SMALL TRACT RIGHTS-OF-WAY
McCARREY v. KAYLOR

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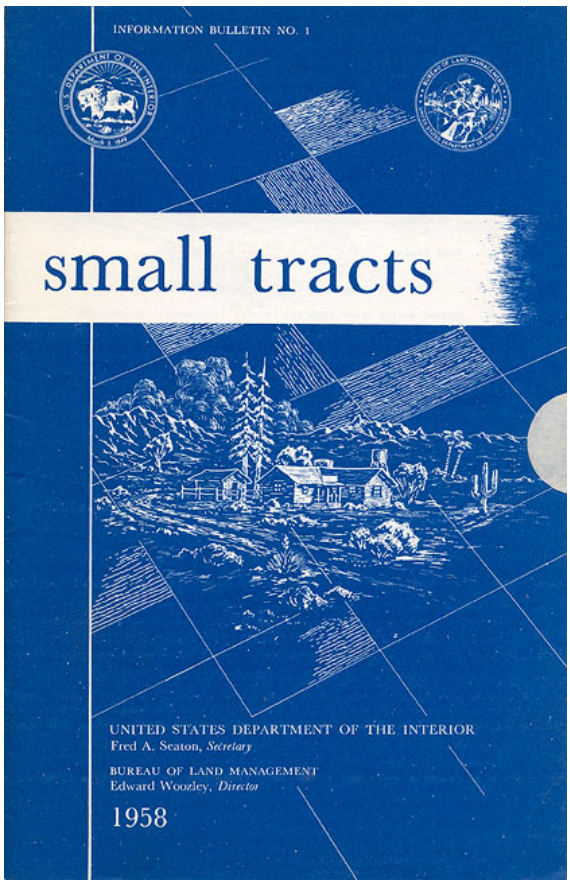

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Small Tract Rights-of-Way

Introduction

A Small Tract parcel authorized under the 1938 Small Tract Act is one of several federal land disposals by which a citizen could obtain a patent to public lands. By federal regulation, a Small Tracts patent may include a specific width right-of-way (ROW) for roadway and utilities purposes.

Surveying & ROW professionals often deal with Small Tract parcels while mapping for subdivisions, expansion of existing rights-of-way or performing boundary retracements. On its face, the ROW paragraph in a Small Tract patent appears to create an express grant or reservation that will exist until vacated by the appropriate authority. In the past, this has generally been the consensus among surveyors, ROW mappers and title professionals.

The 2013 Alaska Supreme Court opinion for *McCarrey v. Kaylor*[1] set our past view regarding Small Tract ROW on its head. The conclusion of the Court was that the Small Tract ROW was actually a common law dedication. The offer of the dedication is made by the "subject to" statement in the patent. The acceptance of the dedication must be by use or by official action. If the Small Tract classification order is terminated prior to acceptance by use or official action, the offer to dedicate is effectively rescinded and no ROW for a road or utility will be available through the Small Tract Act or its patent language.

The result of the *McCarrey* decision is clear. The remaining question relates to how big of an impact it has to past representations of Small Tract rights-of-way and whether the effect on future mapping will be significant. Although difficult to quantify, all past representations of Small Tracts rights-of-way are now suspect. A map may show a valid existing ROW along the boundary of a Small Tract parcel even though there was no evidence of acceptance of a common law dedication. Approximately 5,600 Small Tract patents were issued in Alaska. Given the number of patents, it is reasonable to conclude that most Alaskan surveyors and title professionals have had some experience with them.

While an unaccepted dedication across a Small Tract parcel might not be available once the classification order is terminated, roads constructed after termination of the classification order may be subject to a public easement by prescription. There is also a possibility those road rights-of-way through Small Tracts that appear to be limited to the 33-foot wide common law dedication offer may be wider if they are also subject to a Public Land Order (PLO) ROW or a statutory dedication by subsequent subdivision. Conflicts between PLO and Small Tract rights-of-way have been the subject of several prior Alaska Supreme Court opinions[2]. This is in

[1] *McCarrey v. Kaylor*, 301 P.3d 559, Alaska, March 29, 2013.

[2] See *State, Department of Highways v. Crosby*, 410 P.2d 724, February 3, 1966; *State Department of Highways v. Green*, 586 P.2d 595; *State v. Alaska Land Title Ass'n.,* 667.P.2d 714; *Keener v. State of Alaska*, 889 P.2d 1063, February 17, 1995.

part a result of the actions of Alaska Road Commission and their development of a Farm Road Program[3] through Small Tract subdivisions in the 1950's.

History & Background

A "Small Tract" parcel authorized under the 1938 Small Tract Act[4] is one of several federal land disposals by which a citizen could obtain a patent to public lands.

> Under the small tract law, small parcels of vacant public land may be leased or sold if they are chiefly valuable for residential, recreation, business, or community sites. These tracts may not usually be larger than 5 acres. A 5-acre tract would be one which is 660 feet long and 330 feet wide or its equivalent. However, a small tract may be 1 ¼ or 2 ½ acres instead of 5 acres. The size of the tract depends on the kind of land it includes, the use to which it can or will be put, and other factors.[5]

The 1938 law specifically excluded Alaska. Small Tract leases and sales were made available in Alaska under the Act of July 14, 1945 (59 Stat. 467).

Due to their small size, a Small Tract parcel has been referred to as a "jack–rabbit homestead". A 1954 BLM publication considered the Small Tract to the most popular method of land disposal in Alaska. Small Tracts could be obtained by lease, a lease with an option to purchase or a direct sale. Lease only tracts were used where the sale of the lands would not be in the public interest. A lease and purchase option was used if the public interest required some measure of Federal control over the development of the lands prior to purchase. A direct sale was used where the public interest did not require Federal control over development prior to purchase.[6]

Other land disposal types included Homesteads[7], Homesites[8], Headquarters Sites[9], Trade & Manufacturing Sites[10], Federal Townsite Lots[11], Federal Mining Claims[12] and Native Allotments[13].

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[3] *Tentative Priorities Proposed Farm Road Construction Program Anchorage District, Alaska Road Commission, 1951 Season - November 21, 1950:* "The entire area east of Potter Road between Anchorage and Potter is becoming heavily settled, with many small home tracts being recently thrown open by the Bureau of Land Management. These small tracts are filed upon as rapidly as thrown open, with home construction beginning almost immediately on each. A very large proportion of the work performed by the Anchorage District of the A.R.C. on Farm and Industrial Roads during the 1950 season was the construction of the beginning of a road system designed to make these homesteads and homesites accessible the year around."

[4] *Small Tract Act of June 1, 1938*, (52 Stat. 609) as amended

[5] *Small Tracts*, Bureau of Land Management Informational Bulletin No. 1, 1958

[6] Additional information regarding the Small Tract program can be found in the April 1, 1980 BLM manual, *The Small Tract Act – Guide Book for Managing Existing Small Tract Areas*.

[7] *Homestead Act of Alaska*, May 14, 1898, (30 Stat. 409) - Section 702 of the *Federal Land Policy and Management Act* (FLPMA), effective October 21, 1976 repealed the homestead laws across the U.S. including Alaska. The repeal in Alaska was deferred by a 10-year sunset provision.

[8] *Act of May 26, 1934* (48 Stat. 809) – Homesite Act – This authority was also repealed by FLPMA.

[9] *Act of March 3, 1927* (43 USC 687a) – Headquarters Site – Also repealed by FLPMA.

The on-line BLM patent database[14] indicates that 5,567 Small Tract Patents were issued between 1950 and 1984. The first four patents were issued in 1950 and the final patent was issued in 1984. The bulk of the patent activity occurred between 1952 and 1963.

Small Tract patents are unique in that the implementing regulations provided an opportunity to include a specific reservation for a public right-of-way along one or more sides of the tract. The 1950 version of 43 CFR 257 regarding Small Tracts included a provision for "streets and roads" under Section 257.16(c):

> Unless otherwise provided in the classification order, the leased land will be subject to a right-of-way of not to exceed 33 feet in width along the boundaries of the tract for street and road purposes and for public utilities…and an appropriate clause reserving the easement for such right-of-way will be incorporated into each lease or patent.

The 1963 version of the regulation increased the right-of-way reservation to 50-feet.

While the Small Tract Act included the authority to incorporate right-of-way reservations into a patent, other types of federal disposals were not without opportunities for legal access. For example:

Federal Townsites were essentially subdivision plats that identified and segregated street rights-of-way:

> …it has been uniformly held that when land in a townsite has been dedicated for public use, jurisdiction over such land as well as the title and right to possession and control thereof passes from the United States (and the trustee) and that the right and title to such land is subject to disposition in the courts in accordance with applicable local law.[15]

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[10] *Act of May 14, 1898* - (30 Stat. 413), as amended August 23, 1958 (72 Stat. 730; 43 U.S.C. 687a). The 1898 Act extended the homestead laws to the District of Alaska. Also repealed by FLPMA.

[11] *Townsite Act*, March 3, 1891 (26 Stat. 1099). The townsite laws were repealed by sec. 703 of FLPMA.

[12] *General Mining Law of May 10, 1872* (17 Stat. 91)

[13] *Act of May 17, 1906*, ch. 2469, 34 Stat.197 (1906), Repealed by Pub. L. No. 92-203, §18(a), 85 Stat. 688, 710 (1971) Alaska Native Claims Settlement Act.

[14] See https://glorecords.blm.gov. This database was run for the number of patents issued under the authority of the Small Tract Act of June 1, 1938 (52 Stat. 609) between years 1950-1984 using a search by date and search by BLM Land Office. The 1980 BLM Small Tract Guide book reported 6,082 patents between 1938 and 1977. The reason for this discrepancy is unknown.

[15] *Conveyance of Dedicated Areas within Townsites*, USDOI Office of the Solicitor, Anchorage, February 21, 1961. Also see *O.P. Pesman*, 52 LD 558, February 4, 1929 – "*…the adoption of the plat by the Government and the sale of lots by reference thereto resulted in an actual dedication to public use of the tracts or strips designated thereon as streets and alleys.*"

Revised Statute 2477[16] or RS-2477 provided a federal offer for road easements over public lands. The intent of the grant was to protect the access rights of miners in the early 1800's where there was a virtually complete absence of a federal presence on the public domain lands. Where validated, an RS-2477 right-of-way may provide a right of access across federal lands to many types of federal land disposals. RS-2477 rights-of-way are recognized in Alaska statute and case law[17] and will generally survive a conveyance of land into private, state or ANCSA[18] ownership.

ANCSA 17(b) easements were imposed on lands conveyed to ANCSA corporations with the intended purpose of providing linear easements for access across ANCSA lands to other public lands. These easements are specific with regard to width and scope of use but are often ambiguous as to location. Most 17(b) easements are graphically depicted on 17(b) maps produced by the Bureau of Land Management, however, ANCSA Section 17(b)(2) provides:

> That any valid existing right recognized by this Act shall continue to have whatever right of access (emphasis added) as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access. [19]

This protects the right of access for an owner of an inholding within ANCSA lands. Essentially, if a private party had a right to cross federal lands to access their mining claim or land claimed under another authority, they will retain the right to use the same access once the lands are conveyed to the ANCSA owner. [20]

In addition to the aforementioned ROW authorities, federal land disposals may also be subject to other prior existing rights-of-way authorized by Public Land Orders (PLO) or The Act of 1947 ('47 Act)[21]. These and other federal authorities provided for public access through and to a variety of federal land disposals. Validation of a PLO, '47 Act or RS-2477 ROW typically requires extensive research regarding date of authority, construction, public use, and date by which the federal lands became reserved. Prior to *McCarrey,* that level of effort was generally

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[16] The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976.

[17] See A.S. 19.30.400 *Identification and acceptance of rights-of-way* and *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961); *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 323 (Alaska 1966); *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996); *Dickson v. State of Alaska*, P.3d (2018 WL 4844227) (Alaska 2018)

[18] Alaska Native Claims Settlement Act: ANCSA - P.L. 92-203 (85 Stat. 688), 43 U.S.C. 1601. - Regulations 43 CFR 2650.4-7.

[19] A similar provision is found in Sec. 701(a) of the Federal Land Policy and Management Act of 1976 - "*Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.*"

[20] *Herbert I. Stewart/Donald J. Ferguson*, IBLA 84-148, September 7, 1984. (Appellant argued that his mining claim would not be fully protected without an express reservation granted by the federal government.)

[21] For a more detailed discussion of RS-2477, PLO and '47 Act rights-of-way, see *Highway Rights-of-Way in Alaska 2013,* John F. Bennett, PLS, SR/WA published on the Alaska Society of Professional Land Surveyors website at https://www.alaskapls.org/wp-content/standards2013/Highways-2013.pdf

not found to be necessary for a Small Tract ROW. The rights-of-way we believed were created by the Small Tract Act had always seemed as clear as the text in the patent.

Legal Jurisdiction

The ROW and land disposal authorities discussed in this report are based in federal law. In addition, while there are many federal legal resources to draw upon for guidance relating to Small Tract patents and the effect of ROW authorities upon them, once the patent has been issued, legal conflicts would generally be resolved in the State court system. Federal court jurisdiction over real property cases would apply where it involves federal lands or where the federal government holds a trust relationship with a native allotee.

A 2016 Alaska Supreme Court case[22] specifically considered subject matter jurisdiction in a case relating to a tax foreclosure of a patented homestead by the local government. The appellant argued that state courts did not have jurisdiction over his land as title had been derived from a federal land patent. The Court ruled that "Once [a land] patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts."

The U.S. Constitution declares federal law the supreme law of the land and that state courts are bound by the supreme law. Alaska courts may cite federal court decisions, administrative law such as Interior Board of Land Appeals decisions (IBLA) and federal solicitor's opinions. However, once the Alaska Supreme Court has issued a decision, it can only be appealed to the U.S. Supreme Court. To the extent that the Alaska Supreme Court has ruled on an issue relevant to this report, it will be given the greatest weight. Other relevant sources will be cited where the Alaska courts have not ruled on an issue or where they formed the basis for an Alaska court decision.

Disclaimer: R&M Consultants, Inc. is not a law firm, does not offer legal services and this paper is not presented as legal advice. It is offered as a summary of resources and views relating to right-of-way issues that have been collected over many years. Should you require legal advice on these issues, we recommend that you obtain the services of an attorney.

[22] *Ray Pursche v. Matanuska-Susitna Borough*, 371, P.3d 251, Alaska, March 25, 2016.

Easements, Dedications and Reservations – Definitions & References

The *McCarrey* conflict appears to be based in whether the right-of-way statement in a Small Tract patent is an express reservation of an easement or a common law dedication. A typical Small Tract right-of-way clause would read, *"This patent is subject to a right-of-way not exceeding 50 feet in width, for roadway and public utilities purposes, to be located along the north boundary of said land."*

The Small Tract ROW clause succinctly defines the width, location and purpose of the right-of-way. It also defines the servient estate or the land burdened by the ROW as being the land conveyed by the patent. Unfortunately, it uses the term "subject to" which generally suggests that it is referring to an existing easement.

First, we will review terms relevant to the discussion:

Patent: "A patent operates as a deed of the government. 'As a deed its operation is that of a quitclaim…it passes only the title the government has…on the date of the patent'. 63A Am. Jur.2d, *Public Lands* § 77, at 575 (1984). It follows as a general rules that government patents are 'without any covenants of warranty whatever;'"[23]

Small Tract Classification Order: An order issued by the Secretary of the Interior to classify lands "as chiefly valuable as a home, cabin, camp, health, convalescent, recreational, or business site in reasonably compact form and under such rules and regulations as he may prescribe…"[24] The "regional administrator, upon receipt of the application, will proceed to have such studies and investigations made as may be required for a determination as to whether or not it should be classified for small-tract purposes… Each tract will be classified as available either for lease and sale or for lease only."[25]

Prior Existing Rights: A prior existing right is any right established before vesting of the entryman's rights and to which a subsequent patent is subject. The lack of an express reservation in a patent identifying a prior existing right does not defeat the right.

> The above and other authorities establish that, by operation of law, 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.[26]

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[23] *North Star Terminal and Stevedore Co., Inc. v. State*, 857 P.2d 335 (Alaska 1993) Also see *City of Anchorage v. Nesbett*, 530 P.2d 1324, Alaska, January 24, 1975 citing *Wilson Cypress Co. v. Del Pozo y Marcos* 236 U.S. 635 (1915)

[24] *Act of June 1, 1938 – To provide for the purchase of public lands for home and other sites.*

[25] *43 CFR 257.8 Classification of Land* (Small Tracts) - 1949

[26] *State v. Alaska Land Title Ass'n*, 667 P.2d 714, (Alaska 1983)

Easement Appurtenant: "An easement appurtenant is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate."[27] An easement appurtenant passes with the land and is transferred, through a general clause in a deed or automatically to future owners even if it is not specifically mentioned in the conveyance document. Both dominant and servient estates must be identified to create an easement appurtenant.[28]

Easement in Gross: The easement in gross is "personal to the holder" and is not connected to or for the benefit of a dominant estate. Where an easement in gross exists, there is a servient estate, but not a dominant estate. "…easements in gross are assigned to a specific person and do not run with the land."[29] Commercial easements in gross such as those for utilities are assignable while non-commercial easements in gross such as a right to hunt or fish on another's land are generally not.

Express Grant of Easement: An express grant creates an easement over the grantor's property for the benefit of the grantee. "The most common method of creating an easement is by express grant. This is usually accomplished by a deed that satisfies the requirements of the Statute of Frauds."[30]

Express Reservation of Easement: An express reservation creates an easement for the benefit of the grantor.

> …easements may arise by reservation or exception in a deed of conveyance…a grantor who wishes to retain an easement should use the word 'reserve' because reservation implies the creation of a new interest in the grantor…Deed grantors sometimes use 'subject to' language in an effort to create an easement by reservation. Although, in certain cases, the use of such terminology has been held sufficient to reserve an easement, it should not be employed for this purpose because it does not clearly express the intent of the parties. 'Subject to' language is commonly used in a deed to refer to existing easements, liens and real covenants that the grantor wishes to exclude from warranties of title. However, 'subject to' language coupled with an express reservation is sufficient to establish an easement.[31]

Third Party Reservation: A third party reservation is one made in a deed for the benefit of a person who is not a party to the transaction. The common law rule is that a reservation or

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[27] *SOP, Inc. v. State, Dept. of Natural Resources, Div. of Parks and Outdoor Recreation*, 310 P.3d 962, (Alaska 2013) Citing 25 AM. JUR. 2d *Easements and Licenses § 8* (2004)

[28] See *McCarrey* FN 42 "*The patent did not identify a dominant estate or limit access only to small tract owners."* The patent identifies the servient estate but not a specific parcel of land that was to benefit from the easement. See *Reeves v. Godspeed Properties,* 426 P.3d 845 (Alaska 2018) – *"An appurtenant easement may not be used for the benefit of property other than the dominant estate."* Citing *HP Ltd. Partnership v. Kenai River Airpark,* 270 P.3d 719, (Alaska 2012)

[29] *Reeves v. Godspeed Properties, LLC*, 426 P.3d 845, (Alaska 2018)

[30] *The Law of Easements and Licenses in Land* – Bruce & Ely 2013 - § 3:6 – 3:8

[31] Ibid. - § 3:6 – 3:8.

exception in a deed cannot create rights in third parties. Alaska is among those jurisdictions that find the common law view potentially in conflict with the intent of the grantor, a primary factor in deed interpretation. "The rule clearly conflicts with our general view that a deed should be construed to the effect the intent of the grantor. *Shilts,* 567 P.2d at 773."[32]

Dedication: "The appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public. Such dedication may be express where the appropriation is formally declared, or by implication arising by operation of law from the owner's conduct and the fact and circumstances of the case."[33] "Dedications may be either express or implied. Express dedications can be statutory or common law."[34] "A 'dedication by implication' consists of the assent of the owner, and use by the public; it lacks the formalities and safeguards of formal or statutory dedication."[35] The offer to dedicate may be withdrawn before acceptance.[36] In Alaska, the intent to offer to dedicate must be clear and unequivocal, and must be proven by the party attempting to assert the dedication.[37] The Alaska Supreme Court has confirmed the traditional rule that an acceptance of an offer to dedicate may be through formal official action, public use consistent with the offer to dedicate, or through an act of reliance sufficient to cause an estoppel.[38]

Statutory Dedication: A statutory dedication is one made under and in conformity with the provision of a statute regulating the subject[39]. Generally, these rights-of-way are created by a formal platting action in which the offer to dedicate is evidenced by a "*certificate of dedication*" executed by the landowner and acceptance by the public is evidenced by a "*certificate of acceptance*" executed by an authorized official. "W*hen an area is subdivided and a plat of the subdivision is approved, filed, and recorded, all streets, alleys, thoroughfares, parks and other public area shown on the plat are considered to be dedicated to public use."*[40]

Common Law Dedication: "*A common law dedication occurs 'when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose.'"*[41] *"There are two essential elements of a common law dedication: (1) an owner's offer of dedication to the public and (2) acceptance by the public."*[42] Where there has been a common law dedication

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[32] *Aszmus v. Nelson*, 743 P.2d 377, (Alaska 1987)

[33] Black's Law Dictionary, 5th Ed.

[34] *McCarrey v. Kaylor*

[35] *77 Am. Jur. Proof of Facts 3d 1 – Proof of Offer and Acceptance of Dedication of Land to Public Use* – September 2016 Update

[36] *Swift v. Kniffen*, 706 P.2d 296 (Alaska 1985)

[37] *10.958 Acres, more or less v. State*, 762 P.2d 96, (Alaska 1989) (Parrish)

[38] *State v. Fairbanks Lodge No. 1392*, 633 P.2d 1378 (Alaska 1981) (*Moose Lodge*)

[39] A.S. 29.40.070 Platting Regulation *"....platting requirements that may include, but are not limited to, the control of ...(4) dedication of streets, rights-of-way, public utility easements and areas considered necessary by the platting authority for other public uses."*

[40] A.S. 40.15.030 Dedication of streets, alleys, and thoroughfares.

[41] *McCarrey v. Kaylor*, 301 P.3d 559, Alaska, March 29, 2013 citing *Swift v. Kniffen*, 706 P.2d 296 (Alaska 1985) and *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961)

[42] Ibid.

is usually a factual issue related to the intent of the dedication.[43] Acceptance may also be implied from acts of maintenance by public authorities.[44] Prior to the 1998 legislation appointing the Department of Natural Resources as platting authority in the Unorganized Borough, all subdivision street dedications would be considered common law dedications as there was no available authority to officially accept an offer to dedicate.

Right-of-way: "We have stated that a 'right-of-way is generally considered to be a class of easement.' We have described a right-of-way as 'primarily a privilege to pass over another's land,' and we have consistently used the phrase right-of-way to refer to strips of land used for passage of people or things.[45] "…unless the parties make it clear that a fee interest is intended, a grant of 'right of way' conveys an easement interest."[46]

Deed Ambiguity and Interpretation: Alaska Statutes provide guidance for sorting out conflicts in real estate descriptions that are a part of conveyance document.[47] These are the rules that tell us the order of priority of conflicting elements such as monuments, distances, directions and areas. These are one category of various "rules of construction" related to interpretation of deeds and in the past, a person interpreting a description often went straight to these rules when faced with conflicting terms. The Alaska Supreme Court has held that these rules should only be consulted as a last resort.

When we are faced with deed terms where more than one reasonable interpretation exists, the deed may be deemed ambiguous.

*"*It is well established that the intention to create a servitude must be clear on the face of an instrument; ambiguities are resolved in favor of use of land free of easements*."*[48]

The Court provided a "Three-Step Approach to Deed Interpretation" in *Spinelli*.[49] First, a court must look to the four corners of the document to see if it unambiguously presents the intent of the parties. Second, if the court finds the deed to be ambiguous, the next step is to determine the intent of the parties. Finally, if the intent cannot be discerned after an examination of the deed and extrinsic evidence surrounding its creation, the court may resort to rules of construction.

The three-step approach is based on the Court's position that "…the touchstone of deed interpretation is the intent of the parties."[50] The Court stated that the purpose of rules of construction is not to ascertain the parties' intent, but to resolve a dispute when it is otherwise impossible to ascertain the intent of the parties.

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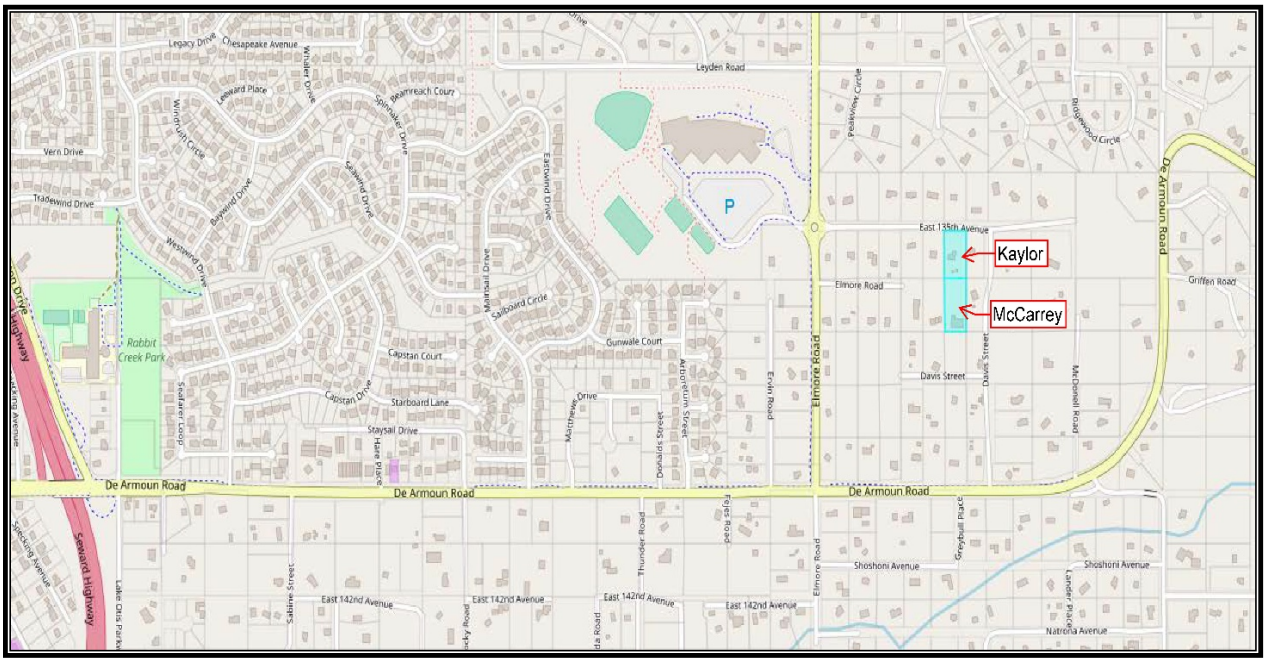
[43] Ibid.
[44] Bruce & Ely, Law of Easements and Licenses in Land 4.06(3)
[45] *Dias v. State of Alaska*, 240 P.3d 272 (Alaska 2010)
[46] *Cowan v. Yeisley*, 255 P.3d 966 (Alaska 2011)
[47] *Sec. 09.25.040 Rules for construing real estate descriptions.*
[48] *Methonen v. Stone,* 941 P.2d 1248, (Alaska 1997)
[49] *Estate of Smith v. Spinelli*, 216 P.3d 524, (Alaska 2009)
[50] *Norken Corporation v. McGahan*, 823 P.2d 622, (Alaska 1991)

McCarrey v. Kaylor

Background

This case was an access dispute between adjoining neighbors. The McCarrey and Kaylor parcels are located to the north of DeArmoun Road and east of Elmore Road. The McCarrey parcel is a 1.25 acre BLM Small Tract lot to the south of Kaylor. The McCarrey Small Tract patent is subject to a 50-foot wide right-of-way for roadway and public utility purposes along the north boundary. A roadway, signed at Elmore as E 136th Avenue runs along the Small Tract ROW. The Kaylor property was a 49,500 square foot lot that was subdivided from an 80-acre federal homestead.



Vicinity Map

The Kaylors used the southern portion of their lot to store a boat, two motor homes and to park other vehicles. The Kaylors claimed to have used this access along E 136th Avenue for at least 15 years, a point disputed by the McCarreys.

In 2010, the McCarreys notified the Kaylors that they intended to construct a chain link fence along the north boundary of the Small Tract lot and that they would install a locked gate in the fence that could be used by the Kaylors upon 72-hour notification. The Kaylors filed suit to establish a prescriptive easement and an injunction to prevent the fence construction. The Superior Court found that:

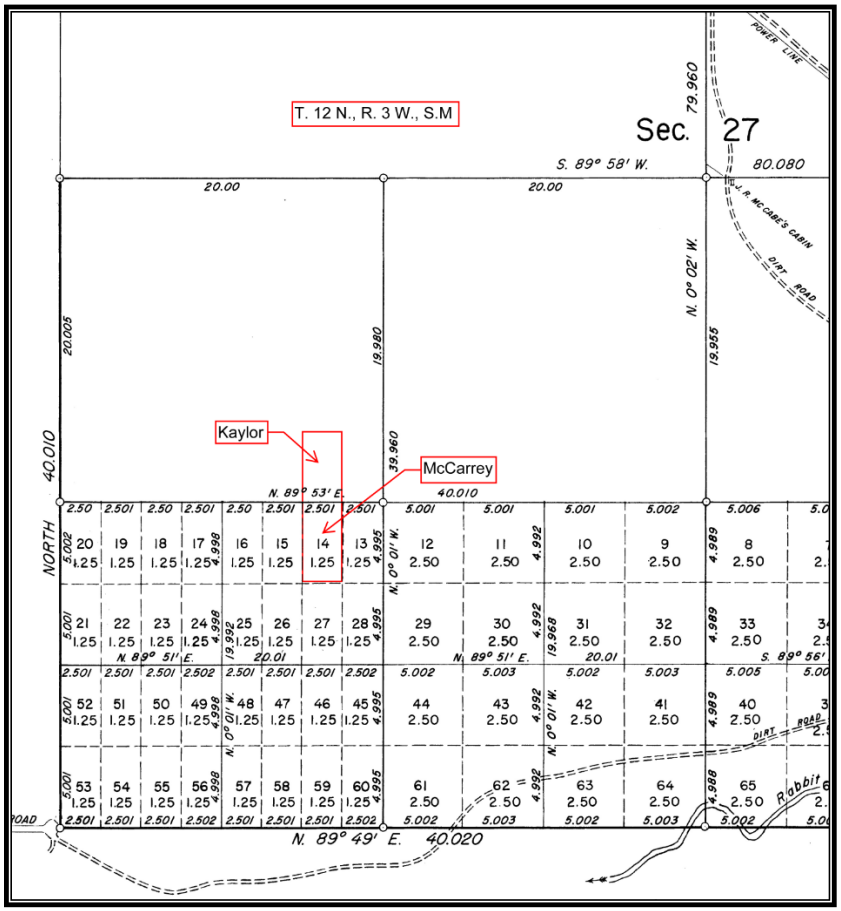
> The wording in this patent is subject to a right-of-way. A right-of-way in common parlance is an area in which a group of people or a political entity can do some specified thing. It's delimited as 50 feet in width and its purpose is both

for public utility purposes and for a roadway to be located along the north boundary.

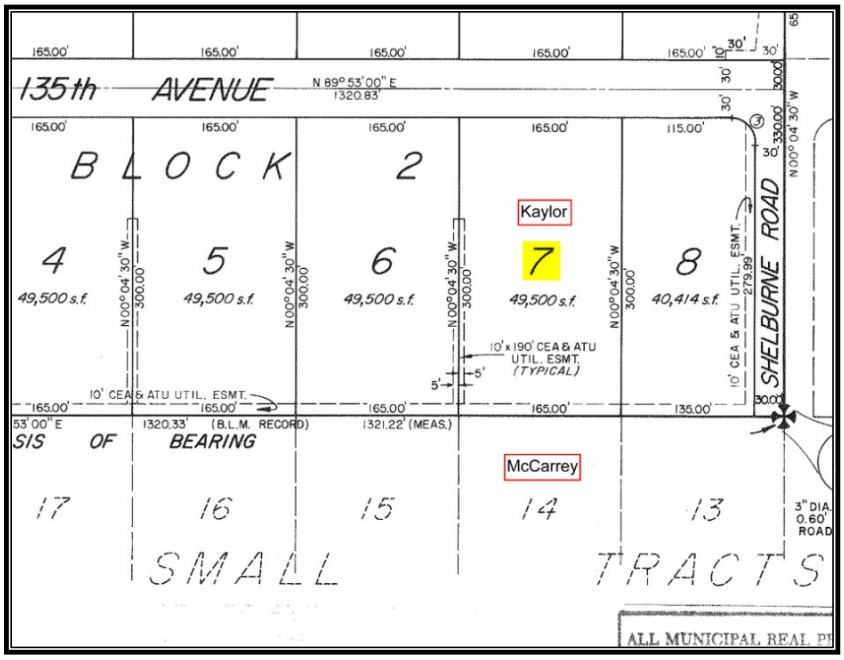
In November of 2010, the Superior Court ruled in favor of the Kaylors and granted their request for a permanent injunction preventing the McCarreys from constructing the fence. The McCarreys appealed to the Supreme Court.

Location Graphics

Assessor's Map – McCarrey v. Kaylor



Section 27 Subdivision



Olson Heights Subdivision

Appeal to the Supreme Court

The Supreme Court reviewed the case as one requiring the interpretation of a deed and applied the three-step analysis to reveal the intent of the parties that it had found appropriate in previous cases. In the event that the analysis required reliance on a rule of construction, it noted that "Ambiguities in public land grants are 'resolved strictly against the grantee and in favor of the government."[51]

The McCarreys argued that the 1938 Small Tract Act that was the authority for the right-of-way noted in the patent had been repealed by the Federal Land Policy and Management Act (FLPMA) in 1976.[52] If the basis for the right-of-way was a common law dedication, the "offer" of the ROW would terminate upon the 1976 FLPMA repeal. Ironically, the Kaylors agreed that the Small Tract ROW was inapplicable because of the FLPMA repeal of the Small Tract Act. The Kaylors were pursuing their right of access through prescriptive use. The Supreme Court declined to consider an easement by prescription because the Superior Court did not make factual findings on the elements necessary to establish a prescriptive easement.

The McCarrey's common law dedication argument relied upon BLM Instruction Memorandum No. 91-196, dated February 25, 1991[53]. According to the memorandum, "small tract rights-of-way were common law dedications to the public to provide ingress and egress to the lessees or patentees and to provide access for utility services." The memorandum also stated:

> The right-of-way remained available as long as the lands were classified for small tract use. These rights-of-way were determined to be common law dedications and had the effect of a public easement. However, until acceptance by use of the easement made the dedication complete, the United States could revoke or modify the offer to dedicate in whole or in part. Said another way, unless the common law rights-of-way were actually used for a road or public utilities to serve a small tract, the dedication disappeared with the termination of the classification.

A classification order specified the public lands made available for Small Tract disposals as well as the location of rights-of-way on the offered lots. The decision notes that the McCarrey property was a part of Small Tract Classification Order No. 97 dated April 28, 1955. There was no indication that the order had been terminated. While FLPMA did terminate the Small Tract Act, it did not terminate Small Tract classifications that were still in effect at that time. And the Court concluded that the FLPMA repeal did not terminate or revoke the ROW in question. Their conclusion was in part because FLPMA applies to public lands and not private lands. As McCarrey's predecessor received patent to the Small Tract lot in 1961, it was no longer in federal ownership when FLPMA was passed.

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[51] *State Department of Highways v. Green*, 586 P.2d 595 (Alaska 1978)

[52] *Federal Land Policy and Management Act of 1976*, Pub. Law 94-579, § 702.

[53] The memorandum states that it "*is an attempt to consolidate previously issued guidance and to provide policy and procedure when Small Tract Act rights-of-ways are encountered.*"

The Nature of the ROW Interest

The Court then interpreted McCarrey's patent for ambiguity. There was no ambiguity in the size and purpose of the ROW. The McCarreys, however, argue that the ROW is a common law dedication, but one that only benefits owners of the Small Tract lots and not the Kaylors whose parcel derived from a federal homestead. The Court disagreed stating that "A common law dedication is a dedication to the public, even when there is no specific grantee."

The Court discussed the definitions of dedications, both express and implied and that express dedications can be statutory or common law. They agreed with the Arizona Court of Appeals that the rights-of-way were intended "to avoid imposing the heavy burden on local governments of subsequently having to acquire an easement when the time came to install utilities and roadways."[54] The Court noted BLM's consistent position in Solicitor's and policy memorandums that Small Tract rights-of-way were common law dedications to the public. Deferring to BLM's interpretations, the Court held that "…the right-of-way at issue here was an express offer of common law dedication to the public."

The Small Tract patent ROW only represented the "offer" of a dedication. Neither party presented the theory of a common law dedication to the Court. As a result, the Court could not conclude as to whether the "offer" had been accepted. Recognizing that acceptance of the dedication can be by a formal official action[55] or public use, the case was remanded to Superior Court to find whether the offer of dedication had been accepted.

Remand to Superior Court

In September of 2013 the McCarreys and Kaylors filed their remand briefs in Superior Court. The McCarreys noted that East 136th Avenue is a privately constructed unimproved dirt road that is not maintained by the Municipality of Anchorage nor does it meet current code for a street and no Municipal improvements have been made other than placement of road signs. The McCarreys argue that there is no evidence of acceptance of a common law dedication by either formal official action[56] or general and continuous use as a public thoroughfare. McCarreys then argued that if the ROW had been accepted by public use, its width was limited to its current physical footprint. As the physical road occupies only 30-feet of the 50-foot wide ROW and does not adjoin or encroach upon the Kaylor property, the Kaylors would have to trespass over a strip of McCarrey's land to reach their lot.

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[54] *City of Phoenix v. Kennedy*, 675 P.2d 293 (Arizona App. 1983)

[55] *McCarrey* cites *Safeway, Inc. v. State, DOT&PF*, 34 P.3d 336, (Alaska 2001) holding that State's inclusion of street on right-of-way map was formal official action accepting street dedication.

[56] A good example of an official acceptance of a Small Tracts ROW is the 2001 Pima County, Arizona policy document titled *SMALL TRACT EASEMENTS by PATENT RESERVATION. "Pursuant to United States Department of the Interior, Bureau of Land Management Instruction Memorandum No. 91-196 and common law applications, it shall be the policy of Pima County to recognize all reservations for road and utility easements contained in U.S. Patents to be public rights of way. As public rights of way, Pima County may establish county roadways within the easement as provided for in A.R.S. § 28-6701, vacate and abandon the easement as public rights of way under A.R.S. § 28-7201, and license, regulate and administer as public rights of way…"*

The Kaylor's brief asserted that they had used E 136th Avenue for access and parking since they had bought their house "more than 15 years ago" as evidenced by aerial photos. They noted that Kaylor's lot is "double fronted" by both E 135th and E 136th. They argued that a formal acceptance by the Municipality of E 136th would not be expected where a lot is "double fronted" and because Municipal code recognizes the existence of "double fronted" or "through lots", such recognition should be considered as an "acceptance" of the street rights-of-way.

This is where the story seemingly ends. The Superior Court issued no judgment regarding whether the common law dedication offer had been "accepted". On September 11, 2013, the Superior Court issued a final judgment of *Stipulation for Dismissal with Prejudice.*[57]

The Rest of the Story

Although the ultimate outcome of the Superior Court remand does not necessarily bear on any other case, it would have been interesting to see what level of evidence the court had required to determine whether the common law dedication had been accepted.

I decided to follow-up with the parties to the case. Initially I attempted contact with the attorneys. I failed to make contact with Kaylor's attorney and suspect he had retired and may have moved. I did exchange email with McCarrey's attorney but as expected, rather than breach confidentiality, he just referred me to McCarrey. I did find a 2017 obituary for Kaylor who passed at age 75. I made contact with David McCarrey on Facebook and he agreed to speak with me.

McCarrey said that he and Kaylor attempted to reach a settlement when the case was initially filed with the Superior Court but were unsuccessful. After the appeal to the Supreme Court and remand to the Superior Court, they ultimately decided to settle rather than have the Court issue a ruling. Essentially, both parties (and likely the attorneys and judge) were just tired of the case. McCarrey said that his only desire was to install a fence with a gate on his northerly boundary. He believed that both attorneys and the judge never understood that. The dismissal was a result of the settlement. Both parties entered into an agreement for a 30-foot wide easement along E 136th Avenue to access the Kaylor property. Kaylor said this was to have been recorded but I found no evidence that it had been. I noted that as the case resulted in a settlement solely between himself and Kaylor, that the issue was not resolved. There was no determination as to whether the Small Tract dedication had been accepted by use or by official action. McCarrey agreed that there was no resolution. With Kaylor's passing and the agreement not being of record, any subsequent assertion of the Small Tract ROW would have to start where the Supreme Court left off. Had there been an acceptance of the common law dedication and was that acceptance made prior to termination of Small Tract Classification Order No. 97? McCarrey believed that the classification order was still in effect.

[57] A Dismissal with Prejudice means the case is permanently dismissed and cannot return to court.

What did we learn?

We did not learn whether E 136th Avenue was a valid public right-of-way established either by dedication or prescription. I suspect that a large sum of money was spent by both parties to reach that non-conclusion.

We had always considered the "Subject to" clause in a Small Tract patent to represent an express reservation of a public right-of-way. The Grantor, the federal government, was reserving the ROW for the benefit of the Small Tract patentees and the general public until such a time that the ROW was vacated by the appropriate authority. Small Tracts are generally a cluster of small adjoining parcels much like a subdivision. The Alaska Supreme Court ruled in *Green*[58] that the specific Small Tract rights-of-way were intended for access streets serving interior lots in contrast to Public Land Order rights-of-way that were more for highways. As the need for road and utility access to the interior Small Tract lots would continue beyond patent, the Small Tract Act and the Classification Orders, it would seem that the federal government would have imposed more permanent rights-of-way that would survive the termination of the Small Tract authority. A BLM Solicitor's memo[59] discussing Small Tract classifications stated that the Small Tract rights-of-ways were *"…*for the mutual benefit of the Small Tract patentees and lessees, i.e. to give patentees and lessees the same ready access from area to area*."* The memo further stated that,

> There can be no question that purchasers of Small Tracts did, in fact, rely upon the right-of-way provisions contained in the regulations and classification order providing them access to their lands. I am of the opinion that Small Tract patentees retain legal access or "a right-of-use" over the public lands identified in the classification order which provide legal access to their property.

The memo speaks to the status of the Small Tract ROW where roads had been constructed prior to cancellation of a classification, but they do not speak to the status of the patent reservations that did not have roads constructed within them prior to cancellation of the classifications. Unfortunately, the *McCarrey* case and the BLM Instruction Memorandum No. 91-196 that was relied upon are clear. The Small Tract rights-of-way are common law dedications.

The Alaska Supreme Court in *Fairbanks Lodge No. 1392* held that acceptance of a common law dedication can be by official action, public use or "*substantial reliance on the offer of dedication that would create an estoppel."* In other words, if the purchaser of the property relied on a plat with representations of rights-of-way for streets to provide access to their lot, their detrimental reliance on that representation that would prevent the subdivider from revoking the dedication. Two years later, the Court ruled in *Creary*[60] that

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[58] *State Dept. of Highways v. Green*, 586 P.2d 595 (Alaska 1978)

[59] *Small Tract Act Classifications*, from Regional Solicitor to BLM State Director, Nevada dated April 2, 1979.

[60] *Creary v. Kenai Peninsula Borough*, 671 P.2d 1286, (Alaska 1983)

> The law is clear that an owner who conveys land by reference to a plat, whether or not the plat was filed by himself, is generally estopped to deny the validity of a dedication shown on the plat, as against his grantee whose land is affected by the dedication or against the public when it relies on the plat or otherwise asserts an interest in the purported dedications.

Small Tract lots were described either by Government Lot number or by aliquot parts. Both descriptions can be considered to be with reference to a plat, but neither the township or township subdivision plat graphically depict the rights-of-way referenced in the Small Tract patents. It does not seem that one can draw a direct parallel between the Small Tract ROW clauses and the plat references in the *Creary* case, but nonetheless, the grantee or subsequent owner of the Small Tract lot certainly may have relied to their detriment upon the patent offer to dedicate. However, does this establish an acceptance of the dedication or just a right to complain about the Small Tract process to the federal government? Once the patent was issued, the federal government considered themselves to be removed from all oversight and management responsibilities and I would expect no opportunity for recourse against them.

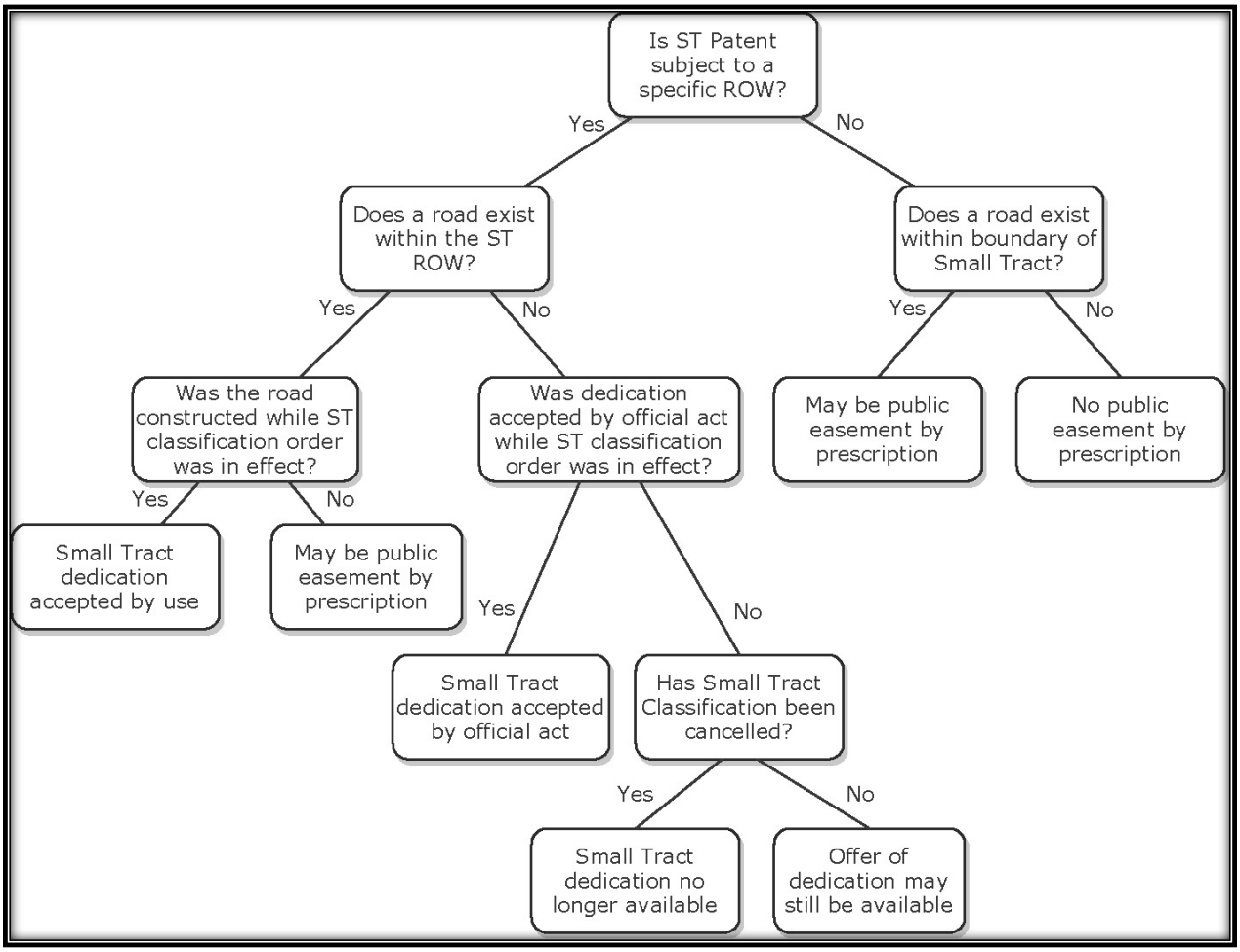
While this decision seems significant, I expect it will reside in obscurity for most owners of Small Tract parcels. As the ROW statement in the Small Tract patent was seemingly clear to surveyors and ROW professionals in the past, it will still read as a clear statement for many owners who review their chain of title and consider the legal access to their lots.

Research Methods

Does the Small Tract Dedication Exist?

As a land surveyor or right-of-way professional, you are assigned to map a specific small tract lot or a corridor that includes Small Tract lots. Given the results of *McCarrey v. Kaylor*, how do you determine whether a common law dedication has been accepted or whether the offer to dedicate is still available for acceptance?

First you will collect the evidence: Small Tract patent; Small Tract classification orders, amendments and cancellation; mapping, aerial photography, news articles and reports establishing date of road construction and use; local government documentation officially accepting the offer to dedicate. Using the following decision chart, determine whether the dedication has been offered and accepted:



Research Example

Government Lot 11, Section 17, T.1S, R.1W, F.M. The lot is located to the north of Davis Road[61] between University Avenue and Peger road in Fairbanks.

The Patent

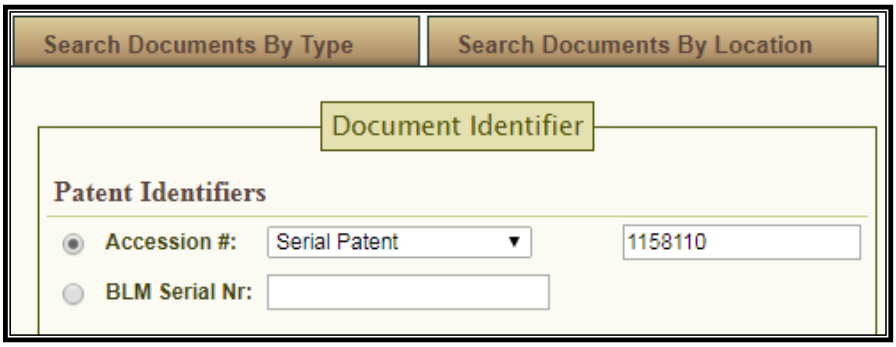
- Go to the on-line BLM Spatial Data Management System (SDMS) website[62] and select "Master Title Plats". Download the MTP for T.1S., R.1W., F.M. In this case, there is a Supplemental MTP for Sections 17 - 20 in which our parcel is located. Review the MTP for GL-11 and note the patent number. (1158110)
- Go to the BLM General Land Office Records website[63] and select "Search Documents". In "Location – State", select Alaska. Select the Tab "Search Documents by Identifier".

[61] Between 1988-1990 DOT&PF prepared the first set of ROW plans in anticipation of widening Davis road, which ran east-west through the center of Section 17. DOT asserted a PLO "Local Road" ROW of 50-feet on each side of centerline or 17-feet wider than the ROW than the Small Tract "reservations" stated in the patents. The assertion was validated in Superior Court and later was unsuccessfully appealed to the Supreme Court on a claim of estoppel and laches. See *Keener v. State*, 889 P.2d 1063, (Alaska 1995)

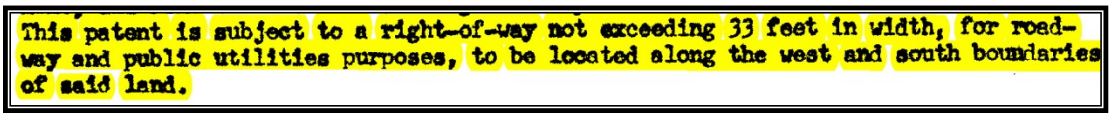
[62] https://sdms.ak.blm.gov/sdms/

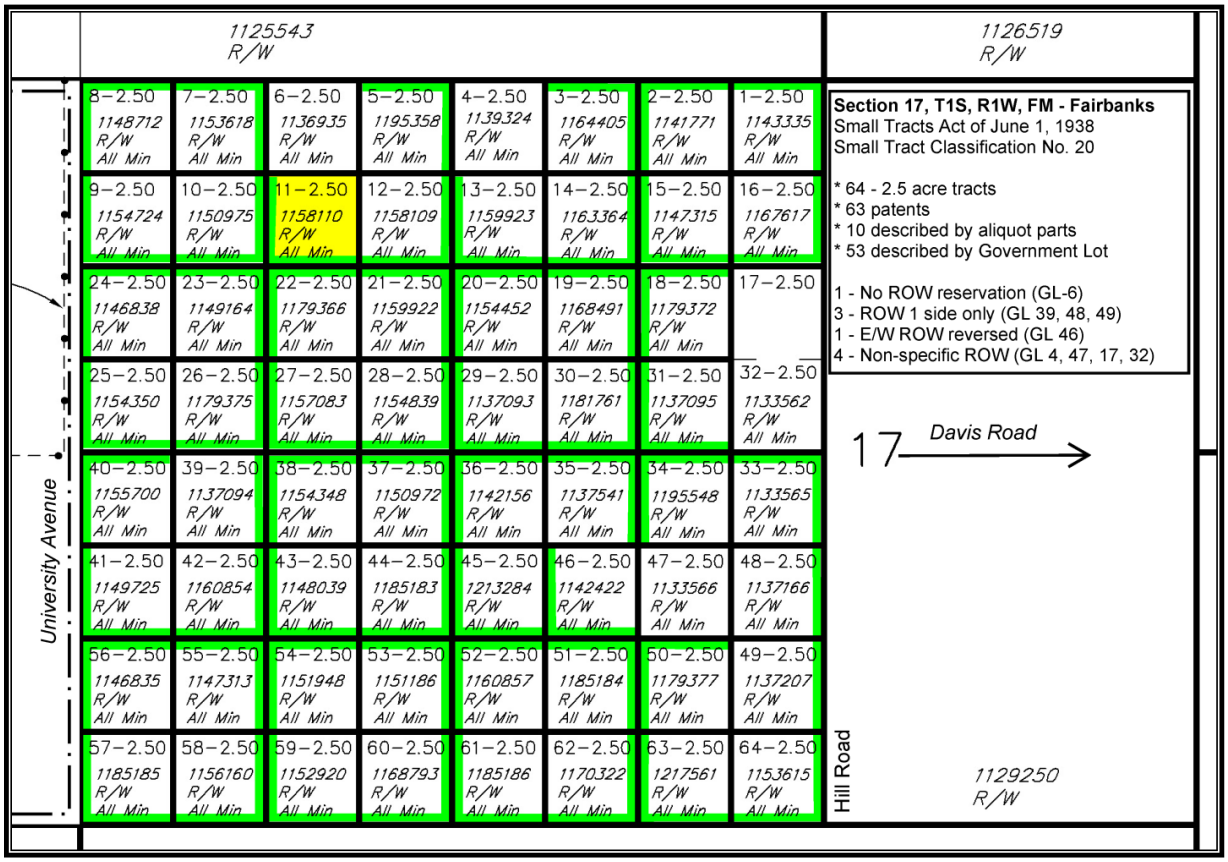
[63] https://glorecords.blm.gov/default.aspx

To the right of "Accession #: Serial Patent", fill in the patent number then press "Search For Document"



- Select the "Patent Image" tab and download the patent. Patent No. 1158110 was issued to Neil H. Haffey on March 19, 1956. Locate the ROW paragraph:


This patent is subject to a right-of-way not exceeding 33 feet in width, for road-way and public utilities purposes, to be located along the west and south boundaries of said land.



MTP S1/2 NW1/4 & N1/2 SW1/4 Section 17

- The previous Section 17 MTP image has been edited as follows:
  - Yellow: The subject GL-11
  - Green: 33-foot ROW "subject to" clauses according to patents
  - 10 Ten patents use aliquot parts descriptions as opposed to lots. These patents were issued prior to the approval of the 4/13/53 township subdivision plat.
  - GL-6 patent does not call for a ROW (error?)
  - GL-39, 48 & 49 patents only call for a ROW on one side (error?)
  - GL-46 patent appears to reverse call for east ROW to west (error?)
  - GL-4, 47, 17 & 42 patents call for a non-specific location for a 33-foot ROW *"This patent is issued subject to an easement for a road-way not exceeding 33 feet in width, to be constructed across said land, or as near as practicable, to the exterior boundaries."*
  - A review of the case files for the classification order (STC-20) and individual patents may reveal reasons for the anomalies.

The Classification Orders

In a perfect world, a researcher should be able to go to the BLM SDMS ACRES abstract system, run the abstract by patent number and then be able to identify the appropriate Small Tract classification orders, amendments and cancellations at a glance. Unfortunately, this information is not shown in the abstract and after several phone conversations and email exchanges with BLM staff; we were unable to find an easy solution.

The best available solution appears to require a review of the BLM Historical Index (HI) for the subject township. The HI is available on the BLM SDMS ACRES system.

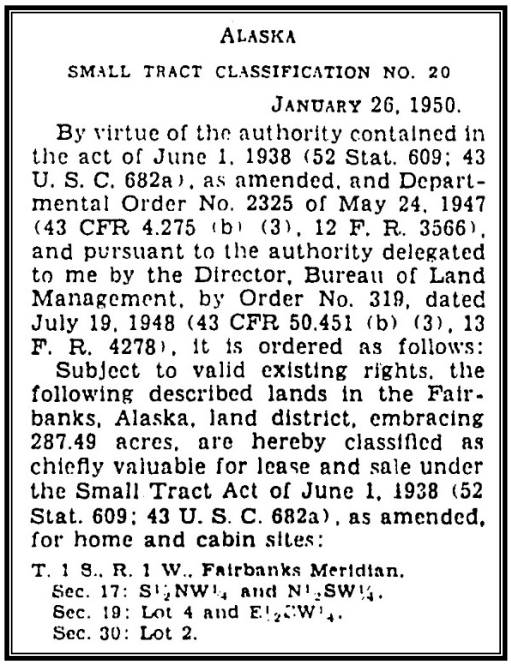
- Return to the BLM SDMS system and select "Alaska Case Reporting Enterprise System" or ACRES. Select "Historical Index Menu" and then select "Historical Index Retrieval by MTR" (Suitable for printing option) Input township data – T1S, R1W, FM., then press "Submit Request".
- The HI can return a substantial amount of information. The BLM system only allows a dump of an entire townships worth of data as opposed to a single section. The best way to locate items specifically within Section 17 is to convert the data into a spreadsheet. Use the cursor to select the HI data and then copy it into an Excel spreadsheet using "paste special match destination formatting". Then, Format – Autofit Column Width. Search for "BLM O" or BLM Orders where the Document ID is 20. These are the rows related to STC-20. Highlight these rows then sort the data by Section. Delete all rows except the Section 17 data, the highlighted STC-20 rows and the header row. The result should be a concise spreadsheet of Section 17 patent and Small Tract classification data.

Action Date	Section	Aliq Part	Lots	Other Desc	Acres Qty	Document ID	Kind Entry	Remarks
26-Jan-50	17	S2NW, N2SW				20	BLM O	
26-Jan-50	19	E2SW	4			20	BLM O	
26-Jan-50	30		2		287.5	20	BLM O	ST CL; PART REV DO 4/26/1960; CANC 2/12/1964

The rows related to STC-20 should look like the previous image. The date in the "Action Date" column is the date that Order No. 20 dated was issued or January 26, 1950. The classification order will apply to the portion of Section 17 identified in the "Aliq Part" column. The remarks column notes a partial revocation on 4/26/1960 and a cancellation dated 2/12/1964.

- Next, return to the BLM SDMS to the page titled "Alaska Public Laws, Orders and Directives Online. This provides a collection of approximately 170 Small Tract orders, but it is not a complete inventory of all Small Tract orders. Select Document Type "Small Tract Classification". Enter "20" where it requests "Enter Document No." This will return two STC 20 orders, STC 20_1 and STC 20_2.

  STC 20_1 contains the Small Tract Classification No. 20 approved January 26, 1950. STC 20_2 file includes a March 23, 1950 *"Notice of Opening of Land to Entry Under the Small Tract Act"* and a correction to the Small Tract Classification Order No. 20 Cancellation that appeared in the Federal Register as F.R. Doc. 64-1624 published on February 19, 1964. However, the file does not include a copy of the cancellation order.



ALASKA

SMALL TRACT CLASSIFICATION NO. 20

JANUARY 26, 1950.

By virtue of the authority contained in the act of June 1, 1938 (52 Stat. 609; 43 U. S. C. 682a), as amended, and Departmental Order No. 2325 of May 24, 1947 (43 CFR 4.275 (b) (3), 12 F. R. 3566), and pursuant to the authority delegated to me by the Director, Bureau of Land Management, by Order No. 319, dated July 19, 1948 (43 CFR 50.451 (b) (3), 13 F. R. 4278), it is ordered as follows:

Subject to valid existing rights, the following described lands in the Fairbanks, Alaska, land district, embracing 287.49 acres, are hereby classified as chiefly valuable for lease and sale under the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U. S. C. 682a), as amended, for home and cabin sites:

T. 1 S., R. 1 W., Fairbanks Meridian.
Sec. 17: S½NW¼ and N½SW¼.
Sec. 19: Lot 4 and E½SW¼.
Sec. 30: Lot 2.

STC 20_1

ALASKA

Small Tract Classification Order Cancellations; Corrected Date

F.R. Doc. 64–1624 appearing in the issue for February 19, 1964, is hereby corrected as follows:

Paragraph 4 containing description of Small Tract Classification Order No. 20 is hereby corrected so that portion reading:

Small Tract Classification Order No. 20 of March 23, 1950 (F.R. Doc. 2642) • • •

will read:

Small Tract Classification Order No. 20 of January 26, 1950 (F.R. Doc. 50–2642) • • •

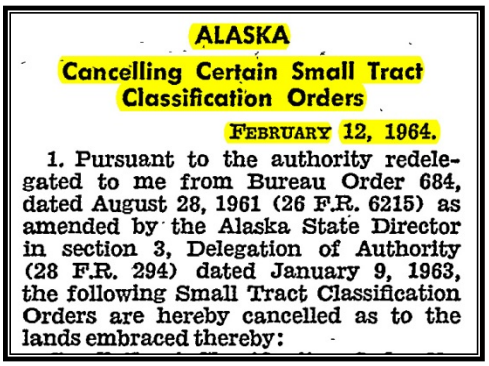
ROSS A. YOUNGBLOOD,
District Manager.

[F.R. Doc. 64–2007; Filed, Mar. 2, 1964; 8:46 a.m.]

STC 20_2

- The U.S. Government Publishing Office (GPO) provides an on-line site to locate items published in the Federal Register by date or by citation[64]. A search of the Federal Register for February 19, 1964 and then "Small Tracts" resulted in the following:

[64] Federal Register publication website, "FDsys" is transitioning to a new site on December 14, 2018. The new site is www.govinfo.gov. This site allows for searches of the Federal Register by citation, date or text.

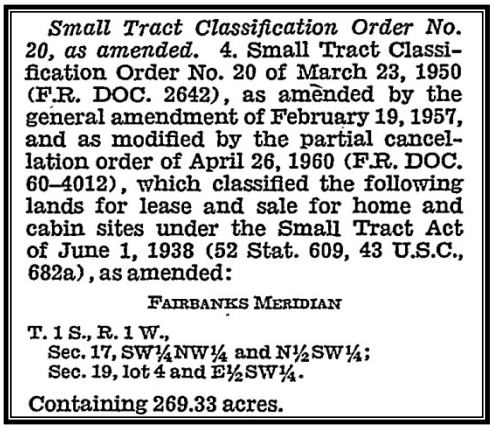


ALASKA

Cancelling Certain Small Tract Classification Orders

FEBRUARY 12, 1964.

1. Pursuant to the authority redelegated to me from Bureau Order 684, dated August 28, 1961 (26 F.R. 6215) as amended by the Alaska State Director in section 3, Delegation of Authority (28 F.R. 294) dated January 9, 1963, the following Small Tract Classification Orders are hereby cancelled as to the lands embraced thereby:



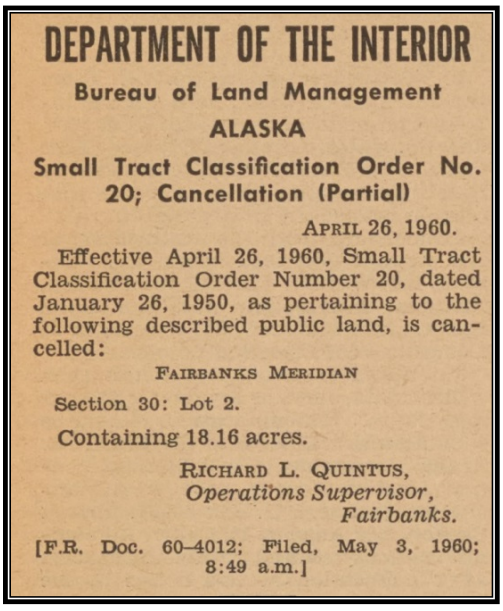
Small Tract Classification Order No. 20, as amended. 4. Small Tract Classification Order No. 20 of March 23, 1950 (F.R. DOC. 2642), as amended by the general amendment of February 19, 1957, and as modified by the partial cancellation order of April 26, 1960 (F.R. DOC. 60–4012), which classified the following lands for lease and sale for home and cabin sites under the Small Tract Act of June 1, 1938 (52 Stat. 609, 43 U.S.C., 682a), as amended:

FAIRBANKS MERIDIAN

T. 1 S., R. 1 W.,
Sec. 17, SW¼NW¼ and N½SW¼;
Sec. 19, lot 4 and E½SW¼.

Containing 269.33 acres.

- The HI also identified a partial revocation in 1960 (PART REV DO 4/26/1960). It was important to locate this item to ensure that the subject lot was not included in the partial revocation. This was more difficult to locate as it did not include an order number or the Federal Register volume and page reference. The BLM SDMS site includes a pdf document titled *Orders Affecting Public Lands In Alaska.*[65] This document is a 290 page summary of federal land orders for Alaska along with their Federal Register references. A search for the date "4/26/1960" resulted in a reference to the STC 20 Cancellation Order that was published in 25 FR 3860. The FR volume was downloaded and a review of page 3860 revealed that the cancellation was limited to Section 30 and so did not affect the subject lot.



DEPARTMENT OF THE INTERIOR

Bureau of Land Management

ALASKA

Small Tract Classification Order No. 20; Cancellation (Partial)

APRIL 26, 1960.

Effective April 26, 1960, Small Tract Classification Order Number 20, dated January 26, 1950, as pertaining to the following described public land, is cancelled:

FAIRBANKS MERIDIAN

Section 30: Lot 2.

Containing 18.16 acres.

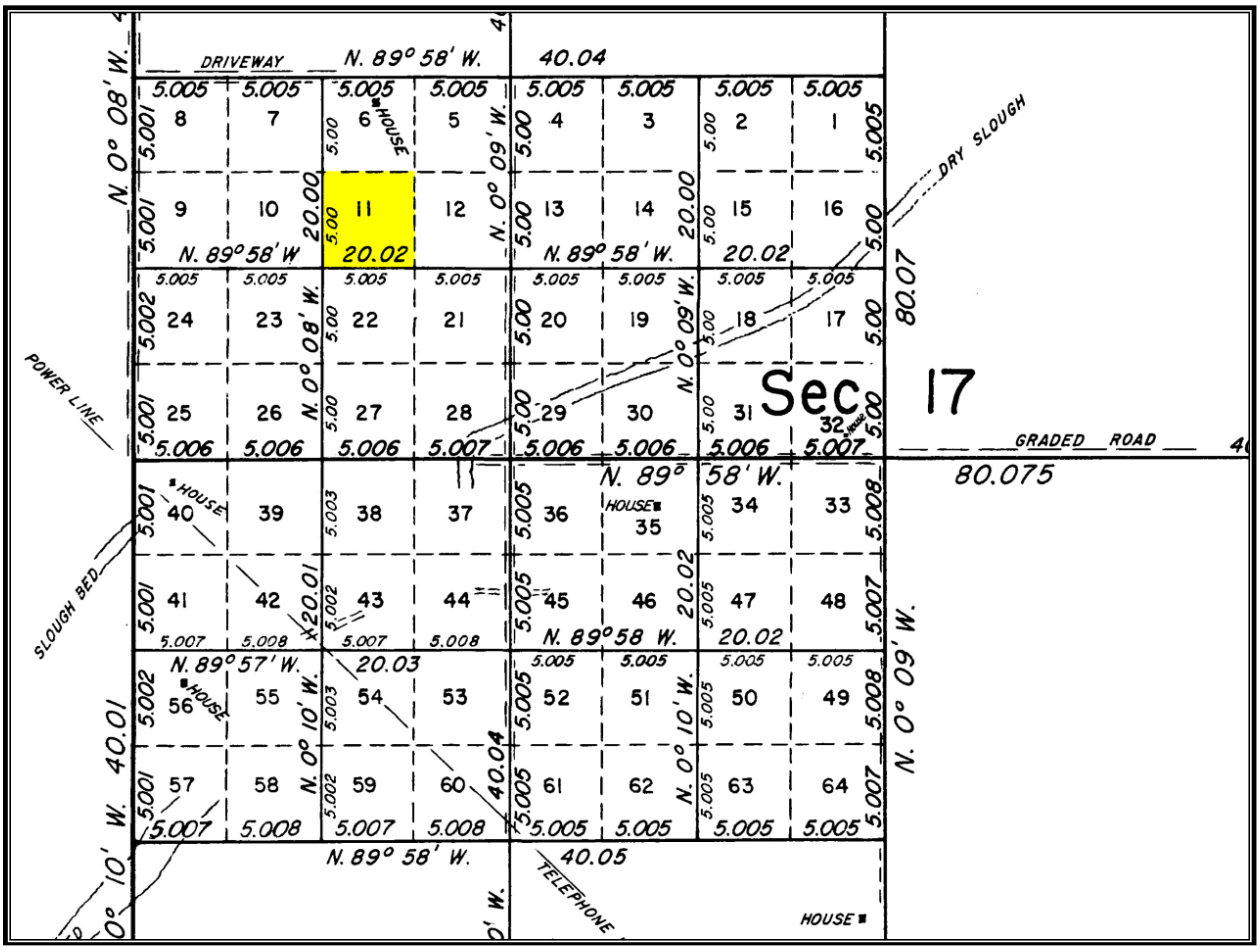
RICHARD L. QUINTUS,
Operations Supervisor,
Fairbanks.

[F.R. Doc. 60–4012; Filed, May 3, 1960; 8:49 a.m.]

[65] https://sdms.ak.blm.gov/sdms/AlaskaOrdersIndex.pdf Latest revision date - 06/9/2016.

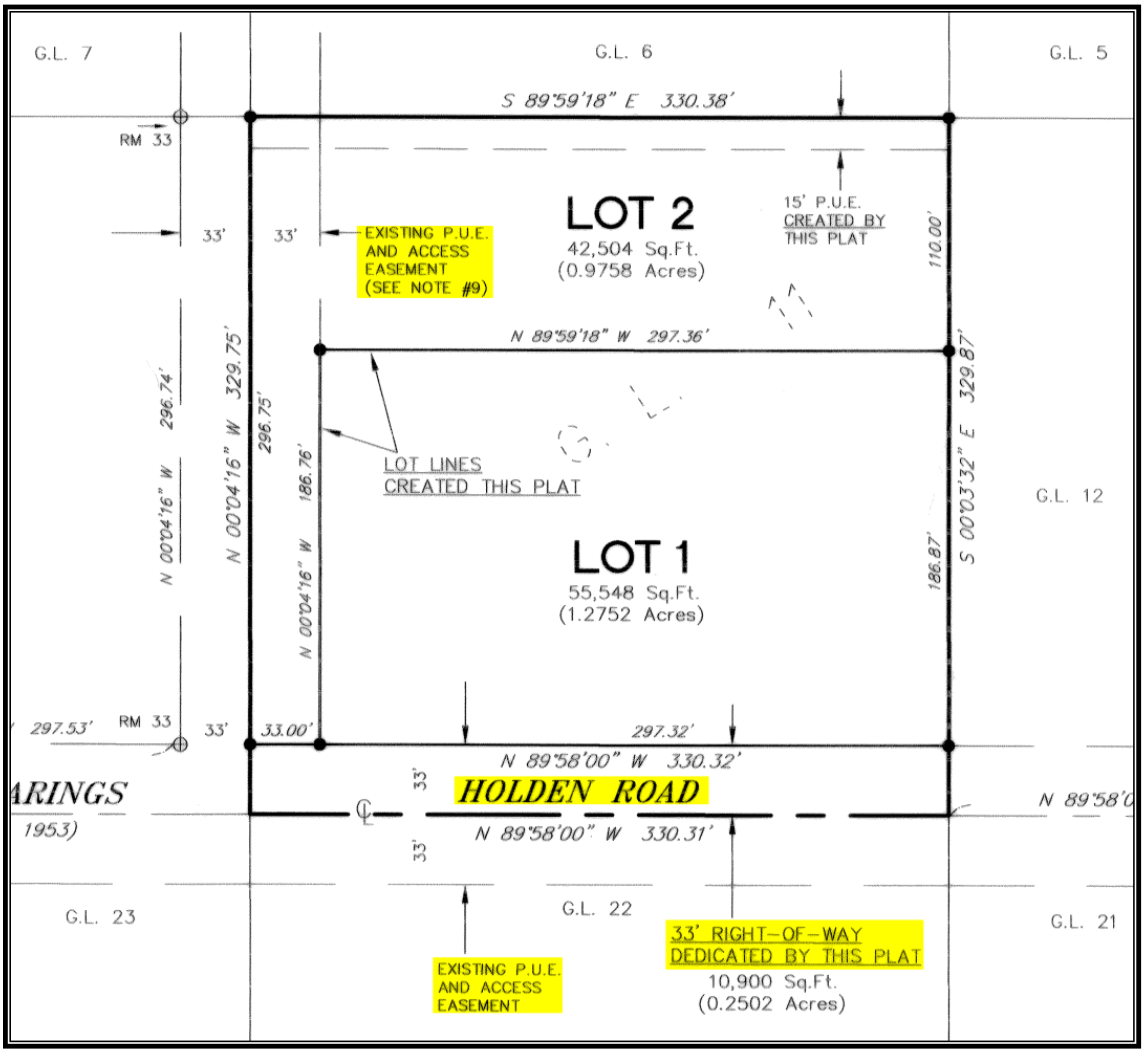
Date of Construction and Use

Small Tract residents filed petitions with the Alaska Road Commission for construction of roads within the Section 17 parcels in the summer of 1950. The 1953 BLM township plat below shows two existing graded roads. Alston road runs north-south through the center of the Small Tracts and Davis road runs east-west. An August 1951 Alaska Road Commission (ARC) map shows a 100-foot wide ROW (presumably by Public Land Order) for Alston and Davis. Other ARC records indicate that construction was complete by October of 1951. These are the only roads within the Small Tracts that were under ARC jurisdiction. The 1953 township plat does not indicate existing roads near the subject parcel except for Alston road 330-feet to east of GL-11.



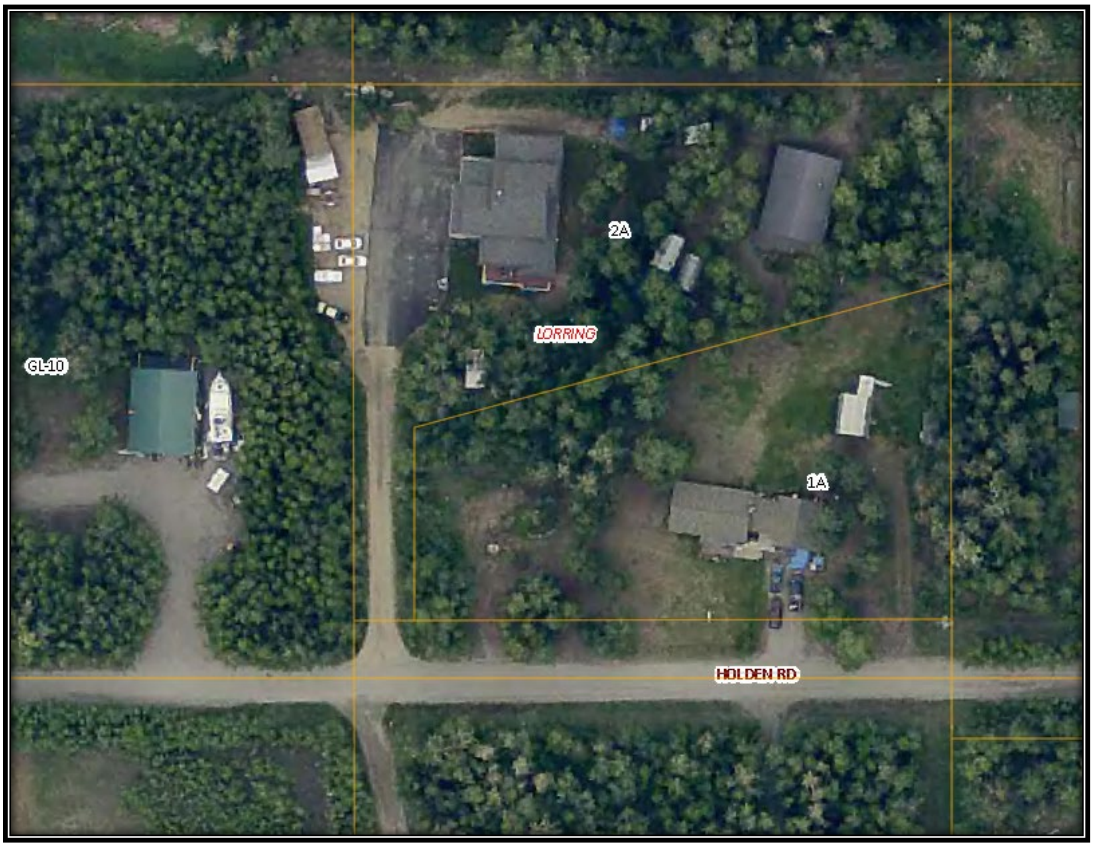
BLM Township Subdivision Plat approved April 13, 1953

The abstract for the GL-11 patent No. 1158110 to Neil H. Haffey indicates that the application to lease was submitted on 7/21/1952. A field report was issued on 11/15/1954 and the patent issued on 3/19/1956. Evidence of access construction and use may be revealed with a review of the BLM case file. The file could be requested from the National Archives.



Plat 2004-62 Lorring Subdivision – a Replat of GL-11

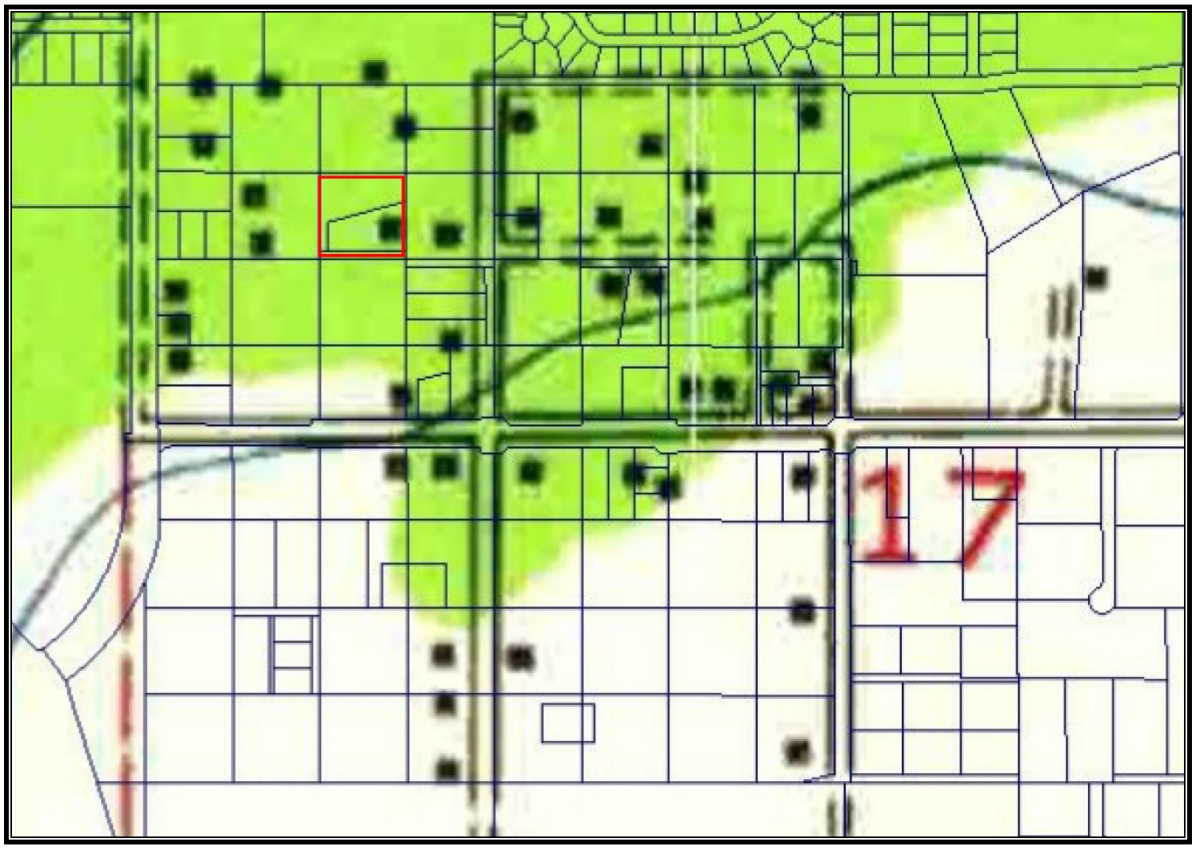
The plat of Lorring subdivision shows Holden Road along south boundary of GL-11. The plat identifies the 33-foot wide "Existing P.U.E. and Access Easement" associated with GL-11, GL-22 and GL-10 along the south and west boundaries as reflected in the patents. The 33-foot wide patent ROW along the south boundary is dedicated in conformance with Fairbanks North Star Borough platting ordinances while the patent ROW along the west boundary of GL-11 is unchanged and serves as the stem of the flag lot. The reference to note #9 in has to do with how setbacks would be measured from the easterly limit of the PUE and not the westerly boundary of GL-11. The subdivision was replatted by Plat 2005-134 to adjust the lot lines.



FNSB GIS 2012-13 Aerial Overlay – Lorring Subdivision (GL-11)

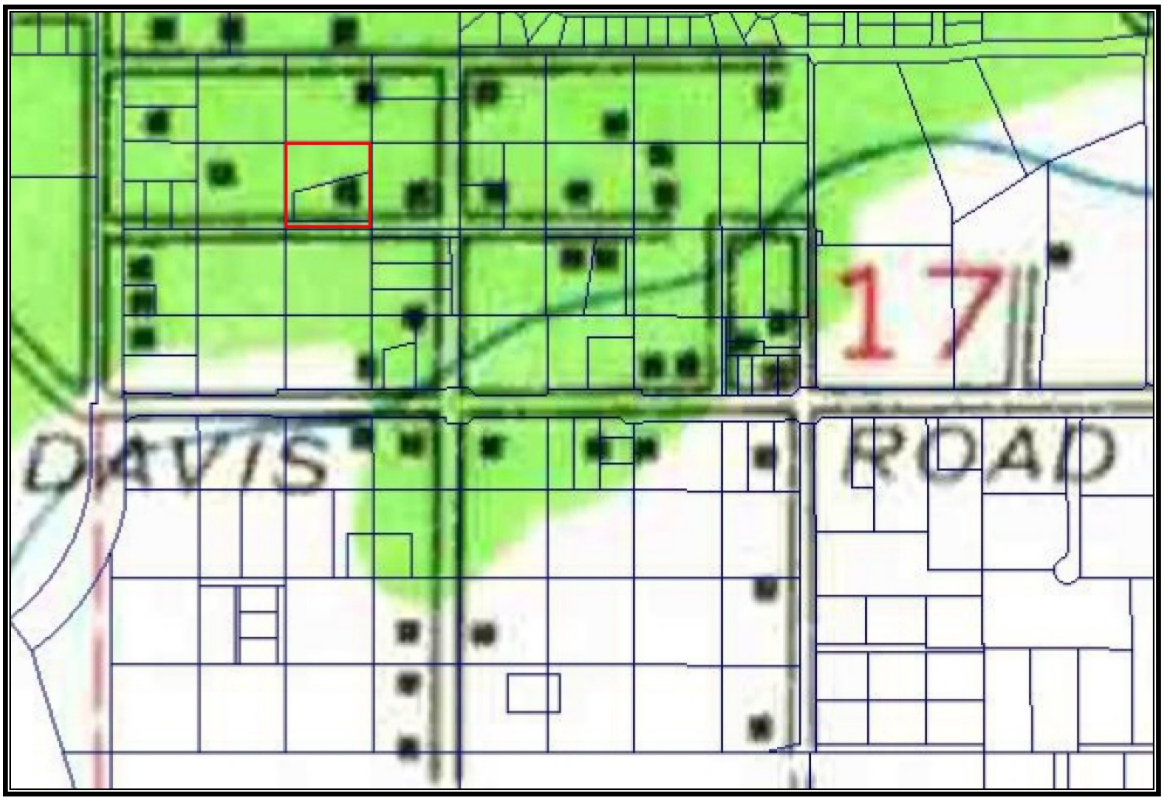
The FNSB 2012-13 aerial photo show the recent improvements within GL-11. The parcel boundary overlay shows the 33-foot wide dedication on the south boundary as segregated from the lots but does not show the 33-wide patent easement along the boundaries of the other lots. Note that the improvements for Lot 2A have encroached across the west boundary into GL-10.

The FNSB Assessor's records note the year of construction for structures. The house in Lot 1A of Lorring Subdivision (GL-11) is dated as 1964 construction and the structure on GL-22 (directly to the south of GL-11 has a construction date of 1960. The construction dates imply that access to these lots existed as early as 1960 suggesting an acceptance of the common law dedication offer along Holden road by construction and public use. A 2003 FNSB GIS aerial photo indicates no development along the boundary between GL-11 and GL-10 suggesting that this common law offer to dedicate was never accepted and is no longer available for acceptance.



USGS Fairbanks D-2 1955 Minor Rev. 1959

The USGS Fairbanks D-2 map shown above states that the topography is based on 1949 aerial photographs and "culture" was revised in 1955 based on 1954 aerial photography. Cultural features include manmade objects such as roads and structures. The USGS map image was imported into Google Earth and the FNSB GIS parcel boundaries were overlain to show the Small Tract lot relationship to the roads and structures. The subject GL-11 is outlined in red and shows the Lorring Subdivision replat 2005-134 boundaries. Davis and Alston roads through the center of the Small Tracts are appropriately shown as light duty constructed roads. Holden road east of Alston is shown as an unimproved dirt road. Holden road along the south boundary of the subject GL-11 is not shown although the structure in the southeast corner of GL-11 is shown to exist. This structure is listed as 1964 construction in the FNSB Assessor's records and it implies that access along the south boundary of GL-11 also existed.



USGS Fairbanks D-2 1955 Minor Rev. 1965

The USGS Fairbanks D-2 map updated with minor revisions to 1965 now shows Holden road as a light duty road along the southern boundary of GL-11 from University Avenue to the west and Alston road to the east.

Conclusion

According to *McCarrey v. Kaylor*, the cancellation of Small Tract Classification Order No. 20 on February 12, 1964 had the effect of terminating the offer of the common law dedication that was presented in the patents. Although further research might uncover additional evidence, the combination of the FNSB Assessor's date regarding date of structure construction and USGS maps regarding existence of Holden road appears to provide the necessary support to show that the common law offer of dedication had been accepted by public use prior to cancellation of STC-20.

Using the roads shown as existing on the 1965 USGS map, a rough count of Small Tract rights-of-way as stated in the patents suggest that as many as half may not have met the acceptance by public use requirement before Small Tract Classification Order No. 20 was cancelled. This would include the Small Tract ROW on the west boundary of GL-11.

If this cluster of 64 Small Tracts is representative of the 5,600 Small Tracts in Alaska, the *McCarrey* case clearly had a significant impact on access rights to these parcels.