

John Bennett

From: Sprout, Timothy L (DOT) <tim.sprout@alaska.gov>
Sent: Tuesday, November 24, 2020 11:18 AM
To: John Bennett
Subject: RE: DNR Mental Health Trust memo re SLEs

John –

I very much appreciate your informed response.

Thank you!

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From: John Bennett <JBennett@rmconsult.com>
Sent: Tuesday, November 24, 2020 10:10 AM
To: Sprout, Timothy L (DOT) <tim.sprout@alaska.gov>
Subject: RE: DNR Mental Health Trust memo re SLEs

Tim – very interesting. I’m hoping when this is all done it will be released to the public so it won’t continually come up again in the future. Going to your quoted DOT paragraph, the first item that causes me concern is where MHT will not challenge roads that were constructed within an SLE as long as it was done “with required approvals and authorizations.” My concern is that DNR has not been consistent with their methods of acknowledging or approving use of SLEs over the years or through their regions. I suspect we can also find some DOT projects where once a valid SLE was determined to exist, it was mapped as existing ROW within which a project could be constructed without additional permitting. Below I have copied a couple of paragraphs from my 2017 ROW report for the North Pole Water System. The reason I discussed this with AJ in 2017 and the reason why I would re-discuss with DNR on any subsequent project is because their policies and how those policies are implemented continue to change over time. (Just like regular people...) Note my quotation of 11 AAC 51.100 below. If the SLE (RS2477) crosses DNR lands and the road crossing it is on the Alaska Highway System, then DOT has jurisdiction and no permit or approval from DNR would have been required.

Permitted Use

Whose permission is necessary to use an undeveloped SLE or an SLE occupied by a road where no government entity has assumed management jurisdiction? If a road exists within an SLE, the general rule is that the government entity holding jurisdiction over that road can permit utility placement through a utility/construction permit. This would be the case for roads under the management of the City of North Pole, DOT&PF and FNSB Rural Services. Another scenario include where an “orphan” road exists within a valid SLE. This occurs where no government entity has assumed management of the road. Other possibilities include where no road exists within a valid SLE that crosses private property or lands owned and managed by FNSB or DNR. It has been long understood that to use an undeveloped SLE across lands owned and managed by DNR, that a Letter of Non-objection (LNO) would be required before the SLE could be used. A DNR LNO

would also be required to place a utility within the undeveloped SLE that exists where section lines cross the navigable 30-mile Slough.

For the most part, use of an undeveloped SLE crossing private property is an issue between the owner of the land underlying the SLE and the user. If the user could not convince the landowner of the SLE validity, the issue could end up in the courts. Alaska regulations state that with regard to SLEs, DNR has jurisdiction over all of these easements unless they are occupied by a road listed in the Alaska Highway System inventory.^[1] This DOT/DNR jurisdiction is reaffirmed with regard to RS-2477 SLEs in A.S. 19.30.400.^[2] Due to the costs and administrative burdens of actively managing all of these easements, DNR management over them has been inconsistent. In 2001 DNR issued regulations under 11 AAC 51.010 that among other issues defined types and widths of certain easements including SLEs. This was to be Phase one of a two-phase regulations project. The second phase of regulations intended to establish rules regarding the management and use of the easements. The second phase was never initiated. To avoid the risk of differing interpretations regarding management and use of undeveloped SLEs within the project area, I contacted A. J. Wait in the local DNR office^[3]. A. J. informed us that DNR does now require users to contact them with regard to SLEs. While an adjudication process is not required and a permit is not issued, they request a letter from the user stating the nature of their proposed activity. DNR will review the request and issue a letter of non-objection contingent on stipulations that are intended to protect future public access needs. DNR will assign an ADL (Alaska Division of Lands) number for tracking purposes but currently there is no fee for the process.

11 AAC 51.100 Management of public easements, including R.S. 2477 rights-of-way “(a) The commissioner has management authority over the use of any RS 2477 right-of-way that is not on the Alaska highway system.”

My second highlight below reflects my concern about how they treat utilities. If I’m reading this right, this agreement protects DOT roads within SLEs but not necessarily utilities unless State owned and operated. DOT has statutory & regulatory authority to permit utilities within the highway rights of way it manages. The exception is where a highway easement crosses federal or federal trust lands as the federal scope of use for a highway easement does not include utilities. But they are included within a highway easement crossing lands subject to state law. (See Fisher v. Golden Valley). DOT has issued a huge number of utility permits within its managed highway ROW and it is likely that some are within section line easements that cross MHT lands. This agreement should not result in an invalidation of those permits.

This agreement covers DOT use of SLEs crossing MHT lands prior to 1994. This was the MHT settlement legislation. The question is whether it is clear how DNR/MHT addressed DOT use of these SLE’s since 1994. Does anyone know to what extent DOT roads may have used State SLEs since 1994 that cross MHT lands without permit or compensation to MHT as a result of the long term confusion on their status over the years? The question is how much liability is DOT accepting as a result of this agreement? I’m not sure anyone knows.

Finally, we talk about the assertion of federal section line easements on “trust lands that were unreserved, surveyed federal land prior to MHT selection.” That does not address the assertion by DNR of protracted section lines where DNR would argue that the 1969 Opinions of the Attorney General No. 7 suggested that federal SLEs might apply to protracted section lines. DNR would argue that the “surveyed” requirement may have occurred when the Section/Township Protraction was approved and published in the federal register. I have worked on a DOT airport project in the last couple of years where DNR wanted to retain a claim to protracted SLEs by having us place a note on the plat explaining the basis for their existence. So without going into more detail, the question is whether protractions were considered at all as a part of this agreement.

One other thing I find a bit confusing between your first statement that the agreement accepts statutory SLEs on trust lands under various validation circumstances and the DOT paragraph that appears to only address constructed roads. So if a valid SLE is found to exist over MHT lands according to the first statement, will it be considered to be “existing” ROW for a new DOT project or is it subject to permitting from and compensation from MHT?

I know you can't release the entire agreement to me so the answers to some of my questions might be in there. That's all I've got right now. JohnB

From: Sprout, Timothy L (DOT) [<mailto:tim.sprout@alaska.gov>]
Sent: Monday, November 23, 2020 4:51 PM
To: John Bennett <JBennett@rmconsult.com>
Subject: DNR Mental Health Trust memo re SLEs

Hi John –

A memo agreement between DNR and the Mental Health Trust on section line easements crossed my desk today, from Barry Hooper, through Jeff Stark, asking for DOT&PF comment. The agreement accepts statutory section line easements on trust lands that were unreserved, surveyed federal land prior to MHT selection, and on surveyed state owned land at the time land was designated as replacement trust land, and honoring plats showing section line easements before HB 201 as amended became effective in 1994. There is a paragraph intending to protect DOT&PF roads. I include it here:

“For certainty of access and because the public may have detrimentally relied on them, the TLO (Mental Health Trust Office) will not challenge or charge for any public roads that were actually constructed by a state or local governmental entity or private party, **with required approvals and authorizations**, within a valid section line easement on trust land prior to the date HB 201 (as amended) became effective in 1994, whether the road is platted or not. This agreement does not include any road or portion of road that is not within a valid section line easement and does not grant or imply permission to expand or move such road, whether within the section line or not, which permission is expressly denied. Any expansion or change in location must be approved by the TLO and may require compensation to the AMHTA. For purposes of this agreement, “road” includes associated facilities necessary for a road, including signs, bike paths, turnouts and rest areas, drainage, and slopes. **It does not include utilities unless state-owned and operated.**”

Would you say DOT&PF interests are adequately addressed?

Thank you.

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^[1] 11 AAC 51.100 Management of public easements, including R.S. 2477 rights-of-way “(a) The commissioner has management authority over the use of any RS 2477 right-of-way that is not on the Alaska highway system.”

^[2] Sec. 19.30.400. Identification and acceptance of rights-of-way. “The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities.”

^[3] Email contact 9/24/14 with A. J. Wait, Natural Resource Manager I, Northern Region