#5.1

SECTION LINE DATA

RS-2477

APRIL, 1983

RIGHT OF WAY
Central Region

Letter to DNR Forwarded 12/19/80 Retyped 12/19/80

No Action Review with Sandberg

TED

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF TECHNICAL SERVICES

703 W. NORTHERN LIGHTS BLVD.
ANCHORAGE, ALASKA 99503

December 19, 1979

RECEIVED
DEC 24 1979
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

State of Alaska
Department of Transportation
& Public Facilities
4111 Aviation Drive
Anchorage, AK 99503

Attn: Jim Sanberg
Right-of-Way and Land Acquisition Agent

File: 237

Dear Mr. Sanberg:

Enclosed please find copies of procedures the Division of Technical Services proposes to adopt for acting on petitions to vacate section line rights-of-way both within other platting authority and outside other platting authority.

These procedures have been reviewed and revised by the Division of Forest, Land and Water Management and are now acceptable, as written, within the Department of Natural Resources.

Please have the appropriate people within your Department review and comment on these procedures so that we may incorporate necessary D.O.T. & P.F. functions within them. I would appreciate your comments as soon as possible so that we may begin coordinating these procedures with the Boroughs at an early date.

Sincerely,

G.B. Best
Acting Chief Cadastral Surveyor

cc: Pending Procedures File (Lyle Riggins)

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: DEC 24 1979
✓	✓	RICHARDS, TED	
✓	✓	SCRATTON, DAN - OK - See me	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
✓	✓	ENGR/PLANS OK - See me	
		RELOCATION	
		PREAUDIT	
	✓	RECORDS: "Hwys"	
		RECORDS: "Aviation"	
	✓	OTHER: Sandberg - Hold file.	

Remarks:

10J14LH

TO: DIRECTOR'S POLICY FILE
80-19

DATE: October 24,

FILE NO: 1130 X-File

TELEPHONE NO:

FROM: THEODORE G. SMITH
Director

SUBJECT: Section Line Rights-of-Way
Ownership of Vegetation
and Materials Within

Situation: The fee owner of a portion of land that contains the 50 foot section line right-of-way has certain ownership rights within the right-of-way. He may utilize the property within the right-of-way, but must be aware that if the right-of-way is used for public highway purposes, he may lose improvements or uses of his property within the section line easement without compensation.

If the owner of said property has used the property for agricultural purposes, or has a stand of natural growth trees within the right-of-way, who owns or has use of this vegetation; the fee owner or the constructor on the right-of-way?

Who owns or has use of the materials, such as sand and gravel; the fee owner or the constructor on the right-of-way?

Policy: The fee owner of the property within the section line right-of-way is considered to have title to the vegetation (i.e., trees, crops, etc.), as well as materials such as sand and gravel within that right-of-way. He may dispose of these in any manner he sees fitting, selling them for a profit. - (Without undo injury to the intended use for highway (2) Gravel pits across section line etc)

This, however, does not abrogate the public's right to utilize the section line easement for public highway purposes.

The constructor of a public roadway within the section line easement may use any vegetation or material left within the actual roadway alignment for purposes of roadway construction, maintenance, or improvement, without the express consent of the fee owner.

The constructor of the public roadway may not remove vegetation or materials from the right-of-way for uses that are not connected with the construction, maintenance or improvement of the roadway without the express approval of the fee owner.

DO 0018 (Rev. 10/78)

STATE
of ALASKA

MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FOREST, LAND & WATER MANAGEMENT
703 W. Northern Lights Blvd.
Anchorage, Alaska 99503

TO: DIRECTOR'S POLICY FILE
80-4

DATE: October 9, 1979

FILE NO: 1130, X-File 2370

TELEPHONE NO:

FROM: THEODORE G. SMITH
Director

SUBJECT: Section Line Easements
and Use Thereof

RECEIVED
MAY 9 1980
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

Situation: Section line easements (50 feet each side of the section line) have been dedicated for use in construction of public roads on all lands transferred to the State under the Statehood entitlement.

Because of this dedication, does the public have the right to construct public roads on these section line easements without permit?

Does a public utility have the right to construct improvements on this easement without permit?

Policy: It is the policy of the Division of Forest, Land and Water Management that anyone does have the right to construct roads on these section line easements without permit and regardless of ownership without sanction of the permitting authority. However, the constructed road becomes a public land and may not be used as a controlled access by the builder or owner of the road.

It has been determined by the Division that enough legal precedence exists to support this policy.

In any case, we should urge the public to check with the Department of Transportation and Public Facilities on planned future uses of the easement.

In the matter of the easements use by public utilities, the following outlines the policy:

A public utility must gain sanction by the landowner, whether it be state, federal or privately owned, in order to construct an improvement on the easement. Furthermore, a letter of nonobjection must be obtained from the Department of Transporation and Public Facilities.

In a case where the State has sold land involved in a section line or is the owner of such lands, the Division of Forest, Land and Water Management reserves the rights of the landowner in the issuance of permit sanctioning the utility's use of the easement.

Note that this interim policy is subject to revision upon adoption of regulations exercising the State's police authority to require certain standards of construction.

ANC COD Central Region RIGHT OF WAY DATE RCVD: MAY 9 - 1980

02-001B (Rev. 10/76)

STATE
of ALASKA

MEMORANDUM

State of Alaska
Department of Law
OFFICE OF ATTORNEY GENER
Anchorage Branch
420 'L' Street, Suite 100
Anchorage, Alaska 99501
(907) 276-3550

TO: Claud M. Hoffman
Chief Cadastral Engineer
Division of Lands
Department of Natural Resources
Anchorage

DATE: May 31, 1979

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross
Attorney General
By:
Thomas E. Meacham
Assistant Attorney General
Department of Law - Anchorage

SUBJECT: "One-Half Section Line Easements"; Your File No. 2370

Attached is the final draft of the proposed document, to be signed jointly by the Commissioner of the Department of Natural Resources and the Commissioner of the Department of Transportation and Public Utilities, and suitably recorded, to clarify the legal situation regarding proported "half-section line easements" declared under assumed authority of 43 U.S.C. § 932. My original draft was reviewed by Ross Kopperud of the Highways Section of the Anchorage Attorney General's Office, and a copy was also reviewed by Jim Sandberg of the Department of Transportation.

I will let you assume the task of routing this document through appropriate channels for signatures, and for subsequent recording in all of the recording districts in which half-section line easements may have been noted. In fact, the safest course would be to simply insure that the document is recorded in all recording districts in the State. For that purpose, it may be easiest to have a number of identical copies of the documents signed by the commissioners, so that an original document may be simultaneously recorded in each recording district in the State. I will let you handle the details regarding this matter.

TEM:ln
Attachment: Declaration of Extinguishment of "Half-Section Line Easements"

cc: Ross Kopperud - AGO, Anch.
✓Jim Sandberg
Regional Right-of-Way Agent
Department of Transportation & Public Facilities, Anch.

Dick LeFebvre
Division of Forest, Land & Water Management
Department of Natural Resources, Anch.

RECEIVED
JUN 1 1979
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: JUN 1 1979
✓	N	RICHARDS, TED	
		SCRATTON, DAN	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
		ENGR/PLANS	
		RELOCATION	
		PREAUDIT	
	✓	RECORDS: "Hwys"	
		RECORDS: "Aviation"	

DECLARATION OF EXTINGUISHMENT
OF "HALF-SECTION LINE EASEMENTS"

The Alaska Department of Transportation and Public Facilities and the Alaska Department of Natural Resources, through their respective undersigned Commissioners, herewith agree and declare that the prior purported reservation on State or Federal lands of "half-section line easements" by their respective Departments, or either of them, through any of their officers, agents, or employees, constituted an act without basis in Federal or Alaska statutory law, and was thus an act void and of no force and effect ab initio.

This declaration shall restore, on all plats upon which purported "half-section line easements" are noted, the lands affected by such purported reservations to the legal status which pertained prior to such purported easement reservations. This declaration shall not be deemed to vacate any rights, easements or rights-of-ways acquired or to be acquired by any other means and which may fall upon a half-section line. This declaration shall not alter or affect valid existing rights, if any, in and to the lands affected by such purported easement reservations or this declaration. The purpose of this declaration is to remove from the public land records any clouds on title which may exist due to the purported reservation of "half-section line easements A true copy of this declaration is to be recorded in each of the several District Recorder's offices throughout the State of Alaska.

DATED at Juneau, Alaska this day of _____

1979

For the Alaska Department of Transportation and Public Facilities:

For the Alaska Department of Natural Resources:

_____ _____

Robert A. Ward, Commissioner Robert E. LeResche, Commissioner

STATE OF ALASKA

ss

FIRST JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this _____ day of _____ 1979, before me, the undersigned, a Notary Public in and for the State of Alaska, personally appeared Robert A. Ward, to me known to be the Commissioner of the Alaska Department of Transportation and Public Facilities, and who stated that he executed the foregoing instrument as his free and voluntary act and deed, with lawful authority and for the uses and purposes therein mentioned.

WITNESS my hand and Notarial Seal on this day of _____, 1979.

_____

Notary Public in and for Alaska
My commission expires: _____

STATE OF ALASKA)

ss

FIRST JUDICIAL DISTRICT

THIS IS TO CERTIFY that on this _____ day of _____, 1979, before me, the undersigned, a Notary Public in and for the State of Alaska, personally appeared Robert E. LeResche, to me known to be the Commissioner of the Alaska Department of Natural Resources, and who stated that he executed the foregoing instrument as his free and voluntary act and deed, with lawful authority and for the uses and purposes therein mentioned.

WITNESS my hand and Notarial Seal on this day of _____, 1979.

_____

Notary Public in and for Alaska
My commission expires: ____

STATE
of ALASKA

MEMORANDUM

RECEIVED
MAY 31 1979
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

Tom Meacham
Assistant Attorney General

DATE: May 30, 1979
FILE NO:
TELEPHONE NO:

SUBJECT: One-Half Section Line Easements

Ross A. Kopperud
Assistant Attorney General

Dick Kerns and I have reviewed your memorandum regarding one-half section line easements.

It is our feeling that the instrument to be recorded should have stronger language regarding existing roads and future roads which may fall on one-half section lines. We agree that the fact that a given road falls on a one-half section line does not in and of itself create a right-of-way merely because it is on the one-half section line. However, it is my understanding that there may be a valid right-of-way of various widths along any given road including a road on a one-half section line by public use under 43 U.S.C. 932, by reason of 48 U.S.C. 321(d), by PLO 601 and later PLO's, by plat, grant or deed including 23 U.S.C. 317.

We would suggest that in order to avoid litigation on the inevitable claim that there are no right-of-ways on one-half section lines because of this declaration that a clause be inserted in the Declaration of Extinguishment of one-half section line easements stating:

> It is not the intent of this instrument to vacate any rights, easements or rights-of-ways acquired or to be acquired by any other means which may fall upon a half-section line.

Mr. Sandberg, Regional Right-of-Way Agent of the Department of Transportation and Public Facilities in Anchorage also agrees there are no right-of-way easements on one-half section lines.

If we can be of further assistance, please call us.

RAK/sls

State of Alaska
Department of Law
OFFICE OF THE ATTORNEY GENERAL
Anchorage Branch, Highway Section
360 "K" St., Suite 200
Anchorage, Alaska 99501

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: MAY 31 1979
	✓	RICHARDS, TED	
	✓	SCRATTON, DAN	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
	✓	ENGR/PLANS	
		RELOCATION	
		PREAUDIT	
		RECORDS: "Hwys"	
		RECORDS: "Aviation"	
✓		OTHER: Sandy	

Remarks:

STATE
of ALASKA

MEMORANDUM

RECEIVED
MAY 31 1979
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

TO: Claud M. Hoffman
Chief Cadastral Engineer
Division of Lands
Dept. of Natural Resources
Anchorage

DATE: May 21, 1979

FILE NO:

TELEPHONE NO:

FROM: AVRUM M. GROSS
ATTORNEY GENERAL
By: Tom Meacham
Assistant Attorney General
AGO - Anchorage

SUBJECT: "One-Half Section Line Easements"; Your File No. 2370. Our File 866-164-77.

I have reviewed your memorandum of April 19, 1979 concerning the proper way in which purported half-section line easements may be cleared from the land records in the Recorder's Office and State land plats. I have also reviewed the sections of the Alaska Administrative Code (11 AAC 68) which you attached to your memorandum, concerning changes to, or vacations of, plats. While the elimination of any reference to any half-section line easements could, I suppose, be termed a "change" to a plat, it should more properly be viewed as the elimination of a previously-recorded "legal" interest which in fact had no legal basis. Thus it is not the imposition of a new legal interest on the land, or the elimination of a previous valid legal interest, but instead the removal of a cloud on land title which had no legal validity. Under these circumstances, it is my opinion that the procedures for public notice and hearing which are outlined in the regulations are not required in this instance. Further, those procedures contemplate that the "petitioner" for a change in a plat is usually a private individual or a member of the general public, and not the Director of the Division of Lands or his designee. While even the Director of the Division of Lands would be required to follow the procedures outlined in the regulations if a substantive legal interest were being added to removed from a plat, because these half-section line "easements" are, and never have been, legal interests, their removal from the plat should not invoke the complete procedural requirements of the regulations.

I am enclosing a copy of a proposed document to be jointly executed by the Commissioner of Natural Resources and the Commissioner of the Department of Transportation and Public Facility, which document would then be recorded in each recording district to remove from any previously-recorded plats the implication that half-section line easements were being reserved under the presumed authority of R. S. 2477, 14 Stat. 253 (43 U.S.C. § 932). I am open to suggestions from the Highways Section attorneys concerning the adequacy of my proposed document.

cc: Ross Kopperud, AGO - Anchorage
Jim Sandberg, Regional Right-of-Way Agent
Dept. of Transportation and Public Facilities, Anchorage
Dick LeFebvre, Division of Forest, Land & Water Management
Dept. of Natural Resources, Anchorage

Department of Law
OFFICE OF THE ATTORNEY GENERAL
Anchorage Branch, Highway Section
360 "K" St., Suite 200
Anchorage, Alaska 99501

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: MAY 31 1979
	X	RICHARDS, TED	
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		APPRAISALS	
		NEGOTIATIONS	
		ENGR/PLANS	
		RELOCATION	
		PREAUDIT	
		RECORDS: "Hwys"	
		RECORDS: "Aviation"	
		OTHER: mc - SANDBERG	

Remarks:

DECLARATION OF EXTINGUISHMENT

OF "HALF-SECTION LINE EASEMENTS"

The Alaska Department of Transportation and Public Facilities and the Alaska Department of Natural Resources, through their respective undersigned Commissioners, herewith agree and declare that the prior purported reservation on State or Federal lands of "half-section line easements" by their respective Departments, or either of them, through any of their officers, agents, or employees, constituted an act without basis in Federal or Alaska statutory law, and was thus an act void and of no force and effect ab initio.

The purpose of this declaration is to restore, on all plats upon which purported "half-section line easements" are noted, the lands affected by such purported reservations to the legal status which pertained prior to such purported easement reservations. This declaration shall not alter or affect valid existing rights, if any, in and to the lands affected by such purported easement reservations or this declaration. The purpose of this declaration is to remove from the public land records any clouds on title which may exist due to the purported reservation of "half-section line easements". A true copy of this declaration is to be recorded in each of the several District Recorder's offices throughout the State of Alaska.

DATED at Juneau, Alaska this day of _____

1979

For the Alaska Department of Transportation and Public Facilities:

For the Alaska Department of Natural Resources:

_____
Robert A. Ward, Commissioner

_____
Robert E. LeResche, Commissioner

STATE OF ALASKA
) ss.
FIRST JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this _____ day of _____, 1979, before me, the undersigned, a Notary Public in and for the State of Alaska, personally appeared Robert A. Ward, to me known to be the Commissioner of the Alaska Department of Transportation and Public Facilities, and who stated that he executed the foregoing instrument as his free and voluntary act and deed, with lawful authority and for the uses and purposes therein mentioned.

WITNESS my hand and Notarial Seal on this day of _____, 1979.

_____
Notary Public in and for Alaska
My commission expires: _____

STATE OF ALASKA
ss.
FIRST JUDICIAL DISTRICT

THIS IS TO CERTIFY that on this _____ day of _____, 1979, before me, the undersigned, a Notary Public in and for the State of Alaska, personally appeared Robert E. LeResche, to me known to be the Commissioner of the Alaska Department of Natural Resources, and who stated that he executed the foregoing instrument as his free and voluntary act and deed, with lawful authority and for the uses and purposes therein mentioned.

WITNESS my hand and Notarial Seal on this day of _____, 1979.

_____
Notary Public in and for Alaska
My commission expires: _____

Ted R.

RECEIVED
MAY 31 1979
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

Claud M. Hoffman
Chief Cadastral Engineer
DNR - Anchorage

March 8, 1979

AVRUM M. GROSS
ATTORNEY GENERAL
Thomas E. Meacham
Assistant Attorney General
AGO - Anchorage

Section Line Easements
on Half-Sections

Your memorandum of February 21, 1979, has been referred to me for a response. I have examined the transcribed copy of the instrument recorded by the Department of Highways and the Department of Public Works at Book 14, Page 37 in the Bethel Recording District, which purports to accept a right-of-way on unreserved public lands for highway purposes along all section and half-section lines in the State of Alaska, pursuant to 14 Stat. 253, 43 U.S.C. § 932 (also known as R.S. 2477). I have also reviewed the statutory authorities cited in the recorded document, and the general statutory authority applicable to the acceptance of the federal right-of-way offer over unreserved public lands. The specific question which you have raised is whether the Department of Highways or the Department of Public Works had authority to declare public rights-of-way along half-section lines under authority of 43 U.S.C. § 932. My legal conclusion is that they did not, and that the purported half-section line reservations are ineffective to accomplish such a result.

The federal offer of public rights-of-way over land which was ". . . not reserved for public uses . . ." was extended to the states and territories by the Act of July 26, 1866, 14 Stat. 253, R.S. 2477, 43 U.S.C. § 932 (since repealed by the Federal Land Policy and Management Act of 1976). The Territory of Alaska, through its legislature, accepted the federal offer of rights-of-way in Chapter 19, SLA 1923. This legislative Act was effective to accept the federal right-of-way offer as to a tract four rods wide between each section of public land within the territory.

This acceptance and dedication was effective until January 18, 1949, when it failed to be included in the 1949 compiled laws of the territory. In 1951 the Territorial Legislature enacted Chapter 123, SLA 1951, which dedicated a tract 100 feet wide between each section of land owned by the Territory or acquired from the Territory. In 1953 the Territorial Legislature enacted Chapter 35, SLA 1953, which amended the 1951 dedication and dedicated a tract 100 feet wide between each section of land owned by the Territory or acquired from the Territory, and a tract four rods wide between all other sections of public land in the Territory. I am enclosing a copy of the 1969 Opinion of the

FROM ✓

State of Alaska
Department of Law
OFFICE OF THE ATTORNEY GENERAL
Anchorage Branch, Highway Section
360 "K" St., Suite 200
Anchorage, Alaska 99501

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: MAY 31 1979
	✓	RICHARDS, TED	
		SCRATTON, DAN	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
		ENGR/PLANS	
		RELOCATION	
		PREAUDIT	
	✓	RECORDS: "Hwys"	
		RECORDS: "Aviation"	
		OTHER: [illegible] - SANDBERG	

Remarks:

Attorney General No. 7, which sets forth in detail the sequence of dedications by the legislature of section line rights-of-way, pursuant to the standing federal right-of-way offer.

In none of the above-mentioned instances was the acceptance of the federal offer accomplished by any action other than an official legislative act. Further, the legislature, in accepting the federal offer, provided no mechanism by which an administrative agency of the State had the authority to accept or broaden the standing federal offer. On the contrary, the legislature itself undertook that responsibility.

It has been clear since 1923 that the vacation of a section line right-of-way could be accomplished ". . . by any competent authority", and this would certainly include the Division of Highways or the Division of Lands, or both. However, there is no mechanism established by the legislative acceptance of the standing federal right-of-way offer which would vest the power in any state administrative agency to broaden the legislative acceptance and dedication by declaring, for example, that all half-section lines on public lands within the State are henceforth 100-foot wide public rights-of-way. To the extent that the recorded document that you have furnished me merely repeats the existing section line dedication pursuant to 43 U.S.C. § 932 and Chapter 35, SLA 1953, it adds nothing to the right-of-way dedication previously accomplished.

The statutes cited by the recorded document as authority for the Department of Public Works' and Department of Highways' "acceptance" and "declaration" of half-section line rights-of-way are very general recitations of these agencies' general purposes and authority, and do not constitute specific legislative grants of power to broaden the prior acceptance of the standing federal offer by accepting half-section line rights-of-way on behalf of the State of Alaska.

While it is apparent that the existence of recorded instruments declaring half-section line rights-of-way on public lands will create clouds on title in subsequent transfers into private ownership of the affected lands, this should occur only due to an excess of caution by title insurance companies. I am not aware of the extent to which such documents have been recorded in the State generally, but the cleanest way to remove such clouds would be to accomplish the "vacation" of the "dedicated" half-section line rights-of-way in all recording districts in which such instruments have been recorded. Because these declarations of

half-section line rights-of-way have, in my opinion, no legal force or effect, they should not be taken into consideration in determining the patterns for state land disposal pursuant to the current land disposal programs and requirements.

TEM:tb
Enclosures

cc: Dick LeFebvre,

Pete Froelich, AGO - Juneau

Ross Kopperud, AGO - Anchorage

STATE
of ALASKA

MEMORANDUM

2nd RECEIVED
MAY 23 1979
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

TO: Claud M. Hoffman
Chief Cadastral Engineer
Division of Lands
Dept. of Natural Resources
Anchorage

DATE: May 21, 1979
FILE NO:
TELEPHONE NO:

FROM: AVRUM M. GROSS
ATTORNEY GENERAL
By: Tom Meacham
Assistant Attorney General
AGO - Anchorage

SUBJECT: "One-Half Section Line Easements"; Your File No. 2370. Our File 866-164-77

I have reviewed your memorandum of April 19, 1979 concerning the proper way in which purported half-section line easements may be cleared from the land records in the Recorder's Office and State land plats. I have also reviewed the sections of the Alaska Administrative Code (11 AAC 68) which you attached to your memorandum, concerning changes to, or vacations of, plats. While the elimination of any reference to any half-section line easements could, I suppose, be termed a "change" to a plat, it should more properly be viewed as the elimination of a previously-recorded "legal" interest which in fact had no legal basis. Thus it is not the imposition of a new legal interest on the land, or the elimination of a previous valid legal interest, but instead the removal of a cloud on land title which had no legal validity. Under these circumstances, it is my opinion that the procedures for public notice and hearing which are outlined in the regulations are not required in this instance. Further, those procedures contemplate that the "petitioner" for a change in a plat is usually a private individual or a member of the general public, and not the Director of the Division of Lands or his designee. While even the Director of the Division of Lands would be required to follow the procedures outlined in the regulations if a substantive legal interest were being added to removed from a plat, because these half-section line "easements" are, and never have been, legal interests, their removal from the plat should not invoke the complete procedural requirements of the regulations.

I am enclosing a copy of a proposed document to be jointly executed by the Commissioner of Natural Resources and the Commissioner of the Department of Transportation and Public Facility, which document would then be recorded in each recording district to remove from any previously-recorded plats the implication that half-section line easements were being reserved under the presumed authority of R. S. 2477, 14 Stat. 253 (43 U.S.C. § 932). I am open to suggestions from the Highways Section attorneys concerning the adequacy of my proposed document.

cc: Ross Kopperud, AGO - Anchorage
Jim Sandberg, Regional Right-of-Way Agent
Dept. of Transportation and Public Facilities, Anchorage
Dick LeFebvre, Division of Forest, Land & Water Management
Dept. of Natural Resources, Anchorage

Department of Law
OFFICE OF ATTORNEY GENERAL
Anchorage Branch
420 'L' Street, Suite 100
Anchorage, Alaska 99501

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD MAY 23 1979
		RICHARDS, TED	
		SCRATTON, DAN	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
	✓	ENGR/PLANS	
		RELOCATION	
		PREAUDIT	
	✓	RECORDS: "Hwys"	
		RECORDS: "Aviation"	
	✓	OTHER: R/W Manual, Attorney General Opinion	

Remarks

DECLARATION OF EXTINGUISHMENT

OF "HALF-SECTION LINE EASEMENTS"

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The purpose of this declaration is to restore, on all plats upon which purported "half-section line easements" are noted, the lands affected by such purported reservations to the legal status which pertained prior to such purported easement reservations. This declaration shall not alter or affect valid existing rights, if any, in and to the lands affected by such purported easement reservations or this declaration. The purpose of this declaration is to remove from the public land records any clouds on title which may exist due to the purported reservation of "half-section line easements". A true copy of this declaration is to be recorded in each of the several District Recorder's offices throughout the State of Alaska

DATED at Juneau, Alaska this day of _____

1979.

For the Alaska Department of Transportation and Public Facilities:

_____
Robert A. Ward, Commissioner

For the Alaska Department of Natural Resources:

_____
Robert E. LeResche, Commissioner

STATE OF ALASKA

ss.

FIRST JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on this _____ day of _____ 1979, before me, the undersigned, a Notary Public in and for the State of Alaska, personally appeared Robert A. Ward, to me known to be the Commissioner of the Alaska Department of Transportation and Public Facilities, and who stated that he executed the foregoing instrument as his free and voluntary act and deed, with lawful authority and for the uses and purposes therein mentioned.

WITNESS my hand and Notarial Seal on this day of _____, 1979.

_____
Notary Public in and for Alaska
My commission expires: _____

STATE OF ALASKA

ss

FIRST JUDICIAL DISTRICT)

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WITNESS my hand and Notarial Seal on this day of _____, 1979.

_____
Notary Public in and for Alaska
My commission expires: _____

File: 111 .22

United States Department of the Interior
OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

IN REPLY REFER TO

May 21, 1980

MEMORANDUM

To Acting Area Director
Bureau of Indian Affairs
Juneau

From: David S. Case
Attorney/Advisor

Subject: Rights of Way on Allotments --
R.S. 2477 and Other Access Questions

I. INTRODUCTION

A. Your Requests

Over the last twelve months you have directed three opinion requests to this office regarding access to and across Native allotments. Your first request (dated May 22, 1979) asked about the effect of Native occupancy on the establishment of section line road easements under R.S. 2477.[1/] Your second request (dated July 6, 1979) was for general guidance about the method for assuring access to landlocked Native allotments you had advertised for sale. You also asked if you have to disclose any access problems in your sale advertisement. With respect to R.S. 2477 easements, you asked whether a section line easement for public access would suffice for private access to an otherwise landlocked

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1/ The request was entitled "Effect of Statutory Reservations on Native Allotments" and was answered in a memorandum by Dennis Hopewell of this office, dated September 4, 1979. The section line easement question was specifically excluded from that response pending this reply.

allotment. Your final request (dated April 4, 1980) reduced to its essentials, asked whether the Indian right of way laws and regulations apply when the right of way on or through a certified allotment coincides with a surveyed section line easement arguably granted under R.S. 2477.

B R.S. 2477 in Brief

R.S. 2477 is an 1866 Act "granting" highway rights of way over public lands in the following deceptively simple terms:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. Act of July 26, 1866, c. 262, sec. 8, 14 Stat. 253.

This act was initially codified as Revised Statute (R.S.) 2477 and later as 43 U.S.C. 932. It was repealed by Section 706(a) of the Federal Land Policy and Management Act (FLPMA) of October 21, 1976, PL 94-576, 90 Stat. 2743, 43 U.S.C. 1701, et seq.

Your questions focus on the section line easements appropriated by the Territory and State of Alaska under this federal authorizing legislation. The State statute appropriating the section line easements is codified as Alaska Statute (AS) 19.10.010. However, the the R.S. 2477 grant includes other kinds of rights of way other than those appropriated under this statute. On the other hand, you should note that the R.S. 2477 grant is specifically limited to rights of way over "public lands." The latter point is significant, because it is our opinion that Alaska Native use and occupancy sufficient to qualify for a certificate of allotment is also sufficient to withdraw the land occupied from "public land" status.

Finally, the State's acceptance of the R.S. 2477 grant along section lines has had an on-again, off-again history that must be taken into account when determining whether the easements granted under R.S. 2477 have ever been accepted by the State. Thus, the answers to your questions require some background in the meaning of the term "public lands" and in the history of the application of R.S. 2477 in Alaska. In order to give some direction to that discussion, however, we have provided short answers to each of the questions posed in your opinion requests.

II. SHORT ANSWERS

A May 22, 1979 Request

We agree with the conclusion expressed at page 2 of your opinion request about the effect of Native use and occupancy on the establishment of a section line easement. However, we would state your conclusion more definitely: If use and occupancy were initiated after survey of the section line, then the section line easement is superior to the allottee's rights and a right of way across the allotment does not require the consent of the allottee or a grant from the United States. If use and occupancy began any time before the survey, then the easement can only be granted with the consent of the allottee and according to the applicable Indian right of way laws.

B. July 6, 1979 Request

We know of no principle requiring you to disclose whether or not there is access to advertised parcels; furthermore, otherwise valid section line easements can be used to provide private access, but they are also open to the public. Under some circumstances, however, easements by necessity can be implied across otherwise unencumbered lands to afford private access to landlocked parcels.

C April 4, 1980 Request

Whether the Indian right of way laws apply to a Native allotment depends on whether the allottee commenced use and occupancy before or after a section line right of way was appropriated by survey.

III DISCUSSION

A R.S. 2477

1 History and Purpose of R.S. 2477

U.S. Supreme Court and Ninth Circuit cases have cast some doubt on whether R.S. 2477 applies in Alaska. A narrow reading of the U.S. Supreme Court's opinion in Central Pacific Railway Co. v. Alameda County, 284 U.S. 463 (1932) and the Ninth Circuit's later decision in U.S. v. Dunn, 478 F.2d 433, 445 (9th Cir. 1973) would indicate that R.S. 2477

was only a recognition of pre-existing rights rather than a grant of new rights. Strictly construed, this interpretation could mean that R.S. 2477 was never applicable to Alaska, since it was enacted in 1866, one year prior to the purchase of the Territory.

The Territorial and State cases, on the other hand, consistently characterize R.S. 2477 as "in effect, a standing offer from the federal government" for the grant of a right of way, Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (Alaska 1975). Under this interpretation, the right of way has been held to come into existence upon the "acceptance" of the standing offer. See Berger v. Ohlson, 9 Alaska 389 (D. Alaska 1938); Clark v. Taylor, 9 Alaska 298 (D. Alaska 1938); United States v. Rogge, 10 Alaska 130 (D. Alaska 1941); State v. Fowler, 1 Alas. L.J. 7 (April 1963); Hammerly v. Denton, 359 P.2d 121 (Alas. 1961). Given the weight of authority in this jurisdiction and the historical reliance placed upon R.S. 2477 in Alaska as a source of rights of way across the public domain, we are unwilling to conclude that the statute has no applicability to Alaska. We suspect that if the question were squarely presented to the Ninth Circuit Court of Appeals it would agree.

It has been held that R.S. 2477 first became applicable in Alaska by the Organic Act of May 17, 1884, 23 Stat. 24, whereby Alaska first became an organized territory. Section 9 of that Act, among other things, provided that the laws of the United States be extended to the Territory of Alaska, U.S. v. Rogge, 10 Alaska, supra at 147. As noted previously, R.S. 2477 is construed as a standing offer from the federal government for the creation of a right of way, Girves v. Kenai Peninsula Borough, 536 P.2d, supra at 1226. Under this construction, it has been held that the offer can be accepted (and the right of way created) either (1) by a positive act of the state or territory clearly manifesting an intent to accept the offer, Hammerly v. Denton, 359 P.2d, supra at 123.[2/]

[2/] Accord: Wilderness Society v. Morton, 479 F.2d 842, (D.C. Cir. 1973), cert. den'd. 411 U.S. 917

or (2) by public use of the right of way for such a period of time and under such conditions as to prove that the offer has been accepted, id.

Statutory acceptance of the grant, formal expression on the part of public officials of an intention to construct a highway or actual public construction of a highway may all constitute acceptance of the R.S. 2477 grant by the "positive act" of the appropriate public authorities. Thus, in Girves, supra, the Alaska Supreme Court held that AS 19.10.010 (establishing a highway easement along all section lines in the State) was sufficient to establish a right of way along the boundary of plaintiff's homestead coinciding with a surveyed section line. In Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), it was held that the State's application to the Bureau of Land Management to construct a "public highway" from the Yukon River to Prudhoe Bay, along with enabling State legislation, was sufficient to establish an acceptance of the federal grant. In addition, the actual construction or public maintenance of a highway may constitute acceptance. See Moulton v. Irish, 218 P.2d 1053 (Montana 1923), construction of highways; Streter v. Stalnaker, 85 NW 47 (Nebraska 1901), public maintenance and improvement of highways.

Public use (sometimes called "public user") may also constitute acceptance of the grant in the absence of any positive official act. Whether any claimed use constitutes acceptance of the grant, however, is a question of fact to be decided by the court. It appears that continued and consistent use of a right of way across the public lands by even one person with an interest in the lands to which the road gives access may be sufficient to establish public user, State v. Fowler, 1 Alas. L.J., supra at 8 (April 1963). See also Hamerly v. Denton, supra at 125. However, the Alaska Supreme Court has held that mere desultory or occasional use of a road or trail does not create a public highway, id.[3]

[3] Of course, it is no longer possible to accept the R.S 2477 grant by any of these methods, because R.S. 2477 was repealed by FLPMA, supra, in 1976.

2. Allotments As "Public Lands"

By its terms, R.S. 2477 is only an offer for a right of way across "public lands." In discussing this term in the context of R.S. 2477, the Alaska Supreme Court has noted:

> The term "public lands" means lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler. Hammerly v. Denton, supra at 123.

Beginning with the 1884 Organic Act, previously discussed, Congress has specifically provided for the protection of lands used or occupied by Alaska Natives. Section 8 of the Organic Act provided in part:

> That the Indians or other persons in [Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.[4/]

Federal decisions have long recognized the statutory protection afforded Alaska Native use and occupancy. See, e.g., U.S. v. Berrigan, 2 Alaska 442 (D. Alas. 1904); U.S. v. Cadzow, 5 Alaska 125 (D. Alas. 1914). Departmental regulations and policy reinforce the statutes. See, e.g., 43 CFR §§ 2091.1(e), 2091.2-1, 2091.5, 2091.6-3; see also Government Appropriation of Rights-of-Way in Alaska, Opinion of the Associate Solicitor, Public Lands (M-36595, March 15, 1960, copy attached).

In analogous circumstances, the U.S. Supreme Court has consistently recognized that railroad land grants are not to be construed in derogation of Native use and occupancy

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4/ Similar provisions appear in the following acts: Act of March 3, 1891, c. 561, 26 Stat. 1095, § 14; Homestead Act of May 14, 1898, c. 299, 30 Stat. 412, § 7; Act of June 6, 1900, c. 786, 31 Stat. 330, § 27.

rights. That is particularly true where those rights have been protected by treaty, Leavenworth L & GR Co. v. United States, 92 U.S. 733 (1875), or specific statutory exceptions, Buttz v. Northern Pacific Railway Co., 119 U.S. 55 (1886). See generally, Bardon v. Northern Pacific Railway Co., 145 U.S. 535, 540-543 (1892). Most significantly, the U.S. Supreme Court has specifically protected rights of individual Native occupancy against competing federal grants even in the absence of any statutory or treaty protections where those rights flow "from a settled government policy." Cramer v. United States, 261 U.S. 219, 229 (1923). Whether from the statutory protection afforded in the 1884 Organic Act and the other legislation specifically noted or from the settled government policy of protecting Alaska Native use and occupancy, we think it is clear that lands used and occupied by individual Alaska Natives are not "public lands" within the meaning of R.S. 2477 and that the R.S. 2477 grant cannot attach during any period of such occupancy.

3. Acts Accepting the R.S. 2477 Grant

(A) Section Line Easements. You have noted that AS 19.10.010 establishes rights of way of varying widths along the section lines in the State. As noted earlier, the Alaska Supreme Court has concluded this statute is a positive official act constituting acceptance of the R.S. 2477 grant, Girves, supra. The Territorial statute accepting the grant was originally enacted on April 6, 1923 (19 SLA 1923), but was subsequently repealed (perhaps inadvertently) on January 18, 1949. Op. Ak. Atty. Gen. No. 7 at 3 (December 18, 1969). The statute was subsequently reenacted in substantially its present form by the 1953 Territorial legislature (Act of March 21, 1953, 35 SLA 1953). Id. Thus, whether a section line easement has attached to Native occupied land must be viewed against the backdrop of the dates of Native occupancy and the dates during which Alaska's acceptance of the grant was in effect. The section line easements could only attach to lands not occupied by Natives between the dates of April 6, 1923, and January 18, 1949, and from March 21, 1953, forward.

Additionally, by the terms of the State statute, the acceptance is dependent on the existence of a "section line." In the Opinion previously noted, the State Attorney General also concluded that for the R.S. 2477 grant to attach under the statute, the "public lands must be surveyed and section lines ascertained," id. at 7. We agree with this conclusion; therefore, you must also determine whether

the lands in question were subject to individual Native use and occupancy on the date the section line was actually surveyed.[5]

(B) Other Official Acts of Acceptance. As noted earlier, other official actions (i.e., construction, repair, dedications, etc.) can constitute official acceptance of the R.S. 2477 grant. Whether such official action has created an R.S. 2477 right of way will have to be determined on a case-by-case basis.

(C) Public User. Rights of way claimed to have been created by public use must also be determined on a case-by-case basis. On the one extreme, an obvious public road established prior to Native use and occupancy would certainly be sufficient to constitute acceptance of the R.S. 2477 grant; see State v. Fowler, 1 Alas. L.J. 7, supra. On the other extreme, it is equally clear that desultory or occasional use of a road or trail by individuals having no interest in the land to which they obtain access is not sufficient to create an R.S. 2477 right of way, Hamerly v. Denton, supra. Whether a given use is sufficient to constitute acceptance of the R.S. 2477 grant, may have to be determined judicially in all but the most obvious cases.

4 Widths

By State statute, section line easements on "public lands" are four rods (66 feet) wide with the section line as a center of the dedicated right of way.[6] Other official

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[5] The Attorney General also concluded that the R.S. 2477 grant attaches on the date the "protracted surveys" were published in the Federal Register. We do not agree with this position; as a practical matter, the protraction diagrams are not a reliable means of ascertaining the correct position of the surveyed section line.

[6] A right of way 100 feet wide is granted between sections of land owned by or acquired from the State. Since Native occupied lands could not fall within this category, section line easements on Native allotments will be confined to the 66 foot width.

acts could conceivably establish larger rights of way. Rights of way established by public user appear to be confined to the width actually used, State v. Fowler, supra.

B Other Access Questions

1 Obligations To Provide Access

We do not believe either the allottee or the United States is obligated to provide a warranty of access to the purchaser of an allotment. By statute (AS 34.15.030) Alaska has incorporated the common law covenants for title into any deed which by its terms "conveys and warrants" real property to another. Thus, a deed substantially in the statutory form includes implied warranties that at the time of the conveyance the grantor: (1) is lawfully seized of the estate in fee simple and has the right and power to convey the premises; (2) that the premises are free from encumbrances and (3) that he warrants quiet enjoyment of the premises and to defend the title against all persons claiming the premises.

You have advised that you use a special warranty deed to convey restricted Indian lands. As you know, a special warranty deed limits the grantor's obligation to defend only against claims arising through him. It does not require the grantor to defend against claims arising through other persons, 21 CJS "Covenants" § 49. Except as so limited, we believe the deed form you used includes all of the statutory covenants implied by AS 34.15.030. None of these, however, include a covenant of access to the land granted. See generally, Powell on Real Property, ¶ 904, et seq. (1968 edition). Furthermore, AS 34.15.080 specifically provides: "No covenant is implied in a conveyance of real estate, whether the conveyance contains special covenants or not." We interpret this to mean that unless there is a specific covenant of access, the grantor is not obligated to provide it.

2 Easements By Conveyance Or Covenant

In spite of the protection this doctrine affords both the United States and the allottee, we recommend that as a prudent land manager you advise the allottee to provide whatever access it is within his power to provide incident to the sale of an allotment. That is especially true if, as in one case you described to us, the allottee is selling a

portion of the allotment which would be landlocked by the remaining lands of the allottee or others. In these circumstances, we advise you to insure that appropriate access is guaranteed through the allottee's other lands either by convenant or specific grant of easement. See generally, Powell on Real Property, ¶ 407 and 408. See also, 28 CJS Easements, § 23, et seq. Conversely, if the allottee's other lands will be landlocked by conveyance of a portion of the allotment to a third party, the allottee should insure that he is reserved an easement in the lands granted. See 28 CJS Easements, § 29. Under these circumstances, failure to provide or obtain access at the time of conveyance could result in later litigation to establish an easement by necessity.

3 Easements By Necessity

Easements by necessity are implied easements across otherwise unencumbered tracts where necessary to afford access to an otherwise landlocked parcel. See generally, Powell on Real Property, supra, ¶ 410. This doctrine comes into play only where there is a unity of ownership between the dominant and servient parcels at the time the landlocked (i.e., dominant) parcel was severed from the rest of the estate. The doctrine would apply to both examples discussed above where the grantor conveys a portion of the allotment thereby isolating either the land conveyed or the grantor's retained lands. In these circumstances, the courts have construed the intention of the parties to create an easement of necessity across the servient estate to provide access to the landlocked (i.e., dominant) estate.

As applied in this jurisdiction, the doctrine only requires proof of reasonable (as opposed to absolute) necessity in order to imply an easement. U.S. v. Dunn, 478 F.2d 443, 446 (9th Cir. 1973). Although the easement must be something more than a mere "convenience," it is not necessary to show that it is the only means of access to the property. In any event, the determination of whether the easement is a "reasonable necessity" is a fact question which involves considerations of public policy as well as the intent of the parties and the reasonable utilization to be made of the landlocked parcel. See generally, Powell on Real Property, supra, ¶ 410..

The doctrine has also been applied to Indian lands in this jurisdiction, cf. Superior Oil Co. v. United States, 353 F.2d 34 (9th Cir. 1965). The oil company in this case

sought to obtain an easement to move heavy oil drilling equipment across Indian reservation lands in order to drill on lands owned by a mission society and leased to the oil company. The mission society had previously been granted the land by the United States under a statute permitting such grants to religious organizations engaged in mission or school work on Indian reservations. The court concluded that although the mission society had an easement by necessity for mission purposes, the scope of that easement could not be expanded to accommodate the purposes of the oil company. We know of no principle which would preclude an easement of necessity from attaching to lands merely because they are Indian trust or restricted lands where the easement of necessity doctrine is otherwise applicable. See also, U.S. v. Clarke, 529 F.2d 984 (9th Cir. 1976), aff'd U.S , (No. 78-1693, March 18, 1980).

IV. SUMMARY

This, of necessity, has been a rather wide-ranging opinion dealing with the several general concerns you raised regarding easements across Indian allotments. We will summarize some of our conclusions below for ease of reference

A. R.S. 2477 Easements

R.S. 2477 easements can be created either by the positive acts of authorized authorities or public user of a right of way across the "public lands." Native used and occupied lands, however, are not "public lands." Therefore, a right of way under R.S. 2477 can only be obtained if, at the time the R.S. 2477 grant is accepted, the lands were not subject to the individual use and occupancy rights of an Alaska Native who has applied for an allotment.

B. Section Line Easements

Whether a section line easement supersedes Native use and occupancy depends on whether the Native use and occupancy preceded either the statutory acceptance or actual survey of the section line easement. If Native use and occupancy began prior to April 6, 1923, or between January 18, 1949, and March 21, 1953, then the easement could not be imposed on those lands by subsequent survey of a section line. If unoccupied lands were surveyed either between April 6, 1923,

and January 18, 1949, or after March 21, 1953, then the section line easement supersedes Native occupancy rights

C. Guarantees of Access

Although there is no legal requirement to guarantee access to otherwise landlocked allotments, you would be well advised to counsel the allottees to provide access if it is within their power to do so. It is especially important to provide access where there is an initial unity of title in the allottee. Under these circumstances an easement of necessity can be imposed to benefit a landlocked parcel. Providing access at the time of the grant will avoid later confusion and possible litigation.

D. Public or Private Access

You should also be aware that any R.S. 2477 right of access (whether by section line easement or otherwise) predating Native use and occupancy is a right of public access. While it may also permit private individuals to have access to otherwise landlocked parcels, it also permits the public at large to use the right of way. Of course, that does not permit the public to trespass on the allottee's or anybody else's private property.

David S. Case
Attorney/Advisor

Enclosure

cc: Scott Keep, Div. of Indian Affairs, Washington, D.C.
Area Realty Officer, Bureau of Indian Affairs, Juneau