

From: John Bennett
To: george.horton@alaska.gov
Subject: SLEs on Protracted Section Lines
Date: Tuesday, December 19, 2017 10:20:00 AM

Good morning George – following up on our favorite subject: In your 11/28 email below you said that you were having a staff meeting to discuss the DNR position on application of SLEs to protracted section lines for lands that were never in state ownership. I’m curious if anything came of that meeting that you can share with me.

As I might have mentioned, I am preparing an opinion memo for an outside company that deals in Carbon Credits. Essentially they are looking at some ANCSA lands that they could impose a restrictive covenant on to prevent development and logging. These lands could then be used as marketable credits in California’s “Cap and Trade” program. The one outstanding question is whether these lands are subject to SLEs. This is important because they would not have control over those strips of land as long as they could be used for access and utilities. I can’t really share my memo with you but the fact is it is based upon many of the resources and writings we both have available regarding SLEs and protracted section lines. Also, I can let you know my conclusions because they would be the same conclusion regardless of who our client was.

Essentially I told them the following:

- ANCSA lands are subject to state law and so would be subject to both federal and state SLEs if applicable. They would be subject to state SLEs if any of the lands the ANCSA corp received had been in state ownership at any time. This would include lands that had been patented to the State, then reconveyed to the federal government and then conveyed to the ANCSA corporation. In addition, a state SLE would apply where there had been an ANCSA corp and State land exchange. This would hold unless the SLE had gone through a formal vacation process or possibly if the conveyance had been clear that SLEs were not imposed on the lands reconveyed to the federal government.
- The current State position is that SLEs clearly apply to unsurveyed (protracted) section lines on lands that had been state ownership after July 1, 1960. It also appears that the state also asserts that federal SLEs apply to unsurveyed (protracted) section lines on all other lands issued by the federal government. This would typically be the case on all ANCSA lands where the conveyances were based on exterior boundary surveys monumented on two mile intervals. This is based on the 1969 Opinions of the Atty General No. 7 that tells us that the filing of protraction diagrams in the federal register constitute a section line that an SLE can attach to but it cannot be used until surveyed. The problem is that there are several conflicting arguments. A strong argument against the AGO Opinion on protractions is John Sedwick’s 1983 paper on SLEs. He points out that the AGO reached this conclusion supported by no analysis and that that the opinion is contrary to existing federal case law. Although never finalized, the 1985 draft opinion by Mike Frank pretty much reached the same conclusion as Sedwick and that it was unlikely that a court would reach a conclusion that federal SLEs were created on protracted section lines. In 2000, DNR wrote detailed responses to public comments on their regulations project which included SLEs. The

responses called the portion of the 1969 opinion regarding protraction into question saying that the opinion left several questions unanswered and that ultimately the courts would have to decide the question. The final regulations only spoke clearly to application of SLEs for unsurveyed section lines on lands that were or had been under state ownership. All references to federal SLEs on section lines refer to those that are surveyed. Also as late as 2010, the letter from AAG Baker to DOI solicitor Hopewell discussing creation of SLEs only discussed application of SLEs to unsurveyed section lines on state lands with no discussion of federal SLEs applying to unsurveyed lands that had not been under state ownership.

As a result, I concluded that to the extent that the State asserts federal SLEs on unsurveyed section lines for lands that have never been under state ownership, it is a very weak argument and not likely to be supported by the courts if challenged.

- Where valid SLEs exist over ANCSA 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.
- The development risk along protracted section lines over ANCSA lands based on a state assertion of an SLE is extremely low.

One other item that Karen brought up was in regard to the DNR vacation plats of protracted SLEs that passed through a US Survey (EV-2-239). The rule on federal SLEs had always been that as a mineral or US survey was not a part of the rectangular survey net, a section line could never pass through them unless the township survey creating the section line had been approved prior to the mineral or US survey. So in EV-2-239 we see the state taking title to USS 3504 and declaring that a protracted section line runs through the US survey and under the state rule, applies a 50' state SLE on each side of the section line. Of course this messes up the ability to develop and market several lots so the SLE is vacated. The US survey was approved in 1963. I'm guessing but I haven't looked into it that the protraction diagram for that area was approved prior to 1963 and that is why the State considered it to be a valid section line that preceded the US survey and was therefore valid to accept a state SLE once the state took title. A mouthful to be sure, but I'm just curious as to whether I got the logic right or if I'm missing it altogether.

If you have anything that would show me the error of my conclusions, I would greatly appreciate it. Thanks again, JohnB

From: John Bennett
Sent: Tuesday, November 28, 2017 3:52 PM
To: Horton, George C (DNR)
Subject: RE: SLEs on Protracted Section Lines

Thanks for the comments George. When I first started looking at this issue I also posed a question to AJ Wait in the Northern Region DNR office. I had just worked a project for a water line to be placed in an undeveloped SLE. (Both state and federal). At the time AJ said that the policy was that I had to request a Letter of Non objection from DNR to use it as they are the managers of all SLEs not under DOT management. It actually went fairly smoothly so no complaints. When the protraction issue

came up I asked him whether DNR felt strongly enough about them that I would have to request an LNO to use one on a protracted section line. Arguably even if DNR agreed that I needed an LNO, I believe that I would first have to have the line surveyed before the SLE could be used. Hmm, the SLE doesn't necessarily cross DNR owned lands so I doubt Cadastral would be interested in issuing survey instructions to establish the section line. It would also be out of BLMs jurisdiction. Maybe it would just be up to the professional land surveyor charged with surveying and monumenting the protracted section line? Under what specs...what a can of worms. JohnB

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From: Horton, George C (DNR) [<mailto:george.horton@alaska.gov>]

Sent: Tuesday, November 28, 2017 3:40 PM

To: John Bennett <JBennett@rmconsult.com>

Cc: Brown, Stanley C (DNR) <stanley.brown@alaska.gov>

Subject: RE: SLEs on Protracted Section Lines

Hi John,

Thanks for the information. I already have copies of it all and have read through this stuff several times (well, maybe not all of the 84 page one) . See comments in red below.

I can't go into a lot of detail on protracted section-lines and section-line easements or set anything in stone until after DMLW staff meet this Friday to discuss the matter. What I can tell you is maybe this meeting, and I'm assuming the many differing opinions discussed, will be the catalyst to motivate the AG for a current opinion (one that's actually adopted). But let's not get our hopes up.

Thanks for the FR research info. I'll be checking it out real soon.

Regards,

George

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<http://dnr.alaska.gov/mlw/survey/index.htm>

"Do not go where the path may lead; go instead where there is no path and leave a trail." (Ralph Waldo Emerson)

From: John Bennett [<mailto:JBennett@rmconsult.com>]

Sent: Monday, November 27, 2017 2:21 PM

To: Horton, George C (DNR) <george.horton@alaska.gov>

Subject: SLEs on Protracted Section Lines

Yes, George, same old subject. As I have been digging through a few old documents I thought I would pass some on to you if you haven't seen them and talk more about protracted SLEs. First is the 2.12.10 letter from AAG John Baker to the DOI Solicitor. I don't know what caused the question to be raised by DOI but now that I look at it again it appears that his statement is limited to SLE's on protracted section lines on state owned lands under AS 19.10.010 (*that's my take also*) It doesn't address the rest of the statute that calls for SLEs 4 rods wide between all other sections of the state. That makes me wonder whether SOA was limited its assertion of protracted SLEs only to State owned lands and was not asserting protracted SLEs on non-state owned lands. Gerald sent me a copy of the letter on January 10, 2013. Then on January 18 Gerald sent me another email saying that something had come up on the protracted section line issue and that I should hold off on passing around that letter. I never heard anything after that but then I wasn't thinking a lot about protracted SLEs. Recently Karen Tilton was over at the Fairbanks DNR offices looking at some files and found a copy of the letter there. As it hadn't been removed or the position rejected, I figured that it is now out in the wild but I'm still not sure why it was written or why it was apparently limited to SLE's on State owned lands. It makes me wonder because why would DOI care about SLEs, protracted or otherwise on state owned lands. The only reason I can think of is in some kind of a land exchange between SOA and either DOI or an ANCSA corporation in which DNR suggested that all sections in that exchange that came from the State were subject to SLEs. Any thoughts on that? *I'd have to see the original DOI question, but I can only assume John Baker was willing to comment only for State land and he purposely ignored the question on federal lands- if it was ever asked..*

The next item is DNR DO 111 regarding SLEs. I have another email chain with Gerald that is easier to attach than explain. It is the pdf titled RE_Department Order #111.pdf. The email chain suggests that some folks at DNR considered DO 111 to be unapproved and never adopted. This may be the case as while the order has initials "JMW" dated 12/17/86, it is not signed or initialed by the Commissioner. The Order also references a lengthy AGO opinion dated July 26, 1985 by AAG Michael Frank on protracted section lines. The opinion is labeled as "draft" and concluded "probably not" to the question of whether AS 19.10.010 has the effect of creating an RS 2477 ROW on a protracted unsurveyed section line. What is interesting in the Baker letter, DO 111 and the Frank draft opinion, is that they all seem to be answer a question of protracted SLEs on lands owned by the state and is to be conveyed out of state hands. I don't see that the focus in on all the other non-state owned lands. *DO 111 was never adopted according to certain staff in the Commissioner's office so to me it carries the same weight as the weight of the paper it's printed on. Same with the other un-adopted opinions. Had any one of them been adopted we wouldn't be having this conversation.*

Another interesting discussion is in the attached 1983 DNR internal memo regarding SLEs. This memo seems to hold that until the section lines are surveyed there is no acceptance of the RS2477 grant. *(refer to USRS plat for T3N, R14W, FM. Lets take Section 23 as an example. BLM considers it surveyed even though its bounds are depicted with protracted section lines. Now how would this scenario play out with the above opinions stating the lines have to be surveyed?)* They also make

another couple of interesting statements. One, that “Exterior boundary surveys are not part of this grid system.” (this does NOT hold true today unless they mean US Surveys or USRS plats like T18N, R48W, SM – gonna have to ask Joe Burch what they meant the next time I see him) I find that interesting because it would suggest that where ANCSA lands were conveyed using exterior 2 mile monumentation, that these might not be considered a part of the rectangular system (you & I know better) and so even if the dates worked out, they could never be subject to a federal SLE. Granted, if you are to set protracted section lines aside, there would be few SLEs on ANCSA lands because of the dates. But I have found a few exterior lines that appeared to represent section lines monumented at 2 mile intervals and met the date requirements and so I concluded that they in fact were subject to a federal SLE. What are your thoughts on that? I agree that they would be subject to an RS 2477 section-line easement if research indicates it. The other item is in regard to vacations. They say that in the case of SLEs, “that if there is no original survey, there is nothing to vacate.”

The 1969 Opinion of the AG is still the operative opinion on SLEs as far as I am aware. YES! The Michael Frank opinion might have had an effect if it had ever made it out of draft and was published, but it was not. The 1969 opinion is pretty clear that they considered the RS2477 grant for protracted sections to have been accepted by the approval of the protraction diagrams in the federal register.

Several years ago when 11 AAC 05 was being revised, the public comments and DNR responses briefly discussed some of the protraction issues.

11 AAC 51.025, SECTION-LINE EASEMENTS.

Q: Does the filing of a protraction diagram count? (Kenai Peninsula Borough Trails Commission)

Response: The chart does not come from BLM but from Attorney General's opinions interpreting state law. 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.

So with all of this I'm wondering whether DNR really takes an official position on the status of SLE's on protracted section lines on lands that were never under state ownership, or if that issue has just been mushed together with DNR's position on how it affects lands that were or are under state ownership.

One final item. I think in our last discussion you may have mentioned that Gerald (no I said Mike Schoder) believed that few if any protraction diagram approvals had been published in the federal register. For my recent project that had about 40 townships in it I found all of the published FR approvals at Go to Library of Congress

<https://www.loc.gov/collections/federal-register/>

Identify required protraction diagram (i.e. "Sheet S 13-2")

Enter sheet within quotes in search box.

This search should pull up two hits

Vol 24 Number 119, June 18, 1959 – Page 4972 (This is the final official notice)

Vol 24 Number 78, April 22, 1959 – Page 3120 (This is not the official filing)

The problem with my instructions above is that as these are images from scanned hard copies so it was just dumb luck that I found the one above because the dash between 13-2 bleeds together and causes the search to fail on other protraction notices. So I just searched for "Alaska Protraction" or something like that and it brought up about 58 hits. I looked at each federal register and found the official published notice approving each protraction diagram. So, it is in fact possible to find them.

Sorry for the long email, just been dwelling on this issue. I'll appreciate any comments or thoughts you have on the subject. JohnB

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