DH-434
(Rev. 1/64)

#26.20

MEMORANDUM State of Alaska

TO: Van Cothern
District Right of Way Agent
Fairbanks

DATE: January 21, 1970

FILE NO: 52A-2901

SUBJECT: 1969 Opinions of the Attorney General No. 7

FROM: Donald E. Beitinger
District Right of Way Agent
Anchorage

Re: SECTION LINE DEDICATIONS for Construction of Highways

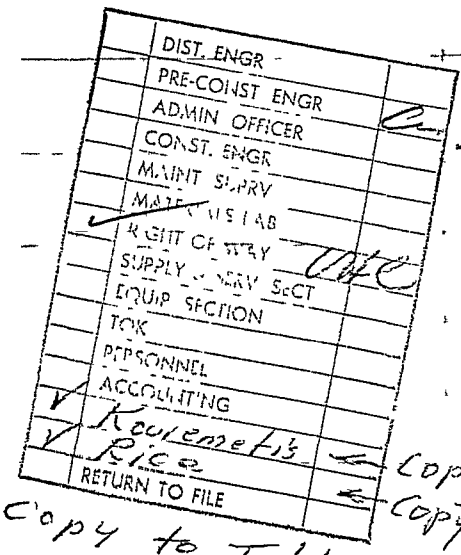
Attached is a copy of the 1969 Opinions of the Attorney General No. 7 for your information.

We can now claim 33 feet on section lines between the years of 1923 and 1949 and after 1953. It may take a little research concerning what may or may not be in existence between 1949 and 1953.

Attachment:

As stated

FAIRBANKS DISTRICT
JAN 22 1 06 PM 1970
DEPT. OF HIGHWAYS



RECEIVED

JAN 23 1970

FAIRBANKS DISTRICT OFFICE

STATE OF ALASKA

KEITH H. MILLER, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH

360 K STREET, SUITE 105
ANCHORAGE 99501

December 18, 1969

1969 Opinions of the
Attorney General No. 7

Mr. F. J. Keenan, Director
Division of Lands
Department of Natural Resources
Anchorage, Alaska 99501

RE: Section Line Dedications for Construction of Highways

Dear Mr. Keenan:

Reference is made to your request for an opinion concerning the existence of a right-of-way for construction of highways along section lines in the state.

It is our opinion, subject to the exceptions herein noted, that such a right-of-way does exist along every section line in the State of Alaska. In reaching this conclusion we rely upon the following points:

(1) Congress by Act of July 26, 1866, granted the right-of-way for construction of highways over unreserved public lands.1/ The operation of this Act within the State is well recognized,2/ and it provides as follows:

1/ Act of July 26, 1866, 14 Stat. 253, 43 U.S.C.A. 932 (1964) RS Sec. 2477.

2/ Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). See also: Mercer v. Yutan Construction Company, 420 P.2d 323 (Alaska 1966); Berger v. Ohlson, 9 Alaska 389 (1939); Clark v. Taylor, 9 Alaska 298 (1938); United States v. Rogge, 10 Alaska 130 (1941); State v. Fowler, 1 Alaska LJ No. 4, p. 7, Superior Court, Fourth Judicial District (Alaska 1962); Pinkerton v. Yates, Civil Action No. 62-237, Superior Court, Fourth Judicial District (Alaska 1963).

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

(2) This grant of 1866 constitutes a standing offer of a free right-of-way over the public domain.3/ The grant is not effective, however, until the offer is accepted.4/

(3) In Hamerly v. Denton, supra note 2, the Supreme Court of Alaska stated the general rule regarding acceptance of this federal grant saying at page 123:

> ... before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted. (Emphasis added.) 5/

(4) In 1923 the territorial legislature enacted Chapter 19 SLA, which provided as follows:

> Section 1. A tract of 4 rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway be vacated by any competent authority, the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved Apr. 6, 1923)

3/ Streeter v. Stalnaker, 61 Neb. 205, 85 NW 47 (1901), and Town of Rolling v. Emrich, 122 Wis. 134, 99 NW 464 (1904); See also 23 Am.Jur.2d Dedication, § 15.

4/ Hamerly v. Denton, supra note 2; Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864, (1946); Koloen v. Pilot Mound TP, 33 N.D. 529, 157 NW 672, (1916); Kirk v. Schultz, 63 Ida. 278, 119 P.2d 266, (1941).

5/ See also Koloen v. Pilot Mound TP, supra note 4; and Kirk v. Schultz, supra note 4.

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This Act was included in the 1933 compilation of laws as Sec. 1721 CLA 1933; however, it was not included in ACLA 1949, and therefore was repealed on January 18, 1949.6/

In 1951 the territorial legislature enacted Chapter 123 SLA 1951, which provided as follows:

> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways, a section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved March 26, 1951) 7/

In 1953 the territorial legislature enacted Chapter 35 SLA 1953, which provides as follows:

> Section 1. Ch. 123 Session Laws of Alaska 1951 is hereby amended to read as follows:
>
> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract 4 rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, the section line being the center of said right-of-way. But if such highway shall be vacated by any competent authority the title to the respective

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6/ Ch. 1 SLA 1949 provides in part that "All acts or parts of acts heretofore enacted by the Alaska Legislature which have not been incorporated in said compilation because of previously enacted general repeal clauses or by virtue of repeals by implication or otherwise are hereby repealed."

7/ This was a reenactment of the 1923 statute; however, in its amended form it applied only to lands "owned by" or "acquired from" the territory, and the width of the right-of-way was increased to 100 feet.

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> strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved March 21, 1953) 8/

(5) The foregoing legislative acts clearly establish a section line right-of-way on all land owned by or acquired from the State or Territory while the legislation was in force. In our opinion, the 1923 and 1953 acts also express the legislature's intent to accept the standing federal right-of-way offer contained in the Act of July 26, 1866.

There is no requirement that the act of acceptance contain a specific reference to the federal offer. In Tholl v. Koles, 65 Kan. 802, 70 P. 881 (1920), the Supreme Court of Kansas discussed legislative acceptance by reference to section lines saying at page 882:

> The congressional act of 1866, as will be observed, is, in language, a present and absolute grant, and the Kansas enactment of 1867 is a positive and unqualified declaration establishing highways on all section lines in Washington county. The general government, in effect, made a standing proposal, a present grant, of any portion of its public land not reserved for public purposes for highways, and the state accepted the proposal and grant by establishing highways and fixing their location over public lands in Washington county. The act of the legislature did not specifically refer to the congressional grants, nor declare in terms that it constituted an acceptance, but we cannot assume that the legislature was ignorant of the grant, or unwilling to accept it in behalf of the state for highways. The law of congress

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8/ With this amendment the statute once again applied to both territorial and federal lands, and except for the increased width of the right-of-way on territorial lands, the statute's application was identical to the original 1923 statute. See A.S. 19.10.010 for present codification.

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> giving a right-of-way for highway purposes over the public lands in Washington county was in force when the legislature acted, and it was competent for it to take advantage of that law, and the general terms employed by it are sufficiently broad and inclusive to constitute an acceptance. (Emphasis added.)

Other jurisdictions have enacted similar legislation, and there is abundant authority to support acceptance by legislative reference to section lines.9/

The Alaska statutes employ the phrase "is hereby dedicated", and we recognize that this phrase is not normally used as a term of acceptance. Nevertheless, the language is not inappropriate where a legislative body is seeking to accept the federal offer, while at the same time making a dedication of land it already owns.10/

Furthermore, in attempting to construe these statutes, it is presumed that the legislature acted with full knowledge of existing statutes relating to the same subject,11/ and that it:

9/ Costain v. Turner, 36 NW 2d 382 (S.D. 1949); Pederson v. Canton TP, 34 NW 2d 172 (S.D. 1948); Wells v. Pennington County, 2 S.D. 1, 48 NW 305, (1891); Walbridge v. Board of Com'rs of Russell County, 74 Kans. 341, 86 P. 473, (1906); Korf v. Itten, 64 Colo. 3, 169 P. 148, (1917).

10/ See 23 Am.Jr. 2 Dedication § 41, where it is stated:

> Technically, offer and acceptance are independent acts. Sometimes, however, the offer and the acceptance are so intimately involved in the same acts or circumstances that the necessity and the fact of the acceptance are somewhat obscured, as where the dedication is made by some governmental agency, the property already being public in ownership, or where the dedication is by statutory proceedings, ...

11/ United States v. Rogge, supra note 2.

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> ... had, and acted with respect to, full knowledge and information as to the subject matter of the statute and the existing conditions and relevant facts relating thereto, as to prior and existing law and legislation on the subject of the statute and the existing condition thereof, as to the judicial decisions with respect to such prior and existing law and legislation, and as to the construction placed on the previous law by executive officers acting under it; and a legislative judgment is presumed to be supported by facts known to the legislature, unless facts judicially known or proved preclude that possibility. (82 C.J.S. 544 § 316)

The statutes of 1923 and 1953 purport to act upon all section lines in the territory. Such legislation affecting land not owned by the territory would have been in contravention of 48 U.S.C.A. 77 and invalid were it anything other than an acceptance of the Federal Grant of 1866.12/

The legislature is presumed to have known the law, and to have intended a valid act, and it follows that these statutes were intended as an acceptance of the federal offer.

(6) Like the standing federal offer, the Alaska statutes are continuous in their operation, and they apply to "each" section of land in the state as it becomes eligible for section line dedication. Public lands which come open through cancellation of an existing withdrawal, reservation, or entry, and subsequent acquisitions by the territory (or state), are all subject to the right-of-way.

(7) Our conclusion that a right-of-way for use as public highways attaches to every section line in the State, is subject to certain qualifications:

12/ 48 U.S.C.A. 77 provides in part that: "That legislative power of the territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; ***."

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a. Acceptance under the Act of 1866 can operate only upon "public lands, not reserved for public uses". Consequently, if prior to the date of acceptance there has been a withdrawal or reservation of the land by the federal government, or a valid homestead or other entry by an individual, then the particular tract is not subject to the section line dedication.13/ (However, once there has been an acceptance, the dedication is then complete, and will not be affected by subsequent reservations, conveyances or legislation.)14/

b. The public lands must be surveyed and section lines ascertained before there can be a complete dedication and acceptance of the federal offer.15/

c. The dedication of territorial or state lands does not apply to those tracts which were acquired by the territory and subsequently passed to private ownership during periods in which the legislative dedication was not in effect; that is, prior to April 6, 1923, and between January 18, 1949 and March 26, 1951.

13/ Hamerly v. Denton, supra note 2; Bennett County S.D. v. U.S., 294 F.2d 8 (1968); Korf v. Itten, supra note 9; Stofferman v. Okanogon County, 76 Wash. 265, 136 P.484, (1913); and Leach v. Manhart, 102 Colo. 129, 77 P.2d 652, (1938).

14/ Huffman v. Board of Supervisors of West Bay TP, 47 N.D. 217, 182 NW 459, (1921); Wells v. Pennington, supra note 9; and Lovelace v. Hightower, supra note 4; Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820, (1909), appeal dismissed 225 U.S. 697 (1911).

15/ Note, however, that the Alaska statutes apply to each section line in the state. Thus, where protracted surveys have been approved, and the effective date thereof published in the Federal Register, then a section line right-of-way attaches to the protracted section line subject to subsequent conformation with the official public land surveys

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d. Acceptance of the federal grant applies only to those lands which were "public lands not reserved for public uses", during periods in which the legislative acceptance was in effect; that is, between April 6, 1923, and January 18, 1949, and after March 21, 1953.

In summary, each surveyed section in the state is subject to a section line right-of-way for construction of highways if:

1. 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;

2. It was unreserved public land at any time between April 6, 1923, and January 18, 1949, or at any time after March 21, 1953.

The width of the section line reservation is four rods (2 rods on either side of the section line) as to:

1. Dedications of territorial land prior to January 18, 1949, and;

2. Dedications of federal land at any time.

The width of the reservation is 100 feet (50 feet on either side of the section line) for dedications of state or territorial land after March 26, 1951.16/

Opinion No. 11, 1962 Opinions of the Alaska Attorney General, to the extent it is inconsistent with the views expressed herein, is disapproved.

16/ For further discussion of section line right-of-way width, see Opinion No. 29, 1960 Opinions of the Alaska Attorney General.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By: John K. Norman
John K. Norman
Assistant Attorney General

GKE:JKN:bl

cc: The Honorable Keith H. Miller
Governor for the State of Alaska

The Honorable Robert L. Beardsley
Commissioner, Department of Highways

The Honorable Thomas E. Kelly
Commissioner, Department of Natural Resources