From: John Bennett
To: [redacted]
Subject: RE: [redacted] Draft Reply 7-8-18
Date: Monday, July 09, 2018 2:48:00 PM

[redacted] So if I understand the response, the argument is basically that Fisher got it wrong. And had Gates of the Mountains been decided prior to Fisher, the Alaska court would have reached a different conclusion. But Gates is about the scope of an RS2477 over federal land so the larger question is whether the scope of an RS2477 over private property in Alaska should be decided according to federal or state law. I've already warned you about listening to my interpretations of the law because I know just enough to be dangerous. Not sure how relevant it is but I recalled the 2016 Alaska Supreme Court case Ray Purshche v. Matanuska-Susitna Borough. The land owners of an old federal homestead was subject to a borough foreclosure action. He 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 patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in the local courts."

The interesting thing about focusing on federal law to determine the scope of use of a section line easement over private property in Alaska is that the feds don't even accept the concept of section line easements as valid implementations of the RS2477 grant. I believe all of your federal case law that might support the argument that placement of utilities is beyond the scope of an RS2477 grant is related to trails as opposed to SLEs. Alaska law considers official action or the Territorial acceptance of the RS2477 offer in 1923 to be sufficient to establish the dedication. The feds will argue that an SLE (for the most part) is an unconstructed RS2477 and that the clear language of the statute…"The right of way **for the construction** of highways…" demonstrates that actual construction during the appropriate periods (ending with the RS2477 repeal in 1976) is absolutely required to consummate the RS2477 dedication. One item you might find interesting is the Amicus brief filed by DOI in 1986 in the Alaska Greenhouses, Inc. v. Municipality of Anchorage. This brief argues that scope is controlled by federal law (citing Gates), but that "state law controls whether a ROW has been validly accepted as a public highway." The Amicus pretty much outlines the federal position but I'm not aware that it every gained much traction when applied to lands subject to state law.

Another item I looked at regarding scope was the 1996 Alaska Fitzgerald v. Puddicombe case. It was remanded to Superior court to work out the "extent" or scope of the grant. I've attached the order on remand as it contains a lot of discussion regarding scope.

I'm not sure I can add anything helpful regarding 23 CFR 645.20(d) as this specific ROW is not under DOT&PF jurisdiction, it's not a federal aid highway and it doesn't cross federal land and so there is no federal agency from which a permit could be obtained. That's all I got right now. JohnB

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From: [redacted]
Sent: Monday, July 09, 2018 9:37 AM
To: John Bennett
Subject: Fwd: [redacted] Draft Reply 7-8-18

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John, This is a draft of the principal argument in reply. Please review and let me know if there is anything you could add from the practical ROW perspective, perhaps something in relation to 23 CFR 645.205(d). [redacted]