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MEMORANDUM State of Alaska

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SUBJECT: Section Line Right-of-Ways

The question presented is: what right does an entryman have regarding section line rights-of-way when the Highway Department grants to the entryman permission to enter the right-of-way and further does this grant of a right to enter extend any additional rights to adjacent or abutting landowners?

This question is misleading in part, for it presupposes a state of the law which does not exist. The Highway Department has no right to grant permission to enter on any section line right-of-way unless that entry is in compliance with the interest in land which the state possesses. In other words, for the use or creation of a highway. The State has no authority to grant permission to enter a section line right-of-way for any purpose other than, for the utilization or construction of a highway. 1/

ORIGIN OF SECTION LINE RIGHTS-OF-WAY

The Congress of the United States enacted on July 26, 1866, 14 Stat. 253, 43 U.S.C.A. 932, R.S. Section 2477, which granted to the states rights-of-way across public land, not restricted for public use which were to be used for the construction of highways. 2/ The provisions of this act are short and concise and are set out as follows:

> The right of way for the construction of highways over public lands, not restricted for public use, is hereby granted.

1/ If the State is also the fee owner of what would otherwise be called the servient estate the State authority is different and will be discussed infra.

2/ Hayes v. Kenai Peninsula Borough, 539 P. 2d 1221 (Alaska 1975); Hamerly v. Denison, 359 P. 2d 121 (Alaska 1961). See also Van Brocklin v. Anderson, 6 S. Ct. 672 (1886); U.S. v. Rindge, 208 F. 611 (D.C. Cal 1913); Duffield v. Ashurst, 150 P. 820, 12 Ariz. 360 (1909); Town of Red Bluff v. Walbridge, 116 P. 77, 15 Cal. App. 770 (1911); Molyneaux v. Grimes, 98 P. 278, 78 Kan. 830 (1908); Van Wanning v. Deeter, 112 N.W. 802, 76 Neb. 284 (1907); Streeter v. Stalnaker, 85 N.W. 47, 64 Neb. 205 (1901); Wallowa County v. Wade, 72 P. 793, 43 Or. 253 (1903); Wells v. Pennington County, 48 N.W. 305, 2 S.D. 1 (1891); Costain v. Turner, 39 N.W. 302 (S.D. 1888); Smith v. Pennington County, 48 N.W. 309, 2 S.D. 14 (1891).

For there to be a gratuitous grant of a right-of-way under the provisions of 43 U.S.C.A. 932 there must be an appropriate acceptance of the grant. 3/ Acceptance can be in either of two forms: (1) a positive act indicating acceptance by an authorized public agency or (2) by public use. The Alaska Supreme Court has expressed the two forms of acceptance in the following language from the case of Hamerly v. Denton, 359 P. 2d 151 (Alaska 1961):

> [B]efore a highway may be created, there must be either some positive act on the part of the appropriate public authority of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted (footnotes omitted. Page 123.)

19 SLA 1923

In 1923 the Territorial Legislature by enacting Chapter 19 SLA 1923 accepted the federal offer of rights-of-way across public lands. This acceptance was for a right-of-way along each section line of the Territory extending to two rods on either side of the section line. Chapter 19 SLA 1923 reads as follows:

> Section 1. A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway But if such highway be vacated by any competent authority, the title of the respective strips shall inure the owner of the tract of which it formed a part by the original survey.

There are several reasons for believing that the 1923 Act of the Territorial Legislature was an acceptance of the federal grant of rights-of-way, even though 19 SLA 1923 never expressly mentioned the language of 43 U.S.C.A. 932. Firstly, there is no requirement in 43 U.S.C.A. 932 that acceptance contain a reference to 43 U.S.C.A. 932. As a matter of fact,

3/ Groves v. Kenai Peninsula Borough, supra footnote No. 2: Hamerly v. Denton, supra footnote No. 2; Lovelace v. Hightower, 168 P. 2d 864, 50 N.M. 51 (1946); Kolden v. Pilot Mound TP, 157 N.W. 672, 33 N.D. 529 (1915); Kirk v. Schultz, 119 P. 2d 260, 63 Ida. 278 (1941).

all §932 contains is a generalized grant of rights-of-way for the construction of highways across public land, not restricted for public use. The Supreme Court of Kansas in Tholl v. Koles, 70 P. 831, 65 Kas. 802 (1920) said in discussing the question of acceptance of the grant of the rights-of-way as allowed by the 1866 federal act:

> The general government, in effect, made a standing proposal, a present grant, of any portion of its public lands not reserved for public purposes for highways, and the state accepted the proposal and grant by establishing highways and fixing their locations over public lands in Washington county. The act of the legislature did not specifically refer to the congressional grant, nor declare in terms that it constituted an acceptance, but we cannot assume that the legislature was ignorant of the grant, or unwilling to accept it in behalf of the State for highways. The law of Congress giving a right-of-way for highway purposes over the public land in Washington county was in force when the legislature acted, and it was competent for it to take advantage of that law, and the general terms employed by it are sufficiently broad and inclusive to constitute an acceptance. (page 882)

In the case of Girves v. Kenai Peninsula Borough, 539 P. 2d 1221 (Alaska 1975), the Alaska Supreme Court said in relation to 35 SLA 1953 an almost identical statute:

> Similarly, ch. 35, SLA 1953 did not expressly "accept" the federal government's dedication of rights-of-way. However, it is well recognized that a state or territory need not use the word "accept" in order to consummate the grant. 43 U.S.C. Section 932 (1964) is in effect, a standing offer from the federal government. All that is needed to complete the transfer is a positive act by the state or territory which clearly manifests an intent to accept the offer. (Footnotes and citation omitted p. 1225)

It is a truism of legislative construction that in construing a statute, it is presumed that the legislature enacted the statute with full knowledge of all present and past laws pertaining to the subject matter of the legislation. The presumption is that the legislature:

> . . . had, and enacted with respect to, full knowledge and information as to the subject matter of the statute and the existing conditions and relevant facts relating thereto, as to prior and existing law and legislation on the subject of the statute and the existing condition thereof, as to the judicial decisions with respect to such prior and existing law and legislation, and as to the construction placed on the previous law by executive officers acting under it; and a legislative judgment is presumed to be supported by facts known to the legislature, unless facts judicially known or proved preclude that possibility. (82 C.J.S. 544 §316)

Hence the presumption is that when the Territorial Legislature "dedicated for use as public highways" a tract four rods wide, the section lines being the center of the right-of-way, that the legislature had in mind the federal offer to grant rights-of-way across public land. Further, given this presumption of knowledge, as to the state of the law, it must be presumed that the Territorial Legislature was aware of the restrictions on its authority to pass any enactment which would interfere "with the primary disposal of the soil" 48 U.S.C.A 77 4/ 19 SLA 1923 would interfere with the primary disposal of the soil 5/ unless it was an acceptance of 43 U.S.C.A. 932. It is fair to assume that the Territorial Legislature intended its act to be valid and hence 19 SLA 1923 must be an acceptance of 43 U.S.C.A. 932. The Alaska Supreme Court in Girves v. Kenai Peninsula Borough, supra, agrees with this position concerning 35 SLA 1953, an almost identical act, when it said:

> Firstly, if the legislature did not intend to accept the federal grant, then the "declaration" contained in ch. 35, SLA 1953 might be in contravention of the "primary disposal of soils" provision contained in 48 U.S.C.A. 77 (1952). Since legislatures generally are presumed to know the law and to intend their enactments to be valid, it is fair to assume that the legislature intended the 1953 "dedication" to also constitute an acceptance of the grant under 43 U.S.C.A. §932 (1964). (p. 1225)

4/ 48 U.S.C.A. 77 provides in part that: "that legislative power of the Territory of Alaska shall extend to all rightfull subjects of legislation not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil.

5/ In a 1962 Attorney General's Opinion number 11, it was postulated that 19 SLA 1923 did not grant rights-of-way to the Territory because such a grant would be in violation of 48 U.S.C.A. 77. This Attorney General's Opinion has been revoked by 1969 Attorney General Opinion number 7.

The Court in Girves, supra, uses yet another theory to indicate that 35 SLA 1953 was an acceptance of the Federal grant. The theory is:

> Secondly, a fundamental maxim in the analagous field of contract law holds that an acceptance may be implied from acts of conduct. Since it is obvious that one cannot "dedicate" property to which one has no right, the 1953 "dedication" must have also constituted an act of implied acceptance. (Footnote omitted p. 1226)

This argument is equally applicable to 19 SLA 1923.

The 1923 enactment of Chapter 19 was included in the 1933 Alaska Compiled Laws at §1721. However, 19 SLA 1923 was not included in the 1949 Alaska Compiled Laws Annotated and hence was repealed on January 13, 1949 by Chapter 1 SLA 1949 which expressly repealed all acts not included in the 1949 Alaska Compiled Laws Annotated. 6/

REVOCATION

The revocation of 19 SLA 1923 extinguished all interests that the Territory of Alaska had in section line rights-of-way as result of 43 U.S.C.A. 932. Hence any public land, which had become subject to section line rights-of-way since 1923, and had later been withdrawn or reserved by the Federal government or where a valid homestead or other entry had been made would no longer be subject to a section line rights-of-way as a result of 19 SLA 1923. The repeal of 19 SLA 1923 was an Act by the Territorial Legislature which revoked all rights granted under that statute. In other words 19 SLA 1923 had become a nullity. An argument can be made, analogizing the law of gifts, to ascert the rights-of-way were not destroyed. If it is assumed that 43 U.S.C.A. 932 is an offer by the federal government of a gift then, by the State accepting the offer the rights-of-way are vested in the Territory of Alaska and cannot be returned to the federal government or given to an individual without an acceptance on the part of the offeree. Even if the law of gifts is analogist to section line rights-of-way as between the Territory of Alaska and the federal government, the Territory (State) cannot act regarding these rights-of-ways unless there is authorizing legislation giving to the executive authority a claim to the rights-of-way and in this instance we have a situation where authority has been repealed. Further, 19 SLA 1923 itself, anticipated the ability of the Territory of Alaska to vacate an interest in section rights-of-way when it said:

6/ Chapter 1 SLA 1949 provides in part that: "All Acts or parts of acts heretofore enacted by the Alaska Legislature which have not been incorporated in said compilation because of previously enacted generally repealed clauses or by virtue of repeals by implication or otherwise are hereby repealed."

> But if such highway shall be vacated by any competent authority the title of the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.

If one were to strictly follow the analogy borrowed from the law of gifts, as to the acceptance of a gratuitous offer, the foregoing language can only be said to make the acceptance conditional on the power to vacate rights-of-way in any manner the Territorial Legislature saw fit to use.

123 SLA 1951

In 1951 the Territorial Legislature enacted chapter 123 SLA 1951 which provided as follows:

> Section 1. 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, a section line being the center of said highway. But if such highway shall be vacated by any competant authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.

There are only two distinctions between 19 SLA 1923 and 123 SLA 1951, but the second difference is crucial. The first distinction is the increase in the width of the right-of-way from 4 rods to 100 feet. The second distinction is the use of the words "land owned by the Territory of Alaska, or acquired from the Territory," in 123 SLA 1951, as opposed to the words "land in the Territory of Alaska" as was used in 19 SLA 1923. The language of 123 SLA 1951 indicates that the Territory Legislature was not one of acceptance of a Federal grant of rights-of-way across public land but is rather limited to land owned by or acquired from Territory".

The result of 123 SLA 1951 is that there are section line rights-of-way over land owned by the Territory (State) or acquired from the Territory (State) since March 26, 1951, the date 123 SLA 1951 became effective. There is no right-of-way created across public land as a result of 123 SLA 1951.

35 SLA 1953

In 1953 the Territorial Legislature enacted 35 SLA 1953 which has not been amended to this date and appears as AS 19.10.010 35 SLA 1953 provides as follows:

> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract 4 rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, the section line being the center of said right-of-way. But if such highways shall be vacated by any competent authority the title of the respective strips shall inure to the owner of the tract of which it formed a part of the original survey.

The distinguishing factor between 123 SLA 1951 and 35 SLA 1953 is the addition of the words "4 rods wide between all other sections in the Territory". This language clearly manifests the intent to accept the grant of rights-of-way across public land as provided by 43 U.S.C.A. 932. All the arguments set out supra, for the proposition that 19 SLA 1923 was an acceptance of the federal grant are equally valid for 35 SLA 1953. In addition to the arguments already set out, the Alaska Supreme Court in Gieves v. Kenai Peninsula Borough, supra, a case where a school access road was built along a section line without compensating the property owner, stated that 35 SLA 1953 was an acceptance of 43 U.S.C.A. 932.

CONCLUSION

The State of Alaska has no claim of a right-of-way for highway construction along sections lines unless the Territory (State) of Alaska was the owner of that land or the land was acquired from the Territory (State) since March 26, 1951 or the land was unrestricted public land at anytime since March 21, 1953.

NATURE OF THE STATES INTEREST

When the State of Alaska has a right-of-way along a section line that right-of-way extends for 50 feet on either side of the section line if the grant was a result of the land being owned or acquired from the Territory or State of Alaska. If the right-of-way exists because the section line lies across public land not reserved for public use or had been across public land which became restricted for public use after March 21, 1953, then the right-of-way extends for two rods on each side of the section line. The rights-of-way exists for the construction of highways. This presumes the ability to enter the right-of-way for the construction and maintenance of the highway. In addition, both Federal and State legislation would be meaningless unless the words "for construction of highways" are liberally construed to allow the use of the highway by the public. 7/

7/ Wilderness Society v. Morton, 479 F. 2d 842 (1973).

The nature of the property right which the State had in rights-of-way is one of easement. 8/ If the State is the fee owner of the subservient estate then the easement will merge into the fee ownership and the State may do what it will with the right-of-way as long as it is not inconsistent with the State's fee ownership. 9/ In other words the State would not be restricted in using the right-of-way for other than the construction of highways. The State may place whatever restrictions it desires on the land when the State authorizes an individual to enter on this form of right-of-way. If the right-of-way is across land which the State does not presently have a fee interest in but was created as a result of the land having been part of the "Territory [State] of Alaska or acquired from the Territory [State] of Alaska or upon public land not reserved for public use, then the property interest the State has is one of an easement for the construction and operation of a highway. Chapter 123 SLA 1951 and 35 SLA 1953 are silent as to the nature of the State's interest in the rights-of-way. The general rule of construction is that when a conveyance is silent as to the nature of a right-of-way it is an easement rather than a fee. 10/ Further, the Act of 1866 which established the offer of a grant of rights-of-way is entitled Rights-of-Way/Easements. It appears clear that Congress intended the grant of rights-of-way to be in the nature of an easement. The State of Alaska has no authority to grant or deny access to a right-of-way to the owner, of the subservient estate and the owner of the subservient estate can treat the land area within the right-of-way in any manner which is not inconsistent with his original ownership interest or which would interfer with the State of Alaskas ability to construct a highway. 11/

The opinion of the Attorney General of 1962, No. 11 should be revoked and the opinion of the Attorney General of 1969, No. 7 should be revoked as far as it is inconsistent with this opinion.

RS:sup

8/ Thompson, Commentaries on the Modern Law of Real Property V. 2 Easements, §383 Public Easements in Highways, page 546, published 1961.

9/ Thompson, Commentaries on the Modern Law of Real Property V. 2 Easements §449, Joinder of the Dominant and Servient estates, page 601.

10/ 39 Am Jur 2d Highways, §158.

11/ The test of 43 U.S.C.A. 932 is also silent as to the nature of the right-of-way.