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December 19, 1996

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Trust Land Office

Mr. Stephen C. Planchon, Executive Director
Alaska Mental Health Trust Land Office
Suite 880
3601 C Street
Anchorage, Alaska 99503-5935

Re: Section line easements across Mental Health Trust Lands
Our file no.: 34-1

Dear Steve:

You have requested that I review for you the issue of section-line public easements or rights-of-way across Mental Health lands: Do they sometimes exist; and if so, under what circumstances?

The answers to these questions cannot be stated in a sentence or two. However, once the legal principles of section line easements are understood, it should be relatively easy to apply this principles to any future situation, to determine whether a particular parcel of Mental Health land is burdened by an existing section line easement, and if so, the width of the easement. I do not propose to include extensive citations to case law in this letter, but I can provide you with a discussion in "legal brief" format if you wish.

The effect of pre-existing section line easements on Mental Health Trust lands should not be underestimated. If a valid easement exists, the Trust will be deprived of the enhanced value which the land, if unburdened by the easement, might command (unless the Trust vacates the easement by formal proceedings). More importantly, public agencies (or the public at large) may demand lawful use of the section line easement for access purposes which have negative or non-productive effects on Mental Health lands, and without compensating the Trust for the use of the easement itself.

1. Some basic concepts. Section line easements in Alaska may arise from either of two sources. One is a federal offer (Revised Statute 2477) which was accepted by enactment of a territorial law (now codified at AS 19.10.010. The other is in state law, also codified at A.S. 19.10.010. The width of a section line easement under the federal law is 4 rods (66 feet), centered on the section line. The easement width under the state law is 100 feet, centered on the section line. In many situations on state lands, a state-law 100-foot easement may be found to have been superimposed on an existing 66-foot federal easement along the same section line. The governing width in this circumstance would usually be 100 feet. In some cases, one-half of a section line easment may exist on one side of a section line, but not the other, depending on the ownership and survey history of the adjacent parcels.

A section line easement (whether state or federal) is presumed to legally arise on a particular tract of public land when that land is first surveyed under the rectangular survey system employed by the U. S. Bureau of Land Management and the State of Alaska., and after the survey is formally accepted by the United States or the state, as the case may be. Before survey and acceptance, there exist no section lines; since the location of the section line fixes the location of public easement

These surveys usually take the form of cadastral township or partial-township surveys. Special surveys (such as for mining claims or homesteads within unsurveyed townships) do not normally fix the location of section lines, and thus would not establish section line easements. Likewise, "protraction" surveys of townships in Alaska (which have been used to speed the identification of lands for state and Native land selections), do not fix the location *on the ground* of particular township or section lines, but merely represent a mathematical projection of the general position of section lines when a formal, on-the-ground survey finally occurs. It is generally assumed (based on existing case law in analogous situations) that a protraction survey does not fix the date or location of a section line easement, because under a protraction survey no section line has yet been fixed on the ground.

2. Section line easements arising under the federal right-of-way grant. The federal law will be discussed first. Revised Statute 2477 (the infamous "R.S. 2477") was passed by Congress on July 24, 1866 as a part of the federal Mining Act of 1866 (which was the immediate predecessor of the federal Mining Law of 1872, which is still with us). The provision states simply, "... That the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This provision was repealed by Section 701(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U. S. C. § 1701 *note*, on October 21, 1976.

a. Easements established by "public user." It has been held that to become effective, the right of way offer made under R.S. 2477 must either have been (1) accepted by actual use ("public user") and arguably by "construction" in some jurisdictions (by either a governmental body or the public at large) or (2) formally accepted by a governmental body, such as by enactment of a law designating easements at particular locations. The method of acceptance indicated in (1) above is at the heart of the ongoing "R.S. 2477 controversy," in which both the existence and the exact location of many claimed public-user easements throughout the western states remain contentious.

Since "public-user" R.S. 2477 easements are not defined in their relation to section lines (and in most cases do not conform to them), they are beyond the scope of the present discussion. However, you should note that R.S. 2477 "public user" easements may burden existing Mental Health Trust lands, if they otherwise meet the criteria of valid R.S. 2477 rights of way by public user: they must have arisen by public use for access purposes before the underlying federal land was selected by the Territory or the State under the Mental Health Enabling Act of 1956. The date of selection fixes the point at which the land became "... public land, ... reserved for public uses" and thus removed it from eligibility for an R.S. 2477 easement. The claimed easement should also have remained documented in continuing use for

public access purposes up to the present time, and should not have been abandoned or relocated at any time after the Mental Health Grant selection was filed. If the claimed public-user easement has not followed these precepts, the Trust may argue that it never arose, or that it no longer exists.

b. Easements created by statutory acceptance of the federal offer. The second method of establishing an R.S. 2477 easement has a more immediate impact on the Trust's land situation. By an act of the Territorial Legislature in 1923, it was first declared that an easement four rods (66 feet) wide would be established on each applicable section line within the Territory, with the easement centered on the section line. Ch. 19, SLA 1923 (April 6, 1923). The width would thus be 33 feet on each side of the section line. This statute has continued in effect (except for a gap between 1949 and1953), and it is today contained within AS 19.10.010.

This portion of AS 19.10.010 applies to all federal lands within the State, and since it constitutes the State's acceptance of the federal R.S., 2477 grant, it is controlled by the requirement of R.S. 2477 that the affected land not be "reserved for public uses." This means that if in 1923 a tract of *surveyed* land was a school or university section, or was within a national monument, forest or park, for example, no section line easement would attach. (If the land was unsurveyed in 1923, no section line easement would attach until such later date as the survey occurred. If the land, prior to that survey, had become "reserved for public uses" such as by a Mental Health Grant selection in 1956 or later, the federal section line easement would not attach.)

The only misstep in this analytical sequence is the fact that the Territorial Legislature, in re-codifying the Alaska territorial laws in 1949, failed to re-enact the earlier 1923 R.S. 2477 section-line easement acceptance. Sec. 1, Ch. 1, SLA 1949 (January 18, 1949). This failure continued until 1953, when the federal 4-rod easement dedication was again put in place. Sec. 1, Ch. 35, CLA 1953 (March 21, 1953).

Therefore, it is possible that a tract of unreserved federal land which first became surveyed between January 18, 1949 and March 21, 1953 would have had no federal 66-foot easement imposed at the time of survey. If that land, prior to March 21, 1953, had passed into private ownership (and was thereafter no longer "public land") or if it became reserved land for a powersite, park, University land selection, etc. (and was thereafter no longer "unreserved public land"), the 66-foot section line easement would never attach. However, if neither of these events occurred, and the land remained surveyed and unreserved federal public land until after March 21, 1953, the re-enactment by the Territorial Legislature of its acceptance of the federal R.S. 2477 offer in the form of 66-foot section-line dedications (33 feet on each side of the section line) would impose, on that date, these section line easements on all federal lands which had become surveyed since January 18, 1949.

c. Repeal of R.S. 2477. This process of section line easement reservation on unreserved federal lands continued until October 21, 1976, the date R.S. 2477 was repealed. However, I am aware of no case law which has specifically dealt with the question of continuing section line easement dedications on federal lands, under authority of AS 19.10.010, after

October 21, 1976. Conceptually speaking, the State of Alaska's right to dedicate section line easements on unreserved federal lands must have ended with the repeal of R.S. 2477. However, much of the land which was affected by this power may be land being conveyed to the State under the Alaska Statehood Act (disregarding for the time being the survey of federal lands for Native corporation conveyance between 1971 and 1976). The fact that another provision of AS 19.10.010 imposes a 100-foot section line easement on "all state lands" appears to negate the practical effect of the repeal of R.S. 2477, with regard to some of the unreserved federal lands which may have become surveyed after 1976.

3. Section line easements arising entirely under state-law dedication. The second basic method by which section line easements have been created in Alaska involves only state-owned lands, not federal lands, and involves only state law and not R.S. 2477. This dedication method is also codified at AS 19.10.010. The dedication of a 100-foot public easement on each side of the section line on "all state lands," as stated in AS 19. 10.010, may pose the most immediate problem for the Mental Health lands. This dedication was enacted by the Territorial legislature in 1951 (Ch. 124, SLA 1951 (March 26, 1951). The plain language of the statute imposes this easement on all tracts of land owned by the Teritory and State of Alaska, whether they are unrestricted general grant lands, community grant lands, original Mental Health grant lands, University grant lands, school sections, state parks, or any other category of state land.

The 100-foot easement along section lines on state land is the creation of state law. It is not based on the federal easement offer which pertained to "lands not reserved for public uses," and which was the basis for the 66-foot R.S. 2477 federal offer and state acceptance in 1923. Therefore, in theory the 100-foot easement is imposed on all section lines on surveyed lands which become owned by the State, and would continue to attach, unless vacated, if these lands are later conveyed into private, municipal or other ownership. Also in theory, it would appear to burden both original Mental Health Trust lands and Mental Health Trust replacement lands, though this theory may be questionable in the case of original Mental Health Trust lands). Since almost all tracts of state land were surveyed before their acquisition by the State, the 100-foot easement would appear to attach the moment these lands were patented to the State of Alaska.

In the case of original Mental Health Trust lands, a significant legal issue is raised by the language of AS 19.10.010. There is no exemption for "lands reserved for public uses" or for "trust lands." Yet the holding of the U. S. Supreme Court in *Lassen v. Arizona Highway Dept*, 385 U.S. 458 (1966) clearly prohibits the uncompensated use of federally-granted trust lands (in the *Lassen* case, school trust lands) for highway easement purposes. Therefore, any plat note or legal description which appears to impose a 100-foot section line easement on a tract of original Mental Health grant land, by virtue of its status as "state land" under AS 19.10.010, should be vigorously opposed. The purported easement should be vacated by appropriate municipal or state action on the basis of the holding in *Lassen*.

However, regarding replacement Mental Health Trust land which has been granted trust status and has been legislatively transferred to the Trust Authority in settlement of the

Weiss litigation, it appears clear that section-line easements burdening these lands at the time of transfer will continue to apply unless later vacated in particular instances. The settlement legislation requires recognition of pre-existing easements and other burdens on these replacement lands, in Section 40(b), Ch. 5, FSSLA 1994.

It is possible that the federal 66-foot section line easement may also exist on some of the Mental Health replacement lands, depending on their history prior to their acquisition by the State. Thus any future vacation petition should seek to vacate both the 100-foot easement and the 66-foot easements, under both the federal-law and the state-law sources of easement designation.

4. Summary. Based on the foregoing discussion, the examination of section-line easement questions in particular situations should first ask whether the land is original Mental Health grant land or replacement Mental Health land. The further examination can then be broken down as follows:

Original Mental Health Grant Lands:

1. Was the land unreserved federal land which was surveyed (and section lines thus established) prior to April 6, 1923? If so, then a 66-foot section line easement exists, by virtue of AS 19.10.010.

2. Was the land unreserved federal land which was surveyed (and section lines thus established) between April 6,, 1923 and Jasnuary 18, 1949? If so, then a 66-foot section line easement exists, by virtue of AS 19.10.010.

3. Was the land unreserved federal land which was surveyed between Janauary 18, 1949 and March 21, 1953 (and section lines thus established), and was it still unreserved federal land at any time after March 21, 1953? If so, then a 66-foot section line easement exists, by virtue of AS 19.10.010.

4. If the land described in (3) above was surveyed between January 18, 1949 and March 21, 1953 and was either reserved or conveyed out of federal ownership between those dates, then no 66-foot section line easement exists.

5. Was the land unreserved federal land which was unsurveyed when it was first selected as Mental Health land under the Alaska Mental Health Enabling Act of 1956? If so, then no 66-foot section line easement exists.

6. Was the land conveyed to the State of Alaska pursuant to a land selection under the Mental Health Enabling Act? If so, then a 100-foot section line easement arguably exists under authority of AS 19.10.010 . However, the holding in the *Lassen* case casts doubt on the enforcement of such a public easement claim.

Replacement Mental Health Lands:

1. Was the land unreserved federal land which was surveyed (and section lines thus established) prior to April 6, 1923? If so, then a 66-foot section line easement exists, by virtue of AS 19.10.010.

2. Was the land unreserved federal land which was surveyed (and section lines thus established) between April 6, 1923 and January 18, 1949? If so, then a 66-foot section line easement exists, by virtue of AS 19.10.010.

3. Was the land unreserved federal land which was surveyed between January 18, 1949 and March 21, 1953 (and section lines thus established), and was it still unreserved federal land after March 21, 1953? If so, then a 66-foot section line easement exists, by virtue of AS 19.10.010.

4. If the land described in (3) above was surveyed between January 18, 1949 and March 21, 1953 and was either reserved or conveyed out of federal ownership between those dates, then no 66-foot section line easement exists.

5. Was the land unreserved federal land which was unsurveyed when it was first selected as Mental Health land under the Alaska Mental Health Enabling Act of 1956? If so, then no 66-foot section line easement exists.

6. Was the land acquired by the State of Alaska under authority of the general grant (Section 6(b)) or community grant (Section 6(a)) provisions of the Alaska Statehood Act? If so, then upon survey and after conveyance to the State, a 100-foot section line easement exists, by virtue of AS 19.10.010.

5. Conclusion. I believe that this list covers all of the likely origins of Mental Health lands. I am assuming that none of the replacement lands came to the State from sources other than as land selections under the Statehood Act. (This may not be material in any event, since the moment they became "state lands." a 100-foot section line easement would have attached, under AS 19.210.010). If you can think of land-status categories which have not been covered, please inform me.

The "cleanest" land category (from the standpoint of freedom from section line easements) is the category of original Mental Health lands which were unreserved and unsurveyed federal lands at the time they were selected under the Mental Health Enabling Act. These lands would be free from the 66-foot section line easement (1) because they were unsurveyed prior to their selection; and (2) because their selection as Mental Health lands made them "reserved" lands which avoid the 66-foot section line easement when they later become surveyed. These lands should also arguably be free of the 100-foot state section line easement which is imposed on "state lands" by AS 19.10.010, due to the *Lassen* holding. However, it may take an easement vacation application, or even litigation, to firmly establish that principle in Alaska.

As to the Mental Health replacement land upon which section line easements exist due to the land's prior history, it may be advisable to apply for easement vacations on a case-by-case basis, in order to preserve the full, unencumbered value of the land for the Trust.

I have not discussed in this letter the various laws and court decisions which govern the construction and use of section line easements for overland transportation purposes by govenmental agencies and by individual members of the public. This aspect should be of concern to the Trust where existing section line easements are found on replacement Trust lands. Also, there are provisions of law whic allow concurrent use of section line easements by public utilities, where the objective is access, but requiring no overland transprtation on a constructed road or trail.

If you have any further questions on this subject, please contact me.

Sincerely yours,

Thomas E. Meacham