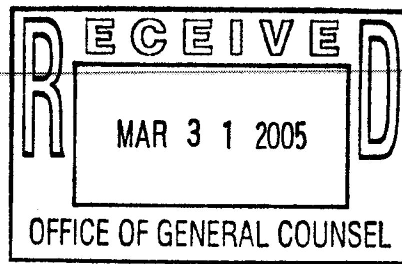
Mortg. Fraud-#7

Turner, Jacqueline



From: leon spiro [leonspiro@hotmail.com]
Sent: Thursday, March 31, 2005 1:07 PM
To: RegComments@ofheo.gov
Cc: apollard@ofheo.gov
Subject: RIN 2550-AA31 . Ref. Our Conversation

Alfred Pollard; General Counsel, OFHEO; Mr. Pollard: I reference this correspondence to possible Mortgage Irregularities and/or Fraud. To begin, I am an owner of a Federal Land Patented Parcel commonly referred to as a GLO Parcel. Under the Small Tract Act of 1938, the Congress authorized, for lease or sale . parcels of Federal Land, with no parcel to be larger than 5 acres, for residential , commercial and recreational purposes to Citizens of the United States , one parcel to a citizen. But first, one question of legality has to be answered by the Federal Government and/or OFHEO before one can delve further. I reference the easement, called for in this Act of Congress, that created these parcels and "easement law" that governs? Arizona Case Law has determined that there is a "private property right" that is "deeded" into the land. Each Federal Land Patent states " 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 west boundries of said land". (This is the wording in my Federal Land Patent). Also, in the event that the demension is not mentioned in the patent , then the width is to be 50 feet. Just what type of easement is this? If the intention of this Act of Congress (Small
Tract Act of 1938) was that this "easement" was for roadway and public utility purposes, then any "encroachment onto this easement" (construction, blockage, and fencing), would then produce a property with a "title defect". I reference Arizona Appelate Court Case, Bernal vs. Loeks, and Arizona Superior Court Case , Hampton vs. Zelman. In the City of Scottsdale , Arizona, the City Council, "abandons their interest in these patented easements and the publics right of use" to these roadway easements. But then the city permits Staff to permit construction, blockage and fencing encroachment on these "Federal Patented Roadway Easements. We have been informed that this is privy information when we request to know if the Federal Lending/Insuring Agencies are involved regarding these properties. We view these properties, that have encroached upon these Federal Land Patent Roadway Easements, as properties having a "title defect" because of this ignored "deeded private property right". The Lender/Insurer is ignoring "prudent lending practice" if so involved. We are aware of the many "exceptions" in a Title Underwriter Insurance Policy. We wish to inform this Committee of this much ignored fact and practice. We hope that no Federal Agency is involved,for if so, these same Agencies, are really a party to this irregularity /fraud for there are many unknowing, unwary, innocent victims that are owners of these properties. . The question once again for this Committee is this, what type of "easement" is it that is called for in the Small Tract Act of 1938 enacted by Congress? Is it" deeded into the land" parcel? Who can legally abandon this deeded roadway easement "in total"? A friend, Mr. John Aleo, has also sent an E Mail with enclosures that are essential in proving our point. Thank you. L. Spiro, SFC-E7 (Retired) U.S.Army. PO Box 5885, Carefree, Az. 85377.

leonspiro@hotmail.com

ATTACHMENT 1

Joseph R. Bertoldo
Scottsdale City Attorney's Office

3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

PHONE 480-312-2405
FAX 480-312-2548

MEMORANDUM

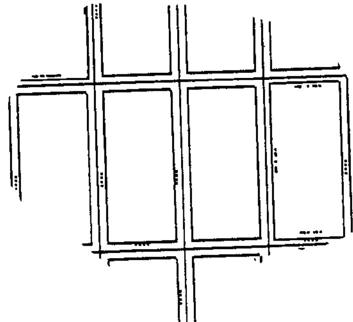
TO: Mayor and Council
THROUGH: Joseph R. Bertoldo
FROM: Kelly Ward
DATE: February 24, 2005
RE: GLO Easement Background

1. Question: What is a GLO easement?

Answer: GLO easements are public street right-of-way. "GLO" stands for "Government Land Office." The GLO created the GLO easements. The GLO is now part of the Bureau of Land Management. The City of Scottsdale has hundreds of miles of public street right-of-way. Only a small percentage of Scottsdale's public street right-of-way is GLO easements.

2. Question: What does a GLO easement look like?

Answer:



3. Question: Where does Scottsdale have GLO easements?

Answer: See Attached map.

85307v1

4. Question: How does the City deal with GLO easements?

Answer: GLO easements are public street right-of-way. The city of Scottsdale treats them like any other public street right-of-way.

5. Question: What is right-of-way?

Answer: "Right-of-way" generally means a long narrow parcel of land created for use as a corridor for streets, sidewalks, utilities, drainage ways, railroad tracks, or some combination of these uses. Right-of-way is usually substantially wider than the actual street, or railroad tracks, etc., in order to provide room for expansion and repairs. The city is a corporation that can own land and other real estate interests, just like Motorola or other corporations can. Some of the land the city owns is public street right-of-way. Right-of-way comes in two types: easement and ownership. The label "right-of-way" applies to both. Legal words like "dedication" and "abandonment" apply to both. GLO easements are easement-type rights-of-way.

6. Question: Who can use right-of-way?

Answer: Most uses of right-of-way require the city's permission. Obviously, the city is very liberal in granting permission, which is why the streets are full of cars and utilities. The city uses both its ownership rights and its regulatory powers to control use of the right-of-way. The word "public" doesn't mean that the public or a utility company owns the right-of-way. The city owns it. The word "public" only describes the types of uses the city makes of it.

7. Question: Where did the GLO easements come from?

Answer: The GLO created the GLO easements when it sold federal land to individuals. One GLO land sales program subdivided large parcels into five (5) acre parcels to sell to the public. The five (5) acre parcels are often called "GLO lots." The type of deed that GLO used to sell the land is called a patent. The patents contained language like this, which created the GLO easements:

> This patent is subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located across said land or as near as practicable to the exterior boundaries.

The GLO created a network of public roads within the land the GLO was selling.

8. Question: Why did the Government Land Office create the GLO easements?

There were two main reasons the GLO created the roads. First, the GLO wanted to make sure the five (5) acre parcels were not landlocked. Second, the GLO wanted to save the local government the cost and effort of condemning a road network within them later. The actual language creating the GLO easements is found in the "patent" that the GLO gave to the purchaser.

9. Question: Can the city abandon GLO easements?

Answer: The city council has power to abandon any right-of-way within the city. There are some limits on the city's abandonment power. For example, the abandonment must accommodate existing utilities. Also, the abandonment must not create a landlocked parcel. These rules apply to any abandonment.

10. Question: Where does the city get its powers to abandon right-of-way?

Answer: The power to lay out, create, build, close and abandon roads is an inherent power of government. In addition, the Arizona State legislature has enacted statutes specifically confirming a city's power to abandon rights-of-way. This power applies to all "roadways," including GLO easements. Here are excerpts from those statutes.

§ 28-7201. Definitions

In this article, unless the context otherwise requires:

1. "Governing body" means the city or town council or other authority of a city or town, the board of supervisors of a county or the transportation board.

. . .

4. "Roadway" includes all or part of a platted or designated public street, highway, alley, land, parkway, avenue, road, sidewalk or other public way, whether or not it has been used as such.

§ 28-7202. Disposition of unnecessary public roadways

If a governing body determines that a public roadway owned by the city, town, county or state or a portion of the roadway is not necessary for public use as a roadway, the governing body may dispose of or use the roadway as provided in this article.

§ 28-7205. City, town or county road vacated.

If the roadway is a city, town or county roadway, the governing body may resolve that the roadway or portion of the roadway be vacated....

§ 28-7214. Extinguishment of easements

If this state or a city, town or county does not own title to a roadway but holds right-of-way easements, the easements may be extinguished by the governing body's resolution.

This bill is pending at the Arizona legislature today.

HB 2227

Be it enacted by the Legislature of the State of Arizona: Section 1. Title 9, chapter 4, article 8, Arizona Revised Statutes, is amended by adding section 9-500.24, to read: 9-500.24. Federal patent easements; city and town abandonment A CITY OR TOWN, BY ITS OWN MOTION OR AT THE REQUEST OF A PROPERTY OWNER, MAY ABANDON A FEDERAL PATENT EASEMENT THAT THE CITY OR TOWN DETERMINES IS NOT BEING USED BY THE PUBLIC OR IS NO LONGER NECESSARY IN THE SAME MANNER AS OTHER EASEMENTS ARE ABANDONED.

We welcome the bill because it will reaffirm the city's power to abandon GLO easements, but that power is already granted by the existing statutes.

11. Once the GLO easement is gone, do the neighboring property owners have any right to keep using it?

Answer: We don't think so. We think the GLO easement is completely gone. We have not been able to find a statute, rule, regulation or document by the BLM, a court, or another legal authority that creates or recognizes a right by anyone to continue using a GLO easement after the city has abandoned it.

12. Question: What should a person do who believes that he has an easement after a GLO easement is abandoned?

Answer: Whether an easement exists is a matter between the owner of the land and the person who claims the easement. After the city abandons a right-of-way, the city neither owns the GLO lot nor claims the easement, so the city is not a proper party to the dispute.

13. Question: What have the courts and other legal authorities said about the city's power to abandon GLO easements?

Answer: Various people have tried over the years to explain how GLO easements work. Legally, the most important indication of an easement's character is the intent of the person who created the easement. BLM's position matches the city's position described in this memorandum.

Here is what the BLM has recently said about GLO easements:

> Since this Department has lost all jurisdiction over the lands, any question concerning the transfer or release of rights in the patented lands would be subject to determination in the local courts under state law. March 5, 2004 letter to Mr. Leon Spiro from Ms. Elaine Y. Zielinski, State Director, Bureau of Land Management.

14. Question: What have Arizona courts said about GLO easements?

Answer: There are three Arizona appellate decisions about GLO easements. None of them is about abandonment. Two say that GLOs are public street right-of-way. One says that private citizens cannot barricade GLO easements. None of them says anything about abandoning GLO easements. In the first case, a property owner, named Kennedy, tried to stop the city from building a road on the GLO easement running across his two adjoining GLO lots. In the second case, the same property owner tried to stop the telephone company from putting wires across the same GLO easement on a different part of his same two lots. In the third case, a GLO lot owner unsuccessfully tried to barricade a GLO easement that ran across his lot to stop his neighbor, named "Bernal," from using it.

15. Question: What did the first Kennedy case say about GLO easements?

Answer: Case Name: City of Phoenix v. Kennedy
Case Citation: 138 Ariz. 406, 675 P.2d 293
Date: 1983
Court: Division 1, Arizona Court of Appeals
Summary: The City of Phoenix wanted to build a road on the GLO easement running along the north boundary of Kennedy's property. Kennedy refused to allow the City of Phoenix access to the right-of-way.

The court ruled that the GLO easement was the City of Phoenix's right-of-way.

> Appellant was clearly apprised of the city's right-of-way across his land by the patent under which he claims title. The record shows that the city is reasonably utilizing the right-of-way in the manner and for the purposes for which it was reserved.

The court also explained why the GLO created the GLO easements.

> The intent behind the grant was to utilize public lands effectively. The reservation of the right-of-way was included so as 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.

The court allowed the City of Phoenix to build its road.

16. Question: What did the second Kennedy case say about GLO easements?

Answer: Case Name: Mountain States Telephone and Telegraph C. v. Kennedy
Case Citation: 147 Ariz. 514, 711 P.2d 653
Date: 1985

Court: Division 1, Arizona Court of Appeals

This lawsuit involved the same land as the first Kennedy lawsuit. The telephone company installed a telephone cable in the GLO easement. Kennedy demanded that the telephone company pay him rent for use of the land or he would remove the cable himself. He claimed that the earlier lawsuit only recognized a right-of-way along one side of his land. The court disagreed.

> The rights-of-way were created to provide street and utility access to the parcel. The purpose of the rights-of-way could best be fulfilled by permitting access along all boundaries.
>
> . . .
>
> Applying the rules of construction for a grant of public land and a restriction thereon, we hold that the patent grants a right-of-way along each boundary. Therefore, Mountain state's placement of telephone cable within the specified 33 feet of the boundary was lawful. (Citations omitted.)

The telephone wire was allowed to remain in the GLO right-of-way.

17. Question: What did the Bernal case say about GLO easements?

Answer: Case Name: Bernal v. Loeks
Case Citation: 196 Ariz. 363, 997 P.2d 1192
Date: 2000
Court: Division 2, Arizona Court of Appeals

Bernal and Loeks were neighbors but not friends. GLO easements gave Bernal's lot good access from the east. But, Bernal's lot was crossed by a wash, so it was hard for him to get to the west half of his lot. But, if he came to his lot from the west, he had easy access by way of a GLO easement on Loeks' land. Loeks built a fence and other obstructions to block Bernal from using the road. The court ruled that one private citizen does not have the power to close a right-of-way to another private citizen.

> We conclude the trial court erred in finding Bernal precluded from using and enforcing the rights-of-way located on the defendants' properties.

Bernal was allowed to use the road.

18. Question: Does the Bernal case say that a private easement exists after a GLO easement is abandoned?

Answer: Some have argued that the Bernal case says that a private easement exists after a GLO easement is abandoned. But, the Bernal case is not about that question. The GLO easement in the Bernal case had not been abandoned, no abandonment was proposed, and the concept of abandonment was not even mentioned in the Bernal case. The Bernal case merely held that one private landowner cannot barricade public street right-of-way so that another citizen cannot use it. Arizona courts use the same rules to stop a citizen from barricading any public right-of-way. In fact, a very similar case was decided the very same way when a neighbor obstructed right-of-way that was not a GLO easement. Drane v. Avery, **72 Ariz. 100, 231 P.2d 444,446** (1959).

19. Question: What do the two Kennedy cases and the Bernal case mean?

Answer: The first and second Kennedy cases and the Bernal case do not talk about abandoning GLO easements. Instead, they held that a GLO easement is public right-of-way, that a city can build a road on it, a utility company can place utilities upon it, and a private citizen cannot block traffic on it. All of these court decisions reach the same result the court would reach for any other right-of-way that was not a GLO easement.

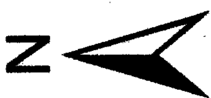
20. Question: How should Scottsdale handle GLO easements in the future?

Answer: That's a fair topic for a policy discussion. This memorandum only tries to outline the legal framework that allows the city to treat GLO easements like any other public street right-of-way. This means, among other things, that Scottsdale should, for abandonment purposes, treat GLO easements like other Scottsdale public street right-of-way.

RKW:cjk

GLO Patent Parcels

GLO Patent Areas



Memorandum

To: Honorable Mayor and City Council

From: Lisa Blyler, Natalie Lewis and Brent Stockwell

Date: March 23, 2004

Re: GLO Letter

Your Honor and Members of the City Council,

At a recent City Council meeting, Mr. Leon Spiro requested a copy of a "direction" letter that the Mayor had sent to members of the Planning Commission. Staff searched the Mayor's correspondence files and did not find such a letter. However, we did discover a letter in the legal files that was prepared in April 2002. This letter is attached for your information and in advance of the March 1st discussion related to Government Land Office (GLO) abandonment policy.

If you have questions, please do not hesitate to call the City Manager's Office at ext. 22422. Thank you.

ATTACHMENT: as stated

c: Jan Dolan, City Manager
Joe Bertoldo, City Attorney

"Most Livable City"
U.S. Conference of Mayors

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Mary Manross

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April 24, 2002

Planning Commissioner Tony E. Nelssen
(Handed out to Planning Commission)

Dear Commissioner Nelssen:

On April 16, 2002, the Mayor and Council took up a request by the Planning Commission for direction regarding legal issues on the abandonment of public access rights in GLO patent easements.

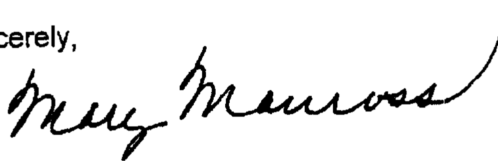
Specifically, the Council received information and legal advice in the public meeting and discussed the policy issues on whether to require applicants for GLO abandonments to defend and indemnify the City of Scottsdale in the event of legal challenge. The Council weighed the many considerations and reaffirmed its prior direction, given in the summer 2001, that City staff continue to bring the GLO abandonment applications forward for discussion on a case-by-case basis and that indemnification will not be required from the applicants. Direction also was given by the Council that Planning staff and the Planning Commission should focus on land-use issues in analyzing the applications and in making a recommendation to Council on each application.

In speaking on one of the GLO abandonment applications also on that night's Council agenda, you suggested that Council's direction may not have been responsive to a request made at a recent Planning Commission meeting, that the Council waive the attorney-client privilege so that the legal advice the Council has received on liability issues related to GLO easements and indemnification can be shared with the Planning Commission. However, the presentation received by the Council in its April 16th public meeting was responsive to this request.

After reviewing much legal advice on these issues in public, at the April 16th and previous meetings, the Council – which is the public body with decision making responsibility on liability issues – gave the direction noted above. While I believe the Council understands that our view of the relative risks and public benefits from continuing to hear GLO abandonment requests, on a case-by-case basis, will not be shared by everyone, I am confident that we have been well-informed and advised and are comfortable with the public interest balance we have struck on these issues.

I want to thank you and the other members of the Planning Commission for your dedication and interest in these issues. We look forward to your diligent review of the land-use issues as these applications come before the Commission and move forward for City Council consideration and decision.

Sincerely,



Mary Manross
Mayor

c: Honorable City Council
Planning Commission Members
Jan Dolan, City Manager
David Pennartz, City Attorney
Ed Gawf, Deputy City Manager
Kroy Ekblaw, Planning & Development Services General Manager

ATTACHMENT 2

Bernal v Loeks

Legal Brief[A]

[A] This legal brief has been scanned; therefore does not have actual signatures or other handwritten insertions.

IN THE COURT OF APPEALS
STATE OF ARIZONA - DIVISION TWO

ARTHUR S. BERNAL,	)	2CA-CV99-0107
	)	
Plaintiff/Appellant,	)	Pinal Co. Case No CV - 98045814
v.	)	
	)	
RONALD LOEKS, et ux., et al,;	)	
	)	
Defendants/Appellees.	)	
	)	

BRIEF OF AMICUS CURAIE
LAND TITLE ASSOCIATION
OF ARIZONA

Gary L. Bimbaum. #004386
Michael S. Rubin, #005131
MARISCAL, WEEKS, McINTYRE
& FRIEDLANDER. P.A.
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TABLE OF CONTENTS

		Page
I.	Introduction	1
II.	The Language and policies of the Small Tract Act are Consistent with Enforceability of the Easement by Adjacent Landowners	2
III.	The Court Should Consider the Effect of the Trial Court's Holding on Titles to Real Property in the State of Arizona …	7
IV.	Conclusion	8

Table Of Authorities

Page

Cases

City of Phoenix v. Kennedy. 4
138 Ariz.406.675P.2d 293 (Ct. App. 1983) ....

Mountain States Tel. & Tel. Co. v. Kennedy. 3
147Ariz. 514, 517.711 P.2d 653, 656 (Ct. App. 1985) ......

Siler v, Arizona Dep't of Real Estate. 3
193 Ariz. 374, 393. 972 P.2d 1010. 1019 (Ct. App. 1993 ………….

Statutes

43 C.F.R. § 2400.0-3(e) 2

43 U.S.C. § 682 (a) - (e) (repealed 1976) 2

Small Tract Act, 43 U.S.C. §§ 682(a)(e) (repealed 1976) ...... , 1

Secondary Authorities

Restatement (Second) of Contracts 6
§302(1)(b),....................,......,.........

1. **INTRODUCTION**

The Land Title Association of Arizona ("LTAA") is a non-profit association. Its members are title insurance companies which issue policies insuring interests in Arizona real property. Specifically, LTAA members are often called upon to insure real property interests derived from United States Patents pursuant to the Small Tract Act. 43 OS-C- §§ 682(a)(e) (repealed 1976).

The trial court's holding in the present case — that easements granted for the benefit of the public under the Small Tract Act are unenforceable by the owners of the benefited lands unless the county has dedicated and established them as public roadways - is, in the judgment of the LTAA, incorrect as a matter of law. Moreover, the implications of that holding on land titles within the State of Arizona in general, and on the real estate and title insurance industries in particular, are extremely significant.

If the trial court's holding is affirmed on appeal, the validity of many land titles may be thrown into Jeopardy and the value of countless properties will be affected. Parties who have used roadway easements for years without objection or contest may find themselves without assured access to their properties; subdivision reports based upon the "legal access" provided by federal patent easements will be called into question; immediate development of many properties may be unnecessarily deferred; and suits to establish private ways of necessity may be anticipated by landowners who previously believed that they had both legal and practical access over the adjacent easement areas.

The LTAA urges the Court to reverse the ruling of the trial court on this narrow issue, and to hold that a patent easement is fully enforceable by the owners of all benefited lands. Such a holding is consistent with existing case law and the recognition afforded such easements by developers and title insurers throughout this state.[1]

II. THE LANGUAGE AND POLICIES OF THE SMALL TRACT ACT ARE CONSISTENT WITH ENFORCEABJLITY OF THE EASEMENT BY ADJACENT LANDOWNERS

The Small Tract Act was enacted in 1938, and authorized the Secretary of the Interior to lease or sell certain classifications of public land if he determined, in his discretion, that they were "chiefly valuable for residence, recreation, business or community site purposes." 43 C.F.R. § 2400.0-3(e). See 43 U.S.C. § 682(a) - (e) (repealed 1976). During the 1940s and 1950s, a substantial number of parcels located in Arizona were sold or leased under the Act. In each case, as provided in the Act, the Patent (the federal conveyance instrument), was expressly made subject to an easement not to exceed 33 feet in width "for roadway and public utilities purposes." The Patents transferred the public lands described therein to private parties. Subsequent transfers of those properties also recognized the right-of-way easements as a matter of fact and law. Index of Record (I.R.) No. 31 (Judgment of Dismissal), U 4, at 2.

[1] LTAA also notes the unusual position of the parties in this litigation. Apparently. Appellant and Appellees both acknowledge the existence of the easements with respect to the land in dispute (See Opening Brief at 14; Answering Brief at 5). It further appears undisputed that Pinal County concedes and supports Appellant's rights of use with respect to the property. If this is the case, what right or standing do Appellees have to object to this use of the property by Appellant? Nothing in the Small Tract Act limits the use of the roadway to the county of to the period after

In the present case, the easement is reflected in the subdivision plat map as "Moonvista Road" and has been accepted by the Pinal County Board or Supervisors, ld. Its status as a public easement is not in dispute. However, the land subject to the easement has apparently not been substantially improved, established by Pinal County as a roadway for public use, or accepted for maintenance purposes by the County.

There is very little case law dealing with the legal issue before this Court. However, the sparse precedent that does exist clearly supports the Appellant's position that the patent easements are enforceable in accordance with their terms, by the intended beneficiaries, regardless of whether or when the county develops the roadway or accepts the improvements into the county system for maintenance.

A land patent from the United States government is essentially a deed and therefore conveys all of the government's interest in the land transferred via the issuance of the patent. <u>See Siler v. Arizona Dep't of Real Estate</u>. 193 Ariz, 374. 383, 972 P.2d 1010, 1019 (Ct. App. 1993); <u>Mountain States Tel. & Tel. Co. v. Kennedy</u>. 147 Ariz. 514. 517. 711 P.2d 653, 656 (Ct. App. 1985). In essence, the patent operates just as a deed between two private parties would operate. <u>Where, as here, the "patent" expressly reserves an easement for public utilities and roadways, those rights are property rights which must be recognized and honored</u>. There is no basis in logic or law for conditioning the effect of that conveyance upon any subsequent act or improvement.

roadway improvements are constructed and accepted for maintenance. To the contrary, a core purpose of the Act is to provide access to private lands.

In two related cases, this Court established the framework needed for the resolution of this appeal. In City of Phoenix v, Kennedy, 138 Ariz. 406, 675 P.2d 293 (Ct- App. 1983) (Kennedy I"), the Court upheld the right of the City of Phoenix to utilize an easement on Mr. Kennedy's property granted under a patent containing language virtually identical to the patent at issue here. Kennedy claimed that the easement was invalid for several reasons, including the lack of formal "acceptance" by the City. The court rejected that argument, based upon the language of the patent. 138 Ariz. at 407,675 P.2d at 294. The Court also rejected Kennedy's argument that the easement granted under the patent failed to describe the right-of-way with sufficient particularity. The Court held that the language in the patents was "sufficient to create a floating easement for a right-of-way which, when created, is not limited to any specific area on the servient tenement, but becomes fixed by the first usage thereof." 138 Ariz. at 408. 675 P.2d at 295.

Significantly, the Court in Kennedy I interpreted the easement created by the federal patent in light of the intent of the government in granting the patent and reserving the easement. The Court observed:

> The intent behind the grant was to utilize public lands effectively. The reservation of the right-of-way was included so as 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. See 43 C.F.R. § 2730.0-2, 2731.6-2 (removed 1980); cf. Ide v. United States. 263 U.S. 497, 44 S.Ct. 182, 68 L.Ed. 407 (1924).

In <u>Mountain States Tel & Tel. Co. v. Kennedy</u>, 147 Ariz. 514, 711 P.2d 653 (Ct, App. 1985) ("<u>Kennedy II</u>"), Mr. Kennedy again sought to prevent utilization of the easement created in the federal patent, this time by Mountain States, a telephone utility company. Mountain States filed a declaratory judgment action, seeking to establish its right to use the patent easement for utility purposes without interference from Kennedy. Kennedy filed a counterclaim to have the easement declared void and to hold Mountain States liable for trespass, Kennedy argued that Kennedy I established the City's easement along one boundary of the property, and that there could only be one easement under the terms of the patent. The trial court entered summary judgment for Mountain States. On appeal, the Court held that the easement created by the patent was specifically intended to provide street and utility access to the parcel conveyed, and that the purpose of the grant could best be fulfilled by construing the patent to permit access along all of the property boundaries. 147 Ariz. at 516, 711 P.2d at 655. Summary Judgment for Mountain States was thus affirmed.

The Kennedy cases <u>establish that an easement created by federal patent is enforceable either by a governmental entity, public utility, or any other intended beneficiary</u>. In this case, the language of the patent makes it dear that adjoining property owners were to have access to their properties via the easement reserved in the patent. Landowners throughout this state have no doubt

purchased, mortgaged, subdivided and developed the properties based upon similar assurances.[2]

Appellees attempt to distinguish the Kennedy cases on the basis that they both involved "public" use of the easement. Appellees' Brief, at 5. However, neither of the Kennedy cases make any distinction between public and private uses of the patent easement. In Kennedy II, the court held that Mountain States was an "intended beneficiary" of the reservation of the easement, under an analysis completely unrelated to its status as a "public" utility. In fact, the court relied upon the Restatement (Second) of Contracts § 302 (1)(b), which also makes no such distinction. A private grantee of a patent can obviously be an intended beneficiary of an easement for ingress and egress, just like a municipality or utility.[3] Moreover, Appellant's use of the easement is with the consent of the County in any event. Thus, the public-private beneficiary distinction provides no rationale for the trial court's decision.

The trial court erroneously held, contrary to the holdings of Kennedy I and Kennedy II, that the easement created by the patent could not be enforced unless and until Final County developed the roadway. Appellees do not even attempt to explain that interpretation of the law in their brief, which is indefensible

---

[2] While certain of these landowners may have title insurance applicable to their circumstances, it is highly likely that others do not and that, in many cases, the value of improvements constructed on the impacted properties exceed the amount of the available insurance in any event.

[3] Without support or explanation, Appellees simply conclude categorically that the appellant "is not an intended beneficiary11 of the patent easement. Id, Implicitly, Appellees thus concede that non-public, but intended, beneficiaries of an easement for ingress and egress, are entitled to enforce the easement rights. LTAA agrees with that position, which seems to be in conflict with Appellees' posture in the trial court.

under the language of the patent at issue and incompatible with the purposes of the Small Tract Act.

III. THE COURT SHOULD CONSIDER THE EFFECT OF THE TRIAL COURTS HOLDING ON TITLES TO REAL PROPERTY IN THE STATE OF ARIZONA

It is respectfully submitted that the trial court erred in holding, without any supporting legal authority, that a private landowner was precluded from using and enforcing a patent easement for ingress and egress unless the county had designated and improved the roadway and/or accepted it for maintenance. The court further concluded that there is no "private right" to enforce the easement created by patent. I.R. 31, ¶ ¶ 7, 8. The language of both the Small Tract Act and the patent easement itself is incompatible with that holding. Moreover, the authority relevant to this issue supports the appellant's position that the easement is enforceable by the private owners for whose benefit (in part) it was granted. Finally, the LTAA wishes to bring to the Court's attention at least certain of the ramifications of a ruling affirming the judgment entered by the trial court in this case.

For many years, properties originally transferred by the federal government by patent have been freely reconveyed, encumbered, improved and used by private parties. Many of these properties are rural in character and they are often in unincorporated areas of a county, such as in the present case. In some cases, the county has developed the roadway, but in other instances, the roadway has not been officially recognized, improved or maintained by the county. Land titles throughout the State of Arizona are potentially threatened by

the trial court's holding in this case. Particularly in rural areas, the patent easement may be the only legal access available to the subject-property. The marketability of such properties would be severely impacted by affirmance of the trial court's judgment and the cost and availability of title insurance could be similarly affected.

This Court can and should avoid such unnecessary effects on the Arizona real estate market by applying the plain language and obvious intent of the Small Tract Act, and by following the logic and holdings of Kennedy I and Kennedy II. The trial court's holding lacks any basis in logic or law and is inconsistent with the purpose of the Act and the patent easement.

IV. CONCLUSION

The LTAA, as amicus curaie, respectfully submits that the holding of the trial court should be reversed. The patent easement is valid and enforceable, regardless of whether Pinal County has improved or accepted the roadway. Appellant (an intended beneficiary) has the right to use and enforce the easement.

RESPECTFULLY SUBMITTED this 14th day of January, 2000.

MAR1SCAL, WEEKS, MciNTYRE&
FRIEDUWDER, P.A.

Gary L. Birnbaum
Michael S. Rubin
2901 N. Central, Ste. 200
Phoenix, Arizona 65012
Attorneys for Amicus Curaie

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

MICHAEL S. RUB1N, being first duly sworn, deposes and states that he caused the original and six (6) copies of the foregoing Amicus Curaie Brief sent via Federal Express this 14th day of January, 2000.

Clerk of the Court
Arizona Court of Appeals
Division Two
State Office Building
400 West Congress
Tucson, Arizona 85701

and caused two (2) copies of the said Amicus Curaie Brief to be mailed this 14th day of January, 2000, to:

William F, Doran, Esq.
Suite 1
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P.O. Box 54099
Phoenix, Arizona 85078
Attorney for Appellee

Jules I. Firetag, Esq.
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CRUSE, FIRETAG & BOCK, P.C.
5611 North 16th Street
Phoenix. Arizona 85016
Attorneys for Plaintiff-Appellant

MICHAEL S. RUB1N

SUBSCRIBED AND SWORN TO before me this 14th day of January, 2000, by Michael S. Rubin.

Yvonne A. Burgess
Notary Public

My Commission Expires
12/15/00

ATTACHMENT 3

-EXPCITE-

TITLE 43 - PUBLIC LANDS

CHAPTER 16 - SALE AND DISPOSAL OF PUBLIC LANDS

-HEAD-

Sec. 682a to 682e. Repealed. Pub. L. 94-579, title VII, Sec. 702,

Oct. 21, 1976, 90 Stat. 2787

-MISC1-

Section 682a, ***acts*** June 1, 1938, ch. 317, Sec. 1, 52 Stat. 609;

July 14, 1945, ch. 298, 59 Stat. 467; June 8, 1954, ch. 270, 68

Stat. 239, related to sale or lease of ***small tracts*** for residence,

recreation, business, or community site purposes.

Section 682b, ***act*** June 1, 1938, ch. 317, Sec. 2, as added June 8,

1954, ch. 270, 68 Stat. 239, related to minimum selling price and

reservation of mineral rights.

Section 682c, ***act*** June 1, 1938, ch. 317, Sec. 3, as added June 8,

1954, ch. 270, 68 Stat. 239, related to qualifications of lessees

and purchasers.

Section 682d, ***act*** June 1, 1938, ch. 317, Sec. 4, as added June 8,

1954, ch. 270, 68 Stat. 240, related to sales or leases to

employees of Department of the Interior stationed in Alaska.

Section 682e, ***act*** June 1, 1938, ch. 317, Sec. 5, as added June 8,

1954, ch. 270, 68 Stat. 240, related to application of sections

682a to 682e of this title to certain revested grant lands in

Oregon and conditions on lease of such lands.

EFFECTIVE DATE OF REPEAL

Section 702 of Pub. L. 94-579 provided that the repeal made by that section is effective on and after Oct. 21, 1976, except such effective date to be on and after tenth anniversary of date of approval of this ***Act***, Oct. 21, 1976, insofar as homestead laws apply to public lands in Alaska.

SAVINGS PROVISION

Repeal by Pub. L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see section 701 of Pub. L. 94-579, set out as a note under section 1701 of this title.

ATTACHMENT 4

HOLD FOR PIU PAPER TRAIL

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MICHAEL K. JEANES, Clerk
By [signature]
Deputy

Charles K. Ayers, Bar No. 003756
Joseph M. Hillegas, Jr., Bar No. 010637
AYERS & BROWN, P.C.
4227 No. 32nd St.
First Floor
Phoenix, Arizona 85018
Phone # 602/468-5700
Our File # 2544.001

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

SUSAN HAMPTON, a single woman and LARRY SENDEJAZ, a single man Plaintiffs v, JOSIE ZELMAN, JOHN DOES 1-5 and JANE DOES 1-5, husband and wife, BLACK AND WHITE CORPORATIONS 1-5, RED AND TAN PARTNERSHIPS 1-5, and unknown owners and claimants and unknown heirs of the above-named Defendants, if deceased, Defendants.	No. CV 99-14250 **JUDGMENT / PERMANENT INJUNCTION**

This matter having come on regularly for trial to the Court, and the parties having been present and represented by counsel, and the Court having taken evidence and heard the testimony of the witnesses and arguments of counsel, and being fully advised in the premises:

It is hereby Ordered, Adjudged and Decreed as follows:

1. Plaintiffs are hereby vested with, and title is hereby quieted in Plaintiffs to, an easement for roadway and public utility purposes over the IN A REASONABLE AMOUNT (JW) easterly UP TO sixty-five (65) feet of the following-described real property: (JW)

The Northeast Quarter (NE 1/4) of the Northeast Quarter (NE 1/4) of the Northeast Quarter (NE 1/4) of the Southeast

AYERS & BROWN, P.C.
4227 North 32nd Street, First Floor
PHOENIX, ARIZONA 85018
(602) 468-5700

Unofficial Document

Quarter (SE 1/4) of Section 21, Township One (1) South, Range Two (2) West of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

Said easement shall inure to the benefit of the Plaintiffs in common with the general public, shall run with the land, and shall be appurtenant to and for the benefit of the following described real property:

The Southeast Quarter (SE 1/4) of the Southeast Quarter (SE 1/4) of the Northeast Quarter (NE 1/4) of the Southeast Quarter (SE 1/4) of Section 21, Township One (1) South, Range Two (2) West of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

The Northeast Quarter (NE 1/4) of the Southeast Quarter (SE 1/4) of the Northeast Quarter (NE 1/4) of the Southeast Quarter (SE 1/4) of Section 21, Township One (1) South, Range Two (2) West of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

Unofficial Document

The Southeast Quarter (SE 1/4) of the Northeast Quarter (NE 1/4) of the Northeast Quarter (NE 1/4) of the Southeast Quarter (SE 1/4) of Section 21, Township One (1) South, Range Two (2) West of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

2. Pursuant to the provisions of A.R.S. §12-1103, a money judgment is hereby granted in favor of Plaintiffs as against Defendant, JOSIE ZELMAN, for Plaintiffs' attorneys fees incurred herein in the amount of $25,000.00 and Plaintiffs' costs in the amount of ~~$414.50~~ $409.50, together with interest on said amounts at the rate of ten percent (10%) per annum from the date hereof until paid.

3. Defendant, JOSIE ZELMAN, her agents, successors and assigns, and any and all persons claiming any interest in the above-described property by or through her, are hereby permanently enjoined from blocking, impeding, or otherwise or in any way interfering with the use of the aforesaid easement for roadway or public utility purposes.

4. Defendant, JOSIE ZELMAN, her agents, successors and assigns, and any and all persons claiming any interest in the above-described property by or through her, shall immediately remove or cause to be removed any and all obstructions not naturally occurring located anywhere within the area of the easement as above described, including without limitation any fencing, rocks or other debris (but excluding the existing utility poles) which might prevent, impede or interfere with the full use and enjoyment of said easement.

5. The Court expressly determines that there is no just reason for delay in the entry of this Judgment and Permanent Injunction, and

///
///

AYERS & BROWN, P.C.
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PHOENIX, ARIZONA 85018
(602) 468-5700

expressly directs that this Judgment and Permanent Injunction be entered forthwith.

DONE IN OPEN COURT this 11th day of September, 2001.

J. Kenneth Mangum
Judge of the Superior Court

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4227 North 32nd Street, First Floor
PHOENIX, ARIZONA 85018
(602) 468-5700

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The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest [signature] 20 01

MICHAEL K. JEANES, Clerk of the Superior Court of the State of Arizona, in and for the County of Maricopa.

By [signature] Deputy

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ATTACHMENT 5

FILED BY CLERK
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COURT OF APPEALS
DIVISION TWO

7

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARTHUR S. BERNAL, a married man dealing with his sole and separate property, Plaintiff/Appellant, v. RONALD LOEKS and DONNA LOEKS, husband and wife; GARY E. McCUSKER and KERRY McCUSKER, husband and wife, Defendants/Appellees.	2 CA-CV 99-0107 DEPARTMENT B OPINION

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV 98045814

Honorable Boyd T. Johnson, Judge

REVERSED AND REMANDED

Cruse, Firetag & Bock, P.C.
By Jules I. Firetag and Paul F. Dowdell
Phoenix
Attorneys for Plaintiff/Appellant

William F. Doran
Phoenix
Attorney for Defendants/Appellees

Mariscal, Weeks, McIntyre & Friedlander, P.A.
By Gary L. Birnbaum and Michael S. Rubin
Phoenix
Attorneys for Amicus Curiae Land Title Association of Arizona

---

B R A M M E R, Presiding Judge.

¶1 Arthur Bernal appeals from the trial court's order granting summary judgment in favor of the defendants/appellees Ronald and Donna Loeks and Gary and Kerry McCusker on his claim that they had unlawfully denied him access to rights-of-way that had been reserved on their properties in federal land patents. We reverse.

Facts and Procedural History

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered. *United Bank of Arizona v. Allyn*, 167 Ariz. 191, 805 P.2d 1012 (App. 1990). Bernal and his neighbors the Loekses and McCuskers all own parcels of land that had originally been acquired from the federal government by land patents pursuant to the Small Tract Act, 43 U.S.C.A. §§ 682a through 682e (repealed 1976). Bernal's property is bounded on the east by the north-south trending Cedar Drive. His house faces this roadway, which provides access to his property. The back, west boundary of Bernal's property abuts the east boundary of the Loekses' property which, in turn, is bounded on the north by the McCuskers' property. The Loekses' and McCuskers' properties are bounded on the west by the north-south trending Meridian Road; this roadway provides access to their properties. Bernal's property is bisected by a north-south trending arroyo. He can access the west half of his property by using a foot bridge that spans the wash. However, he would like to keep horses on the west section, access to which can be readily gained only west of the arroyo.

¶3 Each of the patents for lots of land from which the parties' parcels were subdivided provides that the patent "is subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes, to be located along" three of the lot's boundaries. Hence, each of the parties' parcels are subject to a right-of-way along two of its boundaries. These rights-of-way and others in the area form an "H" pattern, with the uprights representing Cedar Drive and

Meridian Road and the crossbar representing a yet-to-be-built connecting roadway, prospectively named Moonvista Street. Bernal's and the Loekses' parcels lie directly below the crossbar and the McCuskers' parcel lies directly above.

¶4 In April 1998, Obie O. Rooker, the previous owner of Bernal's parcel, brought an action seeking to quiet title to, and to enjoin the Loekses and the McCuskers from blocking his access to, the rights-of-way along, respectively, the northern and southern boundaries of their properties, which together form a portion of the prospective Moonvista Street. Rooker averred that his property was in escrow, the closing of which was dependent upon his acquiring physical access to the western portion of his property. He claimed that the Loekses had erected a fence across, and had deposited piles of soil, rocks, and debris on, the rights-of-way, which prevented him from acquiring such access. Shortly thereafter, Bernal acquired ownership of the parcel and was substituted as the plaintiff in the action.

¶5 In December 1998, Bernal moved for summary judgment, claiming that he had "access rights" to the "right-of-way easements" on the defendants' lands that had been reserved in the federal patents. He argued that, because the reservations of rights-of-ways for roadway purposes in the patents "were inserted . . . for the mutual benefit of the grantees and the general public by providing [property owners in the vicinity of lands subject to the rights-of-way] a means of acquiring ingress and egress" to their property, the federal government, as grantor, must have intended that those property owners could use the rights-of-way, even if, as here, the state or local government had not yet constructed the roadways. The trial court disagreed, finding that:

> . . . although the patent reservation of an easement of 33 feet in width [on the parties' properties] states it is for roadway and public utilities [purposes], it is well established case law that the legislative intent of creating the reserved easement was to preserve for future public action the ability to utilize it for public roads and public utilities; that, although Pinal County accepted all such reserved easements by resolution of the Board of Supervisors, . . .

> the easements in question (which are part of the proposed Moonvista [Street]) have not been dedicated and established by Pinal County as a public roadway;
>
> That there is no private right to enforce the easements reserved by the Federal patents and the subsequent deeds acquired by the parties and their successors in interest.

The trial court therefore denied Bernal's motion for summary judgment and granted summary judgment for the defendants. It denied Bernal's motion for a new trial, and this appeal followed.

Standard of Review

¶6 Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c), 16 A.R.S. *See Allyn*. When reviewing de novo the trial court's grant or denial of summary judgment, we apply the same standard as it used in ruling on the summary judgment motion in the first instance. *Id.*

Discussion

¶7 The Small Tract Act provided for the sale or lease of small tracts of federal land "for residence, recreation, business, or community site purposes." § 682a. It did not specifically provide for the reservation of rights-of-way in the land patents but simply permitted the Secretary of the Interior to reserve in the patents "such rules and regulations" as he or she deemed necessary. *Id.* Bernal argues the trial court erred in holding that the reservation of rights-of-way "for roadway purposes" in the patents was intended solely for the eventual construction of "public," that is, government built and maintained, roadways and that nearby property owners have no private right "to use or enforce" the rights-of-way. For the following reasons, we agree with Bernal.

¶8 Initially, we find misplaced the trial court's reliance on case law to support its conclusion that private parties could not use or enforce the right-of-way provisions reserved in the federal patents. The handful of cases that have addressed these provisions, two of which are from Arizona, were all brought or defended by either a government entity seeking to build a public roadway, *City of Phoenix v. Kennedy* (*Kennedy I*), 138 Ariz. 406, 675 P.2d 293 (App. 1983), or a utility company seeking to install a public utility. *Mountain States Telephone and Telegraph Co. v. Kennedy* (*Kennedy II*), 147 Ariz. 514, 711 P.2d 653 (App. 1985).[1] *See also State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983); *State Dep't of Highways v. Green*, 586 P.2d 595 (Alaska 1978); *State Dep't of Highways v. Crosby*, 410 P.2d 724 (Alaska 1966). Accordingly, none had occasion to address whether nearby property owners could use and enforce the rights-of-way to secure access to properties located in the vicinity of parcels subject to them. Not only did the cases not directly address this issue, but we find nothing in these cases to suggest that these property owners are precluded from doing so.

¶9 Nor do we find such a conclusion supported by the "rules and regulations" the Secretary promulgated pursuant to the Small Tract Act. *See* 43 C.F.R. §§ 2730.0-2 through 2731.6-4 (removed 1980). Section 2731.6-2, entitled "Rights-of-way," the only provision that addressed the reservation of rights-of-way in the patents,[2] provides simply:

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[1]In *Kennedy I*, we upheld the city's right to improve a street and install public utilities on a federal patent holder's parcels, the patents for which contained right-of-way provisions virtually identical to that at issue here. In *Kennedy II*, Division One of this court upheld a utility company's right to install cable lines in the same rights-of-way, concluding that, like municipalities, utility companies were intended beneficiaries of the reservation.

[2]In *Kennedy I*, we cited §§ 2731.6-2 and 2730.0-2 for the proposition that the "reservation of the right-of-way was included so as 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." 138 Ariz. at 408, 675 P.2d at 295. Although we still believe that proposition to be sound, neither provision we cited, nor any others in the rules and regulations, addressed the

> The classification order may provide for rights-of-way over each tract for street and road purposes and for public utilities. If the classification order does not so provide, the right-of-way will be 50 feet along the boundaries of the tract.

The subsection allows for roadway use without qualification. Had the Secretary intended that, like utilities, the rights-of-way be limited to public street and road purposes, such language easily could have been included. *Cf. Tanner Cos. v. Arizona State Land Dep't*, 142 Ariz. 183, 189, 688 P.2d 1075, 1081 (App. 1984) (basic tenet of statutory construction is that legislature presumed to express its meaning in as clear a manner as possible; had it "meant to limit the common mineral materials statute to materials commonly used for aggregate, . . . fill, etc., it could have just said that"). Although utilities almost invariably are installed and maintained by public entities, this is obviously not true for roadways, especially those that are forged in rural, newly developing areas. That the Secretary did not modify the phrase "street and road purposes" with the word "public," therefore, evinces a clear intent that such roadways are not limited to those that are publicly built and maintained.

¶10 As we stated in *Kennedy I*, the "intent behind the [federal land] grant was to utilize public lands effectively." 138 Ariz. at 408, 675 P.2d at 295. The court in *Green* noted that the objective of the right-of-way provision in the patents was to provide "access" to the parcels. 586 P.2d at 601. We cannot, therefore, conclude that the Secretary intended that patent holders be denied access to their parcels, effectively landlocking them, until such time as the government funds and constructs roadways providing such access. Indeed, until patent holders can physically access their parcels, they cannot use them. It is only when the parcels are used, however, that the

---

purpose or purposes of reserving rights-of-way in the federal patents.

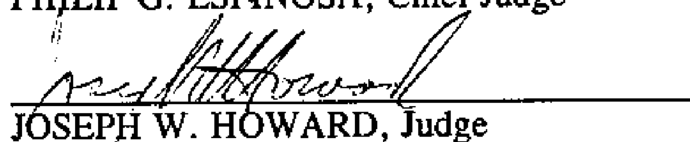
government is justified in expending the time and resources needed to build such roadways.[3] We decline to fashion a rule that would create such an incongruity, especially given that such a ruling would be contrary not only to the plain language of the Act, but also to both § 2731.6-2 and the right-of-way provision.

¶11 We conclude the trial court erred in finding Bernal precluded from using and enforcing the rights-of-way located on the defendants' properties. Accordingly, we reverse the order granting summary judgment for the defendants and remand the case to the superior court for entry of summary judgment in favor of Bernal on his first cause of action and for further proceedings consistent with this decision on his second cause of action to determine the extent of the injunctive relief to which he is entitled.

J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Chief Judge



JOSEPH W. HOWARD, Judge

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[3]In fact, the record reflects that although Pinal County has accepted the dedication of the rights-of-way contained in the patents, it has decided not to immediately fund and build the roadways over them. Accordingly, an official with the county's Department of Public Works averred that his department has, "[in] practice, and continuing until such time, if ever, that the County funds, constructs and establishes County streets and/or highways along these patent easements, . . . conceded the right to use and enforce these easements to adjoining landowners for ingress and egress purposes as evidenced by the County's recognition of these patent easements as legal access to affected properties." Moreover, the county's Planning and Development Department considers the reservation of rights-of-way in the federal patents "to constitute sufficient legal access upon which to issue . . . zoning clearance[s]." For these and other reasons, the Land Title Association of Arizona, in its amicus curiae brief, claims that, if the trial court's ruling is affirmed, "the validity of many land titles may be thrown into jeopardy and the value of countless properties will be affected."

ATTACHMENT 6

In reply refer to:
F-57-2121.10

C
O
P
Y

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

August 5, 1957

Memorandum

To: Director, Bureau of Land Management

From: Associate Solicitor, Division of Public Lands

Subject: Elimination of a Right-of-Way Reservation from Patent

Your memorandum of June 14 asked whether the United States may eliminate a reservation of a right-of-way, not to exceed 33 feet in width, for roadway and public utility purposes contained in a patent issued under the Small Tract Act of June 1, 1938, as amended (43 U.S.C., sec. 682(a)) after the United States has disposed of the lands along the right-of-way.

Under the circumstances you specify, I find no legal authority for the United States to eliminate the reservation. It is clearly within the statutory authority of the Secretary to insert this restriction in a patent under the Small Tract Act since that Act expressly makes its provisions subject to the discretion of the Secretary. Solicitor's Opinion M-36071 of May 16, 1951 (60 I.D. 477); John L. Rice, A26711 of July 20, 1953; Memorandum from acting Assistant Solicitor to Director, Bureau of Land Management, September 27, 1955. After issuance of a patent the Secretary is deprived of all rights to the lands except those specifically reserved to the United States. See Burke v. Southern Pacific RR Co. 234 U.S. 669 (1914).

The reservation undoubtedly stems from a similar provision in Form 4-776, the small tract lease form issued under the same statute. Back as far as 1945, the lease form contained this provision to allow ingress to and egress from the area of the tract along the boundary lines. The Commissioner of the General Land Office was authorized to make the final decision as to the location of the right-of-way whenever necessary. In 1949, the lease form specifically provided for a maximum 33-foot right-of-way. This provision was included in the form adopted in 1950 when the regulations first provided for an option to purchase the lands under lease. Circular 1764, September 11, 1950, 43 CFR, 1954 ed. 257.16(c), since revised by Circular 1899, January 15, 1955, 43 CFR 1954 ed. Cum. Supp., 257.17(b).

This provision in the small tract lease form was inserted, clearly, for the mutual benefit of the lessees. It is equally clear that the identical provision was included in patents under the regulations which provided for sale as well as leasing of tracts under the Small Tract Act to give patentees the same ready access from area to area.

There was no actual platting out of the precise boundaries of the area set apart for public use as a right-of-way. Compare United States v. Illinois Central RR Co., 154 U.S. 225 (1894); O.P. Pesman, 52 L.D. 558 (1929); Gamble v. Sault Ste. Marie, 10 L.D. 375 (1890). The intent of the provision in the patent, which names no specific grantee or beneficiary of the right-of-way, seems clearly to effectuate a dedication of a right-of-way for public use. See memorandum of acting Assistant Solicitor to Director, Bureau of Land Management, approved by the Associate Solicitor, Division of Public Lands on May 9, 1955.

An actual platting out of the area dedicated is not necessary, if the dedicator's intent is clear. See Smith v. Shiebeck, 24 A. (2d) 795, 800 (1942); Galewski v. Noe, 62 N.W. (2d) 703 (1954); Abrams v. Lakewood Park Cemetary Ass'n, 196 S.W. (2d) 278, 283 (1946).

No apparent "public" purpose or governmental use was contemplated except to carry out the purposes of the Small Tract Act to provide for intensive utilization of the public lands. It was not intended to reserve rights to the United States. Compare Augusta G. Stanley, et al., A-26959 of November 15, 1954.

Under a common-law dedication, fee title lies with the owner of the land subject to the easement of the public for the use of the land. Carter Oil Co. v. Myers, 105 F. (2d) 259, 261 (1939); Carroll County Board of Education v. Caldwell, 162 S. W. (2d) 391, 393 (1942). In this case, the Government seems clearly to have intended to transfer all its interest in and jurisdiction over the lands as completely as if the patent had been made subject to a right-of-way in favor of a named holder of such right-of-way. See Hurst v. Idaho-Iowa Lateral and Reservoir Co., 202 Pac. 1068, 1070 (1921). The Government has no legal power,therefore, except under eminent domain proceedings for some governmental purpose, to eliminate this restriction from the patent.

Since this Department has lost all jurisdiction over the lands, any question concerning the transfer or release of rights in the patented lands would be subject to determination in the local courts under state law.

/s/ C. R. BRADSHAW
Acting Associate Solicitor
For Public Lands

ATTACHMENT 7

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

JAN 20 2004

Mr. John Aleo
28625 North 83rd Street
Scottsdale, Arizona 85262

Dear Mr. Aleo:

Reference is made to your letter of August 5, 2002, directing our attention to problems encountered with local governments as to the street, road and public utility rights-of-way reserved in federal Small Tract Act patents. As explained below, we are not in a position to provide an advisory opinion in reply to the questions raised at the end of your letter. It would appear, however, that the state court decisions you enclosed are relevant, although we have not conducted any definitive legal research on the question.

The Small Tract Act, as amended, 43 U.S.C. §§ 682a - 682e (1970 ed.), provided for the classification, and the lease or sale, in the discretion of the Secretary of the Interior, of tracts of the public domain, not exceeding 5 acres, for residence, recreation, business or community sites. The rights-of-way to which you refer evolved through the exercise of, respectively, the supervisory, classification, rule-making, leasing and patenting authority of the Secretary of the Interior. The Small Tract Act was repealed over 25 years ago by the Federal Land Policy and Management Act of 1976, § 702, 90 Stat. 2789.

Following the receipt of your letter, an "in house" search was undertaken for all of the legal opinions of this Division, formerly known as the Division of Public Lands, or the Division of Energy & Resources, pertaining to the reserved rights-of-way for access purposes associated with the Small Tract Act. We regret that this process has taken so long and that its completion was interrupted on numerous occasions by the demands of a variety of competing assignments. The fruits of our search, being relatively few in number, are enclosed with this letter. Listed in chronological order, they are:

1. Memorandum Opinion dated May 9, 1955, from the Acting Assistant Solicitor, Branch of Public Lands, addressed to Director, Bureau of Land Management, re Dedication of Street and Alleys in Small Tract Area at Missoula, Montana. As indicated thereon, this opinion was expressly approved by the Associate Solicitor, Division of Public Lands.

2. Memorandum Opinion dated August 5, 1957, from Associate Solicitor, Division of Public Lands, addressed to Director, Bureau of Land Management, re Elimination of a Right-of-Way Reservation from Patent (your letter refers to this opinion).

3. Memorandum Opinion dated July 25, 1960, from Field Solicitor, Reno, Nevada, to Manager, Bureau of Land Management Land Office, Reno, Nevada.

4. Memorandum Opinion dated July 22, 1968, from Regional Solicitor, Los Angeles Region, addressed to Manager, District and Land Office, Bureau of Land Management, Riverside, California, re Rights-of-Way in connection with Small Tracts.

5. Memorandum Opinion dated April 2, 1979, from Regional Solicitor, Sacramento Region, addressed to State Director, Bureau of Land Management, Nevada, re Small Tract Act Classifications. As indicated at the end of that opinion, a copy of it was sent by the Regional Solicitor to counsel in the Division of Energy & Resources. The April 2, 1979, opinion reversed an opinion released less than three months before it, in which the same Regional Solicitor had concluded that privately constructed and maintained roads running across vacant unsold public lands and public utility lines across those unsold lands would be in trespass unless authorized by the Bureau of Land Management.

6. We have searched our records for, but have not found, the Assistant Solicitor memorandum opinion dated October 9, 1959, referenced in *State of Alaska, Department of Highways v. Gordon E. Green et al.*, 586 P.2d 595, 602, n. 21 (Alaska 1978).

Not discussed in the enclosed opinions but nonetheless to be kept in mind are two differently oriented "rights of access," if you will, that were reserved in many of the Small Tract Act patents. By law, added in 1954, the Secretary of the Interior was required to expressly reserve in each patent "the oil, gas, and all other mineral deposits, together with the right to prospect for, mine and remove the same under applicable law and such regulations as the Secretary may prescribe." 43 U.S.C. § 682b (1970 ed.). In contrast to the "reserved" rights-of-way for streets, roads and public utilities, this mineral reservation, or more precisely the rights associated with it, have been retained by the United States and have not been granted or dedicated to individual small tract owners or the public. Also, by law, the patents transferring federally-owned public lands in the arid western states contained reservations for ditches and canals. 43 U.S.C. § 945 (2000 ed.).

Several of the enclosed opinions of this office and the state court decisions referenced in your letter underline the fact that, unlike the federal government's reserved ditch and mineral rights, the "reserved" small tract easements, having passed out of federal ownership, now are beyond the control of the Secretary of the Interior and are governed by state and local laws. As stated in the enclosed August 5, 1957, memorandum opinion with regard to the rights involved in that opinion that were granted or dedicated and not actually reserved:

> Since this Department has lost all jurisdiction over the lands, any question concerning the transfer or release of rights in the patented lands would be subject to determination in the local courts under state law.

We would add to this statement: "the enforcement" of those rights as well.

This office provides legal services as to issues related to the day-to-day operations of the Department of the Interior. It is not in a position to provide advisory opinions to private individuals or businesses relative to questions involving property rights like those you have posed. Consequently, for a determination as to what law applies to the particular circumstances you have in mind, we recommend that you consult with your own attorney.

As a courtesy, we are providing an extra copy of this letter (without enclosures) for transmittal, at your discretion, to Mr. Leon Spiro. Mr. Spiro has advised that he and you are acquainted and share a common interest in the subject of this letter.

Sincerely,

Laura Brown
Assistant Solicitor
Branch of Public Lands
Division of Land & Water Resources

Enclosures

cc: Regional Solicitor, Intermountain Region
Field Solicitor, Phoenix, Arizona

ATTACHMENT 8

SUPERIOR COURT OF ARIZONA *** FILED ***
MARICOPA COUNTY 07/18/2001

07/09/2001 CLERK OF THE COURT
FORM V000A

HONORABLE J. KENNETH MANGUM T. Melius
Deputy

CV 1999-014250

FILED: ___________________

SUSAN HAMPTON, et al. CHARLES K AYERS

v.

JOSIE ZELMAN STEPHANIE NICHOLS YOUNG

MINUTE ENTRY

This matter having come before this Court for a bench trial, and this matter having been under advisement,

Plaintiff, Susan Hampton, obtained property including a home in the desert area west of Tolleson, Arizona. Defendant Josie Zelman bought a contiguous tract for a home just to the north. Both properties were originally purchased from the federal government, the deeds forwhich reserved an easement of up to 65’ for public roadway. This lawsuit concerns the dispute about Plaintiffs’ right to the easement and the extent thereof.

Plaintiff submitted a quit claim deed pursuant to A.R.S. §12-1103 (B), but Defendant did not execute the same.

Defendant filed a document entitled "survey" with the County Recorder and filed a release of that document on January 14, 2000.

This Court previously granted Summary Judgment and the issues remaining in this case relate to A.R.S. §33-420 and the

amount of attorneys fees per A.R.S. §12-1101, 33-420, and 12-341.01.

Plaintiff seeks a right to travel on the eastern '65 of the separate properties pursuant to the reservation in the deeds. Defendant objects to the amount of the easement requested and suggests something on the order of 20 feet.

The recent case of Bernal v. Loeks, 196 Ariz. 363, 317 Ariz. Adv. REP 25 (Ariz. App. 2000) controls. Thus the easement applies even though Maricopa County has formally rejected needing the easement for a public roadway. Thus, it appears that this easement will only be used for a private street, i.e. access to the several nearby lots.

IT IS ORDERED granting Plaintiff an easement in the eastern portion of Defendant's land in a reasonable amount up to 65 feet.

Plaintiff claims penalties because of an improper filing by Defendants. However, the Court finds that Defendant did not have reason to know that the document was groundless or contained material misstatements or was otherwise invalid, given her education and the ambiguity in the meaning of "up to 65'" and the statements weren't a material misrepresentation and weren't covered by the statute. Accordingly,

IT IS ORDERED denying Plaintiff's claim under A.R.S. §33-420.

IT IS FURTHER ORDERED granting Plaintiff attorneys fees under A.R.S. §12-1103.

ATTACHMENT 9

Information Regarding The Treatment Of Patent Easements Created Under The Small Tract Act Of 1938

In 1938, the ***US Congress*** created the ***Small Tract Act of 1938*** (**STA'38**). Among other things the act established **GLO Patent Easements** basically around each 10 acres, a maximum parcel size of 5 acres sold to original patentees, and a minimum parcel size of 1.25 acres. These are some of the terms and conditions the public purchased under. Originally, the patent easements were deemed by the ***Department of Interior*** as a *private access* and *property right* which were designed to remain in *perpetuity*, and later verified in a memo dated August 5, 1957 from the Associate Solicitor of Public Land to the Director of the Bureau of Land Management, DOI. For whatever reasons, the US Government repealed the STA'38 on Oct. 21, 1976, but stated that all terms and conditions of the STA'38 were in full force and effect for all Government Land Office (**GLO**) areas subdivided prior to said repeal date, and that the repeal shall not be construed as terminating patents, leases, patent easements, etc. Over the years, governing bodies have attempted to treat these easements the same as easements transferred directly from private parties through dedication procedures for public right of way. An array of multi-level cases has upheld the original intent as mentioned above. A recent Arizona case: Bernal v. Loeks http://www.apltwo.ct.state.az.us/cv990107opn.html in the year 1999 again established that the beneficial interest in said **patent easements were a private access and property right which should be recognized and honored**. Another Arizona case, Zelman v. Hampton the judge ordered Zelman to remove everything from the entire patent easement that would impede, interfere, or block the patent easement in anyway and to pay a penalty of $25,000 for Hampton's legal fees. Yet, in Arizona as well as in other states, different governing bodies treat the same thing differently. This cannot continue.

Some governing bodies in Arizona are using A.R.S. 28.7201-7215, as well as other Arizona statutes to abandon these GLO Patent Easements. Since these easements were designed to remain indefinitely under federal law, how could any state law apply? Federal law supersedes state and local law. Yet, some governing bodies use these state statutes as a matter of convenience. This is unfair to all the " affected parties " that have a beneficial interest in patent easements. In essence, their private access and property rights are being taken away without due process.

In Arizona, the Maricopa County Attorney's Office has advised the County Board of Supervisors not to abandon these easements, because their research verifies the original intent. Yet, some cities, in the same county, are abandoning these easements under the pretense that they are only abandoning their interest. How can this continue to happen? The law is written the same for everyone. Does this mean that if you own property in a GLO area in the county, your investment is protected, but not in the city limits? It does not make sense.

Since the **Small Tract Act of 1938 is a federal law** and affects properties all over the United States, particularly in 13 western states, the US Supreme Court or the US Congress, and not local government, should be the only authority to make any changes in the interpretation of the federal law. However, to make it clear to our city and county governments in the interim, state statutes should clearly exempt **GLO Patent Easements** to avoid taking property owners' private access and property rights away unjustly.

Any decisions regarding the status of a GLO Patent Easement should not be at a staff level. The application for abandonment should be brought before the local governing body as per state statutes. The

basic decision should be: **not to abandon patent easements because there are no provisions in the federal to abandon them**.

Once you have read the legal brief for the ***Bernal case #2 CA-CV 99-0107***, you may want to change your governing body's policy. In paragraph 3, page 3, second to last the sentence of the legal brief, it states: " ***Where, as here, the " patent " expressly reserves an easement for public utilities and roadways, those rights are property rights which must be recognized and honored***. " Whether a governing body decides to revoke its' interests or not in the patent easement, the private access and property rights remain in perpetuity and the patent easements should not be removed from the plat of survey or site plan of a parcel of land.

Some governing bodies that still choose to abandon said easements stating that they are only abandoning their interest. **What is their interest**? It certainly isn't to take property rights away. Some say that they are only abandoning public access rights. **Has there been a dedication for public access**? Under the pretense of their abandonment policies and procedures, some of these governing bodies are allowing re-platting, and rezoning of these GLO areas through assemblage, and issuing building permits to place permanent structures on patent easements. Since the method of abandonment by some governing bodies is questionable at best, and potentially takes property rights away from individuals, wouldn't it be wiser not to attempt to abandon these patent easements under any pretense? Maricopa County was wise enough not to.

Your title insurance company and their underwriters insure your property against any title defects. You should question your title insurance company about governing bodies taking your property rights away, and what they have done to protect you and your

property from a possible taking of your beneficial interest in the affected GLO Patent Easements. Under a typical standard title policy, the property owner is not protected from any ramifications surrounding patent easements; however, an extended title policy generally does protect you.

Realtors, sellers, title officers, surveyors, or any person aware of any permanent structure erected onto patent easements should disclose such fact to avoid any potential lawsuits. Essentially, anyone who has the knowledge should disclose any material defect to the title. Blocking, impeding, or interfering with the patent easement in anyway by anyone can create a material defect.

Are you aware? Have you disclosed?

ATTACHMENT 10

Memorandum

November 1, 2002

TO: Hon. J.D. Hayworth
Attention: Ryan Serote

FROM: Pamela Baldwin
Legislative Attorney
American Law Division

SUBJECT: Constituent Inquiry Related to the Small Tract Act

You have asked us to provide background on the questions some of your constituents have raised relating to the Small Tract Act of 1938.[1] By that act, Congress authorized the conveyance of some of the federal public domain lands in parcels usually not exceeding five acres – a size smaller than the parcels conveyed under the homesteading laws or typical grant laws. In order to do so, the Secretary of the Interior had to classify the lands as chiefly valuable for "residence, recreation, business, or community site purposes." Small tracts could be either leased or purchased. The STA was repealed in 1976 by the Federal Land Policy Management Act (FLPMA), a statute that modernized the management of the federal public domain lands and repealed many previously enacted laws, including the STA, but protected valid existing rights.[2]

Your constituents seek information on the nature of the rights of way that were provided in connection with STA conveyances. Although we cannot provide private legal counsel, and the particular facts regarding title in each case must be ascertained, we can provide a general overview and some background material that may be of assistance. We understand that the Bureau of Land Management (the successor to the old General Land Office that issued many of the patents in question) in the Department of the Interior is preparing a large background packet that will be sent to interested persons soon.

The federal government typically did not address access or rights of way in many land grants or under the homesteading laws, but rather left such matters up to the new land owners and state and local laws to resolve. Similarly, the STA did not address access or rights of way. However, perhaps because of the small size of the parcels typically conveyed under the STA, rights of way were addressed administratively. Initially, rights of way appeared in the

[1] Act of June 1, 1938, c. 317, 52 Stat. 609, previously codified at 43 U.S.C. §§ 682a *et seq.*

[2] See uncodified §§ 701 and 702 of Pub. L. No. 94-579, 90 Stat. 2744.

forms used for leasing such tracts, and originally were usually 33 feet in width.[3] Later, authority to provide for rights of way was mentioned in regulations. These later rights of way typically were 50 feet in width, but the nature and the extent of any right of way depended on the classification order and the lease or other conveyance document involved. Evidently, some time in the 1950's, small tract parcels began to be conveyed by patent (a document analogous to a deed from the United States). Typically, the rights of way were for "street and road purposes and for public utilities."[4]

If the easement was in a patent, full title to the land was conveyed out of federal ownership, subject to the easement across it at the specified location. Given the silence of the STA and the succinctness of the past regulations – which language seems to have been repeated in patents[5] – it appears that some issues could arise depending on how the purposes and language of the patent easements are interpreted. One pivotal issue would appear to be whether *private* access rights, as well as more general public road and utility corridor rights, were encompassed by the easements. Given the small size of the parcels, arguably individual access as well as the potential for more general public use for road and utility purposes was intended. The distinction is important because it determines the extent to which an individual parcel owner may have a right that is separate from that of the state or local jurisdiction. This in turn determines what actions a landowner may take regardless of any dedication, development, or abandonment of the *public* aspects of the STA rights of way the state or local jurisdiction may take. In this regard, note that both a 1957 Associate Solicitor's opinion and Arizona cases support the conclusion that the easements encompass both a private access right and a public road and utility rights.[6]

This conclusion – that the easements run to the benefit of both the private owners and the public – may please or displease current owners, depending on what they seek to do. On the one hand, arguably an owner could not be landlocked by being denied access to his parcel, regardless of whether the local jurisdiction accepted the right of way for public purposes or ever developed it. On the other hand, arguably an owner could not use the land within the right of way in a manner that precluded its use for transit and access.

Nor is it clear – if the easement encompasses both private and public rights of way – how the easements could be eliminated in order to clear title to parcels burdened by them. Depending, of course, on the wording of the patents, it appears that all interest of the United States was conveyed. If so, there appears to be nothing the United States can do now to change the interest conveyed. Possibly the United States could condemn the individual access rights – a possibility that does not appear likely, even if legally possible. Also, at least in a state whose courts have held that individual access rights are a purpose and result of the federal patent language, it is not clear whether or how state and local actions could change or eliminate that individual property interest contrary to that federal patent language and

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[3] See Instruction Memorandum No. 91-196, to All Field Offices from the Director of Bureau of Land Management, *re* Easements Reserved In Small Tract Act Leases and Patents, March 4, 1991.

[4] See, *e.g.*, 43 C.F.R. § 257.17(b) (1962).

[5] See Bernal v. Locks, 196 Ariz. 363, 363-364, 997 P. 2d 1192 (Ariz. Ct. App. Div. 2, Dept. B, 2000). The Bernal court looked especially at the purposes of the STA and the patent language which did not use the word "public" to modify "street and road purposes."

[6] Instruction Memorandum No. 91-196, *supra*; Bernal v. Locks, *supra*; and Hampton v. Zelman, CV 99-14250 (Ariz. Sup. Ct. for Maricopa Co. 2001).

intent. It may be that some combination of relinquishment of the easement by the owners of the dominant properties (those that benefit from the access provided by servient properties across which the easements run) combined with abandonment of the public easement may be a possible way to clear title.

Enclosed are copies of some of the materials sent to us by the Department of the Interior; we are informed that a more complete compilation of Departmental materials on STA patent easements is being assembled.

We hope this information is helpful to you.