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SECTION LINE EASEMENTS IN ALASKA:

THE STATE OF AFFAIRS IN FEBRUARY, 1983

I. INTRODUCTION

In Alaska, a section line easement is a right-of-way for a public highway which is either 66 feet or 100 feet wide and centered on the section line. This simple definition raises only one obvious question: When is the easement only 66 feet wide? Unfortunately, there are many less obvious questions--some whose answers are unclear or disputed--which must also be examined before one can claim to understand section line easements. For example, in 1981 Alaska's Supreme Court said that construction of a public highway does not necessarily entitle the builder to use the entire width of the easement.[1] Paradoxically, the same court recently said that it is not necessary to construct a public highway in order to use a section line easement.[2]

Section line easements are not peculiar to Alaska. They are found in a number of other states. Where they exist they are generally said to have resulted from the actions of two governments. The first action was an offer by the federal government to allow construction of public highways on unreserved portions of the public domain. The second was acceptance by a territorial, state or local government providing for the construction of highways along section lines. In Alaska, it can also be maintained that section line easements on state lands result directly from a dedication by the Alaska legislature.

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1 Anderson v. Edwards, 625 P.2d 282 (Ak 1981).

2 Fisher v. Golden Valley Electric, (Op. No. 2606 Jan. 28, 1983).

II. THE FEDERAL OFFER

Ten months before the Senate ratified the Treaty of Cession[3] by which Alaska was purchased from Russia, Congress passed the Mining Law of 1866.[4] Section 8 (14 Stat. 253) of the law reads in its entirety as follows:

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

When the federal laws were reorganized in 1878, this section was redesignated as section 2477 of the Revised Statutes. This section was later codified as part of the United States Code at section 932 of Title 43, but it is still commonly called R.S. 2477.

The law is applicable in Alaska.[5] When Congress passed the landmark federal land use planning law, the Federal Land Policy and Management Act of 1976, or FLPMA,[6] R.S. 2477 was repealed.[7] In its place a much more complex scheme for securing rights-of-way

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3 The Treaty of Cession of the Russian Possessions in North America was ratified May 28, 1867 (15 Stat. 539).

4 The Act of July 26, 1866 (14 Stat. 251 et seq.) was actually titled "An Act granting the Right-of-Way to Ditch and Canal Owners over the Public Lands, and for other Purposes," but is commonly known as the Mining Law of 1866.

5 E.g., Hammerly v. Denton, 359 P.2d 121, 123 (Ak 1961).

6 P.L. 94-579 (90 Stat. 2743 et. seq.).

7 §706(a) of FLPMA (90 Stat. 2793). FLPMA was effective October 21, 1976.

across the federal public domain was enacted,[8] but a savings clause protecting existing rights-of-way was included.[9]

III. ALASKA'S ACCEPTANCE

According to Alaska's Supreme Court acceptance of the federal offer can occur in either of two ways: "...some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted."[10] Situations involving acceptance by public user are outside the scope of this material, but two points deserve mention: (1) proving adequate public use may be very difficult,[11] and (2) where for some reason such as an early conveyance into private ownership a section line easement for an existing road cannot be established through reliance on acceptance by statute, there may be facts to support acceptance by actual public use.

Acceptance by Alaska's public authorities is generally said to have occured through passage of an acceptance statute by the territorial legislature. This was first done in 1923.[12] The 1923 statute created a right-of-way which was four rods or 66 feet wide.

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8 Title V, §§501-511, of FLPMA codified at 43 U.S.C. §§1761-1771.

9 43 U.S.C.A. §509(a).

10 Hammerly v. Denton, 359 P.2d 121, 123 (Ak 1961).

11 See for example Hammerly, supra.

12 Ch. 19 SLA 1923 approved April 6, 1923.

Inexplicably this statute was repealed in 1949 when it was left out of the 1949 compiled laws.[13] In 1951 the legislature enacted a statute which dedicated a tract 100 feet wide between each section of land owned by or acquired from the Territory.[14] In 1953 the legislature amended the 1951 law by adding the dedication of a tract four rods wide between all other sections of land in Alaska.[15] The latest version of the Alaskan acceptance statute was held to create a right-of-way along a section line[16] and prominent Alaskan attorneys have said that the original 1923 act has the same effect.[17]

IV. THE EFFECT OF PRIVATE ENTRY

If land is acquired by a private owner from the federal government before an R.S. 2477 easement is established across it,

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13 Section 1, Ch. 1 SLA 1949 approved January 18, 1949 expressly repealed all acts of the Alaska Legislature not contained in the compilation. Ch. 19 SLA 1923 was not included. The only explanation is what can be gleaned from correspondence tables accompanying the compiled laws. Instead of giving the 1949 section number for Ch. 19 SLA 1923, the table merely states, "Invalid." The same curious result appears in the opposite §1721 CLA 1933 (which is where Ch. 19 was compiled in 1933).

14 Ch. 124 SLA 1951, approved March 26, 1951.

15 Section 1, Ch. 35 CLA 1953, approved March 21, 1953.

16 Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Ak 1975).

17 E.g., Letter of September 19, 1977 from Tom Meachem, Esquire to the Anchorage Daily Times; 1969 Opinions of the Attorney General No. 7 (December 18, 1969); Opinion letter of February 20, 1969 from Eugene F. Wiles, Esquire to the City of Anchorage, Opinion letter of March 21, 1966 from Theodore M. Pease, Jr. to the Greater Anchorage Area Borough.

then no easement can thereafter be established, because the land would not be part of the unreserved public domain. Moreover, it is the date of the entry not the date of patent which is critical.[18] The consequence for Alaskan section line easement law is that lands entered prior to April 6, 1923 are not subject to section line easements and most Alaskan lawyers would probably agree that federal lands entered between January 18, 1949, and March 21, 1953, are not subject to section line easements.[19]

V. THE NEED FOR SURVEY

Thus far the discussion has assumed that survey of the section line antedates the private entry, but the survey establishing a section line could either precede or follow the private entry. One state court has suggested that the passage of a state acceptance statute similar to Alaska's law providing for highways along section lines is effective upon passage and that later survey of the section line relates back to the date of passage[20] and one

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18 See, Hammerly v. Denton, supra.

19 There is no judicial authority in point but three of the four lawyers who have written on the topic in the materials cited in footnote 17 above take this view.

20 Faxon v. Lallie Civil Township, 36 N.D. 634, 163 N.W. 53, 533 (N.D. 1917) (dictum). The North Dakota court said that the territory's right to the highway right-of-way took effect as of the date of the acceptance statute (1871) even though the survey was done in (1875). But, the landowner did not enter until 1904, and the relation back of the survey was not necessary to the court's decision.

federal court appears to have accepted this proposition.[21] This approach is, however, contrary to the rule recognized by the U.S. Supreme Court that it is the survey which creates the section line.[22] This would mean that until the survey is completed there is nothing to which the acceptance statute could attach any right. Consider the practical aspects; until the section line is surveyed, an entryman would have no way to determine where he could erect an improvement.

In his 1969 opinion, the Attorney General concluded that survey of the section line is necessary before the section line easement can be created. However, the Attorney General's opinion indicates in a footnote that protracted section lines are sufficient subject to confirmation by actual survey.[23] This conclusion is supported by no analysis. It is inconsistent with the emphasis o a complete official survey as a necessary predicate for creation of section lines established by the U.S. Supreme Court.[24] To the extent that the conclusion is based upon the belief that protracted section lines will be very close to the actual surveyed line in all cases, it is inconsistent with the realities of surveying. Since no section line exists before the official survey, the better view is

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21 Bird Bear v. McLean County, 513 F.2d 190 (8 Cir. 1975) (semble).

22 Cox v. Hart, 260 U.S. 427, 436, 43 S.Ct. 154, 157 (1922). See also U.S. v. Northern Pacific Ry. Co., 311 U.S. 317, 344, 61 S.Ct. 264, 277 (1940).

23 1969 Opinions of the Attorney General No. 7, p. 7, n. 15.

24 Cox v. Hart, supra.

that an actual survey, not a protracted survey projection, is necessary before the easement can exist.

VII. THE EFFECT OF PUBLIC RESERVATIONS

If the land in question is reserved for a public use, it ceases to be land which falls within the ambit of the 1866 federal offer. The consequence is that federal lands reserved for a public purpose before a section line easement is created are not subject to such an easement.[25] It is not so clear that state lands reserved for a public use would, without more, be free of section line easements. The reason is simply that there is no exclusion for public reservations in the state law. It dedicates an easement along the section line over all state lands.[26]

Much of the federal land in Alaska has been reserved for one public purpose or another. Under the prevailing view, none of these reserved lands would be subject to section lines easements unless the reservation took place after April 6, 1923, but before January 18, 1949, or after March 26, 1953, and the land was officially surveyed prior to the reservation. In the event of a dispute, it is not clear that the federal government would subscribe to this orthodox view. The Solicitor for the United States Department of the Interior has taken the position that section line easements on federal lands in Alaska exist only if a public highway was actually constructed upon the lands prior to the repeal of R.S. 2477.[27] The Solicitor's reasoning goes like this:

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25 E.g., Bennett County v. U.S., 394 F.2d 8 (8 Cir. 1968).

26 AS 19.10.010 (Ch. 123 SLA 1951 as amended by Ch. 35 SLA 1953).

27 The basis for this position is explained in an opinion by Deputy Solicitor Ferguson dated April 28, 1980.

(1) R.S. 2477 literally gives a right-of-way for the "construction" of highways.

(2) The interpretation of R.S. 2477 is a matter of federal law.

(a) The sizable body of section line easement law which exists consists of interpretations of the federal law by state courts in cases to which the federal government was not a party.

(b) The federal government is not bound to acquiesce in the state court interpretations.

(3) Interpretations of the word "construction" in R.S. 2477 through use of the ordinary canons of statutory interpretation requires that the term be given its ordinary meaning.

(4) The administrative difficulty in distinguishing cases of sufficient public use to constitute acceptance from those of insufficient use can be avoided by resort to the construction test, a test which requires more than mere use and which would focus on objective observable facts such as placement of culverts, fill, etc.

(5) The only interpretation which can avoid a serious conflict with the "roadless" review concept of §603 of FLPMA is the "construction required" interpretation.

The Solicitor's opinion cannot be accepted without difficulty. First, while it is true that the bulk of the judicial opinions on the subject are by state courts, such decisions are

numerous and of long standing. Moreover, federal courts have written opinions which accept the orthodox view[28] and the federal government has taken a position in litigation which implies that it has not subscribed to the "construction required" theory.[29] Second, the Solicitor's position is not consistent with the practice followed by the Department's Bureau of Land Management over the years.[30] Regulations dealing with R.S. 2477 easements have generally indicated that the federal offer can be accepted by construction or by establishment of highways in accordance with state laws.[31]

On the other hand, the Solicitor's position really is much more consistent with the language of the 1866 law. Moreover, the literal interpretation of "construction" would sharpen the application of the law to the point where it would operate only where actual construction demonstrated a present need, not only for a road, but for one laid out on a section line. Thus, the Solicitor's opinion would tacitly recognize the fact that not all sections are bounded by stretches of land flat enough upon which to construct a

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28 Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir 1973), cert. den. 411 U.S. 917; Bird Bear v. McLean County, supra.

29 Bennett County v. U.S., supra at 394 F.2d 12.

30 One example of the Department's acceptance of the orthodox view is found in a memorandum dated April 24, 1973, signed by the State Director of the BLM in Alaska, and intended to provide official guidance on the subject.

31 E.g., 43 C.F.R. §244.53 (1962); 43 C.F.R. §2234.2-5(b) (1970); 43 C.F.R. 2822.2-1 (1974).

road. This would save several state legislatures from the apparent folly of assuming that every section line is on flat level ground.

Moreover, the Solicitor's position carries the added advantage of assuming that Congress did not act so rashly in 1866 as to give a large measure of control over management of the federal public domain to the states by allowing them to create highway easements anywhere without regard to actual need. The Solicitor's interpretation would (as he has noted[32]) observe the rule of construction that federal statutory grants must be construed narrowly.[33]

Finally, the Solicitor has contrived ways around both the problem in the regulations--or establishment according to state law must mean construction plus anything else by way of formal action which might be required in addition to mere construction--and the practices of the agency--Congress has plenary power over federal land and no federal employee can exceed his actual authority delegated by Congress.

The Solicitor's position is somewhat persuasive, but it would be an uphill struggle to make the argument in view of a hundred years or so of state court precedents which are contrary. In any event, the validity of a section line easement on federal land will not depend on whether the Solicitor's view is accepted, unless the land in question was surveyed prior to October 21, 1976 while still a part of the unreserved federal public domain and not

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32 See the material cited in footnote 27, - supra.

33 Caldwell v. U.S., 250 U.S. 14, 20, 39 S.Ct. 397, 398 (1914).

later conveyed to the state. Situations involving these criteria should not arise frequently.[34]

In the case of state lands which have been reserved for some public purposes, there will be a section line easement unless the easement has been vacated. This results from the fact that AS 19.10.010 is applicable to all state lands. In addition to formal vacation procedures, it is possible that a court might find an implied vacation where the reservation is created by statute and the purpose of the reservation would be frustrated if the land were criss-crossed by highways.

One special category of state lands which might be accorded different treatments is trust lands. At one time there were three principal categories of trust lands: mental health lands, school lands and university lands. Assuming the validity of Ch. 182 SLA 1978, mental health lands and school lands are now a part of the state's public domain. However, university lands[35] remain subject to the trust obligations imposed by federal law.[36] It is quite possible that the Alaska Supreme Court would choose to

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34 Of course, if protracted surveys could be substituted for actual surveys, the argument would be of vastly greater significance.

35 University lands are lands granted to the state by the Act of March 4, 1915 (38 Stat. 1214) and the Act of January 21, 1929 (45 Stat. 1091).

36 State v. University of Alaska, 624 P.2d 807 (Ak 1981) (construing the 1929 Act). The University Board of Regents was given an option. It could accept or reject conversion of university lands to public domain in exchange for a special trust fund. The Board rejected the exchange of trust lands for trust fund revenues as permitted by §24, Ch. 182 SLA 1978. No such option applied in the case of school and mental health lands. Conversion of the mental health lands is presently the subject of litigation.

interpret AS 19.10.010 narrowly in order to avoid what would otherwise be a conflict between the state law and the federal trust obligation. Otherwise, the court would be forced to find that the University is owed compensation for each section line easement.[37] Computation of the damages would be a difficult proposition which could be avoided through the narrow construction of the section line easement statute necessary to save it from conflict with the federal law.

VIII. If A Section Line Easement Exists, What Is The Permissible Extent Of Its Use?

At the outset mention was made that a section line easement is an easement for highways across unreserved public lands which is 66 or 100 feet wide. By now the discerning reader will have answered the one obvious question this over simplified definition suggests. If the underlying fee is or was federal land when the easement attached, the easement is 66 feet (four rods) wide; if state land, the easement is 100 feet wide. One constructing a public highway may not, however, be privileged to make use of the entire width of the section line.

In Anderson v. Edwards, 625 P.2d 282 (Ak 1981), Alaska's Supreme Court was confronted with a dispute between property owners in McCarthy, Alaska, named Edwards and a joint venture known as Wrangell Mountain Enterprises (in which Mr. Anderson was an indirect participant). Wrangell Mountain Enterprises was developing property near McCarthy in connection with which it was constructing three

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37 This result would be dictated by State v. University, supra.

miles of public roads partially along a section line across property owned by James and Maxine Edwards. The court found that the state had reserved a 100 foot right-of-way along the section line when it sold the land in question and that pursuant to AS 19.10.010 the right-of-way was dedicated for use as a public highway. Before it commenced construction, the developer obtained a letter from the Division of Lands confirming the width of this easement and a letter of non-objection from the Department of Highways. The roadway constructed by the developer was only about 25 feet in width, but the developer cleared the trees across an expanse nearly equal to the full 100 foot width. The Edwardses sued to recover damages for the cutting of the trees and sought treble damages under AS 09.45.730 which authorizes a triple recovery for the wrongful destruction of trees. Following a jury verdict against the developer, the case reached the Supreme Court. Among other things the court held that the language of the dedication statute means that only that amount of land actually necessary for use as public highway is dedicated. The court concluded that the developer was, "entitled to make only reasonable use of the right-of-way." 625 P.2d 287.

Whatever one thinks of the reasoning in Anderson, it is probable that the decision is contrary to the expectations of most lay persons who would, not surprisingly, assume that a right-of-way said to be 100 feet wide is in fact 100 feet wide. Moreover, the decision clearly has the potential to generate litigation over the reasonableness of the use of the easement which could have been

avoided by more straight forward interpretation of the applicable statutes. However, the Supreme Court did not think this consideration outweighed the fact that its ruling, "will prevent needless destruction of property by insuring that the construction of roadways will be accomplished with care." §625 P.2d 287. The court did soften the blow against the expectations of those who use section line easements by holding that the person complaining that the use is more than reasonable has the burden of proving this to be true. I.d.

In its most recent decision dealing with section line easements, Fisher v. Golden Valley Electric, (opinion no. 2606, January 28, 1983), the Alaska court held that a utility company could construct a powerline on an unused portion of a section line easement without paying the owner of the underlying fee for the privilege. First the court noted that in some other states the construction of a powerline which does not interfere with highway travel is considered an incidental or subordinant use of the highway easement which does not constitute an additional burden on the underlying fee. The Alaska court said that the rationale for these decisions is one of technological progress. As the court put it:

> The reasoning underlying this position is that electric, and telephone, lines supply communications and power which were in an earlier age provided through messengers and freight wagons traveling on public highways. So long as the lines are compatible with road traffic they are viewed simply as adaptations of traditional highway uses made because of changing technology....

(Slip opinion at P. 6). The court recognized that other states take differing views. Some apply the technological progress rule in urban areas but not rural areas. Others hold that an easement for

electrical transmission does not constitute an additional burden on the fee only if the electricity is used for highway purposes such as street lighting. Finally, the court recognized that there are states in which courts have held that the use of highway easements for powerlines is an additional burden on the fee. The Alaska court then went on to quote AS 19.25.010 which states that a utility facility may be constructed in a state right-of-way only in accordance with regulations prescribed by the Department of Transportation and Public Facilities. The court said this statute placed Alaska among those states which permit powerline construction as an incidental or subordinant use of a highway easement.

The appellants in Fisher sureties on a bond posted by the owner of the fee) urged that federal rather than state law governed the issue because the right-of-way was based upon an offer from the federal government to grant the easement. The Supreme Court said that argument failed, because absent some contrary indication in federal law the conveyance of an interest in federal land would be construed according to the law of the state where the land is located. The court said that no contrary federal rule had been called to its attention. Appellants apparently overlooked the fact that federal regulations governing section line easements did not

contemplate their unrestricted use for powerlines.[38]

One criticism which can fairly be leveled at the court for its decision in Fisher is a lack of sensitivity for the distinction between section line easements over lands still owned by the state and lands which have been purchased by others for valuable consideration. There is absolutely nothing in the statutory language or in the prior decisions of the Alaska Supreme Court which would lead any reasonable person to conclude that if he purchased land from the state subject to a section line easement for a highway, it would also be subject to an easement for electric transmission lines or other facilities. Not only do electric transmission lines and other facility pose a different set of inconveniences and risks from those posed by roads, but on the basis of topography, proximity of other roads, or other factors, one who purchases lands might well conclude that the chances of a public highway being built on a section line are virtually nil. However, those factors which would cause one to reach that conclusion with

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38 For example, a pertinent regulation in 1970 was 43 C.F.R. 2234.2-5(b) which included the following: "Rights-of-way granted by R.S. 2477 do not include rights-of-way for facilities with respect to which any other provision of law specifically requires the filing of an application for a right-of-way. Where the holder of such highway right-of-way determines that such facility will not seriously impair the scenic and recreational values of an area and its consent is obtained, the Department waives the requirement of an application for a right-of-way for all facilities usual to a highway along the highway right-of-way granted by R.S. 2477 except for electric transmission facilities, designed for operation at a nominal voltage of 33kv or above or designed for conversion to such operation..." The same provision is found in later regulations. E.g., 43 C.F.R. §2822.2-2(a) (1974).

respect to the construction of a highway might not apply with respect to the construction of some other facility such as an electric transmission line. At a minimum, the Fisher court should have examined the reasonable expectations of those who acquire land from the state before concluding that the lesser included interest rule which it has adopted should apply to section line easements which cross land not owned by the state.

One instruction to be taken from Fisher is that a section line easement may be used for a variety of purposes. If an electric utility can construct a transmission line, it follows that a local government or utility authority could construct a sewer line or a water line on the section line easement. A second point of interest is this: the decision in Fisher poses a potential threat to public reservations such as state parks, at least in cases where the parks have been officially surveyed. While it may be asserted that the legislation creating areas such as the Chugach State Park vacated any section line easements by necessary implication, this proposition has yet to be tested in court.

IX. SUMMARY

The following summary represents the current state of section line easement law in Alaska. As the preceeding sections of this material have shown there are some areas of uncertainty and some differences of opinion which have not yet been resolved. With that warning in mind, the generalizations are as follows:

(1) A section line easements is an easement for the construction of a public highway or other facility such a a powerline, water line or sewer line.

(2) The maximum width of the section line will be 100 feet if established on state owned land or land acquired from the state, but 66 feet if established on federal land or land acquired from the federal government. One making use of the section line easement is not, however, automatically entitled to use its maximum width. The user may only take advantage of so much of the section line easement as is reasonably necessary for the construction and maintenance of the public highway or other facility.

(3) Section line easements cannot exist prior to the official survey which creates the section line.

(4) Section line easements will exist on all surveyed lands in Alaska except the following:

   (a) Lands which went into private ownership or were reserved for public purposes prior to April 6, 1923;

   (b) Lands which went into private ownership or were reserved for public purposes between January 18, 1949 and March 21, 1953 except that for lands owned by the Territory March 26, 1951 is the end date.