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December 22, 2017 R&M No. [redacted]

[redacted]

RE: [redacted] Alaska Section Line Easements Opinion

Dear Mr. [redacted]:

You have requested our opinion regarding whether section line easements (SLEs) can be applied to lands conveyed under the Alaska Native Claims Settlement Act[1] and in particular, whether they can be applied to lands subject to protracted or unsurveyed section lines.

The purpose of this assignment relates to the quantification of carbon offsets and the effect of section line easements on the available acreage. Our understanding of the program is that parties enter into a contract in which the owner of undeveloped forestlands is compensated for imposition of a restrictive covenant or conservation easement. The land development prohibition essentially creates a marketable commodity that can be used to offset CO2 emissions generated by various industries. As the value of the offset is based on the acreage protected from development, it is important to be able to determine how much of the land is subject to the land use restrictions. Lands that may not be subject to a contractually imposed restriction include those that may not be under the complete control of the landowner such as road rights-of-way, access easements, submerged lands and those where the surface and sub-surface estates[2] are held under separate ownerships. As a section line easement may be available for development by government, utilities or other users, the focus of this review is the land that may be subject to a section line easement and therefore not available for a carbon offset.

The lands in question are owned by [redacted] Corporation ([redacted]. Our initial estimating indicated that the lands included portions of as many as 41 townships potentially consisting of more than 1,500 section lines. An example of the impact of a 33-foot wide federal section line easement over a nominal section of land (1 mile x 1 mile) tells us that the nominal section size of 640 acres would be reduced by 15.9 acres or approximately 2.5%. When applied over 48 townships this could reduce the lands available for carbon offsets by a significant amount. Unfortunately, elements of SLE research are not all black and white and certain issues such as

[1] ANCSA – Public Law 92-203 dated December 18, 1971 (85 Stat. 488)(43 USC 1601-1624)
[2] 43 U.S.C. § 1613(e & f)

applicability to protracted section lines are still unclear. As a result, this opinion cannot provide an absolute conclusion, but should allow for a more informed risk assessment regarding how the SLEs may be handled.

A brief summary of conclusions finds that:

1. [redacted] lands may be subject to both federal and state SLEs if they meet the authority and title criteria.
2. The current State of Alaska position is that section line easements may apply to both federal and state protracted section lines, although they cannot be used until surveyed.
3. Where valid SLEs exist over [redacted] lands, the authority to permit third party development of the SLE including cutting of trees and placement of roads or utilities resides with the State of Alaska.
4. The risk that SLEs associated with [redacted] lands will be fully or partially developed in the future is low.

Legal Jurisdiction

The authority for SLEs is based in both state and federal law. Once the federal government has divested itself of title, legal conflicts would generally be resolved in the State court system. Federal court jurisdiction over real property cases would apply where it involves federal lands or where the federal government holds a trust relationship with the landowner. Lands that are subject to federal law would not be considered subject to SLEs by the federal government. The RS-2477 grant that is the basis for a federal SLE calls for the "*…construction of highways…".*[3] In the federal view, legislative acceptance without construction or use would be insufficient to complete the dedication. Therefore, for practical purposes, there are no SLEs on federally owned lands.

A recent Alaska Supreme Court case[4] specifically considered subject matter jurisdiction in a case relating to a tax foreclosure of a patented homestead by the local government. The appellant argued that state courts did not have jurisdiction over his land as title had been derived from a federal land patent. The Court ruled that "Once [a land] patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts."

The U.S. Constitution declares federal law the supreme law of the land and that state courts are bound by the supreme law. Alaska courts may cite federal court decisions, administrative law such as Interior Board of Land Appeals decisions (IBLA) and federal solicitor's opinions. However, once the Alaska Supreme Court has issued a decision, it can only be appealed to the U.S. Supreme Court. To the extent that the Alaska Supreme Court has ruled on an issue related to SLEs, it will be given the greatest weight.

ANCSA Corporations are considered as private parties in many contexts and their lands are generally subject to state law. One exception is the special protection from alienation by adverse possession in federal

[3] On October 23, 1986, the United States filed an Amicus brief in the case Alaska Greenhouses, Inc. v. Municipality of Anchorage, (Case No. A85-630 Civil). The brief stated that the United States has a strong interest in the property interpretation of a federal statute (R.S. 2477). *"To the extent the Alaska statute purports to accept rights-of-way without any actual or even planned construction, the purported acceptance exceeds the scope of the offer and is invalid."*

[4] Ray Pursche v. Matanuska-Susitna Borough, 371 P.3d 251, 2016 (Alaska 2016)

law. A 1988 amendment to ANCSA[5] effectively limits the ability of an adverse user to claim an easement by prescription across ANCSA corporation lands including those of [redacted] Corporation.

To our knowledge, there have been no cases decided in the Alaska Court system in which the State or a private party has asserted an RS-2477 based right-of-way across ANCSA lands. Currently, there is a case[6] involving the State and Ahtna, Inc. involving the validity of an RS-2477 trail easement across ANCSA lands between the Richardson highway community of Copper Center and Klutina Lake. A Superior Court trial is scheduled for the spring of 2019. Due to the nature of the issues, it will likely be appealed by the non-prevailing party to the Alaska Supreme Court.

Ahtna, Inc. and other ANCSA Corporations were sufficiently concerned about the impact of RS-2477 assertions across their lands to have bills[7] submitted on their behalf to the Alaska Legislature in 2013. The legislation would have limited the width, scope and management authority asserted by the State of Alaska for an RS-2477 right-of-way. The legislation was not successful leaving resolution of the issues with the courts.

Please note that while this report may state the legal authorities upon which section line easements may be based, R&M Consultant's, Inc. is not a law firm, does not offer legal services and this opinion is not presented as legal advice. However, we are well versed in the history and authorities regarding the establishment of road rights-of-way in Alaska and have provided support in these matters to the State Attorney General's Office and private law firms on a regular basis.

Section Line Easements - Authority

A section line easement is an easement for highway purposes that generally runs along a surveyed section line established as a part of the rectangular survey system. A federal SLE may exist on either side of a surveyed section line based upon the federal offer of an RS-2477[8] grant and the state's legislative acceptance[9] of the offer. Federal SLEs are based the same federal RS-2477 grant across unreserved public land that has been applied to historic trails. The difference is the acceptance of the trail grant was generally by user and

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[5] Section 11 of Public Law 100-241, 101 Stat. 1807, Feb. 3, 1988, (ANCSA Amendment) "amends section 907 of ANILCA (43 USCS 1636) to provide automatic protection for ANCSA lands. So long as ANCSA lands are not "*developed, leased or sold to third parties, they are exempt from: (a) adverse possession or similar claims based on estoppel; ….*" (Quoted from Alaska Native Lands: Aboriginal Title, to ANCSA and Beyond, David S. Case, 1.23.90) – This provision has been tested in the Alaska Supreme Court cases Kenai Peninsula Borough v. Cook Inlet Region, Inc., 807 P.2d 487 (1991) and Snook v. Bowers, 12 P.3d 771 (2000). The term "developed" can be difficult to interpret. Under the Kenai case the court ruled that "*In the context of raw land, the common meaning of 'developed' includes subdivided property which is ready for sale." And "...to be within this definition of 'developed' the land must be practically and legally suitable for sale to the ultimate user.*"

[6] Ahtna, Inc. vs. Leo von Scheben, (Commissioner of Alaska Department of Transportation), Case No. 3AN-08-6337 CI

[7] 28th Alaska Legislature – First Session – Senate Bill No. 94 introduced 3/29/13 and House Bill No. 194 introduced 4/1/13.

[8] The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976.

[9] The 4-rod (66 foot) wide federal section line easement is based upon the offer of the RS-2477 grant and the initial acceptance of that grant on April 6, 1923 by the Territorial legislature (Ch 19 SLA 1923) for highway purposes. The acceptance was codified in A.S. 19.10.010 Dedication of land for public highways.

followed the meandering path of the trail. A federal SLE applies the RS-2477 grant to surveyed and possibly unsurveyed section lines. The Alaska Supreme Court most recently acknowledged the validity of RS-2477 based SLEs in the 2015 Luker v. Sykes decision.[10]

A State SLE is established by legislation that creates a section line easement on lands owned by or acquired from the State or Territory[11] since 1951 or where a section line crosses a navigable body of water. It is presumed that all of the [redacted] Corporation ([redacted] land considered for this carbon-offset transaction has been received directly from the federal government by Interim Conveyance or by Patent. If that were the case, then the only possible application of a State SLE would be where the state holds title to submerged lands within the [redacted] boundaries by virtue of their navigable status. However, an alternative scenario could result in an application of a State SLE over [redacted] lands. If [redacted] received title to lands either directly from the State of Alaska or indirectly because of a reconveyance from the State to the federal government, these lands may be subject to a state SLE. This could be important for two reasons. First, the State SLE is 17-feet wider than a federal SLE and historically it appears that the State may assert these SLEs more aggressively than federal SLEs for protracted section lines.

In 1969, the Department of Law issued formal guidance regarding the legal basis for Section Line Easements in Alaska.[12] This opinion still represents the State's official statement on SLEs.

Scope of Use

An SLE is an easement for highway purposes. The State takes a liberal view towards the scope of use of a highway easement. State courts have held that an RS-2477 may be used for "*any purpose consistent with public travel"* and that "*Alaska views the scope of an R.S. 2477 generously*".[13] Incidental uses such as a power line or communications line are also allowed under State law. However, where an RS-2477 right-of-way crosses land subject to federal law, such as that owned by any federal agency or held in trust as a restricted native allotment, utility use will not be considered to be within the scope of a highway easement. In those cases, the utility will have to obtain a permit from the underlying federal agency.

In Fisher v. Golden Valley[14], the Alaska Supreme Court decided that a utility may construct a power line on an unused section line easement reserved for highway purposes under AS 19.25.010 Use of rights-of-way for utilities. Alaska Administrative Code 17 AAC 15.031 Application for Utility Permit on Section Line Rights-of-way provides for permitting by the Department of Transportation. While there is not a lot of guidance from

[10] Luker v. Sykes, 357 P.3d 1191, (Alaska 2015)
[11] On March 26, 1951, the legislature enacted § 1 Ch. 123 SLA 1951 which stated that "*A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways...*" Also, see A.S. 19.10.010 Dedication of land for public highways.
[12] 1969 Opinions of the Attorney General No. 7 dated December 18, 1969 entitled Section Line Dedications for Construction of Highways
[13] See Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 4110 (Alaska 1985) and Fitzgerald v. Puddicombe, 918 P.2d 1017, 1019 (Alaska 1996).
[14] See Fisher v. Golden Valley Elec. Ass'n, Inc.,658 P2d 127 (Alaska 1983)

the courts regarding scope of use within a highway easement, the statutory definition of "highway"[15] is broad and the historical use references in Fisher suggest that customary and traditional uses of the highway traveler (i.e. overnight camping, fishing, etc.) could be considered acceptable. The aforementioned Ahtna, Inc. vs. Leo von Scheben case, if pursued to the Alaska Supreme Court is expected to bring more clarity regarding the scope of use of an RS-2477 based right-of-way.

In 1970, on advice of the Attorney General's Office (AGO) and with Department of Natural Resources (DNR) concurrence, the Department of Highways asserted jurisdiction over SLEs and issued Letters of Non-objection to persons wishing to use SLEs. On May 8, 1975, the department issued a Letter of Non-objection (LNO) to Wrangell Mountain Enterprises, the appellant in Anderson v. Edwards[16] and advised them that the SLE was 100-feet in width. It was suggested that the LNO resulted in the excessive clearing of the SLE by the appellant. The excessive clearing was found to be beyond the scope of use of the SLE.

Section Line Easements - Width

A federal section line easement based on RS-2477 may be up to 66 feet wide (33-feet on each side of the section line) and the state section line easement may be up to 100 feet in width (50-feet on each side of the section line). As the basis for an SLE could be different on each side of a section line, the resulting total width can vary as follows:

- 0 feet – no valid SLE on either side of the section line
- 33 feet – a half chain or 2 rods – half of a federal SLE
- 50 feet – half of a state SLE
- 66 feet – a full federal SLE – 4 rods or 1 chain
- 83 feet – half federal/half state SLE
- 100 feet – full state SLE

Federal Section Line Easement Analysis for Surveyed Lands

In order to determine the existence and width of a section line easement, it is necessary to evaluate four elements that validate the right-of-way and make it available for use:

- Is the offer of a grant present?
- Is the acceptance of the offer present?
- Are the public lands unreserved?
- Have the public lands been surveyed?

The federal SLE is like an easement dedication on a plat. It is a two-part contract that requires both an "*offer*" of a grant as well as an "*acceptance*" on behalf of the public.

[15] A.S. 19.59.001 Definitions (8) "*'highway' includes a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof…*"
[16] Anderson v. Edwards, 625 P.2d 282 (Alaska 1981)

Offer: On July 26, 1866, the 1866 Mining Law granted the "*right-of-way for construction of highways over unreserved public lands*." This is the "*offer"* of the federal RS-2477 grant. The federal offer was repealed in 1976 by the Federal Land Management Policy Act (FLPMA). From that date forward, no new rights-of-way based on RS-2477 could be asserted.

Acceptance: On April 6, 1923, the Alaska Territorial Legislature accepts the RS-2477 grant[9] completing the dedication. Before this date, federal section line easements could not exist in Alaska. In a January 18, 1949 Legislative oversight, the territorial laws are re-codified and the acceptance of the RS-2477 grant gets misplaced. Laws that are not re-incorporated are considered repealed. The federal RS-2477 offer is still in effect, however no new SLEs can be established without legislative acceptance of the federal RS-2477 grant. Established SLEs were not terminated by the repeal. Pre-existing SLEs remained valid even when the law was temporarily repealed between 1949 and 1953.[17] On March 21, 1953, the error is corrected when the Territorial legislature once again accepts the RS-2477 offer.[18] New federal SLEs can once again be established.

Unreserved Public Lands: Acceptance of the RS-2477 offer can only operate upon "*public lands, not reserved for public uses*". Generally, when reviewing the reserved land status for SLE analysis, we consider the dates of entry, location or publication for some of the more common federal land actions such as homesteads, mining claims, Trade & Manufacturing sites, military reservations and so on. These considerations may be valid for ANCSA lands where the selected lands had been previously surveyed and may be subject to existing claims and patents. For SLE analysis on ANCSA lands, certain land classification Public Land Orders (PLOs) are typically the focus. Prior to the FLPMA repeal of RS-2477, the federal government reserved all lands in Alaska in anticipation of the Alaska Native Claims Settlement Act by issuing PLO 4582. The order withdrew all unreserved public lands in Alaska from all forms of appropriation and disposition under the public land laws. Commonly called the "*Land Freeze*", PLO 4582 was published with an effective date of December 14, 1968.[19] While modified by several subsequent PLOs, PLO 4582 continued to be in effect until passage of the Alaska Native Claims Settlement Act on December 18, 1971. In addition to the repeal of PLO 4582, ANCSA also withdrew vast amounts of land for native selections, parks, forests and refuges. A series of PLOs withdrew additional acreage between 1971 and 1972. PLO 5418 dated March 25, 1974 withdrew all remaining unreserved Federal lands in Alaska. It can be argued that PLO 5418 effectively ended any opportunity to establish a federal SLE although the FLPMA repeal of RS-2477 would not come for another two years. An editor's note to 11 AAC 51.025 Section-line easements states that the PLO 4582 date of December 14, 1968 is the date by which all public lands became reserved such that no new federal SLEs could be imposed. Arguably, the many modifications to PLO 4582 between its effective date and the effective date of PLO 5418 may have

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[17] Brice v. State, 669 P.2d 1311 (Alaska 1983).

[18] The 1951 law was amended on March 21, 1953 by § 1 Ch. 35 SLA 1953, to include "*a tract 4 rods wide between all other sections in the Territory...*"

[19] PLO 4582 (24 FR 1025) withdrawing unreserved lands in Alaska was subsequently modified by PLO Nos. 4589, 4668, 4669, 4676, 4682, 4695, 4760, 4837, 4865, 4884, 4885, 4940, 4962, 4988, 5081, 5108, 5145 and 5146. The first modification on April 4, 1969, PLO 4589 modified PLO 4582 to allow appropriations of lands for 23 U.S.C. 317 highway rights of way and material sites.

left a small window of opportunity for an SLE to attach to an unreserved section of federal land, but the opportunities would have been so small as to be considered almost non-existent.

Surveyed Public Lands: The 1969 AG Opinion regarding SLEs stated, *"The public lands must be surveyed and section lines ascertained before there can be a complete dedication and acceptance of the federal offer."* The general rule as outlined in the 1969 Opinions of the Attorney General No. 7 is that a section line must be surveyed before it can be used. A section line is officially surveyed when the Township plat noting the establishment of the section line has been approved. United States Surveys and Mineral Surveys are not a part of the rectangular net of survey. If the rectangular net is later extended, it is established around these surveys. There are no section lines through a U.S. Survey or Mineral Survey, unless the section line easement predates the special survey.

In our initial estimating for this project, we noted that the [redacted] parcels consisted of a mix of older townships[20] conventionally surveyed and monumented along the section lines at half-mile intervals and newer townships[21] surveyed and monumented along the exterior boundaries at 2-mile intervals. The [redacted] parcels also included several Mineral Surveys[22] and U.S. Surveys[23] that are not a part of the rectangular survey system. The survey and plat approval of the older township far preceded both ANCSA and the repeal of the RS-2477 offer and so would very likely be subject to federal 33-foot SLEs. The application of a federal SLE to the newer townships depends upon the success of an assertion by Alaska DNR that federal SLEs would attached to protracted section lines as of the date the protraction diagram notice is published in the federal register. (See following discussion on protracted (unsurveyed) section lines.

State Section Line Easement Analysis

To the extent that any lands owned by [redacted] Corporation have previously been owned or acquired from the State or Territory of Alaska, the section lines may be subject to a State SLE. Confirmation of prior state or territorial ownership can be determined by a title review. On March 26, 1951, the Territory enacted legislation[11] providing for 100-foot wide (territorial/state) SLEs. The 1951 legislation did not differentiate between surveyed and unsurveyed lands, a matter that was clarified in the 2001 update of 11 AAC 51.025 Section–line easements.

Protracted (Unsurveyed) Section Lines

The Alaska Native Claims Settlement Act is estimated to require conveyance of 45 million acres of land by the federal government. The Alaska Statehood Act requires conveyance of 102 million acres of federal land to the State of Alaska. Most of these federal lands would be defined under the "rectangular system of survey" which typically describes townships of 36 square miles comprised of sections of 1 square mile. Conventional survey and monumentation for each township could require up to 82 miles of surveyed lines.

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[20] Township No. 21 South, Range No. 17 East, Copper River Meridian approved July 11, 1922. [redacted] Parcels No. 1 & 2.
[21] Township No. 22 South, Range 25 East, Copper River Meridian approved June 4, 2003. [redacted] Parcel No. 5.
[22] Mineral Survey No. 736, 928, & 954. [redacted] Parcels No. 9 & 10.
[23] U.S. Survey No. 790 – Parcel No. 13

> Since the Land Ordinance of 1785, it has been the continuous policy of the United states that land shall not leave Federal ownership until it has first been surveyed, and an approved plat of survey has been filed.[24]

The number of acres to be patented under ANCSA and the Alaska Statehood Act created an immense surveying obligation on the federal government that would not be completed for decades using the conventional rectangular survey system. In order to provide title transfer of the lands at a more reasonable pace, ANCSA provided for interim conveyances prior to survey and a survey that could be limited to the exterior boundary of certain tracts.

> ANCSA also modifies public land survey law by allowing selected land to be conveyed by interim conveyance prior to survey. Subject to valid existing rights, the force and effect of such an interim conveyance is to convey to and vest in the recipient exactly the same right, title, and interest in and to the selected lands as the recipient would have received had they been issued a patent by the United States. In addition, the Act authorizes original surveys to monument only exterior boundaries of the areas selected or designated areas at angle points and at intervals of approximately 2 miles on straight lines. The Act states that no ground survey or monumentation will be required along meanderable water boundaries and conveyances can be based upon protraction diagrams. Upon survey of lands covered by the interim conveyance, a confirmatory patent thereto shall be issued to the Native Corporation. This Act is applicable only to land in Alaska.[25]

The unsurveyed section lines within the lands where only the exterior boundaries have been surveyed are referred to as protracted section lines. Prior to survey, they are mathematically defined on protraction diagrams.

> (I) Protraction Diagram means the approved diagram of the Bureau of Land Management mathematical plan for extending the public land surveys and does not constitute an official Bureau of Land Management survey, and, in the absence of an approved diagram of the Bureau of Land Management, includes the State of Alaska protraction diagrams which have been authenticated by the Bureau of Land Management.[26]

In the context of section line easements, protracted, or unsurveyed section lines can be important due to the State's position in asserting that SLEs attach to both surveyed lines that meet the appropriate criteria and to approved protracted section lines. The seventh paragraph of the 1969 Opinions of the Attorney General No. 7 states:

> Our conclusion that a right-of-way for use as public highways attaches to every section line in the State, is subject to certain qualifications:... (b) The public lands must be surveyed and section lines ascertained before there can be a complete dedication and acceptance of the

[24] Manual of Surveying Instructions, Bureau of Land Management, 2009 – Chapter 1, page 1
[25] Ibid., 24.
[26] 43 CFR § 2650.0-5 Definitions

federal offer.[15]

[15] Note, however, that the Alaska statutes apply to each section line in the state. Thus, where protracted (emphasis added) surveys have been approved, and the effective date thereof published in the Federal Register, then a section line right-of-way attaches to the protracted section line subject to subsequent conformation with the official public land surveys.

Official protraction diagrams covering [redacted] lands encompassed by this project exist and are available through the offices of the Bureau of Land Management or the Alaska Department of Natural Resources. Each of the protraction diagrams can be related to a specific publication within the Federal Register fixing their effective date. It is believed that the Federal Register notices for the protraction diagrams covering the subject [redacted] lands were filed in 1960. This would suggest that in accordance with the 1969 AG Opinion, federal SLEs were impressed over the [redacted] lands as of 1960 and that under state law, [redacted] accepted title to the lands by Interim Conveyance or Patent subject to the SLEs.

In opposition to the concept that SLEs will attach to protracted section lines is the paper Law of Section Line Easements in Alaska[27] by John W. Sedwick. Regarding the need for survey, Sedwick stated:

> The survey establishing a section line could either precede or follow a private survey. One state court has suggested that 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. (footnote omitted) 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.[24] This would mean that until the survey is approved 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 his improvements, for a conflicting section line easement might be later located by survey.
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> In his 1969 opinion, the Alaska 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—mathematical estimates of section line locations on unsurveyed lands which [are] commonly used in Alaska—are sufficient subject to confirmation [of the] later actual survey.[26] This conclusion is supported by no analysis in the opinion. It is inconsistent with the rule which has been established by the U.S. Supreme Court that an actual approved survey is needed to create section lines. To the extent that the Attorney General's conclusion is based upon the belief that protracted section lines will be very close to the actual surveyed section lines in all cases, it is inconsistent with the realities of surveying. Since no section line exists before the official survey been conducted and approved,

[27] This 27 page paper is undated but appears to be an expansion upon a 20 page paper by Sedwick titled Section Line Easements in Alaska: The State of Affairs in February, 1983. At the time, John Sedwick was a practicing attorney in Anchorage, Alaska. He served as the Director of the Division of Land and Water Management of the Alaska Department of Natural Resources from 1981 to 1982 and was appointed to the U.S. District Court for the District of Alaska in 1992.

> the correct view is that an actual survey, not a protracted survey projection, is necessary before [the] easement can exist.
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> _____
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> [24] Cox v. Hart, 260 U.S. 427, 436, 43 S.Ct. 154, 157 (1922). See U.S. v. Northern Pacific Ry. Co., 311 U.S. 317, 344, 61, S.Ct. 264, 277 (1940).
> [26] 1969 Opinions of the Attorney General No. 7, p. 7, n.15.

Further opposition was tentatively formulated by the Department of Law in an 84-page draft opinion[28] for DNR that discussed RS-2477 based SLEs and protracted section lines:

> Does AS 19.10.010 have the effect of creating an R.S. § 2477 right-of-way on mathematically protracted, i.e., unsurveyed, "section lines?"[2]
>
> Our answer to this question is "probably not," because we deem it unlikely that a court would find that R.S. § 2477 rights-of-way were created on protracted "section lines" merely through the passage of AS 19.10.010.
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> _____
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> [2] We put the phrase "section lines" in quotes because federal case law explored below concludes that sections do not exist until actually surveyed on the ground, and thus arguably it is incorrect to speak of protracted section lines.

The State has also wavered in the past with regard to the strength of its assertion that SLEs apply to unsurveyed (protracted) federal lands. Between November 1999 and March 2000, the State Department of Natural Resources (DNR) entertained public comments on a project intended to update their public easement regulations[29] including RS-2477 based section line easements. In a project publication titled Comments by Entities other than General Public, DNR reviewers responded to the following comment:

> Does the filing of a protraction diagram count? (Kenai Peninsula Borough Trails Commission) Response: A 1969 Attorney General's opinion notes that federal land must be surveyed before there can be a "complete" acceptance and dedication of a section-line easement under RS 2477. (This type of section-line easement is an RS 2477 right-of-way. This is why DNR is "getting involved" in section-line easements on land never owned by DNR: AS 19.30.400 requires it to do so.) A footnote in that opinion says that "where protracted surveys have been approved and the effective date thereof published…then a section line right of way attaches…subject to subsequent conformation with the official public land surveys." However, the opinion did not close the loop: does the filing of the protraction diagram change the status of the land to "surveyed" and make the dedication "complete" under RS 2477? If not, and if the dedication was still incomplete when RS 2477 ceased to apply (withdrawal, appropriation, repeal), what happened? Ultimately the courts will have to decide whether protraction diagrams sufficed to create "surveyed" land.

[28] R.S. § 2477 rights-of-way, draft opinion dated July 24, 1985 by AAG Michael J. Frank to DNR Commissioner Esther Wunnicke.
[29] Public Easements: Update on New Regulations, http://dnr.alaska.gov/mlw/trails/11aac51/index.cfm

In a companion publication that addressed comments submitted by the public, DNR responds to the following two questions:

> Comment: Is DNR claiming RS 2477 rights-of-way along section lines on federal land that was 'unreserved' at some point from 1866 to 1976, i.e. on most federal land in Alaska?" *Response:* "This regulation does assert an RS 2477 right-of-way along section lines that were surveyed while the land was open to RS 2477. Most federal land was not surveyed before being reserved or appropriated under the public land laws and mining laws.
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> *Comment:* On state land a section line must be surveyed and monumented before it can have a section-line easement. This has been the rule of surveyors for years and should not be changed; it will stand up in court. The easement is "there," but must be surveyed before it can be used. *Response:* This comment raises two separate issues. 1) DNR agrees that an existing easement whose location is uncertain needs to be surveyed prior to development. Survey helps to ensure that the trail construction, utility installation, etc., will not accidentally stray off the easement, trespassing against the landowner's property rights. 11 AAC 51.100 places this long-standing DNR policy in DNR's regulations for the first time. 2) DNR recognizes that surveyors typically believe that a section-line easement does not "attach" unless and until the section line is surveyed. DNR agrees that this conservative view is appropriate if the land was never state-owned. On such land, 11 AAC 51.025 asserts a section-line easement only if the land was surveyed while still open to RS 2477. But on state-owned land, DNR's land sale regulations as early as 1960 gave notice that the state would reserve a section-line easement, and its land sale decisions and land offering brochures in later years repeated this intention. This gave fair notice to those who staked state open-to-entry sites, remote parcels, and homesteads that their parcels would be subject to section-line easements; it was also a commitment to those stakers that section-line easements would be available for their access.

These comments and responses differentiate the DNR view of SLEs for protracted section lines on State owned lands vs. SLEs for protracted section lines on all other lands as of 2001. An "Editor's note" published in 11 AAC 51.025 Section–line easements specifies that the SLE applies to "surveyed (emphasis added) land owned by the Territory of Alaska or the state on or after March 26, 1951 through June 30, 1960,…". A following note expands that limitation to include "surveyed or unsurveyed (emphasis added) land owned by the state on or after July 1, 1960,…". DNR's position is that from July 1, 1960 their regulations expressed intent to reserve 50-foot SLEs in all state land conveyances.[30] All references in the Editor's note referring to application of SLEs on federal lands qualify those lands as being "surveyed".

[30] See Detailed Comments from other than General Public, DNR 2001 Regulations for 11 AAC 51 "*DNR's intent from July 1, 1960 onward was to reserve 50-foot section-line easements in all state land conveyances. DNR's regulations expressed this intent. It was reflected in DNR's "best interest findings" on proposed land sales, and DNR's land sale brochures told purchasers that section-line easements would be available for their access (although purchasers were typically warned that the easement would have to be surveyed before it could be developed)."*

A letter dated February 12, 2010 between Alaska Assistant Attorney General John T. Baker and Department of the Interior (DOI) Deputy Regional Solicitor Dennis J. Hopewell, discussed the "Creation of section line easements". The letter was in response to the DOI inquiry regarding the State's position regarding the attachment of section line easements where the section is unsurveyed.

> The State's position is that section line easements, dedicated under AS 19.10.010 "between each section of land owned by the state," come into existence either by approval of a survey creating the section lines or by approval of a protraction diagram creating the section lines. Under 11 AAC 51.025, section line easements are to be reserved prior to disposal of either a surveyed or unsurveyed State land estate.
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> The State's interpretation of the law is that a protracted section line easement is a surveyable, legally cognizable land interest based upon the latitude and longitude derived from the approved protraction diagram. As a practical necessity, the easement must be surveyed before it can be used. The survey can be accomplished by any land surveyor registered in Alaska.

The letter is not very helpful in resolving the State's position regarding SLEs over protracted section lines on other than state owned lands. It is unclear as to whether the State intended to address all protracted section lines. The text of the response appears to limit the assertion to lands owned by or previously owned by the state.

Jurisdiction and Management of Section Line Easements

Management of an SLE is generally assigned to an agency of the State of Alaska or a local government with road powers. Even if it had accepted the concept of SLEs, once the federal government has divested itself of title, it would no longer have jurisdiction over lands subject to state law.

Developed SLEs are those that contain highways, access roads or trails. If a road or highway exists within an SLE, the general rule is that the government entity that holds jurisdiction over that road may permit utilities and other allowable uses. The government entity would typically be the Alaska Department of Transportation (DOT&PF) or a local government with road powers. An undeveloped SLE could include all other valid SLEs that were not under the jurisdiction of DOT&PF or a local government with road powers. "Orphan" roads may exist within a valid SLE where no government entity has assumed management jurisdiction.

During periods of passive SLE management, use of an undeveloped SLE crossing private property would typically be an issue between the owner of the land underlying the SLE and the user. If the user could not convince the landowner of the SLE validity, the issue could end up in the courts.

Current Alaska regulations state that with regard to SLEs, DNR has jurisdiction over all of these easements unless they are occupied by a road listed in the Alaska Highway System inventory.[31] This DOT/DNR

[31] 11 AAC 51.100 Management of public easements, including R.S. 2477 rights-of-way *"(a) The commissioner has management authority over the use of any RS 2477 right-of-way that is not on the Alaska highway system."*

jurisdiction is reaffirmed with regard to RS-2477 SLEs in A.S. 19.30.400.[32] Due to the costs and administrative burdens of actively managing all of these easements, DNR management over them has been inconsistent. The 2001 DNR issued regulations under 11 AAC 51.010 defined types and widths of certain easements including SLEs. This was to be Phase one of a two-phase regulations project. The second phase of regulations intended to establish rules regarding the management and use of the easements. The second phase has yet to be initiated.

For a recent R&M project that involved placement of a utility into an undeveloped SLE crossing private land, DNR required that no work commence before they issued of a Letter of Non-objection. The process is initiated by submitting a letter to DNR outlining the proposed use. DNR then will review the request and issue a letter of non-objection contingent on stipulations that are intended to protect future public access needs.

Disposal and Vacation of an SLE

If an existing SLE conflicts with the landowner's development plans, provides redundant access or is of limited use due to topography or other issues, a vacation process exists that can release the easement.[33] The legislature was concerned about a concerted effort towards a mass release of the public's RS-2477 rights and so ensured that the vacation process was rigorous. While a vacation plat may begin at a local platting authority, the joint jurisdiction of DNR and DOT&PF require the written approvals of both agencies on the final plat. As DNR essentially manages the regulatory process for these vacations, the DOT&PF role is more of a veto authority. To ensure that public access is not degraded or eliminated, the vacation statute and regulations establish a requirement that equal or better alternative means of access is available or will be provided through realignment.

In the past, most vacations of SLEs relate to both RS-2477 and state easements that were based on surveyed section lines. In recent years there have been more instances involving a vacation of a state SLE associated with a protracted section line. For example, the state received patent for lots 5-15 of U.S. Survey No. 3504 in 1995[34]. The lots were 4 to 5 acres in size. Upon receipt of patent, A.S. 19.10.010 imposed a 50-foot SLE on each side of the protracted section lines that passed through lots 6 and 11-14, significantly reducing their ability to be sold and developed. In 2017, DNR approved and filed a SLE vacation plat[35] to eliminate the conflicting SLEs. This example is offered as an illustration that DNR is actively asserting state SLEs over protracted (unsurveyed) section lines. It also points out a significant conflict in the prior discussion

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[32] Sec. 19.30.400. Identification and acceptance of rights-of-way. *"The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities."*

[33] See A.S. 19.30.410. Vacation of rights-of-way and 11 AAC 51.065. Vacation of easements (g) – (k) for statutory provisions regulations governing the vacation of an RS-2477 right-of-way.

[34] Patent 50-96-0130 dated 12/15/95. USS 3504 approved July 11, 1961.

[35] Plat 2017-3 filed in the Talkeetna Recording District on 3/23/17, DNR file EV-2-239.

(p.7 *Surveyed Public Lands*) that an SLE cannot pass through a preceding Mineral or U.S. Survey as these surveys are not a part of the rectangular survey net. With regard to lands patented to the State of Alaska that include federal Mineral or U.S. Surveys, the State is acting as if protracted section lines that pass through these surveys are valid and therefore establish the basis for a 100-foot wide SLE once they come into state ownership.

As a part of our research into this issue, we were informed by DNR Cadastral Survey that they are currently reviewing a request to vacate of a federal RS-2477 based SLE associated with a protracted section line. Recognizing the apparent conflict of prior positions by DNR that a RS-2477 based SLE could only be associated with a surveyed section line, they are currently reviewing their research before a decision is made.

Practical Use of SLE – Risk

To the extent that an SLE has been determined to apply to either surveyed or protracted section lines within the [redacted] lands, the question that remains is whether they can be developed reasonably and economically. For practical purposes, would the development of SLEs over these lands represent a significant risk to the client?

RS-2477 trails were often located on path of least resistance without due consideration of geology, archeology, soils, hydrology, grades, alignments or environmental concerns. Although valid RS-2477 trails may provide for a public ROW corridor of up to 100-feet in width, it might not be a wise investment of public funds to improve the existing facility if it would result in a deficient design or be costly to maintain. SLEs have similar problems given that the rectangular system was laid out without consideration of engineering, environmental, maintenance or operational concerns. These issues would tend to reduce the potential for road construction even where an SLE is considered valid. The cost to acquire a new right-of-way is always a factor in route location but generally and when compared to the other factors, it rarely represents the deciding element.

The routing for many classes of utilities including pipelines and power transmission lines are less controlled by grades, soils and alignments than roads and are eligible to use a valid SLE.

While a valid SLE may be used to accommodate a road or utilities, there are legal constraints that would prevent the unnecessary clear-cutting of trees. The Andersen v. Edwards[28] case held that clear-cutting a 100-foot wide SLE for a 25-foot wide access road was unreasonable, excessive and beyond the scope of the easement.

Most of the Alaska Highway System consists of easement interests. Our experience with Alaska DOT&PF suggests that they have broad authority to manage the full width of a highway easement for widening, sight distance, rest areas and even scenic vista clearing. Generally, if the existing easement to be cleared for construction or maintenance contains marketable timber, the owner of the underlying fee estate is offered the opportunity to recover and use those materials. It would likely be considered beyond the scope of the highway easement for the State to waste or sell the timber to a third party.

Unless DNR is successful in asserting valid federal SLEs over unsurveyed lands, it would appear that the [redacted] lands would have few opportunities to be impressed with an SLE. Of those, few would meet the

engineering and environmental constraints to warrant their use for public roads and utilities. Most of these would likely fall within the Alaska DNR authority to manage and issue a Letter of Non-objection for development and removal of trees. Finally, those that would be considered reasonable for development could only be cleared of timber to the extent necessary to accommodate the facility.

Conclusions

1. The application of SLEs to [redacted] lands is a matter of state law. If the authority and chain of title criteria are met, [redacted] lands would be subject both state and federal SLEs for surveyed section lines.

2. The Alaska DNR may assert that the [redacted] lands are subject to federal SLEs over unsurveyed or protracted section lines in accordance with a 1969 Department of Law formal opinion.[12] However, this assertion is not well supported, appears to be inconsistent with past State positions and has not been tested in court.

3. Where valid undeveloped SLEs do exist over [redacted] lands, the Alaska Department of Natural Resources regulations provide DNR authority to permit development including tree cutting and construction of roads or utilities.

4. The risk that SLEs associated with [redacted] lands will be fully or partially developed in the future is low. This conclusion is founded on our belief that the majority of section lines within [redacted] lands are unsurveyed or protracted and that an RS-2477 based SLEs along these lines are unlikely to be supported if challenged in court. To the extent that valid RS-2477 based SLEs are found to exist along certain [redacted] parcel boundaries, topography may render many of them undesirable for development of roads or utilities.

If you have any questions regarding this report, please feel free to contact me by email or at my direct line of 907-458-4304.

Sincerely,

R&M CONSULTANTS, INC.

John F. Bennett, PLS, SR/WA
Senior Land Surveyor

Attachments: 1969 Opinions of the Attorney General No. 7