaction which was had, done, suffered, or transpired before the date of the patent unless commenced within 10 years from the date of the patent.[10]

This statute, which clearly evinces the legislature's intent that patents be considered conclusive evidence of the title they purport to convey after ten years from the date of issuance, has been the law of the territory and State of Alaska for the better part of a century. In my view it is appropriate to give effect to this long-standing state policy of promoting public confidence in the stability and marketability of patent titles.[11]

obtaining the patent, as the legal title has passed, bona fide purchase for value is a perfect defense.

Id. at 403, 35 S.Ct. at 341, 59 L.Ed. at 640 (citations omitted) (emphasis added).

9. I find the authorities relied upon by the court, *see ante* n. 19, inapposite for two reasons. First, those authorities simply do not address the statute of limitations issue.

Second, many of those authorities involve situations in which, at the time the patent in question was issued, the patented lands had previously been conveyed to or reserved for some third party, such as a railroad or a state. In such situations courts have sometimes concluded that the prepatent interests prevailed over the patentees' claims. In the case at hand, however, the state is not claiming, and cannot claim, that it acquired the easements or rights-of-way prior to the issuance of the patents in question and that the patents were therefore issued in derogation of the state's rights. The claim is not that the federal government had conveyed away parts of the patented parcels to anyone prior to issuing the patents; rather, the gist of the claim is that the federal government mistakenly conveyed by patent, lands that it intended to keep for itself.

In *Cramer v. United States*, 261 U.S. 219, 67 L.Ed. 622, 43 S.Ct. 342, (1923), the Court made precisely this distinction. *Cramer* involved a suit brought by the United States to set aside a patent granted to a railroad covering lands occupied by Indians. The Court distinguished between suits brought by the government to cancel patents and revest title in itself and suits brought so that the parcels could be vested in third parties whose rights had accrued prior to patent. The Court noted that the six-year statute of limitations applies to the former kind of case, but not to the latter:

> The suit is not barred by [now 43 U.S.C. § 1166], limiting the time within which suits may be brought by the United States to annul patents.
>
> The object of that statute is to extinguish any right the *government* may have in the land which is the subject of the patent, not to foreclose claims of third parties. Here the purpose of the annulment was not to establish the right of the United States to the lands, but to remove a cloud upon the possessory rights of its wards. As stated by this court in *United States v. Winona & St. Peter R.R. Co.*, 165 U.S. 463, 475 [17 S.Ct. 368, 370], 41 L.Ed. 789, 795, ... the statute was passed in recognition of "the fact that when there are no adverse individual rights, and only the claims of the government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the Land Department should be open for consideration." After the lapse of the statutory period, the patent becomes conclusive against the government, but not as against claims and rights of others ....

Id. at 233-34, 43 S.Ct. at 346, 67 L.Ed. at 628 (emphasis in original). *See also United States v. Krause*, 92 F.Supp. 756, 766 (W.D.La.1950); *Capron v. Van Horn*, 258 P. 77 (Cal.1927).

10. *See Monroe v. California Yearly Meeting of Friends Church*, 564 F.2d 304, 306 n. 2 (9th Cir.1977).

11. Although the question of the applicability of AS 09.10.230 was not raised below, we have repeatedly stated that "[u]pon appeal, a correct decision of the superior court will be affirmed regardless of whether we agree with the reasons advanced." *Fireman's Fund Am. Ins. Cos. v. Gomes*, 544 P.2d 1013, 1017 n. 12 (Alaska 1978); *Carlson v. State*, 598 P.2d 969, 973 (Alaska 1979); *A & G Constr. Co. v. Reid Bros. Logging Co.*, 547 P.2d 1207, 1211 n. 1 (Alaska 1976).

Finally, I do not agree with the court's holding that Boysen and the Peases are charged with constructive notice of federal directives published in the Federal Register and thus are unable to claim bona fide purchaser status under Alaska's recording act, AS 34.15.290.

Forty-four U.S.C. § 1507 provides that persons are charged with notice of documents filed for publication in the Federal Register "except in cases where notice by publication is insufficient in law." Thus, the pertinent question is whether published notice of federal directives such as Public Land Orders is "insufficient in law" to bind Boysen and the Peases, who did not have actual knowledge of the published directives when they purchased their parcels.[12]

The answer to this question is supplied by federal law,[13] and, as the court notes, there are a number of situations in which notice in the Federal Register is sufficient to bind persons who did not know of the publication. In my view, however, this appeal involves a situation in which notice by publication is "insufficient in law" within the meaning of 44 U.S.C. § 1507.

Our task is to determine whether Congress intended that the sufficiency of published notice of federal directives affecting Alaska real property is to be tested by looking to state law[14] or by applying an independent body of federal common law designed to supplant the state's conveyancing rules.[15] Congress did not address this question when enacting the predecessor to 44 U.S.C. § 1507, but, in my view, had it done so it would not have concluded that lands whose private title began with a patent from the federal government should be subject to different conveyancing standards than neighboring parcels whose title originated elsewhere. I find it difficult to believe that that Congress could have intended to displace established conveyancing law in every state in the union and create a chaotic system in which each state is required to apply different standards to patented parcels than to parcels whose chain of title did not begin with a federal patent. In short, I think that the sufficiency of notice for purposes of 44 U.S.C. § 1507 should be determined by applying state law standards. Since the law of this state does not charge a grantee with notice of prepatent transactions and documents[16] or of instruments not recorded in the chain of title,[17] I would conclude that Boysen and the Peases did not have constructive notice of the easements claimed by the state and thus are protected by AS 34.15.290.

12. Under AS 34.15.290 Boysen and the Peases must prevail as bona fide purchasers unless they are charged with constructive notice of the existence of easements which were not recorded in their chains of title.

Our ruling in *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (Alaska 1976) does not dispose of this issue because the parties in *Hahn* did not argue, and we did not consider, whether a notice published in the Federal Register might be "insufficient in law."

13. *See, e.g., Ritter v. Morton*, 513 F.2d 942, 946 (9th Cir.1975) (per curiam), *cert. denied*, 423 U.S. 947, 96 S.Ct. 362, 46 L.Ed.2d 281 (1975); *United States v. Boyd*, 458 F.2d 1252, 1254 (6th Cir.1972).

14. *See, e.g., Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172 (1946). Congress is, of course, free to adopt state rules as federal law. *See generally* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 470-71, 491-94 (2d ed. 1973). The classic example of such an incorporation of states' legal doctrine into federal law is the Federal Tort Claims Act, under which the liability of the United States—a federal question—is determined by applying state substantive law. *See* 28 U.S.C. § 2674; *see also, e.g., Otteson v. United States*, 622 F.2d 516 (10th Cir.1980).

15. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).

16. *See File v. State*, 593 P.2d 268, 270 (Alaska 1979) ("patent is the highest evidence of title").

17. *See Sabo v. Horvath*, 559 P.2d 1038 (Alaska 1976).

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALASKA LAND TITLE ASSOCIATION, SECURITY TITLE AND TRUST COMPANY OF ALASKA, ALASKA TITLE GUARANTY COMPANY, BROKERS TITLE COMPANY, LAWYERS TITLE INSURANCE AGENCY, INC., SAFECO TITLE AGENCY, INC., FAIRBANKS TITLE AGENCY, VALLEY TITLE AND ESCROW COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, TRANSAMERICA TITLE INSURANCE COMPANY, RICHARD L. BOYSEN and JACK WHITE COMPANY,

Petitioners,

v.

STATE OF ALASKA, THEODORE M. PEASE, JR. and CLAIRE V. PEASE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

The most fundamental principle of real property law in the United States is found in the Fifth Amendment to the United States Constitution:

> "No person . . . shall be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

In this case, Petitioners or their predecessors[1] received patent to lands in Alaska which were either silent as to road reservations or, for lands entered after 1947, contained only reservations for roads as authorized by the "act of July 24, 1947 (61 Stat. 418, 48 U.S.C. §321d)."

The court below however found there existed other reservations not reserved in the patents which permit the State Highway Department to take without compensation strips of land as wide as 600 feet.[2]

The Alaska Supreme Court held by interpretation of 48 U.S.C. §321, that such taking was not barred by either the United States Constitution, nor a federal or state statute[3] prohibiting further taking under 48 U.S.C. §321d, by finding a separate easement under 48 U.S.C. §321a.

The properties affected by this decision by the State's own calculation are valued at One Billion Eight Hundred Million Dollars. ($1,800,000,000.00).

Under the circumstances, it is this conflict between federal

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[1] A number of the Petitioners are title insurance companies who, as subrogee on claims, joined this action.

[2] Assuming sixteen-foot lanes, this could result in a highway thirty lanes wide. The minimum right-of-way was one hundred feet wide.

[3] Federal-Aid Highway Act of 1970 §138(b) Pub. L. No. 91-605, 84 Stat. 1713 (1970) and Right-of-Way Act of 1966 ch 2, 92 S.L.A. 1966. Petitioners note that this Court has found the Fifth Amendment to the United States Constitution applicable to the State through the Fourteenth Amendment.

guarantees and the lower court's ruling which raises the following questions:*

1. Did Congress intend to create two separate authorities for easements under the Act of June 30, 1932, Pub. L. No. 218 §§1 and 2, (47 Stat. 446), as amended July 24, 1947, Pub. L. No. 229 §5, 61 Stat. 418 (codified as amended at 48 U.S.C. §§321a-321d), so that State and Congressional acts expressly designed to prohibit further taking of property without compensation were inapplicable?

2. Whether the statute of limitation provision of 43 U.S.C. §1166 is applicable to bar the State of Alaska from taking easements or reservations beyond those provided in the actual patents?

3. Whether Congress intended the limitation unless otherwise "insufficient in law" contained in the Federal Register Act, 44 U.S.C. §1507 to apply to preclude documents published in the Federal Register from being constructive notice to real property transactions absent appropriate recording under the state recording statute?

* In the Alaska Supreme Court the case included an additional Plaintiff, Hansen Associates, an Alaska limited partnership. Hansen Associates not appealing the decision of the Court below.

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Petitioners,

v.

STATE OF ALASKA, THEODORE M. PEASE, JR. and CLAIRE V. PEASE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Alaska entered in this proceeding.

OPINIONS BELOW

The Memorandum of Decision of the State trial court, entered on May 7, 1980 and the judgment entered on May 27,

1980, are unreported. The opinion of the Alaska Supreme Court (and dissent), affirming in part and reversing in part, is published at 667 P.2d 714 (Alaska 1983). Petitions for rehearing were filed by both the Petitioners and Respondents. The Alaska Supreme Court denied the Petition of the Petitioners and granted the petition of the Respondent State of Alaska in an order issued July 8, 1983. The order of the court issued in response to the Petition for Rehearing has not yet been published in the official report. All of the unreported opinions and orders are reproduced in the Appendix A-1 to A-3.

JURISDICTION

The opinion of the Alaska Supreme Court was entered on May 27, 1983. Timely Petitions for Rehearing were filed by both parties. The Alaska Supreme Court denied the petitioners' Petition for Rehearing and granted Respondent's Petition for Rehearing and an Order issued on July 8, 1983 modified its opinion. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

U.S. Const. amend. V

U.S. Const. amend. XIV §1

B. Federal Statutory Provisions

43 U.S.C. §932 repealed by Pub. L. No. 94-579, Title VII §706(a), 90 Stat. 2793 (1976)

43 U.S.C. §1166 (1976)

44 U.S.C. §1507 (1976)

The Act of January 27, 1905, Pub. L. No. 26 §2, 33 Stat. 616 (codified at 48 U.S.C. §322), repealed by Pub. L. No. 86-70 §21(d) (6), 73 Stat. 146 (1959).

The Act of June 30, 1932, Pub. L. No. 218 §§1 &

2, 47 Stat. 446, as amended July 24, 1947, Pub. L. No. 229 §5, 61 Stat. 418 (codified as amended at 48 U.S.C. §§321a-321d) repealed by Pub. L. No. 86-70 §21(d) (7), 73 Stat. 146 (1959)

Federal-Aid Highway Act of 1970 §138(b), Pub. L. No. 91-605, 84 Stat. 1713 (1970)

C. Federal Regulations and Administrative Orders

43 C.F.R. §101.3 (1949)

PLO 601, 14 Fed. Reg. 5048 (1949)

PLO 757, 16 Fed. Reg. 10,749 (1951)

PLO 1613, 23 Fed. Reg. 2376 (1958)

DO 2665, 16 Fed. Reg. 10,752 (1951)

D. State Acts

Right-of-Way Act of 1966, ch. 2, 92 S.L.A. 1966

The full text of these constitutional, statutory and regulatory provisions are included in Appendix B.

STATEMENT

This case presents fundamental issues concerning conflicting claims to property between the State of Alaska and the Petitioners to land conveyed by the United States to the Petitioners or Petitioners' predecessors. Immediately following World War II, numerous individuals, particularly World War II veterans, came to Alaska to avail themselves of the offer by the federal government to establish fee simple ownership in public land. Patents were subsequently issued by the federal government to those individual entrymen who qualified. In the patents the federal government set forth exceptions and reservations to the entrymens' interest, including in most instances, reservations for highways. It is other alleged reservations not set forth in the patents which are the subject of this appeal.

Upon Alaska's entry into the Union in 1959, the federal government executed a quitclaim deed to the State of Alaska conveying all of its interest, if any, in highways and roads contained within the State. For unknown reasons, ten years passed before the quitclaim deed was recorded in 1969. In conjunc-

tion with the development boom in Alaska during the 1970s, the State of Alaska began increasingly to take private property without compensation for expansion of numerous highways throughout the State. The State's claim to take property without compensation was based upon certain land orders and a departmental order issued by the Department of Interior prior to Statehood. In particular, the State relied on Public Land Orders (PLO) 601, 757, 1613 and Departmental Order (DO) 2665[5] published between 1949 and 1958.

Patents issued prior to 1947 were silent as to any reference to withdrawals or easements. Patents after 1947 contained only the general reservation for highways as authorized by "the act of July 24, 1947 (61 Stat. 418, 48 U.S.C. §321d)," but did not identify any width for such reservations. Such were to be established at a later date by the Department of Interior. Petitioners assert the Secretary did this in 1951 by DO 2665.

When the State of Alaska began accelerating its claim in the 1970s based on these withdrawals and easements, numerous land owners found themselves deprived of significant portions of their property without compensation. These property rights which will continue to be taken without compensation are valued by the State of Alaska to be in excess of one billion eight hundred million dollars. Additionally, title insurance companies who had insured some, though not all, of the land sales found themselves burdened with claims which could jeopardize their continued solvency. It is in this context this Petition is filed.

The difficulty with the land order withdrawals and easements is that they were not noted on the patents. Thus, property owners never knew that their land might be subject

[5] Promulgated August, 1949 to withdraw land from any form of homestead entry, PLO 601 established corridors for future highways. These withdrawals extended from six hundred feet for the Alaska Highway to one hundred feet for all "local" roads. In October, 1951, PLO 757 removed the withdrawal for "local" roads, but there was simultaneously established "easements" of the same width under DO 2665. Special legislation was passed in 1956 to authorize PLO 1613 which conceded the remaining withdrawals were unnecessarily wide and created a repurchase program for adjoining landowners, subject to the easements identified in DO 2665.

to a highway easement significantly in excess of that noted in their patents or the official government surveys. Further, the PLO easements and withdrawals were never recorded, surveyed or posted to plats. In fact, it is not even possible to find a list of all "local" roads for which a PLO withdrawal or easement may be claimed. The State itself does not prepare a map showing the location of the withdrawals or easements until it has first decided to expand or improve that particular highway.

For years the State, and the federal government before it, has known that the failure to record, survey, map or note on plats these rights-of-way created serious title problems.[6] However, despite this knowledge, the State has acquiesced in the successive sale and improvement of properties which the State now claims to be subject to the highway reservations.

The decision of the Court below clouds the title to the vast majority of properties adjacent to every road (excluding subdivision roads) within the State of Alaska. The Alaska Supreme Court has taken the position that 48 U.S.C. §321a is a separate grant of authority by Congress to the Secretary of Interior to create an easement independent of the express authority granted under 48 U.S.C. §321d. By this erroneous interpretation of federal law finding an independent easement in 48 U.S.C. §321a, the court below precluded the protection afforded by both federal and State statutes designed to prevent the further exercise of highway reservations without compensation.[7] The ruling of the Court below is unquestionably contrary to the legislative history and language contained within U.S.C. §321a-321d.

Additionally, the Alaska Supreme Court failed to follow numerous decisions of the U.S. Supreme Court that the United States (in this case Alaska since it is the successor to the United States' interest) may not bring a suit to challenge a patent

[6] The State of Alaska has taken the position that despite its failure to record its quitclaim deed for ten years and despite the fact none of the land orders are recorded in the state recording districts pursuant to the State's recording statutes, it may seize the land.

[7] See footnote 3, *supra*.

more than six years after the patent has been issued and is thus barred from making a collateral attack upon the patent.

PROCEEDINGS BELOW, PARTIES AND JURISDICTIONAL MATTERS

This action was commenced in the Anchorage Superior Court in February of 1979, when the Petitioners filed a complaint for declaratory relief. Named as defendants were the State of Alaska, Theodore M. Pease and Claire V. Pease. Petitioners in their complaint identified eight claims for relief. On June 4, 1979, Petitioners filed an amended complaint for declaratory judgment which added an additional claim for relief. The Petitioners' amended complaint sets forth several state and federal claims.

Motions for summary judgment were brought by both the Petitioners and Respondent in the trial court. The court denied the Respondent State of Alaska's motion for summary judgment and granted Petitioners' motion as to its second, third and eighth claims for relief. The trial court denied the first claim for relief which reflected petitioner Transamerica's claim that it was not liable under its title insurance policy to Theodore and Claire Pease as to the additional right-of-way taken by the State. The trial court found that the prior Alaska Supreme Court case, *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (Alaska 1976) was controlling. However, the trial court in its decision found that Petitioner Transamerica's argument was persuasive and asked the Alaska Supreme Court to review the *Hahn* decision.

The decision of the trial court rested predominantly on its determination that a State statute, the Alaska Right-of-Way Act of 1966, was applicable to prevent any further taking without compensation. The trial court determined that, unless the State had occupied or staked a highway in excess of the width set forth in the patents prior to April 14, 1966, then it would only be entitled to the roadway actually occupied or that set forth in the patent, whichever was greater. Any additional land needed by the State could be taken only by paying just compensation.

The State filed its points on appeal on June 24, 1980. The Petitioners filed their notice of cross-appeal on June 30, 1980. Upon appeal, the judgment was affirmed only as to one plaintiff and reversed as to all other Petitioners. One Justice filed a dissent from the three-person majority opinion.

FEDERAL QUESTIONS RAISED AND DECIDED BELOW

The decision of the Alaska Supreme Court is based on the determination of a number of controlling questions of federal law. The first question is whether there existed under 48 U.S.C. §321a power to create an easement in the Secretary of Interior on public lands in Alaska separate from that set forth in 48 U.S.C. §321d. The Alaska Supreme Court's misinterpretation of the power of the federal government under 48 U.S.C. §321a results in a taking of private property without compensation. Further, the Alaska State Legislature has attempted to insure that the State not avail itself of rights-of-way under 48 U.S.C. §321a-321d, when it passed the Right-of-Way Act of 1966. The court below determined that the Right-of-Way Act and the protections thereunder were not applicable since that act applied only to easements under 48 U.S.C. §321d and the easements asserted by the State were created under 48 U.S.C. §321a and DO 2665. The court below ignored the intent of a similar federal act to bar such takings. Federal-Aid Highway Act of 1970, §138(b) Pub. L. 91-605, 84 Stat. 1713 (1970). This interpretation of federal law, if allowed to stand, will permit the State to seize private property belonging to Petitioners without compensation.

The assertion that the Right-of-Way Act of 1966 and section 138(b) of the Federal-Aid Highway Act of 1970 were applicable to protect the Petitioners in these circumstances was raised at the trial court during summary judgment proceedings and again during the appeal to the Alaska Supreme Court. The question was specifically addressed by the Alaska Supreme Court in its decision.

Second, the Alaska Supreme Court rejected Petitioners' contention that the easements claimed by the State of Alaska

were not set forth in the patents and therefore eliminated by failure to annul the patents within the six-year statute of limitation period of 43 U.S.C. §1166. This is clearly a federal question. The Alaska Supreme Court, in addressing this issue on appeal, interpreted federal law in a manner such as to preclude the application of the statute to protect Petitioners' rights in this case. Petitioners raised these claims of a federal right in their complaint at the trial court and maintained their position throughout the appeal.

Third, Alaska Supreme Court misinterpreted 44 U.S.C. §1507 in requiring that public land orders and the departmental order, upon publication in the Federal Register, be considered constructive notice for real property transactions independent of compliance with State or territorial recording statutes. By interpreting the Federal Register Act as constituting constructive notice for purposes of determining ownership of land, Petitioners were precluded from availing themselves of the protection offered by the State recording statutes. Petitioners raised these claims in their memorandum in support of motion for summary judgment in the trial court and maintained their position throughout the appeal.

REASONS FOR GRANTING THE WRIT

(a) Impact of the Decision Below.

The decision of the Alaska Supreme Court below has a devastating impact on landholders within the State of Alaska. During the late 1940s when Alaska was still a territory, the federal government held open to individuals the opportunity to settle in the territory and obtain fee simple ownership of land therein. After properly complying with the applicable statutes and regulations concerning homesteads, these individuals were issued patents reflecting their ownership rights. These patents set forth the reservations and exceptions which the federal government stated it was maintaining.

In the approximately thirty years that have passed since this initial transfer of property from the federal government to individuals following World War II, the individual owners and their successors in interest have subdivided and developed

the property pursuant to the natural growth of the State. Thus this lawsuit greatly affects the current property rights of thousands of landowners within the State of Alaska, many of whom have developed valuable improvements within the claimed easements unaware the State claims the right to take their property.

The decision of the court below results in confusion to titles to thousands of parcels held within the State of Alaska. The State admits that the potential value of the land which it can seize without compensation to be valued in excess of $1.8 billion dollars. Already several other cases have been initiated involving issues related to this decision.

Therefore, the Petitioners believe that their Petition for Writ of Certiorari should be accepted by the Court to review the tremendous impact of the decision of the court below upon title to thousands of parcels of land within the State as well as the combined total economic loss to individuals residing in the State.

(b) Important and Novel Questions of Federal Law.

The decision below also involves important questions of federal law never interpreted by this or any other federal court. The Alaska Supreme Court in reaching its decision interpreted several federal statutes and orders regarding public lands within Alaska. In particular, the court below interpreted 48 U.S.C. §321a as creating in the Secretary of Interior a right to establish an easement on public lands separate from that of 48 U.S.C. §321d. By interpreting the federal statute in this manner, the court below voided the specific protection offered to private landholders by the Alaska Legislature by the Right-of-Way Act of 1966 and Congress by section 138(b) of the Federal-Aid Highway Act of 1970.[*]

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[*] The intent of the Alaska Legislature is clear. The Act states in part:

Section 1. Purpose. This Act is intended to alleviate the economic hardship and physical and mental distress occasioned by the taking of land, by the State of Alaska, for which no compensation is paid to the persons holding title to the land. This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions to many citizens of the

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A second question of first impression was raised by the Alaska Supreme Court in its decision regarding the Federal Register Act, 44 U.S.C. §1507. No previous court has addressed the precise question here. In this case the question rests on whether the Federal Register is constructive notice as to landholders in Alaska or whether such notice is "insufficient in law" within the meaning of 44 U.S.C. §1507. Congress did not clearly identify under what circumstances notice under the Federal Register would be "insufficient in law." However, the interpretation of the court below that the Federal Register must be notice under State land laws has not been addressed. Therefore, this presents an important question of federal law which has applicability beyond the State of Alaska. Other states, particularly in the western United States, have large tracts of federal public land which is subject to thousands of federal public land orders and department orders of the Department of Interior and other federal agencies. Thus, applicability of a decision which indicates that Congress intended the federal register to be constructive notice under State land laws has tremendous impact upon title in other states as well as Alaska. Therefore, the Court should accept Petitioners' Writ for Certiorari to address this issue.

(Footnote Continued)

State of Alaska, and which, if not curtailed by law, will continue to adversely affect the citizens of this state. Those persons who hold title to land under a deed or patent which contains a reservation to the state by virtue of the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, are subject to the hazard of having the State of Alaska take their property without compensation because all patents or deeds containing the reservation required by that federal Act reserve to the United States, or the state created out of the Territory of Alaska, a right-of-way for roads, roadways, tramways, trails, bridges, and appurtenant structures either constructed or to be constructed. Except for this reservation the State of Alaska, under the Alaska Constitution and the Constitution of the United States, would be required to pay just compensation for any land taken for a right-of-way. It is declared to be the purpose of this Act to place persons with land so encumbered on a basis of equality with all other property holders in the State of Alaska, thereby preventing the taking of property without payment of just compensation as provided by law, and in the manner provided by law.

(c) The Decision of the Court Below Conflicts with Prior Decisions of the Court

The Alaska Supreme Court determined that the six-year statute of limitations applicable to suits by the United States to vacate and annul a patent under 44 U.S.C. §1166 did not apply to prevent the State Highway Department from seizing private property in which the patents from the federal government did not reserve any of the easements or withdrawals sought to be taken by the State. The court found that despite the failure of the federal government to set forth in the patent any limitations arising under the public land orders and the departmental order identified in this case,[9] it would permit a collateral attack on the patent by reducing the amount of land transferred to the patentee by the federal government and by imposing on that patent restrictions not contained herein. This Court has long held that once the six-year statute of limitations has run the United States may not attack the validity of a patent. *United States v. Chandler—Dunbar Water Power Co.*, 209 U.S. 447 (1908); *Brook v. So. Pac. R. Co.*, 234 U.S. 669 (1914); *U.S. v. Oregon Lumber Co.*, 260 U.S. 290 (1922). Although the statute on its face is applicable to the United States it is equally binding on the State. The State has claimed to possess the interest of the United States under the respective statutes and orders pursuant to the quitclaim deed issued upon statehood in 1959. Therefore, unlike cases cited to by the majority opinion in the court below, the State of Alaska has no more than what the United States possessed in 1959. A failure to assert that interest within six years of the issuance of patent precludes the United States (and the State of Alaska, its successor in interest) from attacking the patents. Therefore, the court below has rendered a decision in conflict with prior holdings of this Court.[10]

I. NO SEPARATE AUTHORITY EXISTS TO ESTABLISH AN EASEMENT UNDER 48 U.S.C. §321a.

[9] PLO 601, PLO 757, PLO 1613, and DO 2665.

[10] A succinct discussion of this misinterpretation of 43 U.S.C §1166 appears in the dissenting opinion by Justice Rabinowitz in the court below.

A review of the legislative history of 48 U.S.C. §§321a-321d reveals, contrary to the decision of the court below, no authority for the Secretary of Interior to establish easements under 48 U.S.C. §321a. Originally, under the Act of January 27, 1905, 33 Stat. 616, Congress established a Board of Road Commissioners for Alaska. This Commission was given the power to "locate, layout, construct, and maintain wagon trails and pack trails . . ." within Alaska. Sec. 2 Act of June 27, 1905, 33 Stat. 616. In 1932, Congress transferred the power of the Commission to the Department of Interior. Sec. 1 and 2 Act of June 30, 1932, 47 Stat. 446.

However, neither of these two statutes granted the power to the Secretary of Interior or the Commission to grant easements across the land but rather only the power to construct roads. In fact, the language contained in sec. 2 Act of June 30, 1932, 47 Stat. 446, codified as 48 U.S.C. §321a, was recognized by the Department of Interior as only granting authority to the Secretary to fix the width of *public domain* roads which were "located, laid out, constructed and maintained" pursuant to sec. 2 Act of June 27, 1905, codified as 48 U.S.C. §322.

Because of the Department of Interior's concern over the pending patenting of public lands in Alaska where a 43 U.S.C. §932 easement did not apply, the Department requested in 1947 that Congress amend the Act of June 30, 1932. H.R. Rep. No. 673, 80th Cong. 1st Sess., *reprinted in* 1947 U.S. Cong. & Ad. News 1352, 1353. In the Department's letter requesting legislation, the Secretary of Interior indicated that his Department was seeking authority for the reservation of easements for the first time. Since 48 U.S.C. §321a already existed at the time that the Department of Interior made this request to amend the Act of 1932, it is evident that the Department of Interior recognized that no easement authority existed under §321a. To hold otherwise negates the 1947 Amendment."

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[11] The Language of 48 U.S.C. §321d provides for only one easement. It states that "(i)n all patents for lands hereafter taken up, entered or located in the Territory of Alaska . . . there shall be expressed that there is reserved, from the lands . . . in such patent . . . *a right-of-way.*" (Emphasis added.)

This position is further supported by a Department of Interior memo on October 10, 1950, which in discussing PLO 601 noted that the Department of Interior discussed changing the withdrawals to easements so that rights-of-way under the Act of July 1947 would still be valid.[12] This once again indicates the Department of Interior looked to sec. 321d (the 1947 act) for its authority, not some strained interpretation of sec. 321a.

48 U.S.C. §321d requires that all lands entered after the date of the Act (June 23, 1947) have reserved in the patents an easement. The Department of Interior pursuant to this Congressional mandate began issung patents which clearly stated that an easement was being reserved pursuant to 48 U.S.C. §321d. It is clear that the Department of Interior did not consider §321a to be authority to impose an easement, or it could have just as easily put this reservation in the patents too.

The court below held that sec. 321a easements exist not from statutory language or legislative intent, but solely from the fact that paragraph 1 of DO 2665 states that the authority for the Secretary to promulgate DO 2665 is 48 U.S.C. §321a. Petitioners do not dispute that section 321a grants the Secretary of Interior the authority over Alaska roads and thus authority to issue the departmental order.[13] Petitioners

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(Footnote Continued)
The statute goes on to state that "(w)hen a right-of-way easement under this Act . . ." once again indicating that a single authority for creating a right-of-way existed under 48 U.S.C. §321. The Act of 1947 was an amendment to the Act of June 30, 1932 (47 Stat. 448) and therefore the language "this Act" must refer to the Act of 1932.

[12] The Department of Interior in October of 1950 revealed concern that the PLO withdrawals were insufficient to protect the rights-of-way desired by the federal government. It was proposed by Department of Interior memo that the withdrawals be changed to easements under the 1947 Act (48 U.S.C. §321d) to set forth the width of the proposed easements. This concern resulted in the publication of DO 2665 in October of 1951 establishing easements under 48 U.S.C. §321d. See Department of Interior memo October 10, 1950 at Appendix C.

[13] The Alaska Supreme Court previously authorized the taking of property without compensation based on this erroneous interpretation in *State, Department of Highways v. Green*, 586 P.2d 595 (Alaska 1978)

however assert that such authority to issue the order does not equate with a separate authority to create an easement. The unmistakable intent of the 1947 amendment, codified at 48 U.S.C. §321d, was to create, for the first time, easements."

The court below in its misinterpretation that 48 U.S.C. §321a is a separate authority for the Department of Interior to establish easements nullifies the attempt by the State of Alaska in the Right-of-Way Act of 1966 to protect private landowners from State exercise of such easements. The Right-of-Way Act of 1966 has been interpreted by the Alaska Supreme Court as applying only to easements established under 48 U.S.C. §321d. Under the terms of the Act, the State is barred from taking without compensation any additional land pursuant to a sec. 321d easement if it has not done so prior to the date of the Act. Further, by its interpretation of federal law, the court below has deprived Petitioners' rights afforded by sec. 138(b) of the Federal-Aid Highway Act of 1970.

II. THE STATUTE OF LIMITATIONS OF 43 U.S.C. §1166 BARS THE RESPONDENT FROM CHALLENGING PATENTS AFTER SIX YEARS.

The United States issued patents to Petitioners and Petitioners' predecessors in interest which contained a description of the reservations and exceptions which the United States intended to retain. The State of Alaska maintains that the various PLOs and the Departmental Order grant it a right-of-way even though not identified in the patents. Had the property at the time of patent still been encumbered by the withdrawals or easements, but patent nevertheless issued, the government would have only six years to annul the patent. *United States v. Chandler—Dunbar Water Power Co.*, 209 U.S.

" The trial court agreed with petitioners and stated that:

It should be noted that DO 2665 is issued under authority of 48 U.S.C. §321a; however, sec. 321a is only the general grant of authority by Congress to the Secretary of Interior to administer the road. In Alaska sec. 321d is the specific authority for the Secretary to reserve easements for roads and therefore, DO 2665 by implication is based on authority of sec. 321d, Pub. L. 229 ch. 313 approved July 24, 1947.

447 (1908). The withdrawals or easements could not have been deemed to have been an implied exception to the patent. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); *Hardin v. Jordan*, 140 U.S. 371 (1891); *Stewart v. Lamm*, 132 Colo. 484, 289 P. 2d 916 (Colo. 1955).

The quitclaim deed could not, as the State asserts, pass greater rights than that the United States had to transfer. It is well established that a patent is in the nature of a quitclaim deed. *Wilson Cyprus Co. v. Del Pozo y Marcos*, 236 U.S. 635 (1915); *Sampeyreac v. United States*, 7 Pet. (U.S.) 222 (1833). Consequently, the United States passed by patent its estate *except* that which was actually reserved in the patent, i.e. the 1947 highway reservations, 48 U.S.C. §321d.

Additionally, it is clear that once a patent is issued, even if it contains a mistake, the Executive Department lacks power to set the transfer aside. The annulment must be done judicially. *West v. Standard Oil Co.*, 278 U.S. 200 (1929); *Stone v. United States*, 69 U.S. 525 (1875). In the case at bar, the United States has never sought to set aside the patents issued without the alleged reservation for the easements cited by the Respondent (48 U.S.C. §321a) and therefore those patents would still be binding on the United States. Under the 1959 quitclaim deed, the State recieved no greater right to the land than the United States had and since the patents were conclusive against the United States then they are likewise conclusive against the State of Alaska.

This court in *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552 (1918) noted that the purpose of the statute of limitations contained in 43 U.S.C. §1166 was to restore, in the public, confidence in the integrity and value of patent title to public lands which had been challenged under numerous suits seeking to cancel such patents. The statute itself presupposes that the government will make an error. *United States v. Chandler—Dunbar Water Power Co., supra* at 450. Indeed,the protection afforded patents under 43 U.S.C. §1166 has been strong enough that this Court has determined that even in the cases of fraud, the patent itself may not be set aside. *United States v. Diamond Coal and Coke Co.*, 255 U.S. 323 (1921). In

United States. v. Whited & Wheless, Ltd., supra, this court has also determined that even in the cases of fraud, if the title to the property has passed to a bonafide purchaser, the government may not challenge the patent. *Wright-Blodgett Co. v. United States,* 236 U.S. 397 (1915); *United States v. California & The Oregon Land Co.,* 148 U.S. 31 (1893).

Courts have also noted that in determining what land is conveyed under a patent, the number of acres specified in the patent is very important. *Ritter v. Morton,* 513 F.2d 942 (9th Cir. 1975). Other courts have also made it clear that the boundaries of land cited in a patent, even if incorrect, would be binding on the United States and its successors. *Grainger v. United States,* 197 Ct. Cl. 1018 (1972). Even though the State claims the withdrawals from homestead entry of PLO 601 and 757 still apply, none of the patents contained any commensurate reduction in total acreage. The United States under 43 C.F.R. §101.3 (1949) was required to put on notice all persons making an entry on public land which could be affected by a right-of-way.[15] The failure to include such an easement on the entry papers or on the final patent is conclusive against the United States.

Therefore, Respondent's claim was barred by the statute of limitations contained in 43 U.S.C. §1166. The Respondent has no greater interest in the land than that held by the United States. The United States was barred from challenging the patents after six years for failure of the patents to contain easements set forth in the PLOs and the departmental order. Assuming *arguendo* that the State's position has merit, any interest which the United States had was extinguished by the

[15] The provisions of 43 C.F.R. §101.3 (1949) set forth the notations which were required to be made on entry papers and notices of allowance in 1949.

> In order that all persons making entry of public lands which are affected by rights-of-way may have actual notice thereof, the register is directed to note upon the original entry papers and upon the notice of allowance of the application . . . issued to the entrymen, a reference to such rights-of-way . . . he will place the same notation as to right-of-way upon the final entry papers so that the reservation of the right-of-way will be made in the patent when issued.

running of the statute of limitations in 43 U.S.C. §1166. The United States did, pursuant to 48 U.S.C. §321d, maintain road reservations which were subsequently relinquished by State and federal acts.

III. THE FEDERAL REGISTER ACT IS NOT CONSTRUCTIVE NOTICE AS TO PRIVATE LANDOWNERS IN THE STATE OF ALASKA

Provisions of 44 U.S.C. §1507 provide that persons will be charged with notice of documents filed for publication in the Federal Register "except in cases where notice by publication is insufficient in law." The question in this case is whether, absent actual notice, does publication in the Federal Register constitute notice insufficient in law for real property transactions. A review of the legislative history does not reveal a clear answer as to whether Congress intended the Federal Register to be constructive notice as a matter of law or whether such notice would be insufficient in law as applied to state land titles. The federal case law cited to by the majority of the court below does not contain a case in which the court addressed the question of what was "insufficient in law." There is no reason to believe that Congress intended to displace established conveyancing and recording laws in every state of the Union with a chaotic system in which landowners must be charged with constructive notice of pre-patent federal orders not noted as reservations in the patents.[16]

Therefore, the court below erred in interpreting federal cases cited for the proposition as to what constitutes constructive notice where that determination is being made as to title under state law. Acts of Congress which affect conveyancing and recording statutes of the fifty states should be considered "insufficient in law" to be constructive notice.

[16] This position was adopted by the Dissenting Opinion in the lower court.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Alaska Supreme Court.

Respectfully submitted,

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APPENDIX

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APPENDIX A-1

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

ALASKA LAND TITLE ASSOCIATION, SECURITY TITLE AND TRUST COMPANY OF ALASKA, ALASKA TITLE GUARANTY COMPANY, BROKERS TITLE COMPANY, LAWYERS TITLE INSURANCE AGENCY, INC., SAFECO TITLE AGENCY, INC., FAIRBANKS TITLE AGENCY, VALLEY TITLE AND ESCROW COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, TRANSAMERICA TITLE INSURANCE COMPANY, RICHARD L. BOYSEN and JACK WHITE COMPANY,

Plaintiffs,

vs.

STATE OF ALASKA, Department of Transportation and Public Facilities, THEODORE M. PEASE, JR., and CLAIRE V. PEASE, and MUNICIPALITY OF ANCHORAGE,

Defendants.

No. 3AN 79-951 Civil

MEMORANDUM OF DECISION

This case is a suit for declaratory relief and the plaintiffs, the State of Alaska and the Peases have moved for summary judgment. The facts are that in 1978 the State of Alaska widened Rabbit Creek Road, a local road off the Seward Highway approximately nine miles south of Anchorage, from a road having a bed of less than 66 feet to a road having a bed of 100 feet in width. Mr. and Mrs. Pease are adjoining landowners to Rabbit Creek Road and own the underlying fee to the centerline. They seek compensation from the State of Alaska or the title insurance company which insured their title for the taking of a strip 17 feet in width from their property for the widening of Rabbit Creek Road.

The Peases acquired by warranty deed Lot 191, Section 33, T 12N, R3W, Seward Meridian, Anchorage Recording District on August 18, 1960 which parcel was separated from the public domain on October 4, 1955 by patent number 115 1722 which provides a "reservation of a right-of-way for roads . . . constructed or to be constructed by or under the authority of the United States or by any State created out of the Territory of Alaska, in accordance with the act of July 21, 1947 (61 Stat. 418, 48 U.S.C. sec. 321d)" and "This patent is subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located along the south and east boundaries of said land."

There are no facts in dispute. The other parties, Mr. Boysen, Hansen Associates and Jack White Company own property which may be affected by easements for through and feeder roads. In this memorandum of decision the case concerning the Peases will be considered first, a decision reached on the ownership of the 17 foot wide strip along Rabbit Creek Road and will be used for illustrative purposes in deciding questions relating to other parcels.

The relevant history of statutes, public land orders (P.L.O.) and department orders (D.O.) affecting rights-of-way for roads like Rabbit Creek includes:

1. P.L.O. 601 dated August 10, 1949 under the authority of *Executive Order No. 9337* (43 U.S.C. §141) withdrew from entry certain lands and reserved those lands for highway rights-of-way as follows:

a. the public lands lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads.

b. through roads are the Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, and Tok Cut-off.

c. feeder roads are Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-

Indian Road, Edgerton Cut-off, Tok-Eagle Road, Ruby-Long-Poorman Road, Nome-Solomon Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Spring Road.

d. local roads are all roads not classified as through or feeder roads established or maintained under the jurisdiction of the Secretary of the Interior.

e. Paragraph 6 reads:

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws and reserved for highway purposes.

2. P.L.O. 757 dated October 16, 1951 provides:

The sixth paragraph of Public Land Order No. 601 of August 10, 1949, reserving public lands for highway purposes, commencing with the words "Subject to valid existing rights", is hereby amended to read as follows:

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway are hereby withdrawn from all forms of appropriation under the public land laws, including

the mining and mineral-leasing laws, and reserved for highway purposes.

Easements having been established on the lands released by this order, such lands are not open to appropriation under the public land laws except as a part of a legal subdivision, if surveyed, or an adjacent area, if unsurveyed, and subject to the pertinent easement.

3. D.O. 2665 dated October 16, 1951 under the authority of section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a) established the width of the public highways in Alaska established or maintained under the jurisdiction of the Secretary of Interior as follows:

a. through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.

b. feeder roads (with an extensive listing) shall extend 100 feet on each side of the center line thereof.

c. local roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

d. the order provided specifically:

Sec. 3. Establishment of rights-of-way or easements. (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all forms of appropriation under the public land laws, including the mining and mineral laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads

as established in section 2 of this order, is hereby established for such roads and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

Sec. 4. Road maps to be filed in proper Land Office. Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public.

It should be noted that D.O. 2665 is issued under the authority of 48 U.S.C. 321a; however, section 321a is only the general grant of authority by Congress to the Secretary for the Interior to administer the roads in Alaska. Section 321d is the specific authority for the Secretary to reserve easements for roads and, therefore, D.O. 2665 by implication is based upon the authority of 321d, Public Law 229, ch. 313 approved July 24, 1947.

4. The effect of P.L.O. 757 and D.O. 2665 was to return to the public domain and make available for entry all land within 100 feet of the center line of feeder roads and 50 feet of the center line of local roads reserving an easement for feeder and local roads of 100 feet and 50 feet on each side of the center line respectively.

5. P.L.O. 1613 dated April 7, 1958 revoked P.L.O. 601 as amended by P.L.O. 757. Therefore, the withdrawal for through roads was no longer in effect; however, an easement for through roads was created extending 150 feet on each side of the center line for through roads designated in P.L.O. 757 and section one of P.L.O. 1613.

6. On June 30, 1959 the United States conveyed by quitclaim deed its interest in highways to the State of Alaska

the mining and mineral-leasing laws, and reserved for highway purposes.

Easements having been established on the lands released by this order, such lands are not open to appropriation under the public land laws except as a part of a legal subdivision, if surveyed, or an adjacent area, if unsurveyed, and subject to the pertinent easement.

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(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads

as established in section 2 of this order, is hereby established for such roads and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

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6. On June 30, 1959 the United States conveyed by quitclaim deed its interest in highways to the State of Alaska

which deed was recorded October 2, 1969.

7. Sec. 2, Ch. 92, SLA 1966, Right-of-Way Act of 1966 provides:

> Taking of Property Under Reservation Void. After the effective date of this Act [April 14,1968], no agency of the state may take privately-owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, and taking of property after the effective date of this Act by the election or exercise of a reservation to the state under the federal Act is void.

8. Public Law 229, ch. 313, approved July 24, 1947 provides:

> The act entitled "An Act providing for the transfer of the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alaska to the Department of the Interior, and for other purposes, approved June 30, 1932 (47 Stat. 446) [footnote: 5 U.S.C.A §§123, 485; 48 U.S.C.A. §§321a-321e, 322-327] is hereby amended by adding at the end thereof the following new section:
>
> "Sec. 5. 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, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon for roads, roadways, highways, tramways, trails, bridges, appurtenant structures constructed or to be constructed by or under the authority of the United States or any State created out of the Territory of Alaska. When a right-of-way reserved under the provisions of this Act is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops

> thereon if not harvested by the owner, and for the value of any improvements, or for the cost of removing them to another site, if less than their value."

The Alaska Supreme Court cases which directly relate to the questions in this case are: *Hahn v. Alaska Title Guaranty Co.* 557 P.2d 143 (Alaska 1976) which holds that the federal register is a public record within the meaning of the language of a title insurance policy; and *State, Dept. of Highways v. Green,* 586 P.2d 595 (Alaska 1978) which gives an exhaustive history of the subject before the court without mentioning the Alaska Right-of-Way Act of 1966.

The Peases have moved for summary judgment on their cross-claim against the State of Alaska and on their counterclaim against Transamerica Title Insurance Company. The Peases are entitled to summary judgment against Transamerica Title Insurance Company under the authority of *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (Alaska 1976) and they are granted such summary judgment establishing the liability of their insurer subject to the provision that if the State must pay for the strip, then the Peases shall collect from the State and not their title insurer.

The plaintiffs have moved for summary judgment against the State of Alaska on the grounds that the State is without authority to exercise jurisdiction over easements allegedly reserved to the State by P.L.O. 601 as amended by P.L.O. 757 and P.L.O. 1613 and D.O. 2665. The title insurance companies and the other plaintiffs have standing to bring this case and are real parties in interest; there is a justiciable controversy and the plaintiffs' pecuniary interest is affected. See *Jefferson v. Asplund,* 458 P.2d 995 (Alaska 1969).

There is no statute of limitations problem; the land is not taken until staked. D.O. 2665(c).

The State asserts that the withdrawals and easements established by the various P.L.O.'s and D.O.'s are dedications of property to the public which cannot be transferred to private ownership until abandoned. There is no evidence of fact or law to support the State's contention. The withdrawals and

easements will be treated as designations by a land owner setting aside certain portions of its property.

It is necessary to view this case in its historical perspective. Pursuant to P.L.O. 601 land was withdrawn for through, feeder, and local roads in strips ranging from 300 feet to 50 feet on each side of the center line. These strips were never surveyed, the Bureau of Land Management did not know what land was withdrawn and patents were issued conveying land which allegedly had been withdrawn. The record is replete with letters explaining the problems created and the hardships which resulted.

In response to the problems created by withdrawals, the Secretary of the Interior revoked P.L.O. 601 in stages: first, P.L.O. 757 in 1951, and then P.L.O. 1613 in 1958 and substituted easements. D.O. 2665 and P.L.O. 1613. The establishment of easements did not solve all of the problems; however, entrymen and the government could determine the boundaries of parcels by measuring from the center line of the existing roads even though the roads were not surveyed.

The predecessor in interest to Mr. and Mrs. Pease was granted a two and one-half acre parcel subject to a 33-foot easement for Rabbit Creek Road and a blanket reservation for easements created pursuant to 61 Stat. 418, 48 U.S.C. sec. 321d, the authority for D.O. 2665. The Right-of-Way Act of 1966 precludes the State from taking without compensation any land pursuant to the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418.

The State argues that it already had the easement reserved by 61 Stat. 418, 48 U.S.C. sec. 321d before the effective date of the Right-of-Way Act of 1966 and, therefore, the Act does not apply. The State is wrong; it did not secure the easement until the right-of-way was staked by the terms of D.O. 2665.

It is realized that *State, Dept. of Highways v. Green*, 586 P.2d 595 (Alaska 1978) does not discuss the Right-of-Way Act of 1966; nevertheless, the Act does apply to the case at bar and would apparently be applicable in the *Green* case; the State should have brought it to the court's attention even if the appellees failed to do so.

Therefore, the plaintiffs and Mr. and Mrs. Pease are entitled to summary judgment establishing the fact that the State or anyone claiming through the State, including the Municipality of Anchorage, may not occupy land reserved for highway or other purposes pursuant to 61 Stat. 418, 48 U.S.C. sec. 321d without compensation which the State was not occupying on April 14, 1966.

This ruling means that unless the easement was specifically reserved in the patent or was occupied by the State or Municipality or staked by the State before April 14, 1966, the underlying fee holder is entitled to just compensation when the State or Municipality asserts its right to utilize the strip between the previously occupied, staked, or specifically designated in the patent distance from the center line and 50, 100 or 150 feet from the center line depending upon the type of road. The State's argument that the plaintiffs by this lawsuit are seeking to divest the State of its interest in all the roads of the state is not understood and is clearly not the fact.

The plaintiff Hansen Associates is not correct in asserting that its property is free from the easement designated in D.O. 2665 because its predecessor in interest entered the property before D.O. 2665 was issued. The Hansen property had not been patented as of October 16, 1951 and between a mere entryman and the government, the entryman may not be heard to complain when the government reserves an easement. *Shiver v. United States*, 159 U.S. 491, 16 S.Ct. 54 (1895); *Wilber v. United States*, 53 F.2d 717 (C.A.D.C. 1931).

It is unnecessary to decide the effect of the quitclaim deed, its later recordation and the status of land whose owners recorded their deeds or patents earlier than the recordation of the quitclaim deed in light of the above determinations. In addition, it is unnecessary to deal with the doctrine of estoppel as it may apply in this case.

And in order to fully adjudicate the issues presented in this case, it is necessary to comment on the plaintiffs' contentions that *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143 (Alaska 1976) was incorrectly decided. The authorities and argument cited by the plaintiffs are persuasive and the Alaska

Supreme Court is requested to review its decision.

The attorneys for the plaintiffs shall prepare, serve and submit a judgment consistent with this decision.

DATED at Anchorage, Alaska, this 7th day of May, 1980.

VICTOR D. CARLSON
Superior Court Judge

This is to certify that on the 8th day of May, 1980, a copy of the above Memorandum of Decision was mailed to:

Michael W. Price, Esq.
David A. Devine, Esq.
Groh, Eggers, Robinson, Price & Johnson
711 H Street, Suite 600
Anchorage, Alaska 99501

Theodore M. Pease, Jr., Esq.
Burr, Pease & Kurtz, Inc.
810 "N" Street
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Jack McGee, Esq.
Assistant Attorney General
Pouch K
Juneau, Alaska 99811

Municipality of Anchorage
Office of Municipal Attorney
Pouch 6-650
Anchorage, Alaska

Secretary to Judge Carlson

APPENDIX A-2

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

ALASKA LAND TITLE ASSOCIATION, SECURITY TITLE AND TRUST COMPANY OF ALASKA, ALASKA TITLE GUARANTY COMPANY, BROKERS TITLE COMPANY, LAWYERS TITLE INSURANCE AGENCY, INC., SAFECO TITLE AGENCY, INC., FAIRBANKS TITLE AGENCY, KACHEMAK BAY TITLE AGENCY, VALLEY TITLE AND ESCROW COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, TRANSAMERICA TITLE INSURANCE CO., HANSEN ASSOCIATES, an Alaska Limited Partnership, RICHARD L. BOYSEN and JACK WHITE COMPANY,

Plaintiffs,

vs.

STATE OF ALASKA, Department of Transportation and Public Facilities, THEODORE M. PEASE, JR., and CLAIRE V. PEASE, and MUNICIPALITY OF ANCHORAGE,

Defendants.

No. 3AN-79-951 CIV.

JUDGMENT

For the reasons set forth in the Memorandum of Decision prepared and executed by this court on the 7th day of May, 1980, the court hereby awards summary judgment declaring the rights and liabilities of the parties to this lawsuit as follows:

1. The State of Alaska and the Municipality of Anchorage are claiming highway easements for local, feeder, and through roads in excess of easement widths specified in patents issued to Alaska property owners. Said easements are claimed by the State or the Municipality pursuant to authority derived from

Public Land Orders 601, 757, 1613 and Department Order 2665. For the reasons set forth in the Memorandum of Decision dated May 7, 1980, the court hereby awards Plaintiffs a summary judgment against the State of Alaska and the Municipality of Anchorage declaring that the State and the Municipality may not take or utilize property for local, feeder, or through roads in excess of the widths set forth in the patents to the affected properties without just compensation to the owners of the affected properties unless such local, feeder, or through roads were occupied and staked by the State of Alaska or the Municipality of Anchorage prior to April 14, 1966 or were specifically designated in the patents to the affected real properties.

2. The Plaintiffs Hanson Associates and Richard L. Boysen are hereby awarded a summary judgment against the State of Alaska and the Municipality of Anchorage declaring that neither the State nor the Municipality can take any portion of their properties for the through road presently known as the Old Seward Highway which is in excess of the easement widths specified in their respective patents without just compensation.

3. The Defendants Pease are hereby awarded a summary judgment on their cross-claim against the State of Alaska declaring that the State may not take or utilize any portion of the Peases' land for the local road presently known as Rabbit Creek Road which is in excess of the 33-foot easement width specified in the patent to the Peases' property without just compensation. The Peases' property is described as Lot 191, Section 33, Township 12 North, Range 3 West, Seward Meridian, Anchorage Recording District, Third Judicial District, State of Alaska.

4. The Defendants Pease are hereby awarded a summary judgment on their counterclaim against Transamerica Title Insurance Company declaring that Transamerica is liable under its title insurance policy issued to the Peases for the taking by the State of Alaska of a 17-foot strip of land for the local road known as Rabbit Creek Road, which 17-foot strip of land was in excess of 33-foot easement specified in the Peases' patent. However, since the State of Alaska must compensate the Peases for the taking or utilization of said additional 17-foot easement, the Peases shall collect just compensation from the State of Alaska, and upon receipt of said just compensation the Peases shall not be entitled to recover damages from Transamerica Title Insurance Company for said taking of the additional 17-foot strip of property.

5. Plaintiffs are hereby awarded the sum of $_____ for costs and $_____ for a reasonable attorney's fee, for a total judgment of $_____ against the State of Alaska and the Municipality of Anchorage, jointly and severally.

6. The Defendants Pease are hereby awarded the sum of $_____ for costs and $_____ for a reasonable attorney's fee for a total judgment of $_____ against the State of Alaska and the Municipality of Anchorage, jointly and severally.

DONE, at Anchorage, Alaska this 27th day of May, 1980.

_____
VICTOR D. CARLSON
Judge of the Superior Court

I hereby certify that on the 19th day of May, 1980, true and accurate copies of the foregoing were mailed to the following attorneys of record for the above-captioned cause:

Municipality of Anchorage
Office of the Municipal Attorney
Pouch 6-650
437 "E" Street
Anchorage, Alaska

Theodore M. Pease, Jr.
Burr, Pease & Kurtz, Inc.
810 "N" Street
Anchorage, Alaska 99501

Avrum M. Gross, Attorney General
State Capitol, Pouch K
Juneau, Alaska 99811
Attention: Jack McGee
Assistant Attorney General
Department of Law
Transportation Section

Michael W. Price

APPENDIX A-3

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA

Appellant and Cross-Appellee.

vs.

ALASKA LAND TITLE ASSOCIATION, et al.,

Appellees and Cross-Appellants.

Supreme Court Numbers 5407/5408

O R D E R

Superior Court No. 3AN 79-951 Civil

Before: Burke, Chief Justice, Rabinowitz, Matthews and Compton, Justices.

On consideration of the petition for rehearing filed June 6, 1983 by the Alaska Land Title Association, et al., and the [second] petition for rehearing by the State, lodged June 14, 1983 and filed June 23, 1983,

IT IS ORDERED:

1. The petition for rehearing filed by the Alaska Land Title Association is denied.

2. The petition for rehearing filed by the State is granted, and Opinion No. 2681 filed on May 27, 1983, is amended by adding a new footnote 15, referenced to the word "purposes" on page 27, line 19. The new footnote shall read as follows:

> The State and the plaintiffs have agreed that PLO 601 is based on Executive Order 9337 which, "in turn, rests on" 43 U.S.C. §141. We thus have no occasion to consider whether Executive Order 9337 delegated authority to make withdrawals in addition to those authorized by 43 U.S.C. §141.

Succeeding footnotes shall be renumbered.

Entered by direction of the court at Anchorage, Alaska on July 8, 1983.

CLERK OF THE SUPREME COURT

Robert D. Bacon

cc: Justices
Counsel
The Honorable Victor D. Carlson
West Publishing Company
Mead Data Central

APPENDIX B

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

43 U.S.C. §932

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted. R.S. §2477.

43 U.S.C. §1166

Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents. Mar. 3, 1891, c. 559, §1, 26 Stat. 1093; Mar. 3, 1891, c. 561, §8, 26 Stat. 1099.

44 U.S.C. §1507

A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a per-

son who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of the title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficent in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. the publication in the Federal Register of a document creates a rebuttable presumption—

(1) that it was duly issued, prescribed, or promulgated;

(2) that it was filed with the Office of the Federal Register and made available for public inspection at the day and hour stated in the printed notation;

(3) that the copy contained in the Federal Register is a true copy of the original; and

(4) that all requirements of this chapter and the regulations prescribed under it relative to the document have been complied with.

The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.

Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1276.

The Act of January 27, 1905, Pub. L. No. 26 §2, 33 Stat. 616

Sec. 2. That there shall be a board of road commissioners in said district, to be composed of an engineer officer of the United States Army to be detailed and appointed by the Secretary of War, and two other officers of that part of the Army stationed in said district and to be designated by the Secretary of War. The said engineer officer shall, during the term of his said detail and appointment, abide in said district. The said board shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, layout, construct, and maintain wagon roads and pack trails from any point on the navigable waters of said district to any town, mining or other industrial camp or settlement [illegible] between any

such town, camps, or settlements therein, if in their judgment such roads or trails are needed and will be of permanent value for the development of the district; but no such road or trail shall be constructed to any town, camp, or settlement which is wholly transitory or of no substantial value or importance for mining trade, agricultural, or manufacturing purposes. The said board shall prepare maps, plans, and specifications of every road or trail they may locate and lay out, and whenever more than five thousand dollars in the aggregate shall have to be expended on the construction of any road or trail, contract for the work shall be let by them to the lowest responsible bidder, upon sealed bids, after due notice, under rules and regulations to be prescribed by the Secretary of War. The board may reject any bid if they deem the same unreasonably high or if they find that there is a combination among bidders. In case no responsible and reasonable bid can be secured, then the work may be carried on with material and men procured and hired by the board. The engineer officer of the board shall in all cases supervise the work of construction and see that the same is properly performed. As soon as any road or trail laid out by the board has been constructed and completed they shall examine the same and make a full and detailed report of the work done on the same to the Secretary of War, and in such report they shall state whether the road or trail has been completed conformable to the maps, plans, and specifications of the same. It shall be the duty of said board, as far as practicable, to keep in proper repair all roads and trails constructed under their supervision, and the same rules as to the manner in which the work of repair shall be done, whether by contract or otherwise, shall govern as in the case of the original construction of the road or trail. The cost and expenses of laying out, constructing, and repairing such roads and trails shall be paid by the Secretary of the Treasury out of the road and trail portion of said "Alaska fund" upon vouchers approved and certified by said board. The Secretary of the Treasury shall, at the end of each month, send by mail to each of the members of said board a statement of the amount available of said "Alaska fund" for the construction and repair of roads, and trails, and no greater liability for construction or repair shall

at any time be incurred by said board than the money available therefor at that time in said fund. The members of said board shall, in addition to their salaries, be entitled to receive their actual traveling expenses paid or incurred by them in the performance of their duties as members of the board.

48 U.S.C. §322 (1958)

The Secretary of the Interior, or such officer, or officers as may be designated by him, shall upon his own motion or upon petition, locate, lay out, construct, and maintain roads, trails and bridges from any point on the navigable waters of Alaska to and through any town, mining or other industrial camp or settlement, or between and through any such town, camps, or settlements therein, if in his judgment such roads, trails, or bridges are needed and will be of permanent value for the development of Alaska: *Provided,* That within incorporated towns only roads and bridges which are designated by the Secretary of the Interior as part of the through highway system of the Territory of Alaska may be constructed under this section; *Provided further,* That no roads or bridges within incorporated towns shall be maintained under this section. (Jan. 27, 1905, ch. 277, §2, 33 Stat. 616; May 14, 1906, ch. 2458, §2, 34 Stat. 192; June 30, 1932, ch. 320, §1, 47 Stat. 446; July 14, 1955, ch. 359, 69 Stat. 321.)

The Act of June 30, 1932, Pub. L. No. 218 §§1 & 2, 47 Stat. 446

Providing for the transfer of the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alaska to the Department of the Interior, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alska, and upon the Secretary of War, as provided for in the Act of January 27, 1905 (ch. 277, sec. 2, 33 Stat. 616), as amended by the Act of May 14, 1906 (ch. 2458, sec. 2, 34 Stat. 192), and Acts supplemental thereto, and amendatory thereof, are hereby transferred to

the Department of the Interior, and shall hereafter be administered by the Secretary of the Interior, or under his direction by such officer, or officers, as may be designated by him.

Sec. 2. The Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska, heretofore administered by said board of road commissioners under the direction of the Secretary of War; and all appropriations heretofore made, and now available, or that hereafter may be made, for expenditure by said board for meeting the cost of such work in the Territory of Alaska, are hereby transferred to the Secretary of the Interior, to be thereafter administered in accordance with the provisions of this Act; and the said board is directed to turn over to the Secretary of the Interior all equipment, materials, supplies, papers, maps, and documents, or other property utilized in the exercise of such powers, for the use of the said Secretary in the administration of the construction and maintenance of roads, tramways, ferries, bridges, and trails, and other works in the Territory of Alaska heretofore administered by said board.

The Act of July 24, 1947, Pub. L. No. 229 §5 61 Stat. 418 (amending the Act of June 30, 1932, Publ. L. No. 218, 47 Stat. 446)

To amend the Act entitled "An Act providing for the transfer of the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alaska to the Department of the Interior, and for other purposes", approved June 30, 1932.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An Act providing for the transfer of the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alaska to the Department of the Interior, and for other purposes", approved June 30, 1932 (47 Stat. 446), is hereby amended by adding at the end thereof the following new section:

"Sec. 5. In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds

by the United States herefter conveying any lands to which it may have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or any State created out of the Territory of Alaska. When a right-of-way reserved under the provisions of this Act is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops thereon if not harvested by the owner, and for the value of any improvements, or for the cost of removing the .1 to another site, if less than their value."

Approved July 24, 1947.

48 U.S.C. §321a (1958)

The Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska, heretofore administered by said board of road commissioners under the direction of the Secretary of War; and all appropriations heretofore made, and now available, or that hereafter may be made, for expenditure by said board for meeting the cost of such work in the Territory of Alaska, are transferred to the Secretary of Interior, to be thereafter administered in accordance with the provisions of sections 321a-321d of this title; and the said board is directed to turn over to the Secretary of the Interior all equipment, materials, supplies, papers, maps, and documents, or other property utilized in the exercise of such powers, for the use of the said Secretary in the administration of the construction and maintenance of roads, tramways, ferries, bridges, and trails, and other works in the Territory of Alaska, heretofore administered by said board. (June 30, 1932, ch. 320, §2, 47 Stat. 446)

48 U.S.C. §321d (1958)

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

have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or of any State created out of the Territory of Alaska. When a right-of-way reserved under the provisions of sections 321a-321d of this title is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops thereon if not harvested by the owner, and for the value of any improvements, or for the costs of removing them to another site, if less than their value. (June 30, 1932, ch. 320, §5, as added July 24, 1947, ch. 313, 61 Stat. 418.)

Federal-Aid Highway Act of 1970 §138(b) Pub. L. No. 91-605, 64 Stat. 1713 (1970)

(b) Any right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures reserved by section 321(d) of title 48, United States Code (61 Stat. 418, 1947), not utilized by the United States or by the State or Territory of Alaska prior to the date of enactment hereof, shall be and hereby is vacated and relinquished by the United States to the end and intent that such reservations shall merge with the fee and be forever extinguished.

43 C.F.R. §101.3 (1949)

Notation of Rights-of-Way

§101.3 *Notations to be made on entry papers and notice of allowance.* (a) In order that all persons making entry of public lands which are affected by rights-of-way may have actual notice thereof, the manager is directed to note upon the original entry papers and upon the notice of allowance of the application (Form 4-279) issued to the entryman, a reference to such right-of-way.

(b) He will make no such notation upon the final entry papers unless the right-of-way has been granted under an act of Congress which does not in terms protect the grantee

against subsequent adverse rights, in which case he will place the same notation as to right-of-way upon the final entry papers, so that the reservation of the right-of-way will be made in the patent, when issued (23 L.D. 67).

[Reg. Nov. 3, 1909, as amended by Reg. Jan 19, 1910]

Public Land Order 601

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Executive Order No. 9145 of April 23, 1942, reserving public lands for the use of the Alaska Road Commission in connection with the construction, operation, and maintenance of the Palmer-Richardson Highway (now known as the Glenn Highway), is hereby revoked.

Public Land Order No. 386 of July 31, 1947, is hereby revoked so far as it relates to the withdrawal, for highway purposes, of the following-described lands:

(a) A strip of land 600 feet wide, 300 feet on each side of the centerline of the Alaska Highway (formerly the Canadian Alaskan Military Highway) as constructed from the Alaska-Yukon Territory boundary to its junction with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 600 feet wide, 300 feet on each side of the center line of the Gulkana-Slana-Tok Road as constructed from Tok Junction at about Mile 1319 on the Alaska Highway to the junction with the Richardson Highway near Gulkana, Alaska.

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of all other through roads, 100 feet on each side of the center line on all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws, and reserved for highway purposes:

Through Roads

Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.

Feeder Roads

Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok Eagle Road, Ruby-Long-Poorman Road, Nome-Solomon Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.

Local Roads

All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

With respect to the lands released by the revocations made by this order and not rewithdrawn by it, this order shall become effective at 10:00 a.m. on the 35th day after the date hereof. At that time, such released lands, all of which are unsurveyed, shall, subject to valid existing rights, be opened to settlement under the homestead laws and the homesite act of May 26, 1934, 48 Stat. 809 (48 U.S.C. 461), only, and to that form of appropriation only by qualified veterans of World War II and other qualified persons entitled to preference under the act of September 27, 1944, 58 Stat. 747, as amended (43 U.S.C. 279-284). Commencing at 10:00 a.m. on the 126th day after the date of this order, any of such lands not settled upon by veterans shall become subject to settlement and other forms of appropriations by the public generally in accordance with appropriate laws and regulations.

Public Land Order 757

Amendment of Public Land Order No. 601 of August 10, 1949, reserving public lands for highway purposes.

By virtue of the authority vested in the President and pursuant to Executive Order 9337 of April 24, 1943, it is ordered as follows:

The sixth paragraph of Public Land Order No. 601 of August 10, 1949, reserving public lands for highway purposes,

commencing with the words, "Subject to valid existing rights", is hereby amended to read as follows:

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws, and reserved for highway purposes.

Easements having been established on the lands released by this order, such lands are not open to appropriation under the public land laws except as a part of a legal subdivision, if surveyed, or an adjacent area, if unsurveyed, and subject to the pertinent easement.

Public Land Order 1613

Revoking Public Land Order No. 601 of August 10, 1949 which reserved public lands for highway purposes, and partially revoking Public Land Order No. 386 of July 31, 1947.

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, and the act of August 1, 1956 (70 Stat. 898) it is ordered as follows:

1. Public Land Order No. 601 of August 10, 1949, as modified by Public Land Order No. 757 of October 16, 1951, reserving for highway purposes the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof, within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway, is hereby revoked.

2. Public Land Order No. 386 of July 31, 1947, so far as it withdrew the following-described lands, [illegible] items

(a) and (b) in said order, under the jurisdiction of the Secretary of War for right-of-way purposes for a telephone line and an oil pipeline with appurtenances, is hereby revoked:

(a) A strip of land 50 feet wide, 25 feet on each side of a telephone line as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson highway near Big Delta, Alaska.

(b) A strip of land 20 feet wide, 10 feet on each side of a pipeline as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

3. An easement for highway purposes, including appurtenant protective, scenic, and service areas, over and across the lands described in paragraph 1 of this order, extending 150 feet on each side of the center line of the highways mentioned therein, is hereby established.

4. An easement for telephone line purposes in, over, and across the lands described in paragraph 2(a) of this order, extending 25 feet on each side of the telephone line referred to in that paragraph, and an easement for pipeline purposes in, under, over, and across the lands described in paragraph 2(b) of this order, extending 10 feet on each side of the pipeline referred to in that paragraph, are hereby established, together with the right of ingress and egress to all sections of the above easements on and across the lands hereby released from withdrawal.

5. The easements established under paragraphs 3 and 4 of this order shall extend across both surveyed and unsurveyed public lands described in paragraphs 1 and 2 of this order for the specified distance on each side of the center line of the highways, telephone line and pipeline, as those center lines are definitely located as of the date of this order.

6. The lands within the easements established by paragraphs 3 and 4 of this order shall not be occupied or used for other than the highways, telegraph line and pipeline referred to in paragraphs 1 and 2 of this order except with the

permission of the Secretary of the Interior or his delegate as provided by section 3 of the act of August 1, 1956 (70 Stat. 898), provided: that if the lands crossed by such easements are under the jurisdiction of a Federal department or agency, other than the Department of the Interior, or of a Territory, State or other Government subdivision or agency, such permission may be granted only with the consent of such department, agency, or other governmental unit.

7. The lands released from withdrawal by paragraphs 1 and 2 of this order, which at the date of this order, adjoin lands in private ownership, shall be offered for sale at not less than their appraised value, as determined by the authorized officer of the Bureau of Land Management, and pursuant to section 2 of the act of August 1, 1956, supra. Owners of such private lands shall have a preference right to purchase at the appraised value so much of the released lands adjoining their private property as the authorized officer of the Bureau of Land Management deems equitable, provided, that ordinarily, owners of private lands adjoining the lands described in paragraph 1 of this order will have a preference right to purchase released lands adjoining their property, only up to the center line of the highways located therein. Preference right claimants may make application for purchase of released lands at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph not claimed by and sold to preference claimants may be sold at public auction at not less than their appraised value by an authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the office in the Territory in which their title to their private lands is recorded. Such notice shall give the preference claimant at least 60 days in which to make application to exercise his preference right; and if the application is not filed within the time specified, the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to pay for the lands within the time period specified by

the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

8. The lands released from withdrawal by paragraphs 1 and 2 of this order, which at the date of this order, adjoin lands in valid unperfected entries, locations, or settlement claims, shall be subject to inclusion in such entries, locations and claims, notwithstanding any statutory limitations upon the area which may be included therein. For the purposes of this paragraph, entries, locations, and claims include, but are not limited to, certificates of purchase under the Alaska Public Sales Act (63 Stat. 679; 48 U.S.C. 364a-e) and leases with option to purchase under the Small Tract Act (52 Stat. 609; 43 U.S.C. 682a) as amended. Holders of such entries, locations and claims to the lands, if they have not gone to patent, shall have a preference right to amend them to include so much of the released lands adjoining their property as the authorized officer deems equitable, provided, that ordinarily such holders of property adjoining the lands described in paragraph 1 of this order will have the right to include released lands adjoining such property only up to the center line of the highways located therein. Allowances of such amendments will be conditional upon the payment of such fees and commissions as may be provided for in the regulations governing such entries, locations, and claims together with the payment of any purchase price and cost of survey of the land which may be established by the law or regulations governing such entries, locations and claims, or which may be consistent with the terms of the sale under which the adjoining land is held. Preference right claimants may make application to amend their entries, locations, and claims at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph, not claimed by and awarded to preference claimants, may be sold at public auction at not less than their appraised value by the authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the appropriate land office, or if the land is patented, in the Territory in which ti-

tle to their private land is recorded. Such notice shall give the claimant at least 60 days in which to make application to exercise his preference right, and if the application is not filed within the time specified the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to make any required payments within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

9(a) Any tract released by Paragraph 1 or 2 of this order from the withdrawals made by Public Land Orders Nos. 601, as modified, and 386, which remains unsold after being offered for sale under Paragraph 7 or 8 of this order, shall remain open to offers to purchase under Section 2 of the act of August 1, 1956, supra, at the appraised value, but it shall be within the discretion of the Secretary of the Interior or his delegate as to whether such an offer shall be accepted.

(b) Any tract released by Paragraph 1 and 2 of this order from the withdrawals made by Public Land Orders Nos. 601, as modified, and 386, which on the date hereof does not adjoin privately-owned land or land covered by an unpatented claim or entry is hereby opened, subject to the provisions of Paragraph 6 hereof, if the tract is not otherwise withdrawn, to settlement claim, application, selection or location under any applicable public land law. Such a tract shall not be disposed of as a tract or unit separate and distinct from adjoining public lands outside of the area released by this order, but for disposal purposes, and without losing its identity, if it is already surveyed, it shall be treated as having merged into the mass of adjoining public lands, subject, however, to the easement so far as it applies to such lands.

(c) Because the act of August 1, 1956 (70 Stat. 896; 48 U.S.C. 420-420c) is an act of special application, which authorizes the Secretary of the Interior to make disposals of lands included in revocations such as made by this order, under such laws as may be specified by him, the preference-right provisions of the Veterans Preference Act of 1944 (58 Stat. 747; 43 U.S.C. 279-284) as amended, and of the Alaska Mental

Health Enabling Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b) will not apply to this order.

10. All disposals of lands included in the revocations made by this order which are under the jurisdiction of a Federal department or agency other than the Department of the Interior may be made only with the consent of such department or agency. All lands disposed of under the provisions of this order shall be subject to the easements established by this order.

11. The boundaries of all withdrawals and restorations which on the date of this order adjoin the highway easements created by this order are hereby extended to the center line of the highway easements which they adjoin. The withdrawal made by this paragraph shall include, but not be limited to the withdrawals made for Air Navigation Site No. 7 of July 13, 1964, and by Public Land Orders No. 386 of July 31, 1947, No. 622 of December 15, 1949, No. 803 of February 27, 1952, No. 975 of June 18, 1954, No. 1037 of December 16, 1954, No. 1059 of January 21, 1955, No. 1129 of April 15, 1955, No. 1179 of June 29, 1955, and No. 1181 of June 20, 1955.

Department Order 2665

Rights-of-Way for Highways in Alaska

Section 1. Purpose. (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a).

Section 2. Width of public highways. (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and

Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.

(2) For feeder roads: Abbert Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram Road, Steese Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasilla Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Slana to Nebesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Eureka Road, North Park Boundary to Kantishna Road, Paxson to McKinley Park Road, Sterling Landing to Ophir Road, Iditarod to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 100 feet on each side of the center line thereof.

(3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

Section 3. Establishment of rights-of-way or easements. (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601, of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all forms of appropriation under the public land laws, including the mining and the mineral leasing laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the

route of the new construction specifying the type and width of the roads.

Section 4. Road maps to be filed in proper Land Office. Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public.

Right-of-Way Act of 1966

Section 1. Purpose. This Act is intended to alleviate the economic hardship and physical and mental distress occasioned by the taking of land, by the State of Alaska, for which no compensation is paid to the persons holding title to the land. This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions to many citizens of the State of Alaska, and which, if not curtailed by law, will continue to adversely affect citizens of this state. Those persons who hold title to land under a deed or patent which contains a reservation to the state by virtue of the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, are subject to the hazard of having the State of Alaska take their property without compensation because all patents or deeds containing the reservation required by that federal Act reserve to the United States, or the state created out of the Territory of Alaska, a right-of-way for roads, roadways, tramways, trails, bridges, and appurtenant structures either constructed or to be constructed. Except for this reservation the State of Alaska, under the Alaska constitution and the constitution of the United States, would be required to pay just compensation for any land taken for a right-of-way. It is declared to be the purpose of this Act to place persons with land so encumbered on a basis of equality with all other property holders in the State of Alaska, thereby preventing the taking of property without payment of just compensation as provided by law, and in the manner provided by law.

Section 2. Taking of Property Under Reservation Void. After the effective date of this Act, no agency of the state may

take privately-owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch. 320 sec. 5, as added July 24, 1947, ch. 313, 61 Stat. 418, and taking of property after the effective date of this Act by an election or exercise of a reservation to the state under that federal Act is void.

Section 3. Prospective Application. This Act shall not be construed to divest the state of, or to require compensation by the state for, any right-of-way or other interest in real property which was taken by the state, before the effective date of this Act, by the election or exercise of its right to take property through a reservation acquired under the Act of June 30, 1932, ch. 320, sec. 5, as added July 24, 1947, ch. 313 61 Stat. 418.

Section 4. Short Title. This Act may be cited as the Right-of-Way Act of 1966.

Section 5. Effective Date. This Act takes effect on the day after its passage and approval or on the day it becomes law without such approval.

APPENDIX C

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Anchorage, Alaska

October 10, 1950

Executive Order 601, August 10, 1949

Executive Order 601 of August 10, 1949, established rights of way along highways in the Territory of Alaska by means of withdrawing from all forms of entry strips a specified width on each side of each road.

The width of the right of way along the Alaska Highway is 600 feet. On all other through roads in Alaska it is 300 feet, on feeder roads 200 feet, and on local roads 100 feet.

Although Region VII, Bureau of Land Management, had attempted to have easements created rather than withdrawals, before the actual withdrawal order was issued, we had not even then begun to comprehend to what extent the Executive Order would complicate the functions of the Bureau of Land Management. The Bureau of Land Management gradually had begun to pick up momentum in the processing of various types of applications following the delegation of authority to the field. Depending upon our not being completely hamstrung by lack of funds, we could foresee the time when we could become reasonably current. And then it happened. Executive Order 601 was promulgated.

First, let me point out to you, there are no withdrawals along the railroad track of the Alaska Railroad. That is to say that the right-of-way itself is an easement rather than a strip of withdrawn land. Patents are issued to homesteaders which do not interfere with the operations of the Alaska Railroad but yet include the land upon which the tracks are built. If, in the future, a portion of the track is abandoned or the railroad decides to adopt another course, the land upon which the track was first located automatically becomes the property of the individual in whose patent or deed it was described. There are

no complications about a strip of land running up through the country owned by nobody.

Because of the existence of the withdrawal along roads, it has ben ruled that no entry filed or initiated after August 10, 1949, may go across the road, unless it is in the category of a local road with a right-of-way 100 feet wide. It has not been possible for the Alaska Road Commission to officially survey all of their roads and tie them in exactly with the existing corners of the rectangular net of surveys. Until these roads are surveyed, it will not be possible in some cases to determine whether or not the road crosses a given homestead entry.

Before any patent or final certificate can be issued to homesteaders who are restricted to only one side of the road, it will be necessary to survey many roads and all of the homesteads affected by roads running through surveyed land. This adds a tremendous job and workload to our Division of Engineering. In addition, it adds a tremendous expense to the taxpayers.

There is accumulating in the Land Offices files of applications by veterans who have complied with the regulations and who now want to obtain patent. These veterans are required to live on the land seven months and are not required to cultivate. Therefore, they may make application to obtain patent or, technically, to make final proof at the end of their seven months residence period. But these papers cannot be processed because withdrawal strips run through the land. The veteran must await a survey, which may be forthcoming this field season and may be forthcoming next field season.

After the survey has been made on the ground, it is necessary for the field notes to be processed, the plats to be produced from the drafting boards, the completed plat to be sent to Washington, the plat to be approved in the Washington office, and then returned to the proper Land Office for official filing. It is optimistic to assume that the plat will be finally filed in the proper Land Office within one year of the survey on the ground. During all of this time, the veteran has been unable to publish his final proof because his land cannot be

adequately described in the notice of publication.

The Sterling Highway, going down through the Kenai Peninsula gives us a specific project to discuss. The exact location of that road was not known to the Anchorage Land Office and therefore many entries were allowed which subsequently proved to straddle the road. In the meantime the entrymen have cultivated land on one side of the road, and have built their improvements on the other side of the road. Under the present rules and regulations, each entryman must elect which side of the road he is to take, and must relinquish or give up the land on the other side of the road. We have specific cases in which the road has cut across, leaving five, six or ten acres on one side of the road, and it is here that the entryman has built his house. He has cultivated and placed his fields on the other side of the road. As the saying goes, he is between the devil and the deep blue sea, and we can be of no assistance.

Then assuming that the entryman selects the portion of his entry which includes only ten acres or less. Under the provision of an act of 1947, the Alaska Road Commission still has the right to build a road through any homestead entry and therefore, technically, the Commission could put a road through the small acreage that has been left to the entryman.

Here are some specific cases:

Anchorage 014800, Richard Teller. There are 54 acres in the whole application, which comprises two lots, one north of the other. The Sterling Highway goes through the two lots, from north to south, but not through the middle, rather toward the eastern edge, about two-thirds of the way across. Teller has built a small road and has planned to build his house on the side of the road which would force him to choose the narrow strip. Originally his entry extended to Cook Inlet, and therefore he had water frontage. Under the new regulations he must relinquish either the area where he planned to build his house, and construct a small road, and give up the portion fronting the water, or he must select the portion fronting the water and give up the area where he planned to build his house and which evidently has the best house site.

There is nothing in the regulations which require us to investigate every homestead. We have an example of a case where the homesteader had appeared to be complying with the regulations in good order. He was a veteran, and therefore was not required to cultivate. His name is Clarence E. Herman, Anchorage 014574. There is nothing in the records to indicate we should make an investigation of his homestead, therefore we went through the procedures which is called "clear listing." That is, the Division of Land Planning indicated to the Land Office that a final certificate could be issued without further investigation or negotiating of any type. However, during a recent trip to that vicinity, a field examiner was making routine investigations of other homesteads, and was incidentally checking the location of the road as he went along. He discovered that the road goes through the homestead entry of Clarence E. Herman, therefore, we must backtrack in about everything that we have done. The Notice of Allowance of Herman must be vacated. Then we will have to have the road surveyed, and then await preparation of a supplemental plat. When the supplemental plat has been processed and finally filed in the Land Office, we must require this homesteader to publish again, as he already has published at the time he submitted his final proof. This homesteader had also bumped up against the regulation which affected Department of Interior employees as he was an employee of the Alaska Road Commission, but happily that restriction has now been removed through action of the Secretary of Interior.

You will recall that the homestead regulations state that each qualified individual may obtain land under the homestead laws up to a total of 160 acres. He may take that in one entry or several entries. If he homesteads in one part of Alaska and goes to another part of Alaska, he may homestead again, so long as he has not taken up an area exceeding 160 acres. If a homesteader has less than 160 acres and some available land becomes public domain adjacent to his original holdings, under the regulations he can acquire this additional land if it does not run his total over 160 acres. He is not required to live on the additional land if it is contiguous to his original entry. As a withdrawal along a highway causes a piece of land on one

side of the road to be not contiguous to a piece of land on the other side of the road, an entryman who had 40 acres would have to make proof and complete his requirements on one side of the road, then go across the road and build a house on that side, or move his house across in order to take land only 200 feet away from his original entry. As the regulations do not prevent a person from taking lands on both sides of the road under two entries, it merely complicates the matter by providing additional filings that must be placed on record by an entryman in order to get across the road if the land is still available.

The regulations provide that an entryman may obtain 160 acres, so if the land is available, the entryman may stretch his entry far along one side of the road until he has obtained 160 acres. There is a serious question as to whether it is more undesirable to have one entry straddle the road than it is to have one entry string along one side of the road for a mile and a half or two miles.

Then another complication enters into a different phase of the work. It appears that the withdrawals are in effect through the Matanuska Valley as they are elsewhere. We have on file several applications to purchase land. Two of them, Anchorage 016216 and 016304, filed by Gerald Brunner and Floyd Rock respectively, cover only five acres each. We are assuming that in this case the proposed sale may go on both sides of the road, but in order to know exactly how many acres are in the tract after the right of way has been deducted, it is necessary to survey the road to know just where it enters and leaves each tract, and then compute the acreage. In the meantime, the sales are not consummated.

We have many thousands of acres of unsurveyed lands through which roads are now built or will be built. There are claims which were staked out and are legally filed in the U.S. Commissioners' offices before August 10, 1949, the date on which 601 was promulgated. These settlement claims, therefore, have precedence over the order. However, our surveying crews are not investigators, and as they survey down through the country, they are not aware of which claims

antedate Executive Order 601 and which do not. Therefore, to be on the safe side, they must prepare their plats with two rights of way, that which was in effect before Executive Order 601 and that which was in effect after Executive Order 601 was promulgated. It may be that there was a legal claim on the land before August 10, 1949, but the claimant decides to go back to the states and give it up. The next person who settles there must stay on one side or the other of the road, and the wider right of way becomes effective. Let us assume that the claimant who was there before August 10, 1949, decides voluntarily that he wants to be on only on side of the road, and extend his claim further back to obtain other desirable lands. In effect, therefore, he gives up his claim to the other side of the road, and immediately the wide right of way becomes effective on that side, but the narrow right of way stays in effect on the side which the claimant retains. In no one given spot will anybody be able to determine what width the right of way is without referring to official plans in the Land Offices.

Let us assume another situation. A claimant was situated within 50 feet of the center line of a through road before Executive Order 601 was promulgated. For some reason he built his house within 50 feet of the road. Then he decides that he will have to go back to the states, and sells his house and gives up his claim to another individual. This sale we will assume was made after August 10, 1949. Immediately the house is in trespass, as it is located within the right of way, and the second claimant must move it back in order to get it on his homestead claim, which starts 100 feet from the center line of the road, if the road is a feeder road, and 150 feet from the center line of the road if it is a through highway. If this situation should develop along the Alaska Highway, of course, the man would have to move the house back 300 feet from the center line of the road.

Of course the Road Commission will straighten out many of the kinks in its highway system. Whenever it does that, it leaves strips of no man's land, which are withdrawn from entry. If these strips are restored to entry, the adjoining land owner does not have preference, but veterans of World War

II have preference to obtain these strips of land. We have been advised that the withdrawal becomes effective when the Road Commission sets its survey stakes through the public domain. In some cases I would imagine that the Alaska Road Commission officials change their minds and locate the road elsewhere than where it was first surveyed. Then we may have a very real difference of opinion as to where withdrawals actually do exist.

Previously in this memorandum, I mentioned that additional expense results from the requirement that we survey the roads. Each session it would be necessary to hire two draftsmen to keep up with the work of a field crew and to do a little extra work otherwise. It would take this one survey crew working indefinitely as we do not know how many roads are located within the rectangular surveys at present, or do we know how many roads are to be built by the Alaska Road Commission in the future. We are unable to estimate how many survey crews it actually would take to keep current with this work, but it is conservatively estimated that it would cost at least $31,000 per crew each season.

If the road rights of way were easements instead of withdrawals, it would not be necessary for us to delay processing of the applications for final proof by veterans or others. It would not again cause us to build up a backlog which will extend for 2, 3 and sometime 5 years before the surveys are all completed. The Alaska Road Commission could change their rights of way under the act of July 1947, without there being any question as to the ownership of the land. The entryman would still own the land, and the Alaska Road Commission would have an easement across it. There would not be additional expense to the taxpayers of hiring additional survey crews, and there would not be the delay in the survey program that will result in our putting experienced men on the road survey work instead of on other work that requires attention.

The situation is very grave. The results of the promulgation of Executive Order 601 were not foreseen, but now that we are operating with it in effect, we can see it's failing, and we should act accordingly.

Exhibit A

THE SUPREME COURT OF THE STATE OF ALASKA

RESOURCE INVESTMENTS, a joint venture composed of HAROLD J. MOENING, DAVID G. FRITZ, BRUCE G. PURCELL, ALBERT A. KELLY and HARVEY P. PITTELKO, Appellants, v. STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Appellee.	File No. 7229 O P I N I O N [No. 2853 - July 27, 1984]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karl S. Johnstone, Judge.

Appearances: Mary K. Hughes and Steven S. Tervooren, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for Appellant. Bruce Tennant, Assistant Attorney General, Anchorage, Norman C. Gorsuch, Attorney General, Juneau, and Eugene F. Wiles and Marc D. Bond, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, for Appellee.

Before: Burke, Chief Justice, Rabinowitz, Matthews, and Compton, Justices, [Moore, Justice, not participating.]

MATTHEWS, Justice.

This appeal follows the trial of an eminent domain action in which the State acquired a thirty acre parcel in Anchorage owned by Resource Investments. The land is situated next to the Old Seward Highway. Prior to trial the superior court granted the State's motion for summary judgment, holding that the State already had a 100 foot wide right-of-way along Old Seward Highway. This removed approximately two acres from the parcel. Resource Investments appeals this decision, contending that the State only had a thirty-three foot right-of-way.

Following a jury trial on the issue of just compensation, the superior court entered judgment on the verdict for $5,061,040, an amount more than 10% larger than the total amount deposited by the State, thus entitling Resource Investments to an award of attorney's fees under Civil Rule 72(k). The court awarded Resource Investments $115,000 for attorney's fees and $76,877.13 for costs. Resource Investments has appealed these amounts claiming that the superior court erred in not awarding actual costs of $149,918.49 and attorney's fees of $357,720.14.

I. THE RIGHT-OF-WAY ISSUE

The property in question was acquired by Resource Investments in 1966 from John Schandelmeier, the original patentee. Schandelmeier filed his application for homestead entry on March 27, 1946 and continuously lived on the property thereafter. He received the patent to his land on June 6, 1951

from the Bureau of Land Management of the United States Department of the Interior. On August 10, 1949 the Secretary of the Interior issued Public Land Order (PLO) 601, which, among other things, withdrew for highway purposes 100 feet on each side of the center line of the Old Seward Highway. The withdrawal was, however, subject to "valid existing rights." The question presented is whether Schandelmeier's pre-patent homestead entry was a valid existing right under the terms of PLO 601. If it was then PLO 601 did not effect a withdrawal from the property.

The landowner's situation in the present case is virtually identical to that of Hansen Associates in State v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983) (ALTA). There the original patentee had made his homestead entry prior to the issuance of PLO 601 but did not receive his patent until after PLO 601 became effective. We rejected the State's contention that it owned a 100 foot right-of-way, holding that a homestead entry was a "valid existing right" that was expressly excepted from withdrawal by PLO 601's own terms. Id. at 724. The State asks us to reconsider this decision.

In ALTA all parties, including the State, agreed that PLO 601 was based on Executive Order 9337[1] which in turn was

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1. Executive Order 9337 provides in relevant part:

(Footnote Continued)

based on the Pickett Act, 43 U.S.C. § 141 et seq. Id. at 724. In the present case, the State agrees that PLO 601 is based on Executive Order 9337, but argues that the Executive Order is based in part on the Pickett Act and in part on the inherent authority of the President of the United States to withdraw public lands for public purposes. The significance of this distinction is that while the Pickett Act withdrawals may not include lands embraced in any lawful homestead entry, no such limitation applies to withdrawals made under the inherent authority of the President.

Although the State may well be correct that Executive Order 9337 is based on the President's inherent authority as well

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(Footnote Continued)

> AUTHORIZING THE SECRETARY OF THE INTERIOR TO WITHDRAW AND RESERVE LANDS OF THE PUBLIC DOMAIN AND OTHER LANDS OWNED BY OR CONTROLLED BY THE UNITED STATES.
>
> By virtue of the authority vested in me by the Act of June 25, 1910, ch. 421, 36 Stat. 847 [Pickett Act], and as President of the United States, it is ordered as follows:
>
> Sec. 1. The Secretary of the Interior is hereby authorized to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States to the same extent that such lands might be withdrawn or reserved by the President, and also, to the same extent, to modify or revoke withdrawals or reservations of such lands. . . .

(Emphasis added).

as on the Pickett Act, that fact is not determinative of the meaning of the phrase "valid existing rights" in PLO 601. In Stockley v. United States, 260 U.S. 532, 544, 67 L.Ed. 390, 395 (1923), the United States Supreme Court recognized that an unperfected homestead entry was within an excepted category of "existing valid claims" excluded from the terms of a government withdrawal order. The court stated:

> [T]here is excepted from the operation of the order "existing valid claims." Obviously this means something less than a vested right, such as would follow from a complete final entry, since such a right would require no exception to insure its preservation. The purpose of the exception, evidently, was to save from the operation of the order claims which had been lawfully initiated, and which, upon full compliance with the Land Laws, would ripen into a title.

For the same reason, it seems apparent that the Secretary of the Interior intended to except pre-patent homestead entries from the operation of PLO 601.

We conclude that Schandelmeier's entry was a valid existing right, therefore no part of his homestead was affected by PLO 601. Accordingly, we REVERSE the trial court's grant of summary judgment which held that the State owned a 100 foot right-of-way along the Old Seward Highway and REMAND for a determination of just compensation as to the seventy-seven foot strip of land extending beyond the thirty-three foot right-of-way conceded by Resource Investments.

II. COSTS AND ATTORNEY'S FEES

The award of costs and attorney's fees in eminent domain cases is governed by Civil Rule 72(k).[2] Resource Investments is entitled to an award of costs and attorney's fees under Rule 72(k)(3) because the award it obtained was more than ten percent larger than the amount deposited by the State.[3] Full attorney's fees are the norm under Civil Rule 72(k), but those

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2. Rule 72(k) provides:

> Costs and attorney's fees incurred by the defendant shall not be assessed against the plaintiff, unless:
>
> (1) the taking of the property is denied; or
> (2) the plaintiff appeals from the allowance of the master and the defendant does not appeal; or
> (3) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant; or
> (4) the action was dismissed under the provisions of paragraph (i) of this rule; or
> (5) allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the owner.
>
> Attorney's fees allowed under this paragraph shall be commensurate with the time committed by the attorney to the case throughout the entire proceedings.

3. The jury awarded $5,061,040.00. The State had deposited $3,510,000.00.

fees must be both reasonable and necessarily incurred to achieve just and adequate compensation for the owner. Triangle, Inc. v. State, 632 P.2d 965, 970 (Alaska 1981). We will not disturb a trial court's decision to award less than the property owner's actual costs or fees unless it appears that the court's decision is an abuse of discretion. Badger Construction v. State, 628 P.2d 921, 924 (Alaska 1981). When a trial court decides not to award full attorney's fees and costs it must state its reasons. Triangle, 632 P.2d at 970.

A. Attorney's Fees.

In the present case, Resource Investments claimed actual attorney's fees of $357,720.14. The superior court determined that $115,000.00 were reasonable and necessarily incurred. In making this determination the trial judge issued a five page written order which explained why he did not accept the full fees requested. The full text of the order is set forth in the Appendix. The most important of the trial judge's reasons, as we view his order, are as follows: (1) there was an unnecessary utilization of two and sometimes three attorneys at trial and pre-trial proceedings at which the presence of one attorney would have sufficed; (2) the time spent by the property owner's attorneys in preparing for trial was excessive in view of the straightforward nature of the issues to be tried; (3) the time spent in resolving the question concerning the taking of the easement was excessive and not reasonably related to the

complexity of the issue; (4) the claim of $17,887.65 in attorney's fees for preparing motions for costs and attorney's fees was not only excessive in itself but suggested excessiveness as to all of the fees requested; and (5) attorney Richards' billings for travel time to and from Alaska were unreasonable and his hourly rate of $175.00 was also unreasonable.

We regard these reasons as an adequate explanation for the court's determination and we are unable to say that the determination was an abuse of discretion. We suggest, however, that the trial court review its award on remand in connection with the third reason listed above, namely that excessive time was spent concerning the question of the taking of the easement. In light of the determination on the merits on that question reflected in today's opinion, the trial court may find that additional fees are warranted.

B. Costs

Resource Investments claimed costs of $149,908.49. The clerk taxed costs of $19,846.00. The clerk did not consider costs for expert witnesses, but deferred to the court concerning that subject. The court allowed costs of $76,877.13 including the costs taxed by the clerk.

On appeal Resource Investments claims that the court erred in failing to award costs in thirteen categories:[4]

(1)	Airfares:		
	6/18/82	Tervooren air fare for Tollefson deposition	$ 426.00
	7/21-30/82	Richards air fare for trial	714.94
		Subtotal	$1,140.94
(2)	Actual expenses for attending depositions and trial:		$3,308.75
	The clerk allowed $80.00 per diem in lieu of actual expense amounting to:		1,509.78
		Subtotal	$1,798.97
(3)	Meeting expenses, travel of attorneys, clients and witnesses to attend periodic meetings. Appellants do not state in their briefs the total amount of this claim but refer us to Appendix A of their brief which contains eight items totaling:		$11,182.14
	Some of these items are plainly duplications of items in other categories. We exclude the expert expenses for 9/2-3/80 and 8/21-25/80 and the attorney expenses relating to 6/17-18/82, 6/18/82 and 7/21-30/82 as those categories are substantially duplicated by other categories. The excluded categories total:		3,234.60
	Thus, for purposes of determining what the appellants claim is, we consider this category to amount to a claim of		$ 7,947.54

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4. Resource Investments claims that the court erred in failing to award its actual costs of $149,908.49. It then discusses in general fashion numerous costs that were reduced or not mentioned by the superior court. We have itemized its claim into thirteen categories for ease of discussion. Cost items not discussed in its brief were deemed abandoned.

(4)	Actual copying costs	$4,277.40
	Amount allowed by clerk	3,638.82
	Amount of claim	$ 638.58
(5)	Lexis search costs	$ 44.00
(6)	Telecopy, mileage and parking fees:	$ 108.75
(7)	DOWL Engineering surveying and drafting work to verify the size of the takings	
	3/13/81	$1,528.75
	5/26/81	385.26
	Subtotal	$1,914.01
(8)	Soils drilling and testing:	$2,345.00
(9)	Appraisal consultations	
	Norene Realty	$ 75.00
	Alaska Valuation Services	960.00
	Subtotal	$1,035.00
(10)	Disallowance of out of $7,050.00 claimed in costs attributable to Dr. Twelker - soils expert	$3,020.00
(11)	Disallowance of costs with respect to Clifford Moles - architect	$10,795.50
(12)	Reduction in fees and costs of John Day - appraiser.	
	Claimed:	$21,660.63
	Allowed:	14,850.63
	Amount claimed on appeal	$ 6,810.00
(13)	Ronald Hoefer - appraiser.	
	Total claimed:	$61,008.17
	Allowed:	35,782.92
	Balance claimed on appeal	$25,225.25
	TOTAL COSTS CLAIMED ON APPEAL	$62,823.54

The court gave no reason for disallowing items 1, 3, and 5 through 9 and for reducing items 2 and 4. As to these

items we remand so that the court may express its reasons for its action.[5]

The court failed to allow costs for the June 16, 1982 trip to Anchorage of Resource Investments' soils expert, Dr. Twelker. This trip was for the purpose of on-site field work and appears to have been reasonably necessary. On remand, costs should be allowed for this trip.

The court disallowed all costs of Clifford Moles, the defendants' expert architect, stating he did not testify at trial. The court subsequently corrected this factual misstatement, but failed to award any of Mr. Moles' costs to defendants. This omission must be corrected as Mr. Moles' testimony was found by the court to have been necessary.

The trial court disallowed a trip to Anchorage of Resource Investments' appraiser, John Day, begun on November 9, 1981. This trip was taken for appraisal field work and appears to have been reasonably necessary. On remand, the court should award costs for this trip.

The trial court disallowed eleven of the fourteen trips taken by Resource Investments' appraiser Roland Hoefer. The court did not abuse its discretion in concluding that not all of the trips were necessary. However, we believe that the court

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5. The court is also authorized to award any of these items if it finds that they were improperly omitted or reduced.

should more fully explain why the following trips taken by Mr. Hoefer should not be allowed: 9/2/80, trip to Anchorage to inspect property; 4/10/81, trip to Anchorage to attend Master's hearing; 3/9/82, trip to Anchorage to continue deposition; and 3/26/82, trip to Anchorage to continue deposition. The court is authorized to award costs for these trips if it determines on remand that the trips meet the reasonable and necessary standard.

REVERSED and REMANDED for action consistent with this opinion.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Plaintiff, vs. 29.513 Acres, more or less; RESOURCE INVESTMENTS, a joint venture, et al., Defendants.	Case No. 3AN-80-7419 Civil Minnesota Drive Extension Project No. OF-031-2(47) Parcel Nos. A-104 and A-104B

ORDER (ATTORNEYS' FEES)

The defendant landowner moved for attorneys' fees in the amount of $339,832.25 through August 31, 1982. Since that date, the landowner has requested additional attorneys' fees for work apparently rendered by Hughes, Thorsness, Gantz, Powell & Brundin in the amount of $17,887.65. The total requested through January 5, 1982, is presently $357,720.14.

Of the total, defendant asserts a breakdown as follows:

Richard Richards (non-resident counsel who participated in trial)	$155,629.00
Mary K. Hughes, Steve Tervooren, and other attorneys in the firm	202,091.14

The landowner asserts that the amounts requested were reasonably and necessarily incurred to obtain just compensation for the landowner.

Even though the sums involved in the trial were large, this case involved a relatively simple question of just compensation for a taking of approximately 40 acres at the intersection of the Old and New Seward Highways and O'Malley Road. Initially, there was a partial taking by the state which matured into a total-taking substantially reducing the complexity of the litigation.[1]

[1] A full taking made it unnecessary for landowner to fully prepare for and prove damages to the remainder, which, according to landowner's counsel, reduced the complexity of the case significantly.

According to the landowner, Mr. Richards was associated for the purpose of his trial expertise in the field. His rate charged to the landowner was $175 per hour, while the rates charged by Anchorage counsel were approximately one-half the hourly rate charged by Mr. Richards.

Counsel for landowner argues that they are entitled to actual attorneys' fees if the court concludes that the professional services were necessarily incurred to achieve just compensation by the landowner. The State of Alaska argues that the fees charged were excessive and unreasonable and not necessarily incurred to achieve just compensation.

This court has carefully reviewed the itemized billings from respective counsel to the landowners, together with the affidavits in support of the motion for attorneys' fees. In addition, the court has given due regard to the length of this trial (approximately two weeks), the pretrial motions and work which necessarily accompanied them, the overall complexity or lack of complexity of the issues involved, the amount in controversy, the time spent in court and during pretrial hearings and conferences, and is otherwise fully informed of the circumstances of this case.

During the course of the trial, Mr. Richards and Ms. Hughes were present almost all of the time. Ms. Hughes participated in the examination and cross-examination of non-expert witnesses for the most part, while Mr. Richards participated in the examination and cross-examination of expert witnesses. Mr. Tervooren, additional counsel for the landowner, was present a portion of the time in court, sitting in the back of the room, but took no active role in the trial itself. Pretrial matters generally involved both Ms. Hughes and Mr. Tervooren. Both counsel appeared for practically all hearings and pretrial conferences. On the other hand, Mr. Richards did not appear before the court until immediately before trial.

The landowner contends that it is entitled to full compensation for attorneys' fees, asserting that all fees were necessarily incurred to achieve just compensation. The court agrees that the landowner is entitled to just compensation, including attorneys' fees, provided such attorneys' fees are reasonable, given all the circumstances of the case. To hold otherwise would essentially be giving the landowner a blank check which would be contrary to law and public policy.

The court finds that to award the fees requested by landowner would be unreasonable under the circumstances. The charges by attorney Richards were not reasonably necessary to achieve just compensation. Mr. Richards' statements show significant charges for his professional time in route to and from Alaska. His hourly charges are significantly higher than what the court believes to be a reasonable rate charged by skilled Anchorage, Alaska lawyers. The case did not involve any unusual complexity nor did it take a protracted length of time to try. The issues were straight forward, and while the court recognizes a need for preparation, the time spent in preparing for this trial appears excessive and not reasonably related to the issues presented.

Time spent in resolving the question of the taking of a road easement which was finally resolved by the trial court against the landowner appears grossly excessive and not reasonably related to the complexity of the issue which had been previously argued before this court on at least two other occasions and was pending on appeal at the time this court resolved the issue in the instant case.

Similarly, it was not reasonably necessary to secure just compensation for two and sometimes three attorneys to be present on behalf of the landowner at most all stages of the litigation.

The landowner argues that the request for fees is reasonable as it is less than what C.R. 82(a)(1) would permit.

The landowner argues that a Rule 82 fee calculation would lead to a presumed partial fee reimbursement in excess of $500,000.00, thus justifying at least the $357,000.00 requested.

This argument assumes, however, that the full amount awarded by the jury was in dispute. In reality, if a Rule 82 calculation was made, it would have been made on not more than the difference between what had been deposited and what was eventually achieved through a jury verdict. The amount deposited was not disputed, had been already paid to the landowner, and would not have been utilized as a basis for calculation of Rule 82 fees by this court. In fact, a good argument can be made to limit the Rule 82 calculation to the difference between the amount of the appraisal by the state and the verdict finally arrived at by the jury. In either case, the attorneys' fees under C.R. 82 would be somewhere between $80,000.00 and $150,000.00.[2]

Finally, the court has reviewed the filings since August 31, 1982, in support of the landowner's claim to an additional $17,887.65 in attorneys' fees. The claim is somewhat unsupported but it is reasonably apparent that these fees were incurred in the landowner's attempt to recover their costs and attorneys' fees. A certain pyramiding of attorneys' fees is reasonably necessary to protect the landowner's rights in obtaining just compensation. However, the amount claimed suggests another "blank check" approach to these fees as was done in the application for fees incurred prior to August 31, 1982.

Provided that the records were maintained in an orderly fashion (which I would expect to have been accomplished), application for costs and attorneys' fees would not appear to involve any complexity or significant time. A compilation of the statements for services rendered together with an itemization of the costs incurred, with a short brief, would appear to be all that

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[2]C.R. 82 is not the controlling rule. It is used simply as an analogy and was not considered by the court in its determination of attorneys' fees in this case.

was necessary to present the landowner's claims. In addition, an appearance before the clerk at the cost bill hearing and an appearance before the court on the application for costs and attorneys' fees was required.

This court finds that almost $18,000.00 is not reasonable and is unnecessary to the presentation of the landowner's application for costs and attorneys' fees.

Having given consideration to the factors hereinabove, this court awards the sum of $110,000.00 as attorneys' fees which were reasonably and necessarily incurred to acquire just compensation through August 31, 1982. Additionally, this court finds that the sum of $5,000.00 was reasonably and necessarily incurred by the landowner to process its application for costs and attorneys' fees from August 31, 1982 through the present date. The sum of $115,000.00 shall be inserted as attorneys' fees awarded to the landowner in the approved form of judgment.

DATED at Anchorage, Alaska, this 25 day of January, 1983.

Karl S. Johnstone
Superior Court Judge

On 1/25/83 a copy of the foregoing was mailed to:

Bruce Tennant, AG
Mary Hughes
David Berry

Secretary to Judge Johnstone

I certify that on 1-27-83
a copy of this document was sent to
☑ Attorney(s) of Record, or
☐ Other
at the address of record.
D.O.E. 2-2-83 by
Deputy Clerk

cc: Evenson
Tennant
Hughes
Berry

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