From: John Bennett
To: [redacted]
Cc: [redacted]
Subject: RE: Roe vs. College Utilities
Date: Sunday, June 24, 2018 6:32:00 PM

[redacted]

- You mention Luker v. Sykes. My surprise in that case is that both parties (both pro se) and the court never had access to the official BLM homestead file with every transaction and document that led to patent. They pretty much were working from the BLM on-line abstract for the homestead which leaves a lot of ambiguities in the process. The important part was that the court reaffirmed that the entry that leads to patent is the critical date to determine when the lands became reserved from the public domain. This is important because the federal section line easement is based on the portion of the 1866 mining law referred as RS-2477. RS-2477 can only apply to "unreserved" lands. The Luker court was speaking to the "relation back" doctrine in which in a homestead context, once the patent is issued, the homesteaders rights "relate back" to the date of their entry. So while the Hollist patent was issued on August 31, 1949, their rights relate back to the date of entry, shown on the abstract as May 28, 1948. Prior to that application, the lands had to be open to entry for Hollist to file a homestead entry, and once she received her patent, it can be said that those lands left the public domain and were thereby reserved as of May 28, 1948.

- As far as determining whether a section line easement exists, we still operate under the guidance of the 1969 Opinions of the Attorney General No. 7 regarding "Section Line Dedications for Construction of Highways". To show that there is a valid SLE, three things must fall into place. There must be an offer of a dedication, there must be an acceptance of a dedication and the section lines have to be surveyed on the ground. The offer for an RS-2477 SLE was in the 1866 mining law. The acceptance was made by the Territorial legislature on April 6, 1923. The survey of Township 1 S, Range 2 W, FM was approved on June 7, 1913. At the date of township survey approval, there would be no section line easement because the "offer" had yet to be accepted. But on the date of survey approval in 1913, all of the three critical elements required for a valid section line easement were in place and that is when the section line easement along the west boundary of Section 14 was created.

- You then suggest that if the SLE exists, there may be a case that it cannot be used for a water line. I would refer you to the Alaska case Fisher v. Golden Valley Electric. This related to a federal section line easement in which GVEA proposed to construct an electric sub-station. At the time of this case it was unclear whether the scope of an RS-2477 Section line easement included placement of utilities. Some states allow for it and others do not. Also, if this was an issue relating to the scope of a highway easement crossing lands subject to

federal law, the answer to that would be no. Federal law does not consider utilities to be within the scope of an highway easement. But GVEA won their case and that case has been interpreted to hold that the scope of a highway easement (such as an SLE) includes placement of utilities as a subordinate use to a highway. Even though that case related to a power facility, it has been interpreted to pretty much include all utilities.

- Third, you say that if a water line can be placed within an SLE, a DOT permit is required. I mentioned to you that in 2014, I finished 29 years with DOT with the last 15 as Northern Region ROW Chief which included supervision of the Utilities Section. Northern Region does not issue utility permits to a utility seeking to use an SLE similar to the one crossing your property. The SLE is an RS-2477 based easement. RS-2477 rights-of-way include both SLEs and trail easements. The focus of DOT is management and permitting of those rights of way that are specifically a part of the State Highway System. DNR's regulations spell this out that they have jurisdiction for management of all RS-2477 ROW other than those that are a part of the State Highway System. So those SLE's that make up the straight part of Chena Hot Springs Road, those are under DOT management and would require a DOT permit for placement of utilities within them. In the last year I have been working on the City of North Pole water system expansion project and a lot of that was constructed in DOT ROW for which we obtained permits. A few other areas we placed the water line in an SLE that crossed private property but was not within a DOT managed road. DNR has a process in which they require that a utility who wishes to use an SLE to apply to them for a letter of non- objection. This is a somewhat informal process as DNR's management of RS-2477 SLEs over private property in the past has been very limited.

Other than the obvious but unlikely, "has the section line easement been vacated" question, my from the hip review suggests that College Utilities may be within their rights. That's the 5-minute answer. You might want to talk with [redacted] about it and then decided if there is anything further you would want me to do. If so, then we can talk about entering into a contract. JohnB

John F. Bennett, PLS, SR/WA *Senior Land Surveyor – Right of Way Services*

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Innovating Today for Alaska's Tomorrow

From: [redacted]
Sent: Sunday, June 24, 2018 9:59 AM
To: John Bennett <JBennett@rmconsult.com>
Cc: [redacted]
Subject: [redacted] College Utilities

Dear Mr. Bennett,

[redacted] here is some of the information about the property in

question:
The lot is Tract A in the Twin Lakes Subdivision. College Utilities intends to clear-cut the believed section line easement on the 3rd of July. We have made a few arguments. First, there may not be an easement based on the 1948/1949 entry by Hollist, for which the certificate was issued in July 1949. In Luker v. Sykes, the court seemed to find that "entry" was composed of multiple parts, being perfected by the issuance of the certificate. Second, that IF there is an easement, it may be the case that a water line may not use it. And third, that IF there is an easement AND the easement may be used for a water line, a DOT permit is required, which has not been obtained.

[redacted]