UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

March 15, 1960

M-36595

Memorandum

To Director, Bureau of Land Management

From Associate Solicitor, Division of Public Lands

Subject: Appropriation of rights-of-way on public lands for government use

Your office's memorandum of July 9, 1958, called to our attention memoranda dated February 14 and 24 from the Field Solicitor to the Area Administrator, both at Anchorage, which discuss the effect of Federal appropriation of rights-of-way on entries and Indian occupancy claims. We have had additional correspondence with the Field Solicitor on this question.

The courts have zealously protected the rights of those who have made valid entries, locations, and selections on public lands. In Hastings R.R. Co. v. Whitney, 132 U.S. 357, 364 (1889), the court found in favor of an allowed homestead entry against a railroad company claiming under a Congressional grant by the act of July 4, 1860 (14 Stat. 87), stating that

> "So long as it remains a subsisting entry of record, whose legality has been passed for by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

See also Cornelius v. Kessel, 128 U.S. 456 (1888); United States v North American Co., 253 U.S. 330 (1920); Payne v. Central Pacific R.R. Co., 255 U.S. 228 (1921).

The Department also has long recognized the vesting of rights by those holding allowed entries, for example, against later Government withdrawals of public lands. Op. Atty. Gen., 1 L.D. 30 (1881); Nathais Ebert, 14 L.D. 589 (1892); Instructions, June 6, 1905 (33 L.D. 607, 608). In the cases of May C. Sands, 34 L.D. 653 (1906) and John L. Maney, 35 L.D. 250 (1906), cited in the Field Solicitor's memorandum, the withdrawal order appears in each case to have preceded allowance of the entry. The former case held that an entry is a contractual right against the Government. We find no clear basis moreover for the suggested distinction between "specific" and "general" reclamation withdrawals. See 43 CFR 230.15; Edward F. Smith, 51 L.D. 454

(1926). Certainly none of the cited decisions hold that the entryman could be deprived of his entry without compensation.

We cannot doubt that an appropriation of lands by a Government agency under the Instructions, January 13, 1916 (44 L.D. 513), would be subject to any valid entry existing at the time of tract appropriation. The Solicitor has said that:

> "In practice the Department has limited its authority to reserve from grants made by patent, road and other rights-of-way constructed with Federal funds to those cases where construction preceded the initiation of the right on which the patent is based. Instructions of August 31, 1915 (44 L.D. 359) and Instructions of January 13, 1916 (44 L.D. 513)."

Opinion of April 23, 1958 (65 I.D. 200, 202).

Surely an allowed entry is such an "initiation of the right" as to protect it from later appropriation by a Government agency without compensation. See Solicitor's Opinion of September 30, 1921 (48 L.D. 459, 462). We find no evidence that the entries involved in either the 1915 or 1916 Instructions preceded the Government appropriation.

The Department's disinclination in the instructions to accept "a mere survey" as "an appropriation of the land to the public use", and urging "staking the area", can hardly be explained except as provision for giving notice to later entrymen that they could only enter the lands subject to the Government's appropriated rights. To be fully consistent with these instructions and the regulations (43 CFR 205.13), we should not encourage Federal agencies to rely on mere filing of a map, without staking the area on the ground sufficiently to evidence an actual appropriation of the land.

The courts have held that a mere settler, who has no allowed entry, has no rights against the Government. Yosemite Valley case, 82 U.S. 77, 87 (1872). Like allowed entries, however, we believe continued Indian occupancy in good faith would receive protection against later appropriations. See A.S. Wadleigh, 13 L.D. 120 (1891). The Congress may of course extinguish the occupancy rights of any Indians. See United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941); Tee Hit Ton Indians v. United States, 348 U.S. 272 (1955). Indian occupancy rights are otherwise protected against later adverse claims or Government withdrawals. Cramer v. United States, 261 U.S. 219 (1923); Schumacher, 33 L.D. 454 (1905); Departmental Opinion, 56 I.D. 395 (1939).

In the Tee Hit Ton case supra, the Supreme Court held that Congress could by statute refuse to recognize Indian tribal rights of occupancy and disqualify Indians from compensation for the taking of timber under a specific statute providing for such timber cutting. The case did not hold that a Federal agency could ignore actual occupancy by an Indian, or group of Indians, without specific provision

therefor by Congress. Whether or not the Indian interest is by law compensable, the Department's position, protecting lawful Indian occupancy, is clear. Solicitor's Opinion, 53 I.D. 481, 489 (1931) Associate Solicitor's Opinion, M-36539, November 19, 1958.

We recognize the additional acuteness of the problem in Alaska since the repeal of the act of July 24, 1947 (48 U.S.C., sec. 321d) by Section 21(d)(7) of the Alaska Omnibus Act of June 25, 1959 (73 Stat. 146). See Associate Solicitor Memorandum, December 23, 1959, to Regional Solicitor at Juneau. However, the needs of Government agencies should not override the necessity for giving entrymen and Indian occupants every protection afforded them by previous judicial and administrative rulings in the absence of contrary legislation. The Field Solicitor's memoranda of February 14 and February 24, 1958, to the extent that they are inconsistent with this opinion, should not be followed.

(Sgd) C. R. Bradshaw

C. R. Bradshaw
Associate Solicitor
Division of Public Lands

Interior--Duplicating Section, Washington, D. C

TED

of ALASKA

MEMORANDUM

TO: John D. Horn
Manager
Highway & Airport M & O
DOT/PF

DATE: May 9, 1979

FILE NO:

TELEPHONE NO:

SUBJECT: Access to Section Line Easement

FROM: Hal P. Gazaway
Assistant Attorney General

You have asked:

1. Who has jurisdiction over the section line easements.

2. Since Lore Road east of Lake Otis is State-maintained, will a developer have to obtain a permit to extend Lore Road along the section line highway right-of-way easement.

Without addressing the question of whether the property in question might not be subject to a section line easement and operating under the assumption that it is the answer to your questions are as follows:

1. The Department of Transportation and Public Facilities has the authority to regulate the use of section line right-of-way easements. I understand the policy of DOT/PF has not been to exercise that authority in the absence of a substantial public interest. In keeping with that policy, the department has ceased the practice of issuing letters of non-objection.

2. The developer does not have to obtain a permit from the Department of Transportation to extend Lore Road along the section line. The developer does have to obtain a driveway permit to connect to the State-maintained road.

HPG/sls

From:
State of Alaska
Department of Natural Resources
Division of Land and Water Management
Southcentral District
3327 Fairbanks Street
Anchorage, Alaska 99503

Attn. Jim Sandberg

RECEIVED
MAY 30 1979
D.O.T. & P.F.
RIGHT OF WAY
ANCHORAGE

ANS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: MAY 30 1979
	W	RICHARDS, TED	
		SCRATTON, DAN	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
		ENGR/PLANS	
		RELOCATION	
		PREAUDIT	
		RECORDS: "Hwys"	
		RECORDS: "Aviation"	
		OTHER:	

Remarks:

STATE
of ALASKA

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FOREST, LAND AND WATER MANAGEMENT

MEMORANDUM

ROUTING

To:	Action	Initial
Dist. Mgr.	☐	
Admin.	☐	
(2) Information	☐	
Forestry	☐	
(1) Lands	☐	
Planning	☐	
(4) Water	☐	
(5) Special Proj.	☐	
Appraisal	☐	
(3) Survey	☐	
	☐	
	☐	

TO: See Distribution List

DATE

FILE NO

TELEPHONE NO

FROM: Bruce Wolfarth B.W.
Land Management Officer

SUBJECT: Section-line right-of-ways across Native Lands

This memo concerns the Alaska Division of Lands, position on section-line right-of-ways across Native lands. In the years 1923 and 1953 the Territory of Alaska accepted a federal offer to dedicate unreserved public lands for construction of highways. If the lands granted belonged to the United States at the time of the grant in 1866, or upon subsequent acquisition of lands by the United States, the 1866 Highway Act, whtich made the above offer, was made to apply to those lands. When Alaska accepted this offer in 1923 and again in 1953, as long as the land remained unreserved public lands at the date of acceptance, this acceptance related back to the date of the grant, i.e. 1866.

Once these highway rights became vested in the territory of Alaska subsequent conveyances of that land carried an encumbrance across every section-line of a highway right-of-way, unless the right-of-way had been vacated by the proper authority. The states' acceptance of the Highway Act was repealed in 1949 by Alaska and reaccepted in 1953. The effect of this repeal was not to divest right-of-ways as such, but only the states acceptance of the act. Again once this right-of-way has vested, it can only be vacated by the proper authority. The width of the highway will vary according to the above dates of states acceptance of the 1866 Highway Act and the manner in which the initial Act was accepted. It could be accepted by use of the right of-way as well as by territorial or state law. Therefore, the Alaska Division of Lands has adopted the policy that section-line right-of-ways exist upon all section-lines unless they were either properly vacated or never came under the 1866 Highway Act. If a Native allotment was granted prior to any acceptance of the Act, then the land was reserved land at the time the territory or state accepted it and therefore would not be subject to a section-line right-of-way upon it. However, if the allotment or reservation was granted subsequent to the acceptance, then the land is burdened by the right-of-way across it, unless the right-of-way has been vacated

During the upcoming 1979 open-to-entry and homesite disposals, the Alaska Division of Forest, Land and Water Management will grant access to its disposal lands along section-line right-of-ways, unless it can be shown that they do not exist.

The Bureau of Land Management takes the position, that section-line right-of-ways must be surveyed and platted before it will recognize their existence. The Alaska Division of Lands is not going to allow the private sector to open these section line right-of-ways up, without restrictions. They will be required to obtain a permit from ADL before thy can build a road upon the section-line. If any questions should arise concerning the substance of this memorandum, please feel free to contact our District office at 279-7691.

Distribution:
Theodore G. Smith, Director
George, Hollett, Deputy Director
Al Carson, Deputy Commissioner
Richard A. LeFebvre, Chief, Land Mgmt. Sect.
Steve Reeve, Chief, Planning & Classification
Brent Petrie, Chief, Water Mgmt. Section
Claud Hoffman, Engineeri
Bill Copeland, Mgr, NCDO
Larry Dutton, MGR, SCDO
Henry Hall, MGR, SEDO
Jim Wicks, Chief, Planni & Research
Dean Nation, Project Off

The BLM has requested that this meeting be held to discuss the fact that the ANCSA conveyance to the Hooper Bay Native Corporation does not diminish the States interest for the road serving the Hooper Bay airport by the fact that a 17(b) easement has been placed over the road and the R.S. 2477 has not been addressed as a specific valid existing right within the conveyance.

In the DIC to the corporation BLM placed a 60 foot easement on the existing road which has been accepted by the State as a 100 foot right of way pursuant to RS 2477, the land interest accepted by FAA for the federal aid projects. These projects are:

ADAP 8-02-0126-01, grant agreement of 6-01-72 for funding in the amount of $605,117.

ADAP 6-02-0126-2, grant agreement of 9-17-76 for funding in the amount of $215, 625.

The state appealed the DIC in an effort to have the RS 2477 recognized and the corporation's IC to be granted subject to the road specifically as RS 2477.

Based on the statements presented in the appeal ANCAB ruled that the native corporation IC should be granted subject to the RS 2477.

BLM has met with the state to show how the ANCAB order presents proceedural problems to them and to have ANCAB reconsider its order to relieve BLM of the problem they feel is created.

The state's purpose in appealing the DIC is to have the RS 2477 properly recognized and to protect its committment to retain the 100 foot ROW under its contractual funding agreement with FAA for the Hooper Bay Airport.

Since the provisions within 17 b easements seem to provide that the BLM can issue rights of way pursuant to FLPMA in order for the State to obtain an actual document, the state disucssed possibilities of obtaining such documents where 17 b easements had been placed. The Lands and Minerals section

of BLM indicate they are not issuing any such right of ways due to internal conflict of interpretation between ANCSA and LMD.

ANCSA is saying that BLM acted improperly in reserving easements for roads, etc. in the corporations

They interpret the easement to mean that since the road was reserved to the US it is to be developed by the US ONLY and therefore it cannot issue permits over the 17 b easement to another agency or entity. This alone causes a problem in that BLM has not resolved its own position of jurisdiction and therefore any conjecture that the 17 b easements protects the states right for the road, is uncertain.

The regulations by which 17 b easements were established allows them to be extinguished by BLM by several determinations. Another reason to make the easement an insecure interest for the state.

The IC wherein the 17 b easement is reserved stipulates that it is to conform at a later date in accordance with the terms and conditions of the agreement between the Secretary and the corporation. Those terms and conditions could cause the state problems at such time as they are implemented

If the state allows no recognition of RS 2477 then it diminishes its interest to the point that future protection of the road could deprive public access to the airport, a public facility, both of which were constructed with public funds.

Where the BLM is still unsure of its own action in placing 17 b easements in the IC it is not in the best interest of the public for the state to accept any consilitory action with regard to the ANCAB order.

Therefore we have brought the problem to FAA to take under advisement since they have accepted the RS 2477 as the state's interest in the Hooper Bay Airport road and the state feels they should be aware of the possible detraction of the states title interest if the RS 2477 is not recognized.

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UNITED STATES DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS APPEAL BOARD
P.O. Box 2433
Anchorage, Alaska 99510

ANCAB VLS 80-51) MOTION FOR RECONSIDERATION

The Bureau of Land Management (BLM), by and through its undersigned counsel, hereby moves the Board to reconsider that portion of the decision of June 26, 1981, which holds that BLM is required to specifically identify, in ANCSA decisions and conveyance documents, rights-of-way which are claimed under R.S. 2477. The question of listing such interests was not adequately briefed by the parties and the Board should therefore reconsider its holding and vacate that portion of its decision for the reasons set forth herein

I. The November 20, 1979, amendment to S.O. 3029 was intended to preclude identification of claimed R.S. 2477 rights-of-way.

On November 20, 1979, the Secretary concurred in and adopted a memorandum by the Solicitor as a clarification of and amendment to Secretarial Order 3029. In discussing rights-of-way granted pursuant to R.S 2477, the Solicitor stated:

> R.S. 2477, enacted in 1866, provided: "The right-of-way for the construction of highways over public lands, not reserved for public use, is hereby granted." 19 Stat. 253, 43 U.S.C. § 932. It was repealed in 1976, 90 Stat. 2793. BLM did not issue grants of rights-of-way under this statute. The courts have generally considered the issue of whether a right-of-way has been established under this statute to be a question of State law not requiring any federal approval or acknowledgment. See, e.g., Hamerly v. Denton, 35 P.2d 1. (Alaska 1961) Accordingly, the Deparment has refrained from adjudicating possible RS 2477 interests. See Herb Penrose, A-29507 (July 26, 1963) and Alfred E. Koenig, A-30139 (November 25, 1964)

The Board has construed the Solicitor's memorandum to preclude "adjudication" but not the "identification" of these rights-of-way. The BLM disagrees with that interpretation

It is clear that the Solicitor was relying on the cited Departmental precedent in reaching his conclusion that S.O. 3029 should be amended. A careful reading of these decisions indicates that the Department has

consistently refused to identify or list such claimed rights-of-way in its decisions and conveyance documents. It is unreasonable to conclude that the Solicitor's memorandum was intended to permit a result directly contrary to that required by the cases he cited.

The primary issue in Herb Penrose, A-29507 (July 26, 1963), was whether a claimed R.S. 2477 right-of-way should be referenced in a proposed conveyance document. The decision held:

> It has long been the position of this Department that any grant of public lands upon which there is a public highway as provided for by Revised Statutes sec. 2477 is subject to the easement of the highway regardless of the absence of any provision concerning the right-of-way in the patent. Therefore, it has been considered unnecessary to include any reservation or exception for the right-of-way in a patent as the public's rights are protected without such a provision in the patent. See The Pasadena and Mt. Wilson Toll Road Co. v Schneider, 31 L.D. 405 (1902); Charles A. Crane, 47 L.D. 181 (1919). (Emphasis supplied.)

In Alfred E. Koening, A-30139 (November 25, 1964), the sole issue on appeal was whether proposed patents should include reservations for a right-of-way claimed under R.S. 2477. The decision held that no reservation or exception should be included in the patent because the grant of lands would be subject to the easement despite the absence of such a provision in the patent

Both of the cases cited in the Solicitor's memorandum addressed the issue of identification of claimed R.S. 2477 rights-of-way and held that such identification was not necessary. The Solicitor's memorandum, adopted by the Secretary, should therefore be construed to preclude identification of such interests in ANCSA conveyances in a manner consistent with the cited Departmental precedent

II. The BLM is, for the most part, unable to comply with the Board's holding.

The BLM understands the Board's holding in this case to require that all claimed R.S. 2477 rights-of-way be identified in all future ANCSA decisions and conveyance documents. The BLM is unable to accomplish this. Most types of rights-of-way are identifiable from an examination of Federal or State public land records. This is not true of all rights-

of-way claimed under R.S. Because of the manner in which these interests can be created, it is impossible for the BLM to ascertain the existence of all claimed R.S. 2477 rights-of-way.

R.S. 2477 has been/was 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 1221, 1226 (Alaska, 1975). 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 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. Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961).

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 7, 8 (April 1963). See also Hamerly v. Denton, supra at 125.

Because of the informal manner in which these interests ~~are~~ can be created, the BLM does not have the means to identify all possible rights

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claimed by the State and the public under R.S 2477. Under the various court decisions discussed above, it is possible that virtually every road, trail, and ~~every~~ section line in the State could be a "claimed" R.S. 2477 ~~2477~~ right-of-way interest. An attempt to list all such claims in BLM decisions and conveyance documents would be burdensome and futile.

III. Identification of claimed R.S. 2477 interests is not in the best interests of the Native corporations or the State.

An analysis of the impact the Board's holding will have on the Native corporations and the State indicates that both parties stand to lose more than they will gain from the listing of claimed R.S. 2477 interests in conveyance documents. In addition, the Board's holding imposes a significant administrative burden on the BLM since it has not previously listed such claimed interests in its conveyance documents

By holding that the BLM should identify all claimed R.S 2477 interests in ANCSA decisions and conveyance documents, the Board is treating ANCSA corporations differently from all other grantees of Federal lands. Native corporation patents will list a type of interest (unadjudicated) which does not appear in patents issued under any other Federal law This difference in treatment is not mandated by statute or regulation and does not appear to be justified by any compensating benefit to the Natives, the State or anyone else.

The State and other potential claimants of R.S. 2477 rights-of-way will not be harmed if such interests are not listed in ANCSA conveyance documents It is clear that all ANCSA conveyances are subject to valid existing rights. §14(g) of ANCSA. S.O. 3029, October 24, 1978, also makes it clear that listing or failing to list an interest as a valid existing right in the conveyance document does not create or extinguish the right. The purpose of listing interests which are "of record" is to serve notice on all grantees, their assignees and the public at large of possible third party interests. R.S. 2477 rights-of-way, however, are not necessarily "of record" and have traditionally not been listed in conveyance documents. The guidelines that have been established as to what types of interests must be listed in the BLM decisions and conveyance documents are not mandated by statute or regulation but have developed as Departmental policy designed to make conveyances as free from confusion as possible. ~~The guidelines that have been established as to what types of interests must be listed in the BLM~~

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~~decisions and conveyance documents are not mandated by statute or regulation, but have developed as Departmental policy designed to make conveyances as free from confusion as possible.~~ The interests BLM does list have been adjudicated by the BLM, another Federal agency, or the State and appear on the adjudicating agency's records.

A listing of claimed R.S. 2477 rights-of-way in ANCSA conveyances will generate confusion and, perhaps, lessen the value of the conveyance documents to the Native corporations. It is uncertain how title companies will react to a listing of such claimed interests some of which are not otherwise of record. Many of the proposed §17(b) easements which were not reserved are likely to be claimed by members of the public under R.S 2477. If BLM is required to institute a procedure to identify such claims, the public is likely to be confused about their rights.

If an administrative procedure to identify such claims is required, the State will have to compile an exhaustive list ~~of~~ all its claims in order to adequately protect its interests. Since the BLM has never required the State to notify it officially of such claims, this will mean that both the BLM and the State must institute new record-keeping systems. If the State can protect its interest in a less burdensome fashion, it seems sensible to do so.

The BLM and the State have discussed this matter extensively both before and after the Board's decision. The State's appeal on the Hooper Bay Airport Road was brought because the State feared that the BLM decision would diminish its interest and would interfere with certain funding it receives from the FAA. The Board's decision makes it clear that whatever interest the State has is not and cannot be diminished by the ANCSA conveyance. The BLM is meeting with the State and the FAA to discuss the fact that the ANCSA conveyance does not diminish the State's interest. It appears that the State's concerns about funding can be resolved through this process. There are only a few roads claimed under R.S 2477 in the State where Federal funding may be affected by ANCSA conveyances. If the funding for these roads can be assured by other means, the State has no interest in having ANCSA patents, unlike all other patents, include a lengthy list of interests claimed under R.S.

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FOREST, LAND AND WATER MANAGEMENT

DATE: July 21, 1978

RICHARD A. LeFEBVRE
Chief, Land Management Section

FILE NO:

TELEPHONE NO:

DEAN T. NATION
Land Management Officer

SUBJECT: Use/Control of dedicated sectionline right(s)-of-way

The attached letter from the Dept. of Law would imply that a user, a member of the public, may, where a dedicated sectionline exists, enter and use dedicated rights-of-way to construct a road or use it as a road as long as not blocked from public use and further, that the user bears full responsibility for title search, determination of location and preservation of survey monuments.

The requirement for a permit by ADL regulations being prepared would appear to be rendered moot and without force or effect. However, a question is raised as to whether the State may require certain construction standards. I would presume that standards would be dictated as set forth by local government (borough-city) regulation for road construction and in absence of any the user could proceed in his own fashion.

It is requested that a Attorney Generals Office review be made of this matter before we proceed further as a guide in preparation of any regulations.

cc w/enclosures: Ted Richards
William Copeland
Larry Dutton
Henry Hall
Gary Johnson

RECEIVED
JUL 24 1978
RIGHT OF WAY SECTION
ANCHORAGE DISTRICT

INS	COPY	Central Region RIGHT OF WAY "Hwys"-"Aviation"	DATE RCVD: JUL 24 1978
		WILD, PAUL	
		RICHARDS, TED	
		SCRATTON, DAN	
		DAVIS, SHIRL	
		APPRAISALS	
		NEGOTIATIONS	
		ENGR/PLANS	
		RELOCATION	
		PREAUDIT	
		RECORDS: "Hwys"	
		RECORDS: "Aviation"	
		OTHER: Ross Kopperud, ms	

Remarks:

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
JAY S. HAMMOND, GOVERNOR
P.O. BOX 1309 — FAIRBANKS 99701

June 14, 1978

Richard C. Borsetti
Green Rage Farmstead
Box 118
Delta Junction, AK 99737

Dear Mr. Borsetti:

As you describe the affected section lines, and the entry dates for the land across which they run, it would appear that they were dedicated by the legislature to the public for use as public highways, Ch. 35, SLA 1953.

When a member of the public decides to construct a road along a section line, or use it as a road, the public retains the ultimate right to use the section lines as a public road. No private citizen can obtain private rights to those lands, however, and interference with the rights of the public may subject one to court action. AS 28.35.140 states, "No person may purposely obstruct or block traffic on any roadway by any means."

The user bears the complete responsibility for determination of the true location of the section line, and for preservation of existing section corners or quarter corners. The issuance of this letter is without warranty that a section line easement does in fact exist.

Sincerely,

STATE OF ALASKA

AVRUM M. GROSS
ATTORNEY GENERAL

Gary W. Vancil
Assistant Attorney General

GWV/ps

MEMORANDUM State of Alaska

DEPARTMENT OF NATURAL RESOURCES - DIVISION OF LAND AND WATER MANAGEM
NORTHCENTRAL DISTRICT

TO: Richard A. LeFebvre, Chief
Lands and Water

DATE: June 22, 1978

FILE NO:

THRU: William H. Copeland
District Manager

TELEPHONE NO:

FROM: John A. Dunker
Land Management Officer

SUBJECT: Rights-of-way on Section Lines, Tanana Loop Area

Last fall, during the initial Tanana Loop Sale layout stage, we decided to reserve ADL easements on section lines where we felt their use would be compatible with the layout, but not where it wouldn't. The idea was that people could then proceed to develop and use those section lines with additionally reserved easements, without seeking our further approval in a permit or R/W. On other section lines, they would have to request a permit or R/W, giving us the chance to steer the applicant toward more efficient alternatives, if possible.

Have we ever determined a final policy on how this is to work, and a procedure? Needless to say, the first inquiry has been received here, and there will doubtless be others.

Incidentally, the attached is the first result I've seen of DOT&PF's new policy of forwarding requests for use of section line rights-of-way to the Attorney General.

WHC/jad/ld

c: Gary Johnson

Matanuska-Susitna Borough, Inc.
BOX B, PALMER, ALASKA 99645 • PHONE 745-3246
PLANNING DEPARTMENT

MATANUSKA-SUSITNA BOROUGH
PLANNING COMMISSION

POLICY MEMORANDUM NO. 18

PROOF OF SECTION LINE EASEMENT

The purpose of this Policy Memorandum is to clarify MSB 16.32.030 B-2 and Policy Memorandum #16, as it pertains to legal access along a section line and to further clarify the steps necessary in documenting "proof" of the existence of the section line easement.

PROOF:

MSB 16.32.030 B-2 and Policy Memorandum #16 requires the following:

1. Research for reservations on the land, ie. Executive Orders, Public Land Orders, Secretary Orders, or other orders which may be in existence in the records of the Bureau of Land Management Office to determine whether it was unreserved public land.

2. Copy of the Government Survey Plat showing the approved date of the plat.

3. Copy of the dates of entry.

4. Copy of the patent (s).

5. Written summary including the following:

   a. Statement that all appropriate land records have been researched and none have been found to contain information or data contrary to the applicant's claim for a section line easement.

   b. Statement based on performed research and attached documents that a section line easement does exist along _____ section line in accordance with MSB 16.32.030 B-2 and Policy Memorandum #16, and that the width of said section line easement is _____ feet.

c. Affidavit by one of the following that the summary is complete and correct:

1 Attorney admitted to practice in the State of Alaska;

2. Representative of the Department of Highways;

3. Land Surveyor registered in the State of Alaska and sealed by him;

4. Representative of the Alaska Division of Lands or the Bureau of Land Management.

ADOPTED:

May 9, 1977

David B. Simpson, Planning Director
Matanuska-Susitna Borough
Planning Commission

MATANUSKA-SUSITNA BOROUGH

ORDINANCE SERIAL NO. 76-51

AN ORDINANCE AMENDING MSB 16.32.030 TO PROVIDE ADDITIONAL STANDARDS CONCERNING SECTION LINE EASEMENTS.

WHEREAS, the Borough Assembly has determined that there is considerable public interest in the use of easements along section lines within the Matanuska-Susitna Borough to provide access for subdivisions as required by MSB 16.32.030; and

WHEREAS, the Borough Assembly has found that it is desirable to include a more elaborate statement of the conditions under which the section line easement will satisfy the requirement of legal access established by that section;

NOW THEREFORE, BE IT ORDAINED:

Section 1. Classification. This ordinance is of a general and permanent nature and shall become a part of the Borough Code.

Section 2. Severability. If any provision of this ordinance or any application thereof to any person or circumstance is held invalid, the remainder of this ordinance and the application to other persons or circumstances shall not be affected thereby.

Section 3. Effective Date. This ordinance shall become effective upon its adoption by the Borough Assembly and signature of the Borough Mayor

Introduction: September 21, 1976

First Reading: September 21, 1976

Public Hearing: October 5, 1976

ADOPTED by the Assembly of the Matanuska-Susitna Borough, Alaska, this 16th day of November, 1976.

Ronald L. Larson
Borough Mayor

ATTEST:

Evelyn Thompson
Borough Clerk

(SEAL)

Section 4. Sections Amended. MSB 16.32.030 is hereby amended to read as follows: 16.32.030 Access. There shall be legal and physical access:

(A) By road to all subdivisions, from the public highway system, except where there is no anticipated or feasible method of providing access other than by water or air. All lots within road-served subdivisions shall have road access.

(B) For purposes of this section, legal access which lies in whole or in part along a section line does not exist until the following conditions are met:

1. The applicant for approval of the subdivision provides certified copies of recorded conveyances creating the easement or right-of-way where the access road is located which were executed by the owner of record of the tract or tracts traversed by the access road or by a court of competent jurisdiction, or

2. The applicant proves that a section line right-of-way is located in a surveyed section and

(a) It was owned by or acquired from the Territory (or State) of Alaska at any time between April 6, 1923, and January 18, 1949, or at any time after March 26, 1951; or

(b) It was unreserved public land at any time between April 6, 1923, and January 18, 1949, or at any time after March 21, 1953, excepting lands described under U. S. land patent No. 1120981 dated May 27, 1946 under Anchorage Serial No. 010338.

3. The applicant for approval of the subdivision proves to the reasonable satisfaction of the Borough Engineer that the access road meets the following minimum requirements:

(a) Road width shall be a minimum of 10 ft. which can be traversed in a standard passenger car useable between May 15 and September 15; and

(b) Road width shall be a minimum of 18 ft. which can be traversed by an ordinary 4-wheel drive vehicle useable between September 15 and May 15; and

(c) The roadway actually used for access is located entirely within the easement or right-of-way described in the documents provided pursuant to (b) above.

ALASKA
LAND DEVELOPMENT SERVICES, INC.
4546 Business Park Blvd.
ANCHORAGE, ALASKA 99503
274-6191
(907) ~~274-2389~~X

LETTER OF TRANSMITTAL

DATE 6/29/77 | JOB NO.

ATTENTION Ted Richards Right of Way Agent

Matanuska Susitna Borough
Policy Memorandum #18

TO Dept. of Highways
Pouch 6900
Anchorage, AK 99502

GENTLEMEN:

WE ARE SENDING YOU ☒ Attached ☐ Under separate cover via _____ the following items:

☐ Shop drawings ☐ Prints ☐ Plans ☐ Samples ☐ Specifications
☐ Copy of letter ☐ Change order ☐ _____

COPIES	DATE	NO.	DESCRIPTION

THESE ARE TRANSMITTED as checked below:

☐ For approval ☐ Approved as submitted ☐ Resubmit _____ copies for approval
☒ For your use ☐ Approved as noted ☐ Submit _____ copies for distribution
☐ As requested ☐ Returned for corrections ☐ Return _____ corrected prints
☐ For review and comment ☐ _____
☐ FOR BIDS DUE _____ 19 ☐ PRINTS RETURNED AFTER LOAN TO US

REMARKS Ted: Thanks for taking the time to talk to me about section line easements. The copy of memo #18 is for your information, you may be interested.

COPY TO _____

SIGNED: Ron Mitchell

If enclosures are not as noted, kindly notify us at once.

Bill Luria
Principal Planner
Division of Policy Development & Planning
Department of Transportation

July 20, 1977

Richard Svobodny
Assistant Attorney General
Department of Law
Transportation Section

Section Line Rights-of-Way Across D-2 Lands for Transportation Corridors

In response to your request for a memorandum explaining what section line rights-of-way are, and how they may affect transportation corridors across d-2 lands, I am transmitting with this memorandum a memorandum dated September 2, 1976, from me to Assistant Attorney General Richard P. Kerns. Please take note that for policy reasons, my memorandum of September 2, 1976, was not a formal Attorney General's opinion, and should not be circulated as such.

Section line rights-of-way are easements, either 66 feet or 100 feet wide, with their center being the section lines which are the result of the township method of surveying. A township, according to Black's Law Dictionary Fourth Edition, is "in surveys of public land of the United States a 'township' is a division of territory 6 miles square, containing 36 sections." Hence, a section line exists every 1 mile in a north south direction, and every 1 mile in a east west direction.

Section line rights-of-way are created by the interaction of two statutes: one state, and one federal. 43 U.S.C.A. 932, until its repeal in 1976, read as follows:

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

Courts, including the Alaska Supreme Court, have agreed that for there to be a gratuitous grant of a right-of-way under the provisions of 43 U.S.C.A. 932, there must be an appropriate acceptance of the grant. Acceptance can be in either of two forms: (1) a positive act indicating acceptance by an authorized public agency, or (2) by public use.

In 1923, the Territorial Legislature, by enacting Chapter 19 SLA 1923, accepted by positive act indicating acceptance, the federal offer of rights-of-way across public lands. This statute was subsequently repealed on January 18, 1949, and renacted in a form, which once again accepted the federal grants of right-of-way by 35 SLA 1953. There are differing opinions as to the status of section line rights-of-way during the period from 1949 to 1953, and in reviewing my own memorandum, I believe that more research should be done to determine whether section line rights-of-way were extinguished by the repeal of 19 SLA 1923 in 1949.

I am not aware of the amount of the land within the State of Alaska which has been surveyed. There is a dispute as to whether the section line right-of-way can exist without an actual survey being conducted on the land to pinpoint the location of a section line. Basically, the

argument is that if there has not been a survey, you cannot describe with specificity the section line right-of-way, and therefore, that section line right-of-way does not exist. This argument can be carried one step further to indicate that since 23 U.S.C.A. 932 was repealed in 1976, no section line right-of-way would exist unless the survey had been conducted prior to 1976. On the other hand, an equally good argument can be made that since section lines will fall across the land in conformity to the township system of classifying lands, once you know the reference point in the State for defining townsites, you can plot section lines across the State of Alaska without ever having entered upon the land.

The memorandum which I am attaching does not deal with all the questions raised by applying section line rights-of-way to d-2 lands. In addition, I am not satisfied with the work done regarding the character of section line rights-of-way during the period of 1949 to 1953. More work needs to be done on the question of whether section line rights-of-way exist if land has not yet been surveyed. Basically, this memorandum is to give you an idea of what section line rights-of-way are, and should not be construed as a definitive statement on the entire question of section line rights-of-way.

RS:lm

STATE
of ALASKA

MEMORANDUM

TO: Ted Smith
Department of Natural Resources
Division of Lands
Anchorage

DATE: August 1, 1977

FILE NO:

TELEPHONE NO:

FROM: Richard Svobodny
Assistant Attorney General
Department of Law
Transportation Section

SUBJECT: Section Line Rights-of-Way

I have been informed by Frank Baxter that you are presently drafting regulations regarding the utilization of section line rights-of-way. I have done some research in this area for the Department of Transportation, and for the Governor's Division of Policy and Developmental Planning.

Section line rightsof-way have the potential for being very important to the State's D-2 policy. Therefore, would you please forward to me all policy memorandum which you have developed, and a copy of your proposed regulations.

RS:lm

I also discussing on Aug 9 1977 and Ted was we were not writing and writing at this time. The reading was a policy statement and not regulation & requested that we write. Ted Smith requests for a policy statement on that it would be helpful to assist him in any way.

R V Kesling

02-0015 (Rev 10/76)

STATE of ALASKA

MEMORANDUM

Ted Smith
Department of Natural Resources
Division of Lands & Water
Anchorage

DATE: August 16, 1977

FILE NO:

TELEPHONE NO.:

FROM: Richard Svobodny
Assistant Attorney General
Department of Law
Transportation Section

SUBJECT: Section Line Rights-of-Way

As a result of my memorandum to you of August 1, 1977, I was contacted by Bob Kesling, who indicated to me that I had received inaccurate information regarding your division's drafting of regulations concerning section line rights-of-way. We both agreed that there were several important questions which have not been answered regarding section line rights-of-way. Mr. Kesling suggested that a memorandum from me requesting a policy statement from your division would be appropriate. I discussed the merits of Mr. Kesling's suggestion with Bill Luria from the Governor's Office. As a result of this conversation, I would at this time request that your division prepare an analysis of the problems and proposed policy that the State should develop regarding section line rights-of-way. At the present time, I am not requesting a policy position from your division, but merely a memorandum stating what problems you foresee with section line rights-of-way, the policy which the State of Alaska should formulate, and any solutions to problems regarding section line rights-of-way. For your information, I am attaching a memorandum from myself to Bill Luria briefly explaining section line rights-of-way and outlining a few potential problems. The memorandum to Mr. Luria was not meant as a definitive analysis of section line rights-of-way, nor was it in the form of an Attorney General's Opinion, but was merely a response to a request from Mr. Luria for information regarding section line rights-of-way as they potentially could relate to D-2 lands.

RS:lm

STATE
of ALASKA

MEMORANDUM

TO: Michael C. T. Smith
Assistant Commissioner
Division of Lands
Anchorage, Alaska

DATE: May 4, 1977

Attn: Theodore G. Smith, Director
Division of Land & Water Mngt.

FILE NO:

TELEPHONE NO: 364-2121, Ext. 111

FROM: Dick Chitty
Deputy Commissioner
Department of Highways
Juneau, Alaska

SUBJECT: Cooperative Agreement on Section Line Easement Policy

We have reviewed the proposal for a cooperative agreement on administration of section line easements, outlined in your letter of April 28, 1977, to Commissioner Harris.

We have no objection to the proposal as outlined and would appreciate the opportunity to provide input as the regulations are drafted. A.A.C. Title 17, Chapter 15 is presently being revised and may have some effect on the proposed regulations.

02-C)18

STATE
of ALASKA

MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LAND & WATER MANAGEMENT

TO: DON HARRIS, Commissioner
Department of Transportation
and Public Facilities

DATE: April 28, 1977

FROM: THEODORE G. SMITH
Director

SUBJECT: Cooperative Agreement on
Section Line Easement Policy

I am writing in regard to resolving problems of administering section line easements involving the Department of Highways and the Division of Lands.

In 1974 a policy for the vacation of section line easements was established between the Department of Highways and the Division of Lands, Department of Natural Resources and with the organized boroughs. The policy is to vacate section lines only when ingress and egress to state land have not been curtailed.

The use of section line rights-of-way has recently arisen during the discussion of the Cook Inlet Land Exchange with Don Beitinger, Right-of-Way agent for the Central Division of the Department of Highways. At this meeting a question arose: Are the interests of both Departments protected when actual use of section line easements for privately financed road construction occurs? Since the main authority over comprehensive land-use planning on state lands involves the Division of Lands and the land records which it maintains, it was agreed that the Division of Lands should undertake the responsibility of recommending legislation or regulations, with review by the Department of Highways, to manage section line right-of-way use by private applicants.

At the April 20, 1977, committee meeting among ADL personnel, the question of coordinating the private use of section line easements was proposed to be the responsibility of the Division of Lands, Department of Natural Resources. This administration and control of use could be promulgated under concurrent Highways and Division of Lands regulations. The final decision for the private use of a section line easement should require the concurrence of the Department of Transportation and the Division of Lands. It was felt that since the Division administers land disposals, leases, classifications, and planning on a statewide basis, more comprehensive input and analysis may be available at our offices. Our public records system of applications, plats, and state land records would be readily available for initial actions, recording of final status, and use by the public.

It is not contemplated that this arrangement, or the regulations adopted, which would implement this plan, would have any effect on the existing

authority of the Department of Highways to use section-line easements for public roads and highways.

If you feel this approach is desirable, we will continue by drafting proposed regulations, policy, and a working flow chart. We believe implementation of such processes could aleviate future problems arising in the organized boroughs, and also protect state interests on state lands outside the boroughs.