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May 19, 1976

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Ross Kopperud, Esq.
Assistant Attorney General
P. O. Box 1309
Fairbanks, Alaska 99707

State of Alaska v. 3.248 acres, Alaska
Gold Company et al
C. A. No. 76-695

Dear Ross:

This will confirm our conference of May 11th regarding the above captioned condemnation action.

You will recall that at that time we discussed the alleged section line easements for which the State is intending to deny compensation to Alaska Gold Company in the above condemnation action. I pointed out that Alaska Gold Company disputed this position of the State based on the differences between mining claims and homestead claims. I advised that I would attempt to secure authority from general counsel of Alaska Gold Company to provide you with a memorandum of research on this subject. Such authority has now been granted me and I am attaching hereto a copy of a Memorandum prepared by Barbara Schuhmann of our office for review by Alaska Gold Company officials. This Memorandum clearly supports the view long held by major mining companies with respect to the alleged section line easements crossing mineral claims. All the supporting data with respect to times of location of mineral claims, as well as times of survey of section lines in this area and the issuance of patents are matters of public record but if need be we can supply you with a resume of this supporting data.

We would be pleased to sit down and discuss this matter with you further if you have any questions.

Cordially,

MERDES, SCHAIBLE, STALEY & DELISIO, INC

BY Grace Berg Schaible
Grace Berg Schaible

GBS:mk
Enclosure

MEMORANDUM

TO Grace Schaible
FROM Barbara L. Schuhmann
DATE: March 29, 1976
RE: Alaska Gold Company properties along Section lines

The State is claiming that it does not have to pay for property of Alaska Gold Company which lies along section lines. The basis of this claim is that the United States granted right-of-way for the construction of highways over publicly owned land in 43 U.S.C.A. §932, which reads as follows

Right-of-Way for Highways.

The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. R.S. §2477. (Derivation. Act July 26, 1866, c. 262, §8, 14 Stat. 253.)

This section is operable in Alaska and constitutes the congressional grant of the right-of-way for public highways across public lands. Hamerly v. Denton, 359 P.2d 121 (Alaska, 1961). However, this section is merely an offer to states, which must be accepted in order for such land to be set aside for highway use. U.S. v. Rogge, 10 Alaska 130, 152 (1941), *aff'd* 10 Alaska 307 (9th Cir., 1942), *cert. den'd* 63 S. Ct. 54.

While lands remain in the public domain and are not reserved for public uses a State may accept this offer by the public use of such land for highway purposes, or by an acceptance by a duly authorized public authority. Berger v. Ohlson, 9 Alaska 399 (1938). In our case there has been no such "public use" of the land of Alaska Gold Company for highway purposes, thus no acceptance by the State can be claimed on these grounds.

However, the State claims it accepted the federal offer to use this land for highway purposes by Chapter 19, SLA 1923, which provided as follows:

§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

recently enacted versions (§1721 CLA 1933, Chap. 123 SLA 1951, and Chap. 35 SLA 1953) formally accepted the federal offer. In addition, the Alaska Supreme Court in Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (Alaska, 1975), held that Chap. 35 SLA 1953 was a positive act clearly manifesting the territorial legislature's intention to accept the federal grant contained in 43 U.S.C.A. §932. In that case, Irene Girves entered upon a homestead in 1958 and obtained a patent for the property from the **United States in 1961. Neither her "Notice of Allowance" nor her patent contained any express reservation of rights-of-way in favor of any public body. She claimed that the State (Borough) had no right to build a road across her property without compensating her for it.** The Court held that since the State Legislature had accepted the federal offer in 1953, in Chap. 35 SLA 1953, a dedication of a part of her land for a right-of-way was accomplished.

However, the Alaska Gold Company case is quite different than that of a steader. The predecessor in interest of Alaska Gold Company entered upon the land in Goldstream Valley prior to the first act of the Alaska Territorial Legislature accepting the federal offer (April 6, 1923). In Clark v. Taylor, 9 Alaska 298, 304 (1938) the District Court of Alaska held that under the provisions of the federal mining laws, 30 U.S.C.A. §§22, 26, 35, 49,:

...the ground included within the boundaries of a valid location of a mining claim is, by virtue of such location, withdrawn or segregated from the public domain, and the exclusive right of possession and enjoyment thereof becomes vested in the locator, and remains as long as he complies with the Acts of Congress and the local statutes and regulations, such as by performance of the required annual assessment work. [Such a location has the effect of a grant from the federal government of the right of present and exclusive possession of the land located, and includes every appurtenant belonging to the realty. The locator's rights under a valid location exists, although the locator does not apply for or obtain a patent.]

Thus, by "locating" upon this land, including section lines, the predecessor of Alaska Gold Company caused this land to be withdrawn from the public domain. *(Substantive withdrawal)* These

" Thus, the federal

In addition, the predecessors in interest of Alaska Gold Company, and Alaska Gold Company itself, have complied with federal and local laws and regulations so as to retain their exclusive right to possession and enjoyment of this land. By locating on this land, Alaska Gold Company's predecessors caused the federal offer as to this land to cease. There was no land here within the public domain for the State or Territory to accept for purposes of a right-of-way.

In addition, the Court in Clark v. Taylor, supra, at 305, stated:

The locator of a mineral claim has, prior to the issuance of the final receiver's receipt, a broader control over his claim, and a higher estate therein than an entryman of agricultural land.

Thus, even those cases which apply to homestead rights do not toally apply to the rights of a locator of a mineral claim. Mineral rights (30 U.S.C.A. §1 et seq. are outlined in a totally different part of the U. S. Code and the rights are totally different than the rights of homesteaders (43 U.S.C.A. §161 et seq.). Mineral lands are not liable to entry and settlement under the Homestead Act. 43 U.S.C.A. §201. Mineral claims follow the position of the minerals, and not artificially placed section lines or townships.

It has also been held that every grant of public lands whether to a State or otherwise, should be taken as reserving and excluding mineral lands in the absence of an express purpose to include them. U.S. v. Sweet, 245 U.S. 563, 38 S. Ct. 193, 62 L. Ed. 473 (1918), and 30 U.S.C.A. §§21 and 50.

Thus, although an entry upon the land subsequent to Alaska's acceptance of the federal offer will not affect the acceptance of the right-of-way, an entry prior to the State's acceptance in this case caused a withdrawal of the land from the public domain, and consequently caused the federal offer to terminate before Alaska accepted it.

In addition, public lands would have to be surveyed and section lines ascertained before there could be a complete dedication and acceptance of the federal offer under the Alaska statute. Here again, the predecessors in interest of Alaska Gold Compa

Clark v. Taylor, 9 Alaska 298, 312 (1938). Thus, Alaska could not have "dedicated" this land until section lines were established, and this time was after the land had been "located" by the predecessors of Alaska Gold Company.

In conclusion, the State must pay Alaska Gold Company just compensation for any land taken in this area whether the land lies upon section lines or not. First, because the predecessors of Alaska Gold Company "located" upon this land prior to the statute of the Alaska Territorial Legislature accepting the federal offer in 1923, the land was withdrawn from the public domain, and the federal offer terminated before the acceptance was effective. Secondly, the land involved here was unsurveyed at the time they were "located." The Alaska statute enacted in 1923 could not be effective as to this land until it was surveyed, and section lines established. Because the predecessors of Alaska Gold Company "located" prior to that time, the statute could have no effect against it. Thus all the land involved is owned exclusively by Alaska Gold Company today. As such, State must compensate Alaska Gold Company for any of the property taken

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