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STATE OF ALASKA

DEPARTMENT OF HIGHWAYS

INTRA-DEPARTMENTAL CORRESPONDENCE

INSTRUCTIONAL MEMORANDUM NO. 10

SUBJECT: SECTION LINE ROADS. Attorney General's Opinion No. 11, 1962

TO: All Right of Way Personnel DATE: September 12, 1962

FROM: Alfred A. Baca, State Right of Way Agent

On July 26, 1962, the Attorney General issued Opinion No. 11 of 1962, concerning section line statutes.

The opinion declared in effect that Ch. 19, SLA 1923, Ch. 123, SLA 1951, and Ch. 35, SLA 1953 are of no effect in so far as private lands and United States lands are concerned. In other words, when the statutes were passes, they did not encumber lands owned privately or by the United States.

The opinion did state, however, that land owned by the Territory or the State was so encumbered. For all intents and purposes, this means land selected by the State under State Selection. Accordingly, all such State selected land is subject to a dedicated highway of fifty (50) feet on each side of the section line.

It is understood by this office that some highways were constructed by the State over private property on the basis of the section line statutes. During periods of relative inactivity, the field offices should ascertain which property owners were so affected. This information should be submitted to this headquarters for determination of whether the former owner is entitled to additional compensation.

Enclosure: 1
1 Copy of Opinion No 11, 1962 to field offices.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Also for your file

1962 Opinions of the
Attorney General No. 11

July 26, 1962

Mr. Donald A. McKinnon, Commissioner
Department of Highways
Douglas, Alaska

Attention: Mr. Alfred A. Baca
State Right of Way Agent

Re: Section Line Dedications;
An interpretation of Ch. 19,
SLA 1923, Ch. 123, SLA 1951
and Ch. 34, SLA 1953.

Dear Mr. McKinnon:

You have asked whether the State has a right of way easement along certain section lines, which can be used for highway purposes without compensation.

If the State has such an easement it must be based upon either Ch. 19, SLA 1923, Ch. 123, SLA 1951 or Ch. 35, SLA 1953. The relevant language of Ch. 19, SLA 1923 states:

> "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 shall be vacated by any competent 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."

The legislature could not be referring to sections which have passed to private ownership because dedication of easements on private property would be an infringement of vested property rights prohibited by the fifth amendment to the Constitution of the United States. Nor could the territorial legislature legally dedicate an easement in section lines over the public domain. Section 9 of the Alaska Organic Act (48 USCA § 77) reads in part as follows:

> "The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistant with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; . . . " Cf. Betsch v. Umphrey, 270 Fed. Rep., 45, 48 (1921).

The preserving of an easement in the territory certainly would interfere with the primary disposal of the soil. Since the territorial legislature had no powers not conferred by federal statute, Ch. 19, SLA 1923 cannot be construed as a dedication of right-of-way easements on federal lands.

Ch. 19, SLA 1923 could only be effective to dedicate an easement on land owned by the Territory of Alaska and conveyed subsequent to the approval of the Act of April 6, 1923. However, this question is moot because according to the Bureau of Natural Resources, the Territory of Alaska from the period of its inception until statehood never possessed more than 105,000 acres. It is my understanding that this land is located in small parcels throughout the State and is used for school and public works purposes. It is doubtful if any of this land has ever been conveyed.

Ch. 19, SLA 1923 was included in the 1933 compilation of session laws but was omitted from the last compilation in 1949. All acts not included in the compilation were expressly repealed. Chapter 1, ESLA 1949.

In 1951 the Territorial Legislature enacted Ch. 123, SLA 1951 which stated:

> "Section 1. A tract of one hundred 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, the section line being the center of said highway. Byt if such highway shall be vacated by any competent 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."

The only real distinction between Ch. 19, SLA 1923 and Ch. 123, SLA 1951 is the increase in width of the easement from four rods to one hundred feet. Ch. 123, SLA 1951

is derived from House Bill No. 101. The Bill in its original form reiterated Ch. 19, SLA 1923 which had been repealed. On March 20, 1951 the Senate amended House Bill No. 101 to its present form. The amendments read in part as follows:

> "Page 1, line 11, delete the word 'in' and substitute therefor the words 'owned by' and after the word 'Alaska' insert a comma and the words 'or acquired from the Territory' and a comma." Cf. Senate Journal of Alaska 1951, Pages 789, 790.

These amendments indicate that the legislature was aware of its limited powers and therefore did not attempt to dedicate easements on lands not owned by the Territory of Alaska.

Ch. 35, SLA 1953 amended Ch. 123, SLA 1951 as follows:

> "Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract four rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, . . . " (amendment emphasized)

However, the amendment was of no effect since a legislature operating under the limitations of 48 USC § 77 was without power to dedicate section line property not owned by the Territory. The power to "dispose of primary interests in the soil" was not delegated to the Territorial Legislature and, in fact, such power was expressly denied the Territory.

It might be argued that Ch. 19, SLA 1923 and Ch. 35, SLA 1953 can be supported on other grounds. An Attorney General's Opinion issued September 25, 1956 suggests that Ch. 35, SLA 1953 was not enacted in contravention of 48 USCA § 77 but was actually an implementation of 14 Stat. 253 (1866) 43 USC 932, enacted by Congress in July, 1866. There are two problems with this view. 14 Stat. 253 (1866) is a grant of right of way easements for the construction of highways over public lands, not reserved for public uses. This grant constituted an offer of dedication and does not become effective until accepted by the several states or territories. A recent Alaska case is in agreement with other courts in dictating the two methods of acceptance. Mr. Justice Dimond in Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961) states:

> "But before a highway may be created, there must be either some positive act on the part of the appropriate public authorities 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." (emphasis added)

The question of prescriptive user is well settled but that is not what we are concerned with. Has the Territorial Legislature completed "some positive act, clearly manifesting an intention to accept"? Ch. 19, SLA 1923 and Ch. 35, SLA 1953 make no mention of 14 Stat. 253 (1866). The House and Senate Journals, 1923 and 1953, do not indicate that there was any discussion on the matter. There are no cases on the matter and the State has never done any positive act to exercise its "rights" to the section line easements.

Several other jurisdictions, notably North Dakota and Kansas, have accepted the federal grant by statute. A recent North Dakota case, Costain v. Turner County (N.D. 1949), 36 N.W. 2d, 382, 384, states, "The legislature of Dakota Territory enacted Ch. 33 S.L. 1870-1871 stating: 'That hereafter all section lines in this Territory shall be and are hereby declared public highways as far as practicable. . . .' The federal statute made the dedication, the territorial statute accepted it, ..." Cf. Huffman v. Board of Sup'rs. of West Bay TP Benson County, 47 N.D. 217, 182 N.W. 459 (1921). In Wallbridge v. Russell County, 74 Kan. 341, 86 Pac. 473 (1906), the Supreme Court of Kansas agreed that Kansas Laws 1873, p. 230, C. 122, identical to the Dakota statute, constituted legislature acceptance of 14 Stat. 253 (1866). By legislative fiat these jurisdictions established highways on section lines within seven years after the federal grant.

Chapter 19, SLA 1923, passed 57 years after the federal grant, and Chapter 35, SLA 1953, passed 87 years after the federal grant, do not establish highways nor do they use language of acceptance. The Alaska territorial statutes "dedicate" easements. The word "dedicate" is synonymous with the word "convey". Cf. Quality Building & Securities Co. v. Bledsoe, 14 P.2d 128, 132 (Cal. 1932). Clearly the legislature cannot accept a right of way by dedicating or conveying the same property. The reasonable interpretation of Ch. 19,

SLA 1923 and Ch. 35, SLA 1953, is that the legislature did not intend to accept the federal grant, but was reserving easements for the Territory. As I mentioned earlier, the legislature had no power to do this with property not owned by the Territory.

In summary, Ch. 19, SLA 1923 reserved the right of way easements on land owned by the Territory from April 6, 1923 until its repeal by Ch. 1, ESLA 1949 on January 18, 1949. There were no section line dedication acts between January 18, 1949 and March 26, 1951. Ch. 123, SLA 1951 did not attempt to dedicate easements on land not owned or acquired from the Territory of Alaska. Ch. 35, SLA 1953 approved on March 21, 1953 is restricted to dedication of easement on land owned or acquired from the Territory of Alaska. However, this act is still in effect and all property turned over by the Federal Government to the State of Alaska and all land which will in the future be turned over to the State will be burdened with right of way easements inuring to the benefit of the State.

Very truly yours,

GEORGE N. HAYES
ATTORNEY GENERAL

By
Michael M. Holmes
Assistant Attorney General

MMH:jj

cc: The Honorable William A. Egan
Governor of Alaska
State Capitol
Juneau, Alaska

The Honorable Floyd L. Guertin
Commissioner of Administration
Alaska Office Building
Juneau, Alaska