

# MEMORANDUM

State of Alaska

#4 4

TO: Jack Bodine  
Right-of-Way Director  
Department of Highways

DATE: October 21, 1976

FILE NO:

TELEPHONE NO:

FROM: Richard Svoboda  
Assistant Attorney General  
Department of Law  
Highway Section

SUBJECT: Section Line Rights-of-Way  
and Letters of Nonobjection

Mr. James Edwards, the owner of real property near McCarthy, Alaska, has contacted Governor Hammond, Attorney General Gross, Frank Flavin, State Ombudsman and the District Attorney's office in Anchorage concerning the utilization of a section line right-of-way across his property, by a Mr. Andersen, for the construction of roadway to Mr. Andersen's property. Mr. Andersen apparently constructed the roadway in question under the color of a letter of nonobjection which he received from the Department of Highways. I have been informed by Mr. Williams that this letter of nonobjection does not appear in the files of either the Valdez or Anchorage district offices. However, I have been informed by Ms. Paddy Moriarty that the Ombudsman has a copy of the letter of nonobjection.

At the present time, there appears to be no standards or regulations concerning the issuance of a letter of nonobjection for the utilization of a section line right-of-way. It is the opinion of the Ombudsman that such letters not be given unless there is a thorough evaluation of the necessity for the utilization of a section line right-of-way.

I suggest that the Department of Highways cease from issuing any letters of nonobjection for the utilization of section line rights-of-way unless the letter has been approved by the Department of Law. In addition, I think the suggestion of the Ombudsman that regulations be promulgated, under the provisions of the Administrative Procedures Act, relating to the use of section line rights-of-way by private individuals, is a good suggestion. The proposed standard to be met by these regulations would be one of public necessity and should spell out that no permission to use a section line right-of-way would be granted unless there could be an affirmative showing, by an applicant, that there was no substantial public opposition to the granting of a letter of nonobjection.

In summary, it is the recommendation of the Department of Law, that no letter of nonobjection should be issued concerning section line rights-of-way unless approved by the Department of Law and that the Department of Highways gives substantial consideration to the promulgation of regulations relating to the issuance of letters of nonobjection.

RS:lm

April 13, 1979

Mr. Thomas R. Gilbertson  
P. O. Box 1069  
Delta Junction, Alaska 99737

Re: Section Line Easement

Dear Mr. Gilbertson:

In response to your letter I should like to set forth our policy regarding section line access.

Although the Highway Department policy regarding section line use currently is in flux, the following considerations are to be borne in mind in any section line use.

1. Section lines are public easements for highway purposes. As such, no one is entitled to exclusive use of a section line. Accordingly, all parties are to be afforded use of the line and unrestricted access is to be the rule.

2. As a section line easement for highway purposes, any highway department uses, proposed now or in the future, supersede any use by private individuals on the line. In short, private enhancement of section line easements in the way of roads is subject to Highway Department uses of the section line.

3. In upgrading the line it is your responsibility to remain within the section line easement unless permission is obtained from private land-owners to enter upon their land.

4. The Highway Department takes no position at this time with respect to any clearances which you might require from other agencies or departments.

5. All monuments and survey corners encountered must remain undisturbed. Additionally, please be advised that any access of section line roads upon State-maintained

*W.S.*  
William Satterberg  
Assistant Attorney General  
Department of Law  
Transportation Section  
Fairbanks

DATE July 25, 1977

FILE NO:

TELEPHONE NO:

FROM: Richard Svobodny  
Assistant Attorney General  
Department of Law  
Transportation Section  
Juneau

SUBJECT: Section Line Rights-of-Way

Bill, don't get excited, this is not the memorandum which I promised on how district offices should deal with section line rights-of-way. I've spoken with the right-of-way section at headquarters, and have been informed that the present policy of not issuing letters of nonobjection should be maintained until a policy has been developed by either the Governor's Office or the Division of Lands. Presently, the Division of Lands is working on a policy regarding section line rights-of-way, and the Right-of-Way Section will have input into this policy development. In addition, Bill Luria, from the Governor's Office is looking into developing a policy on section line rights-of-way. We should not, in my estimation, be informing our district offices regarding section line rights-of-way, even if they are on privately owned land, until there is a uniform State policy.

I will be in Anchorage on July 27, and will talk to Dick Kerns regarding section line rights-of-way. At the present time, I do not believe that we should advise district offices regarding section line rights-of-way until either the Governor's Office or the Division of Lands, with the concurrence of the Department of Transportation, lets us know the policy regarding section line rights-of-way. My advice to the district offices would be to follow the procedure as established by the right-of-way section, that is, cease issuing letters of nonobjection, until the new policy is established.

RS:lm

✓	Dist. R / W Agent	
✓	Title	
✓	Engineering	L.S.
✓	Negotiations	Act
✓	Relocation	
✓	Appraisals	
✓	App. file	

rec'd 7-27-77

RS

Rec'd 8-1-77

*lb*

roads will require approval and a driveway approach permit from the Driveway Permit Section of the State of Alaska Department of Highways.

6. Finally, it should be borne in mind that the letter of non-objection is not necessary for use of section lines. The Highway Department does reserve the right, however, to object at any time to any use of a section line if it conflicts with law, public use, or Highway Department plans.

Finally, please be advised, again, the actual determination of a section line easement, as opposed to a section line, is your responsibility.

STATE OF ALASKA

AVRUM M. GROSS  
ATTORNEY GENERAL

By: William R. Satterberg, Jr.  
Assistant Attorney General

WRS:dp

MEMORANDUM

TED - FYI  
George  
file

AA copy for me

State of Alaska

TO: Theodore Smith, Director  
Division of Forest, Land &  
Water Management  
Dept. of Natural Resources  
Anchorage

DATE: February 11, 1981

FILE NO:

TELEPHONE NO: 276-3550

FROM: WILSON L. CONDON  
ATTORNEY GENERAL

SUBJECT: Section line easements

By: Barbara J. Miracle *bjm*  
Assistant Attorney General  
Anchorage - AGO

Forest, Land & Water Mgmt.

FEB 20 1981

Director's Office

I thought you would be interested in the recent decision from the Alaska Supreme Court concerning section-line easements, Anderson v. Edwards (No. 2274, Jan. 30, 1981). The defendant in that case, Wrangell Mountain Enterprises, requested a letter of non-objection from DOT to utilize a section line easement over private property. The Department of Transportation gave Wrangell Mountain Enterprises a letter of non-objection and advised it that the section line right-of-way was a hundred feet in width. The private property crossed by the section line was obtained through a conveyance from the State of Alaska. In the state contracts for sale of the private property, the state reserved for "itself, its successors and assigns a 100-foot right-of-way along the section line." Wrangell proceeded to construct a highway along the section line 25 feet in width. However, it cleared the section line, leveling the timber for almost a full 100-foot width. Wrangell was sued by the private property owners. The Supreme Court did not consider the issue whether as a matter of law Wrangell had the authority to construct the section line right-of-way because the private property owners failed to preserve this issue on appeal. However, the Court did find that Wrangell could only clear the amount of trees reasonably necessary to construct the roadway.

BJM:dr

# MEMORANDUM

# State of Alaska

TO: Honorable H. D. Scougal  
Commissioner

DATE: November 29, 1976

ATTENTION: Jack Bodine  
Right-of-Way Director  
Department Of Highways

FILE NO:

TELEPHONE NO:

FROM: Richard Svoboda  
Assistant Attorney General  
Department of Law  
Highway Section

SUBJECT: Ombudsman Complaint  
76-0842

I am in receipt of a carbon copy of the Ombudsman's letter to Commissioner Scougal dated November 19, 1976, and I am in general accord with the tenor of the letter. However, I do not believe that the Department of Highways improperly allowed excessive clearing of a section line right-of-way across Mr. James H. Edward's property near McCarthy, Alaska. By letter dated May 8, 1975, the Department of Highways indicated its non-objection to Wrangell Mountain Enterprises utilizing a section line being between Section 27 and 26, T. 5 S., R.13 E., C.R.M. for a public access roadway. The Department merely granted this letter of non-objection and did not in any manner affirmatively allow or disallow excessive clearing of Mr. Edward's property. I think if the fault lies with the Department of Highways, it can be more properly characterized as nonfeasance rather than malfeasance. The portion of Mr. Flavin's letter concerning free issuance of letters of non-objection is well taken and the Department of Highways should strongly consider restricting the issuances of letters of non-objection without first making a determination whether the use of a section line is in the best interest of the State of Alaska and will cause minimal impact to the property owner over who's property the section line runs. In order to implement a consistent policy throughout the State of Alaska and in an attempt to eliminate instances like that which occurred in McCarthy, I would suggest that Mr. Flavin's recommendation that regulations be implemented in accordance with the Administrative Procedures Act be acted upon with due diligence by the Department of Highways.

Further, I would like to reiterate the suggestion I made to you in my memorandum of October 21, 1976, and suggest that the Department of Highways cease from issuing any letters of non-objection for the utilization of section line rights-of-way unless the letter has been approved by the Department of Law.

Mr. Flavin's letter raises a question of whether or not the Department of Highways has specific statutory authority to regulate the use of section line rights-of-way. I can find no reference to such specific statutory authority, however, I believe that it is implicit in Title 19 that the Department of Highways has such authority. AS 19.10.010, the statute dedicating section line for public highways, is founded on Title 19, the Title dealing with state highways. This statute very specifically says "a track...between each section of land...is dedicated for use as

Honorable H. D. Scougal  
Attention: Jack Bodine

November 29, 1976  
- 2 -

public highways". AS 19.05.010 states that "the department is responsible for the planning, construction, maintenance, protection and control of the state highway system". AS 19.05.030 delineates the duties of the Department of Highways which includes "direct approved highway planning and construction and maintenance, protection and control of highways;". AS 19.05.040 allows the Department to acquire property, acquire rights-of-way for present or future use, control access to highways, dispose of property acquired for highway purposes and exercise any other power necessary to carry out the purposes of Chapter 5-25 of this title. AS 19.05.070 provides for the vacation or disposal of land and rights in land possessed by the Department of Highways. I believe that all of these statutes, by implication, grant to the Department of Highways the authority to issue letters of non-objection for section line rights-of-way as defined by AS 19.10.010. If you desire, however, legislation can be introduced in this session to clarify the authority of the Department of Highways. If you wish to follow this procedure, (although I believe it unnecessary) please contact me as soon as possible so that legislation can be drafted before the beginning of the session.

RS:lm

cc: Frank Flavin, Ombudsman

November 19, 1976

Hasden D. Scougal  
 Commissioner  
 Department of Highways  
 P.O. Box 1467  
 Juneau, Alaska 99802

Route A		Date
	Director	
	Deputy	
	C & SF Area	
	IE	
	SP	
	App	
	R. W. Div.	
	File	
C	I	S

Re: ~~Brookside~~ Complaint 76-0842

Dear Commissioner Scougal:

Please be advised that the above-captioned complaint has been investigated and is found to be justified. This complainant charged that the Department of Highways improperly allowed excessive clearing of a section line right-of-way near McCarthy, Alaska.

Findings:

1. In 1970, on the advice of the Attorney General's office and with concurrence from the Division of Lands, the Department of Highways asserted jurisdiction over section line rights-of-way, ostensibly to ensure consistent regulation of their use by private individuals.
2. Since that time the Department has issued letters of non-objection to persons wishing to use section line rights-of-way, if the Department has no objection to the particular use and deems it to be in the best interests of the state.
3. There are no laws or regulations concerning the issuance of these letters of non-objection or concerning acceptability of proposed uses of these easements. Opinion varies within the Attorney General's office as to the Department's statutory authority to regulate the use of section line rights-of-way.
4. On May 8, 1975, the Department issued a letter of non-objection to Wrangell Mountain Enterprises for the purpose of constructing a public access roadway on Section 27 and 26, T.5S., R.13E., C.R.M.
5. Subsequently a Mr. Anderson of Wrangell Mountain Enterprises cleared a 100 foot wide strip of this right-of-way, and constructed a roadbed approximately ten feet wide (see attached photograph).

RECEIVED

NOV 24 1976

RIGHT OF WAY DIV



Conclusions

We find this complaint to be justified because:

1. If the Department of Highways has no specific statutory authority to regulate the use of section line rights-of-way, letters of non-objection should not be issued.
2. If the Department does have jurisdiction over these easements, their use should be controlled so as not to allow the violation of the property rights of adjacent owners.

I can see no public purpose served by allowing one individual to needlessly destroy the esthetic and monetary value of another's property with the implied approval of state government. If one of the criteria used in issuing a letter of non-objection is that the proposed use be in the best interests of the state, some review should be made before this determination is reached. The current procedure provides for no such review, and I understand that the Department routinely approves all requests.

Recommendations:

1. The question of the Department's statutory authority to regulate the use of section line rights-of-way by private individuals should be resolved and, if need be, legislation drafted to clarify the matter.
2. Should it be concluded that the Department does have, or should have, jurisdiction in this matter, regulations should be immediately adopted under the Administrative Procedures Act to require that:
  - a. public input be solicited from adjoining land owners as to the proposed use of a section line right-of-way;
  - b. The Department review a proposed use to determine if it is in the best interests of the state and whether or not potential public objections have validity;
  - c. if approval is given by the Department, it be for a specific use and allow for use of no more of the easement than necessary.
3. I am in agreement with an October 21, memorandum to you from the Attorney General's office that, in the interim, letters of non-objection not be issued without the approval of the Department of Law.

Hesden D. Scougal

3

November 19, 1976

I will be glad to discuss this matter with you further and would very much appreciate your response to these recommendations within a month.

Sincerely,

Frank Flavin  
OMBUDSMAN

FF:da

CC: Jack T. Bodine, Right-of-Way Director  
Richard Svobodny, Assistant Attorney General

STATE  
of ALASKA*MEMORANDUM**Hugh Williams*

o. [ ALL DISTRICT R/W AGENTS

DATE November 3, 1976

*HNW*  
FROM: Hugh N. Williams  
Deputy Director  
Right of Way Division  
Department of Highways  
Juneau, AlaskaSUBJECT: Letters of Nonobjection for  
Section Line Rights-of-Way

Attached is a letter from the Attorney General's office concerning issuance of letters of nonobjection for utilization of section line rights-of-way. Please advise your personnel that no further letters will be issued until the matter is resolved. We would like your comments and suggestions on the Attorney General's letter, as well as what impact compliance will have on your operation.

Attachment: As stated