MEMORANDUM

State of Alaska

Department of Law

TO: John F. Bennett
Engineering Supervisor
DOT/PF, Fairbanks

DATE: June 13, 1996

FILE NO: 225-93-0109

TEL. NO.: 451-2905

FROM: Leone Hatch
Assistant Attorney General

SUBJECT: PUEs

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CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

You have asked several questions concerning Public Utility Easements (PUEs) at the intersection of Rewak and University, and the PUE containing a bicycle path in the Lakloey Hill area. Please keep in mind that this memo is limited to the specifics in these two instances and is not an Attorney General Opinion.

The greatest difficulty inherent in the situation springs from the identification of the legal ownership of the easement interest. You have indicated that GVEA is claiming an ownership interest in the Rewak PUE because it was not served in the condemnation.[1] However, unless a specific utility is named in the documents creating the easement, it is not at all clear that in Alaska a utility has such an ownership interest. As a preliminary matter, it is useful to draw a distinction between the right to use a PUE, and the power to regulate activity in the PUE.

DOT's Power to Regulate Utilities

Whatever right or property interest a utility may otherwise have, DOT has been given the statutory authority to regulate utilities "across, along, over, under or within" a ROW. AS 19.25.010. Please note that this language may include a utility which is placed along but not within a ROW. Section line easements are also subject to DOT regulation of utilities. Fisher v. Golden Valley Electric Assoc., 658 P.2d 127 (Alaska 1983). However, by regulation DOT has determined that utility permits relating to section line easements are required only when the section line easement is in use or is proposed for use. 17 AAC 15.031.

[1] Prior to condemnation, the Rewak lots had standard language on the plat stating "Easement for future Public Utilities consists of a ten foot right-of-way for construction, operation and maintenance of utilities along all side and rear lot lines." Fairwest, 60-4962. GVEA had not made use of the easement.

Therefore, those portions of the section line easement and the PUE within the ROW are clearly subject to DOT utility permitting. It is less clear that the section line easement immediately adjacent to ROWs is similarly under DOT's authority, but a strong case can be made that it is.

In the Lakloey situation, if the path is within the ROW, DOT can regulate utility usage to protect the highway use. Whether or not this newly acquired ability to regulate generated a right to compensation in the existing utilities is an open question. Because utilities are entitled to the cost of alterations due to highway projects, it is likely that a court would not find that additional compensation is due unless DOT's use forecloses all utility use. AS 19.25.020. Lucas v. S. Carolina Coastal Council, 505 U.S. 1003 (1992). Absent DOT's statutory power to regulate utilities in the ROW, the path would be a subservient use, which could be destroyed by the dominant estate in the utility if the utility's need was reasonable.

The Borough's Power Over PUEs

PUEs in Alaska are a required function of the platting authority. AS 29.40.070. First and second class boroughs are required to exercise platting authority. AS 29.40.010. The Fairbanks North Star Borough is a second class borough, and does in fact exercise platting authority. FNSB 17 et. seq. Both Lakloey and Rewak are within the Borough The Borough has deteimined that "the platting board shall require reservation of utility easements along lot lines or tights-of-way within a subdivision when a utility company demonstrates a specific need for them." FNSB 17.90.030. They may be vacated through the short plat procedure. FNSB 17.50.040.

The legal governance of the existence of PUE's strongly suggests that the Borough has the power to vacate or require them in the exercise of its platting authority to regulate the development of property, independently of ordinary property interests. Ergo, even if the court declares that an easement is vacated and no utility retains an interest in it, if the borough requires DOT to designate PUEs on a subdivision plat as it has for Rewak, the PUE will be resurrected. See, A.S. 09.55.275 (DOT must obtain re-plat approval). If DOT objects to the PUE, it could institute a legal challenge forcing the borough to demonstrate that it has complied with its' own ordinances, If a utility has not demonstrated a need for the PUE, the Borough may have violated its own ordinances by requiring DOT to place the PUEs back into the most recent plat. Such litigation would also confirm whether or not a

Utility which has not used a PUE has any sort of ownership interest. In view, however, of DOT's ability to subject utilities to its permitting process, I doubt that such litigation would be cost effective unless some other supporting reason to litigate comes to light.

Utilities' Property Interests in **PUEs**

The Alaska Supreme Court has determined that the designation of PUE's on plats does not constitute a public dedication (like a street or park) because the public at large is not invited to make use of the easement. Chugach Electric Association v. Calais Company, 410 P.2d 508 (Alaska 1966). See, AS 40.15.030(dedication). The Chugach Court found that the subdivider had the right to designate which of competing utilities could use a PUE, and found that a utility which installed facilities against the subdivider's express wishes was trespassing. The benefit of a PUE, according to Chugach, inures to the members of the public served by the utilities using the PUE, not necessarily to the utility itself or the general public. Chugach, 410 P.2d at 5 10. Chugach did not recognize any property interests in the PUE by utilities that had not yet constructed improvements.

Chugach establishes firmly that a utility which has not lawfully gained access to a PUE does not necessarily have a "right" to use the PUE. However, it is not clear that fee owner may eject a utility that has lawfully entered an easement. The consequences of a ruling giving the fee owner such a power would be destructive, far reaching, and out of step with decisional law that has developed in other jurisdictions. In the context of the Chugach ruling, a court may be attracted to an argument that a utility's interest in a PUE "vests" upon lawful entry and use, and may even be limited to the value of the facilities placed in the PUE.

The Alaska Supreme Court has also determined that a utility company can construct facilities in a roadway section line easement without the permission of the underlying fee holder, subject to the permitting authority of the Department of Transportation. Fisher, 658 P.2d 127. The Fisher and Chugach decisions can be reconciled because the fee owner/subdivider in Chugach could be cast as the representative of the intended benefited class. The Fisher fee-owner however, had a very limited interest in the

section line,' and no claim to the representation of the benefited class. In Fisher, DOT could claim its statutory right to regulate utility use which could conflict with the eventual dominant highway use. AS 19.25.0 10.

Merger of the Section Line Easement

A merger generally occurs when an easement interest and an underlying fee interest in the same property come into the hands of the same party. To determine whether the Rewak section line easement was merged into DOT's underlying fee interest it is necessary to identify the owner of the section line easement. At least two other states have considered whether an easement for road purposes will merge into the Fee. In California it probably will not merge, because the easement is held in trust for the general public. Marin v. Marin, 344 P.2d 95 (Cal. App. 1959) vacated on other grounds, Marin v. Marin, 349 P.2d 526 (Cal. 1960). The Delaware court declined to follow Marin, but refused a merger on grounds not relevant here. Guv v. Delaware, 438 A.2d 1250 (Del. 1981).

In 1866 Congress adopted a statute creating a right of way for highways over all federal public lands not reserved for other public uses. The statute, commonly referred to as R.S. 2477, provided:

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

43 U.S.C. § 932, repealed by Pub.L. No. 94-579, Title VII, § 706(a) (1976). The Alaska Supreme Court has held that the Alaska territorial legislature accepted the federal government's R.S. 2477 right of way grant along section lines when it enacted 19 SLA 1923 on April 6, 1923, repealed 1949. Brice v. State, 669 P.2d 131 1, 1315 (Alaska 1983). This

A section line easement allows the construction of a public roadway; a use which wholly dominates the surface estate once the use is made. The extent of the roadway use within the boundaries of the easement is limited only by reasonability. Anderson v. Edwards, 625 P.2d 282, 286 (Alaska 1981). The underlying fee owner has little left once the highway occupies a section line easement, but DOT, the public entity charged with the management of the state highway system, has a great deal of interest, with the statutory authority to manage other compatible uses. AS 19.245.010.

territorial legislation established a 66 foot wide tract of land for highways between each section of land in the public domain in Alaska, the section line being the center line of the highway. Brice, 669 P.2d at 1314-1315 and n.5. The Rewak section line came into the public domain in 1924 and w-as then impressed with the 66 foot easement.

The state statute which accepted the federal grant purported to dedicate the easement "for use as public highways" and specifically provided for the reversion of title upon vacation. 19 SLA 1923. While DOT has the statutory authority to regulate and make use of section line easements, the nature of a public dedication and the specific language creating the dedication suggest that it is the public that technically holds the easement, subject to state authority and stewardship, until affirmatively vacated. The section line easement will remain valid until technically vacated.

I hope I have addressed all of your concerns. Please feel free to contact me if you would like to discuss these matters further.

LH/arp

MEMORANDUM

State of Alaska

Department of Law

TO: John F. Bennett
ROW, Engineering Supervisor
DOT/PF, Northern Region

DATE: July 1, 1996

FILE NO: 225-93-0109

TEL. NO.: 451-2811

FROM: Leone Hatch LH
Assistant Attorney General

SUBJECT: PUEs

1996

CONFIDENTIAL ATTORNEY - CLIENT **COMMUNICATION**

This memo is in response to your request for clarification (dated June 28, 1996) to my memo of June 13, 1996. The memo dealt with the status of certain PUEs. You numbered your requests for clarifications, and so I shall number my responses.

1) The short answer to your question is "yes." Absent a Borough action to establish or re-establish the Rewak PUEs pursuant ordinance, the Rewak PUEs were probably extinguished.

The better rule is that the court can indeed extinguish a PUE if the utilities actually using it are served. Until the Alaska Supreme Court rules on the matter however, some uncertainty will remain. The Rewak PUE is probably extinguished, however, the judgment describes the take by reference to schedule A. Page one of schedule A is a straight forward legal description that does not refer to the PUEs. However pages 2 and 3 are drawings which show the PUEs. The Borough could **claim** that these drawings preserved the PUEs, despite the clear intent of the litigation to extinguish all other interests in the property. Future condemnations in which this is an issue should make specific reference to the extinguishment of the PUEs in the opening and final documents. Please keep in mind, however, the power of the Borough to re-impose them as described in my first memo.

Assuming that the PUEs were judicially extinguished at the Rewak property, the Borough's instance alone[1] that DOT place them on the plat will not re-instate them unless the Borough can demonstrate technical compliance with its own ordinances for establishing PUEs; most notably, a demonstrated need by a utility. This is what I meant when I suggested in the first memo that a technical challenge could be brought in court to confirm or deny the survival of the PUEs. As you noted though in your request for clarification, DOT does, clearly, have the right to regulate utilities in the ROW. Regulatory control may be a less costly method to achieve the same pragmatic effect in this case.

2) Your understanding that the failure of the merger is attributable to a technical difference in the "ownership" of the estates is correct. This is a hyper-technical distinction of the sort forgiven in many other areas of modern law, but usually not in the law of real property.

Fees obtained through purchase or condemnation by the government are held in the same way that a private person or a corporation can hold a fee. Although as a governmental agency DOT as landowner has particular responsibilities established by constitution, statute and precedent to serve and represent the public, the nature of the fee it holds is no different than any other fee simple. This can be compared to a land-owning corporation who's by-laws control its use of land. A section line easement however, owes its existence to a historical offer to the public at large, accepted in the case of section line easements on the public's behalf by a governmental entity. Although philosophically the responsibilities are equivalent, the legal distinction in the state of the title is dispositive. Like the earlier PUE question however, the Alaska Supreme Court has not yet ruled on this question. If the Court rules traditionally, there will be no merger. As I mentioned earlier, technical distinctions

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[1] Should a utility rely to its detriment on the PUE, a court in the future might find that DOT/PF is estopped from denying the PUE.

such as this are deeply and conservatively rooted in property law. The Court is less likely to depart from tradition in this area than in others.

3) Absolutely. PUEs in a DOT ROW are subject to DOT permitting. PUEs adjacent to a ROW may be subject to DOT permitting. DOT's authority does not spring from the state of the title, but from its regulatory authority. A utility which disputes DOT's permitting power may have come to its error by failing to perceive DOT's regulatory role as distinct from its role as landowner. A shift in perspective may resolve the dispute.

I hope I have responded fully to your questions. Please feel free to contact me if you would care to discuss this further. Do keep in mind that this advice is limited to the specific properties at issue. It does not have the force or authority of an Attorney General opinion.

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PUE's 7/3/96 JFB

In response to Leone Hatch's memo of 711196 clarifying her earlier opinion, I called her with one more question. "Did the condemnation action vacate the existing section line easement?" Her initial response was that the nature of a section line easement, that of an easement dedicated to the general public, could not be vacated because the general public is not an entity that had been named in the condemnation. She said that this issue is a bit fuzzy and may not be held by the courts if they ever hear a case with this as they question. It is unlikely that the question will ever be asked, because our regulatory authority over the use of the section line easement and the ROW corridor makes the question moot.

She acknowledged that if we were very concerned that no existing easements survive the condemnation that their intended demise could be specified in the condemnation documents.