of ALASKA

A 4.12

TO: Donald Harris, Commissioner
Department of Transportation
and Public Facilities
Pouch Z
Juneau, Alaska 99811

DATE: February 22, 1978

FILE NO:

TELEPHONE NO:

FROM: Thomas E. Meacham
Assistant Attorney General
AGO - Anchorage

SUBJECT: Request by Division of Lands for Non-Highway Use of Section-Line Rights-of-Way for Public Utility Access Purposes

I have been requested by Gary Vancil of the Transportation Section of the Attorney General's Office in Fairbanks to analyze the request by Claud M. Hoffman, Chief Cadastral Engineer for the Alaska Division of Lands, for permission to use a width of 10 feet along the exterior of dedicated section-line rights-of-way for purposes of placement of public utilities in connection with land disposals which the State Division of Lands will be making under the homesite provisions of AS 38.08.010. This request was made in a letter dated January 16, 1978 from Mr. Hoffman to Woodrow Johanson, Fairbanks Regional Engineer of the Department of Transportation and Public Facilities. Gary Vancil's request to me on this subject arose as a result of our discussion of the legal status of section-line right-of-way dedications contained in federal and state law, in relation to other subjects.

My initial reaction to the request by Mr. Hoffman, which appears to be supported by the language of federal and state statutes is that the use of dedicated section-line rights-of-way for purposes other than "public highways" is outside the scope of the grant and dedication, and is therefore inappropriate. Chapter 262 of the Act of July 26, 1866, 43 USC Section 932 (sometimes referred to as R.S. 2477) states,

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. [Emphasis supplied]

Thus the limiting term of the federal grant, which conditions the purposes for which the State can accept the section-line grant, requires use of the land granted for "highways over public lands".

AS 19.10.010, which has been held to be the territorial (and later state) acceptance of the federal R.S. 2477 grant, states

> A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections of the state, is dedicated for use as public highways.

> The section-line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inurs to the owner of the tract of which it formed a part by the original survey. [Emphasis supplied]

The dedication by the State of the grant received from the federal government is also strictly in terms of use of the land for "public highways". Thus the state acceptance is consistent with the terms of the federal grant, does not exceed it, and becomes an effective acceptance of the R.S. 2477 offer of dedication. Hamerly v. Denton, 359 P. 2d 121 (Alaska 1961); Gibbs v. Campbell, No. 72-462, Sup. Ct., Third Judicial District, Alaska (January 8, 1973); Girves v. Kenai Peninsula Borough, 536 P. 2d 1221 (Alaska 1975); Mercer v. Yukon Construction Co., 420 P. 2d 323 (Alaska 1966)

Since the State's acceptance of the federal offer of dedication cannot exceed the offer itself, and in fact did not, the section-line rights-of-way accepted by territorial and state legislation are limited for use as "public highways". The use of the exterior 10 feet of these rights-of-way for public utilties is inconsistent with that dedicated purpose, and in fact exceeds the dedication. It might be physically possible to construct underground utilities beneath portions of the section-line right-of-way actually used for highway construction, without materially interfering with the use of that easement as a public highway. However, this involves the use of the subsurface, a subject not addressed in either R.S. 2477 or the state legislation accepting the federal grant. Since neither the grant nor the acceptance and dedication speak to the use of the sub-surface, presumably sub-surface uses consistent with use of the surface as a public highway could be accommodated. Nevertheless, the use of the surface of a valid section-line right-of-way for any purpose other than public highways is precluded by the language quoted previously.

As a practical matter, to implement the request of the Division of Lands might be quite difficult, since it would require a determination, as to each tract of land, of the applicable width of the section-line right-of-way, which has varied from time to time according to the history of acquisition of the land by the State and by private parties. This determination in itself might be premature, since there may be no present intention of the Department of Transportation and Public Facilities to construct highways in this area to the full width which might be permissable (or to construct any highways at all).

Furthermore, the legislation at AS 38.08.010(c)(5) does not require that "existing services" be presently "inaccessible" from a right-of-way or easement standpoint in order to disqualify such lands for homesite disposition; instead, a reasonable interpre-

tation of that provision might be that the Legislature desired to disqualify lands which were physically inaccessible from reasonable extension of existing services. Certainly as natural gas, electricity, and telephone services are provided to new areas, easements and rights-of-way are regularly acquired by utility companies in order to facilitate such extension. The lands thus served are not considered "inaccessible" simply because no existing utility easements were present when consideration was first given to the extension of services to new areas.

It is not clear from the Hoffman letter whether the lands being considered for homesite disposal are "inaccessible" because no utility easements were reserved, or will be reserved, on state lands which will be disposed of under the program, or whether they are considered "inaccessible" simply because such easements would need to be acquired from existing private landowners in order to bring these services to the state lands being disposed of. In the former case, the State could easily reserve utility easements at the time of the disposal; in the latter case such easements could be acquired under existing public utility authority at the time services are extended. In neither case would the lands involved appear to be physically "inaccessible" to existing services by virtue of the fact that no public utility easements presently exist, nor by the fact that the State's section-line rights-of-way are limited to use as "public highways".

I hope that this memorandum is helpful in clarifying the issues raised by the Hoffman letter of January 16, 1973.

cc: Gary Vancil

Ray Preston

Claud N. Hoffman

Theodore G. Smith