LAW OF SECTION LINE EASEMENTS IN ALASKA

By John W. Sedwick*

I. BASIC DEFINITION

Stated most simply, in Alaska a section line easement is a right-of-way for a public highway which is either 66 feet or 100 feet wide and centered on the section line. This simple definition raises only one obvious question: When is the easement only 66 feet wide? There are less obvious questions--some whose answers are unclear or disputed--which must also be examined before one can claim to understand section line easements. For example, in 1981 Alaska's Supreme Court said that construction of a public highway does not necessarily entitle the builder to use the entire width of

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easement.[1] Paradoxically, the same court recently said that it not necessary to construct a public highway in order to use a section line easement.[2]

Section line easements are not peculiar to Alaska. They are found in a number of other states. Where they exist they are frequently said to result from the actions of two governments. The first action was an offer by the federal government to allow construction of highways on unreserved portions of the public domain second was acceptance by a territorial, state or local government providing for the designation or construction of highways along section lines. The offer-acceptance concept is the source of section line easements created on federal lands in Alaska. Section line easements created on state lands result directly from a dedication by the Alaska legislature.[3]

Ten months before the Senate ratified the Treaty of Cession[4] by which Alaska was purchased from Russia, Congress passed

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1 Andersen v. Edwards, 625 P.2d 282 (Alaska 1981)

2 Fisher v. Golden Valley Electric, Op. No. 2606 (Alaska Jan. 28, 1983).

3 The statutory dedication is the same law which accepts the federal offer. It is presently codified at AS 19.10.010.

4 The Treaty of Cession of the Russian Possessions in North America was ratified May 28, 1867 (15 Stat. 539).

the Mining Law of 1866.[5] Section 8 of the law reads in its entirety as follows:

> That the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

This is the law which constitutes the federal offer. When the federal laws were reorganized in 1878, it was redesignated section 2477 of the Revised Statutes. Later codified as part of the United States Code at section 932 of Title 43, the law is still commonly called "R.S. 2477." The law applied in Alaska.[6]

When Congress passed the Federal Land Policy and Management Act of 1976, or FLPMA,[7] R.S. 2477 was repealed.[8] In its place a much more complex scheme for securing rights-of-way across the federal public domain was enacted,[9] but a savings clause pro-

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5 The Act of July 26, 1866 (14 Stat. 251) was actually titled "An Act granting the Right-of-Way to Ditch and Canal Owners over the Public Lands, and for other Purposes," but is commonly known as the Mining Law of 1866.

6 E.g., Hamerly v. Denton, 359 P.2d 121 (Alaska 1961).

7 P.L. 94-579 (90 Stat. 2743)

8 Section 706(a) of FLPMA. FLPMA was effective October 21, 1976.

9 Title V, §§ 501-511, of FLPMA, 43 U.S.C.A. §§ 1761-1771.

tecting existing rights-of-way was included.[10]

According to Alaska's Supreme Court, acceptance of federal offer can occur in either of two ways: "...some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept the grant, or . public user for such a period of time and under such conditions as to prove that the grant has been accepted."[11]

Acceptance by Alaska's public authorities has occurred through enactment of statutes dedicating rights-of-way for highways along section lines. This was first done in 1923.[12] The 1923 statute created a right-of-way which was four rods (66 feet) wide Inexplicably this statute was repealed in 1949 when it was left of the 1949 compiled laws.[13] In 1951 the legislature enacted a

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10 Section 509(a) of FLMPA, 43 U.S.C.A. § 1709(a).

11 Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961). Situations involving acceptance by public use are beyond the scope of this article. It is worth mentioning that it can be difficult to prove sufficient use as Hamerly demonstrates.

12 Ch. 19 SLA 1923, approved April 6, 1923.

13 Section 1, Ch. 1 SLA 1949, approved January 18, 1949, expressly repealed all acts of the Alaska Legislature not contained in the compilation. Ch. 19 SLA 1923 was not included. The only explanation is what can be gleaned from correspondence tables accompanying the compiled laws. Instead of giving the 1949 section number for Ch. 19 SLA 1923, the table merely states, "Invalid." The same curious entry appears opposite §1721 CLA 1933 (which is where Ch. 19 was compiled in 1933).

statute which dedicated a tract 100 feet wide between each section of land owned by or acquired from the Territory.[14] In 1953 legislature amended the 1951 law by adding the dedication of a tract four rods wide between all other sections of land in Alaska.[15] latest version of the Alaskan acceptance statute was held to create a right-of-way along a section line,[16] and prominent Alaskan attorneys have said that the original 1923 act has the same effect.[17]

II. THE EFFECT OF PRIVATE ENTRY

If land is acquired by a private owner from the federal government before an R.S. 2477 easement is established across it, then no easement can thereafter be established, because the land would not be part of the unreserved public domain. It is the date of entry, not the date of patent, which is critical.[18] Similarly,

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14 Ch. 124 SLA 1951, approved March 26, 1951.

15 Section 1, Ch. 35 CLA 1953, approved March 21, 1953.

16 Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975).

17 E.g., Letter of September 19, 1977 from Thomas E. Meacham, Esq. to the Anchorage Times; 1969 Opinions of the Attorney General No. 7 by then assistant attorney general John K. Norman, Esq. (December 18, 1969); Opinion letter of February 20, 1969 from Eugene F. Wiles, Esq. to the City of Anchorage; Opinion letter of March 21, 1966 from Theodore M. Pease, Jr., Esq. to the Greater Anchorage Area Borough.

18 Hamerly v. Denton, supra. The making of a valid entry segregates the land entered from the public domain.

land acquired from Alaska before it has been surveyed in a survey which establishes section lines would not be subject to section line easements, because it would cease to be land owned by Alaska and therefore would not be subject to dedication if later surveyed.[19] The consequence for Alaskan section line easement law is that lands entered prior to April 6, 1923 are not subject to section line easements, and lands which were unsurveyed on January 18, 1949 and which were entered between January 18, 1949, and March 26, 1951 (state lands) or March 21, 1953, (federal lands) are not subject to section line easements. If prior to January 18, 1949, a section line survey had been approved, a private entry after January 18, 1949 would be subject to the pre-existing section line easement unless one views the 1949 repeal as a vacation of existing section line easements.[20]

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19 Alaska has a sizable land disposal program pursuant to which lands not yet surveyed in a survey creating section lines are transferred into private ownership. Easements conforming to protracted section lines are reserved in the lease and sale contracts. The program is administered by the Department of Natural Resources (DNR) which takes the position that after official survey of the section line, the easement can be used. See DNR's Division of Land & Water Management Policy and Procedure Manual at 5122-02-3.6 (11/4/81). Such use of protraction surveys to create easements later "found" by actual survey is based on an opinion by Alaska's Attorney General, which is criticized in section IV, below.

20 Of course, if it were shown that the 1923 statute were truly "invalid" as implied in the tables of corresponding section numbers discussed at note 13, above, then no section line easement established pursuant to the 1923 law would be valid.

It is easier to construe the 1949 repeal as prospective only, meaning that no new section lines would be subject to easements. To construe the repeal as retroactive, meaning that existing easements were vacated, would raise questions of constitutional proportion. While the right to use a section line easement is a public right, in some circumstances a particular landowner might have a right to use a section line easement which would be considered a property right not to be taken without compensation.[21] Moreover, there is no evidence of any legislative intent to make the repeal retroactive.

III. THE NEED FOR SURVEY

The survey establishing a section line could either precede or follow a private entry. One state court has suggested that a state acceptance statute similar to Alaska's law providing for highways along section lines is effective upon passage and that later survey of the section line relates back to the date of pas-

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[21] See, Wernberg v. State, 516 P.2d 1191, 1200 (Alaska 1973) in which Alaska's Supreme Court said, "A property owner on a public street has a private right of access to the intersecting public streets on either side of him."

sage.[22] One federal court appears to have accepted this proposition.[23] This approach is, however, contrary to the rule recognized by the U.S. Supreme Court that it is the survey which creates the section line.[24] This would mean that until the survey is approved there is nothing to which the acceptance statute could attach any right. Consider the practical aspects: Until the section line is surveyed, an entryman would have no way to determine where he could erect his improvements, for a conflicting section line easement might be later located by survey.[25]

In his 1969 opinion, the Alaska Attorney general concluded that survey of the section line is necessary before the section line easement can be created. However, the Attorney General's opinion indicates in a footnote that protracted section lines--mathematical

22 Faxon v. Lallie Civil Township, 36 N.D. 634, 163 N.W. 531, 533 (N.D. 1917) (dictum). The North Dakota court said that the territory's right to the highway right-of-way took effect as of the date of the acceptance statute (1871) even though the survey was done in 1875. But, the landowner did not enter until 1904, and the relation back of the survey was not necessary to the court's decision.

23 Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975) (semble).

24 Cox v. Hart, 260 U.S. 427, 436, 43 S.Ct. 154, 157 (1922). See, U.S. v. Northern Pacific Ry. Co., 311 U.S. 317, 344, 61 S.Ct. 264, 277 (1940).

25 Entry upon unsurveyed lands was permitted to a much greater extent in Alaska than elsewhere in the United States and its territories.

estimates of section line locations on unsurveyed lands which commonly used in Alaska--are sufficient subject to confirmation later actual survey.[26] This conclusion is supported by no analysis in the opinion. It is inconsistent with the rule which has been established by the U.S. Supreme Court that an actual approved survey is needed to create section lines.[27] To the extent that the Attorney General's conclusion is based upon the belief that protracted section lines will be very close to the actual surveyed section lines in all cases, it is inconsistent with the realities of surveying. Since no section line exists before the official survey been conducted and approved, the correct view is that an actual survey, not a protracted survey projection, is necessary before easement can exist. A private entry or public reservation (see following section) made prior to approval of the actual survey would preclude creation of a section line easement.

IV. THE EFFECT OF PUBLIC RESERVATIONS

If the land in question is reserved for a public use, it ceases to be land which falls within the ambit of the 1866 federal offer. The consequence is that federal lands reserved for a public

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26 1969 Opinions of the Attorney General No. 7, p. 7, n.15.

27 Cox v. Hart, supra.

purpose before a section line survey is approved and maintained reserved status are not subject to a section line easement.[28] It is not so clear that state lands reserved for a public use by state would be free of section line easements. The reason is that there is no exclusion for public reservations in the state law. dedicates an easement along section lines over all state lands.[29]

Much of the federal land in Alaska has been and remains reserved for one public purpose or another. Under the prevailing view, none of these reserved lands would be subject to section easements unless the reservation took place after April 6, 1923, and the land was officially surveyed prior to the reservation.[30] Thus, this orthodox view holds that after April 6, 1923, a reservation surveyed federal lands is subject to section line easements. In the event of a dispute, it is not clear that the federal government would subscribe to this orthodox view. During the Carter Administration, the Solicitor for the United States Department of the

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28 E.g., Bennett County v. U.S., 394 F.2d 8 (8th Cir. 1968).

29 AS 19.10.010.

30 Two refinements must be added to make this proposition entirely correct. First, if the survey were approved between January 18, 1949, and March 26, 1953, and if the reservation were made after the survey's approval but before March 26, 1953, there would be no section line easement. The reason is the absence of the acceptance statute. Second, if the survey were approved after the repeal of R.S. 2477 on October 21, 1976, the federal lands could not be subject to a section line easement.

Interior took the position that section line easements on federal lands in Alaska exist only if a public highway was actually constructed upon the lands prior to the repeal of R.S. 2477.[31] The Solicitor's reasoning goes like this:

(1) R.S. 2477 literally gives a right-of-way for the "construction" of highways.

(2) The interpretation of R.S. 2477 is a matter of federal law.

  (a) The sizable body of section line easement law which exists consists of interpretations of the federal law by state courts in cases to which the federal government was not a party.

  (b) The federal government is not bound to acquiesce in the state court interpretations.

(3) Interpretation of the word "construction" in R.S. 2477 using the customary canons of statutory interpretation requires that the term be given its ordinary meaning.

(4) The administrative difficulty in distinguishing cases of sufficient public use to constitute acceptance from those of insufficient use can be avoided by resort to the con-

31 The basis for this position is explained in an opinion by Deputy Solicitor Ferguson dated April 28, 1980. The author is aware of no subsequent change in position by the Solicitor.

struction test, a test which requires more than mere use which would focus on objective observable facts such as placement of culverts, fill, etc.[32]

(5) The only interpretation which can avoid a serious conflict with the roadless area review concept of § 603 of FLPMA is "construction required" interpretation.

The Solicitor's opinion cannot be accepted without difficulty. First, while it is true that the bulk of the judicial opinions on the subject are by state courts, such decisions are numerous and of long standing. Moreover, federal courts have written opinions which accept the orthodox view[33] and the federal government appears to have taken a position in litigation which implies that it does not regard the "construction required" theory to be worth presentation.[34] Second, The Solicitor's position is not consistent with the practice followed by the Department's Bureau of Land

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32 This reason relates to acceptance by actual public use, not to acceptance by action of proper authorities, but it would be convenient to have a single test applicable to both situations.

33 Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973), cert. denied, 411 U.S. 917; Bird Bear v. McLean County, supra.

34 Bennett County v. U.S., supra at 394 F.2d 12. There the government could have argued that construction of a county road first graded along a section line in 1954 [the facts are recited in U.S. v. Bennett County, 265 F.Supp. 249 (1967)] came long after an 1868 reservation. Instead, it argued successfully that the lands had been effectively reserved since 1851.

Management over the years; it has consistently followed the orthodox view.[35] Third, the regulations dealing with R.S. 2477 easements were written to indicate that the federal offer could be accepted by construction or by establishment of highways in accordance with state laws. For years the regulations contained a paragraph reading in part: "[R.S. 2477] grants become effective upon the construction or establishment of highways, in accordance with state laws, over public lands, not reserved for public uses."[36]

On the other hand, the Solicitor's position is much more consistent with the language of the 1866 law. The right-of-way was undeniably offered for "construction" of highways, not for what has amounted to state or territory declared reservations of strips of

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35 Many examples may be found in the files of the Alaska BLM. One example of the Department's acceptance of the orthodox view is found in a memorandum of instruction on section line easement litigation dated April 24, 1973, from the State Director of the BLM in Alaska. A longer discussion which demonstrates federal acceptance of the orthodox view is found in a BLM study by Patrick C. Beckley, Chief, Branch of Lands and Minerals, entitled "Report on 44 LD 513, R.S. 2477 and Section Line Easements in Alaska" (October 1977). This report was approved by the Regional Solicitor.

36 E.g., 43 C.F.R. § 244.53 (1962); 43 C.F.R. § 2234.2-5(b) (1970); 43 C.F.R. § 2822.2-1 (1974).

public domain for possible future construction.[37] The Solicitor's position is that Congress did not act so rashly in 1866 as to give a large measure of control over management of the federal public domain to the states by allowing them to create highway easements anywhere on public lands without regard to actual need.

The Solicitor has contrived a way around the problem in the regulations. He argues that the regulatory language "construction or establishment according to state law" must mean construction plus those formalities which might be required by state law to create a public road. The Solicitor would sidestep the problem of agency practice by pointing out that since Congress has plenary power over federal land, no federal employee can exceed the authority actually delegated by Congress. Thus, the practices followed by the Interior Department can be ignored as ultra vires. The Solicitor's stratagems seem superficial. If the regulations were truly meant to create a standard requiring field construction plus formal establishment actions, they would read "and establishment" not "or establishment." The argument that a federal executive cannot exceed

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37 Moreover, the literal interpretation of "construction" would sharpen the application of the law to the point that it would operate only where actual construction demonstrated a present need, not only for a road, but for one laid out on a section line. Thus, the Solicitor's opinion would tacitly recognize the fact that not all sections are bounded by stretches of land flat enough upon which to construct a road.

power delegated to him is sound, but it does nothing to reduce signficance of the fact that knowledgeable federal officials have long interpreted the law according to the orthodox view.

The Solicitor's position faces an uphill struggle against more than one hundred years of contrary judicial precedent and many years of executive actions which are also contrary. Rendered closer in time to the enactment of R.S. 2477, the Solicitor's opinion would have been more persuasive. In any event, the validity of a section line easement on federal land will not depend on whether the Solicitor's view is accepted, unless the land in question was surveyed prior to October 21, 1976 while still a part of the unreserved federal public domain. Situations involving these criteria will not affect a significant percentage of the federal acreage in Alaska.[38]

In the case of state lands which have been reserved for some public purpose, there will be a section line easement unless easement has been vacated. This results from the fact that AS 19.10.010 is applicable to all state lands. In addition to formal vacation procedures, it is possible that a court might find an implied vacation where the purpose of the reservation would be frustrated if the land were criss-crossed by highways. State parks,

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38 Of course, if protracted surveys could be substituted for actual surveys, the acreage involved would become far more substantial.

refuges, recreation areas and critical habitat areas could be adversely affected by highway construction and use.

One special category of state lands which might be accorded different treatment is land granted to Alaska in trust for special purposes. At one time there were three principal categories of trust lands: mental health lands, school lands, and university lands.[39] In 1978, the state passed legislation making mental health lands and school lands part of the state's unrestricted grant public domain.[40] However, university lands remain subject to the trust obligations imposed by federal law.[41] A literal application

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39 University lands are lands granted to the territory by the Act of March 4, 1915 (38 Stat. 1214) and the Act of January 21, 1929 (45 Stat. 1091). School lands were certain sections 16 and 36 granted to the territory for the support of public schools by the Act of March 4, 1915 (38 Stat. 1214). Mental health lands comprised 100,000 acres of land to be selected by the territory pursuant to the Act of July 28, 1956, the Alaska Mental Health Enabling Act, P.L. 830 (70 Stat. 712). These grants to the territory were confirmed and transferred to the state upon its admission to the Union. Section 6(k) of the Alaska Statehood Act, P.L. 85-508 (72 Stat. 339).

40 Ch. 182 SLA 1978.

41 Chapter 182 SLA 1978 purported to convert the state's trust lands into general grant lands. However, the Alaska Legislature gave the University Board of Regents the option to accept or reject conversion of university lands to state public domain in exchange for a special trust fund. The Board rejected the exchange of trust lands for trust fund revenues as it was permitted to do by § 24, Ch. 182 SLA 1978. No such option applied in the case of school and mental health lands. Conversion of the mental health lands is presently the subject of litigation.

of the state's section line dedication statute would create section line easements on university lands. To avoid the dedication of section line easements on university lands, one would have to interpret AS 19.10.010 (and its predecessors) so that the statute does not apply to university lands. Such an interpretation might be justified on the basis that it is necessary to avoid a conflict between the state dedication statute and the paramount federal trust obligation.

It would, perhaps, also be possible to avoid the conflict by finding that the federal trust obligation can be satisfied hrough the state's payment to the University of the value of the easements. In State v. University of Alaska,[42] a case reconciling the apparent conflict between the federal trust obligation and the Alaska Legislature's inclusion of university lands within the Chugach State Park, the Alaska Supreme Court held that the legislature had the authority to commit university lands to a park. The court held that the federal trust obligation could be discharged by payment to the University of the value of the lands taken.

It is tempting to apply the same logic to section line easements. There are, however, reasons for resisting such a solution. First, some of the section line easements were "taken" prior

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42 624 P.2d 807 (Alaska 1981).

to the repeal of federal statutory restrictions on the use of versity lands. One of the restrictions was that any interest created in university lands other than for university purposes would be null and void.[43] This restriction had been repealed prior to creation of Chugach State Park.[44] Second, calculating compensation for section line easements created at diverse locations at various times would be far more complex than calculating the value of block of land placed into Chugach State Park by a single legislative action. Third, it is more reasonable to infer (as the court did in the Chugach Park case) that the legislature really did mean to for the use of a single block of university lands within a specifically described park boundary, than it is to infer that the legislature intended to evaluate and pay for section line easements sprinkled across the expanse of non-contiguous university grant lands

V. IF A SECTION LINE EASEMENT EXISTS, WHAT IS THE PERMISSIBLE EXTENT OF ITS USE?

At the outset mention was made that a section line easement is an easement for highways across unreserved public lands which is 66 or 100 feet wide. By now the discerning reader will

43 Section 7, Act of January 21, 1929 (45 Stat. 1091)

44 Sections 3-7 of the 1919 Act were repealed in 1966. PL 89-588 (80 Stat. 811).

have answered the one obvious question this simplified definition suggests. If the underlying fee is or was federal land when the easement attached, the easement is 66 feet (four rods) wide; if state land, the easement is 100 feet wide. One constructing a public highway may not, however, be privileged to make use of the entire width of the section line easement.

In Andersen v. Edwards,[45] Alaska's Supreme Court was confronted with a dispute between property owners in McCarthy, Alaska, and Mr. Andersen's joint venture, Wrangell Mountain Enterprises. Wrangell Mountain Enterprises was developing property near McCarthy in connection with which it was constructing three miles of public road partially along a section line across property owned by the Edwardses. The court found that the state had reserved a 100 foot right-of-way along the section line when it sold the land in question and that pursuant to AS 19.10.010 the right-of-way was dedicated for use as a public highway. Before it commenced construction, the developer obtained a letter from the Division of Lands confirming the width of this easement and a letter of non-objection from the Department of Highways. The roadway constructed by the developer was only about 25 feet in width, but the developer cleared the trees across an expanse nearly equal to the full 100 foot

45 625 P.2d 282 (Alaska 1981).

width. The Edwardses sued to recover damages for the cutting of the trees and sought treble damages under AS 09.45.730 which authorizes a triple recovery for the wrongful destruction of trees. Following a jury verdict against the developer, the case reached Alaska's Supreme Court. Among other things the court held that the language of the dedication statute means that only that amount of land actually necessary for use as a public highway is dedicated. The court concluded that the developer was, "entitled to make only reasonable use of the right-of-way." 625 P.2d 287.

Whatever one thinks of the reasoning in Andersen, the decision is probably contrary to the expectations of most lay persons who would, not surprisingly, assume that a right-of-way said to be 100 feet wide is in fact 100 feet wide. Moreover, the decision clearly has the potential to generate litigation over the reasonableness of the use of the easement which could have been avoided by a more literal reading of the applicable statute. However, the Supreme Court did not think this consideration outweighed the fact that its ruling, ". . . will prevent needless destruction of property by insuring that the construction of roadways will be accomplished with care."[46] The court held that the person complaining that the use is unreasonable has the burden of proving this to be true.

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46 625 P.2d 287.

In its most recent decision dealing with section line easements, Fisher v. Golden Valley Electric,[47] the Alaska Supreme Court held that a utility company could construct a powerline on an unused portion of a section line easement without paying the owner of the underlying fee for the privilege. First, the court noted that in some other states the construction of a powerline which does not interfere with highway travel is considered an incidental or subordinant use of the highway easement which does not constitute an additional burden on the fee. The Alaska court found the rationale for these decisions in technological progress:

> The reasoning underlying this position is that electric and telephone lines supply communications and power which were in an earlier age provided through messengers and freight wagons traveling on public highways. So long as the lines are compatible with road traffic they are viewed simply as adaptations of traditional highway uses made because of changing technology....[48]

The court recognized that other states take differing views. Some apply the technological progress rule in urban area but not rural areas. Others hold that an easement for electrical transmission does not constitute an additional burden on the fee only if the

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47 Op. No. 2606 (Alaska, Jan. 28, 1983)

48 Id., p. 6. The analogy is hardly perfect. One can scarcely imagine a pioneer waiting at trailside for the arrival of his wagonload of electricity.

electricity is used for highway purposes such as street lighting. Finally, the court recognized that there are states in which courts have held that the use of highway easements for powerlines is an additional burden on the fee. The Alaska court then went on to quote AS 19.25.010 which states that a utility facility may be constructed in a state right-of-way only in accordance with regulations prescribed by the Department of Transportation and Public Facilities. The court said this statute placed Alaska among those states which permit powerline construction as an incidental or subordinant use of a highway easement. The court's reasoning on this point is shallow. The statute addresses regulatory control of activities within a state highway right-of-way; it does not purport to fix the property rights of the owner of the underlying fee.

In Fisher, the appellants urged that federal rather than state law governed the extent of use of the right-of-way. Alaska's Supreme Court held that, absent contrary indications in federal law, the grant of a right-of-way on federal land would be construed according to the law of the state where the land is located. The court said that no contrary federal rule had been called to its attention. Appellants apparently overlooked the fact that federal regulations governing section line easements did not contemplate

their unrestricted use for powerlines.[49]

One criticism which can fairly be leveled at the court its decision in Fisher is a lack of sensitivity for the distinction between section line easements over lands still owned by the state and those over lands which have been purchased from the state valuable consideration. To begin with, the purchaser should allowed to rely on the language in his patent reserving lands highways. There is nothing in the statutory language or in the prior decisions of the Alaska Supreme Court which would lead a purchaser to conclude that if he purchased land from the state subject to a section line easement for a highway, it would also be subject to an easement for electric transmission lines or other facilities. The differences between roads and other facilities do bear on value of the fee. Electric transmission lines and other facilities

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49 A pertinent regulation in 1970 was 43 C.F.R. 2234.2-5(b) which included the following: "Rights-of-way granted by R.S. 2477 do not include rights-of-way for facilities with respect to which any other provision of law specifically requires the filing of an application for a right-of-way. Where the holder of such highway right-of-way determines that such facility will not seriously impair the scenic and recreational values of an area and its consent is obtained, the Department waives the requirement of an application for a right-of-way for all facilities usual to a highway along the highway right-of-way granted by R.S. 2477 except for electric transmission facilities, designed for operation at a nominal voltage of 33kv or above or designed for conversion to such operation..." The same provision is found in later regulations. E.g., 43 C.F.R. § 2822.2-2(a) (1974).

pose a different set of inconveniences and risks from those posed by roads. On the basis of topography, proximity of other roads, or other factors, one who purchases a particular tract might conclude that the chances of a public highway being built on the tract along a section line are nil. The factors supporting the conclusion that construction of a highway would not occur might not apply to the construction of some other facility such as an electric transmission line. The Fisher court should have examined the reasonable expectations of those who have acquired land from the state before concluding that the lesser included interest rule which it has adopted should apply to section line easements on land no longer owned by the state.

One lesson to be taken from Fisher is that a section line easement may be used for a variety of non-highway purposes. If an electric utility can construct a transmission line, it follows that a local government or utility authority could construct a sewer line or a water line within the section line easement. A second point of interest is this: The decision in Fisher poses a potential threat greater than that posed by possible highway construction to state reservations such as parks, recreation areas, and refuges. While it may be asserted that the legislation creating areas such as the Chugach State Park vacated any section line easements by necessary implication, this proposition has yet to be tested in court. More-

over, not all state reservations are created by express legislation. Some are created by administrative action.

VI. SUMMARY

The following summary represents the current state of section line easement law in Alaska. As the preceding sections of this paper have shown there are some areas of uncertainty and some differences of opinion which have not yet been resolved. With that warning in mind, the summary is as follows:

(1) A section line easement is an easement for the construction of a public highway or other facility such as a powerline, water line or sewer line.

(2) The maximum width of the section line easement will be 100 feet on state-owned land or land acquired from the state, and 66 feet on federal land or land acquired from the federal government. One making use of the section line easement is not, however, automatically entitled to use its maximum width. The user may only take advantage of so much of the section line easement as is reasonably necessary for construction and maintenance of the facility.

(3) Section line easements cannot exist prior to approval of the official survey which creates the section line.

(4) Section line easements exist on all lands in Alaska for

which an official survey was approved prior to October 21, 1976[50] except the following:

(a) Lands which went into private ownership prior to April 6, 1923;

(b) Lands which went into private ownership prior to approval of the official survey;

(c Lands whose official survey was approved on or after January 18, 1949 which if territorial lands went into

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50 This is the date that R.S. 2477 was repealed. In practice, the consequence of earlier large scale withdrawals of federal lands in Alaska is that few, if any, section line easements could have been created on federal lands which were unsurveyed on January 17, 1969, the date of Interior Secretary Udall's "land freeze" accomplished by Public Land Order 4582 (34 Fed. Reg. 1025). That order withdrew all public lands in Alaska not already reserved from all forms of appropriation and disposition under the public land laws (except locations for metalliferous minerals) to protect and determine the rights of Alaska Natives. The order was clearly intended to preclude creation of R.S. 2477 easements, for a special exception to P.L.O. 4582 was made to allow the location of a right-of-way for a 53-mile section of the North Slope Haul Road out of Livengood by P.L.O. 4676 (34 Fed. Reg. 13415). P.L.O. 4582 was continued in force until passage of the Alaska Native Claims Settlement Act, P.L. 92-203 (85 Stat. 688). That law withdrew huge blocks of land for Native selection (ANCSA § 11, 43 U.S.C.A. § 1610) and provided for administrative withdrawal of additional acreage to aid Native selections (id.), withdrawals needed for the protection of the public interest [ANCSA § 17(d)(1), 43 U.S.C.A. § 1616(d)(1)], and up to 80 million acres of withdrawals for addition to or creation of new units of the Park, Forest, Refuge, and Wild and Scenic River systems [ANCSA § 17(d)(2), 43 U.S.C.A. § 1616(d)(2)]. Vast acreages were withdrawn by administrative action in a series of public land orders which culminated in P.L.O. 5418 (39 Fed. Reg. 5583) which withdrew all remaining unreserved federal lands on March 25, 1974.

private ownership before March 26, 1951 and which if federal lands went into private ownership before March 21, 1953;

Federal lands reserved for a public use prior to April 6, 1923 which remained reserved at least until October 21, 1976;

Federal lands reserved for a public use prior to approval of the official survey and which remained reserved at least until October 21, 1976;

Federal lands whose official survey was approved on or after January 18, 1949 which were reserved for a public use prior to March 21, 1953, and which remained reserved at least until October 21, 1976;

(g) University lands.