

John Bennett

From: Horton, George C (DNR) <george.horton@alaska.gov>
Sent: Monday, March 15, 2021 10:01 AM
To: John Bennett
Cc: Gervelis, Gwen M (DNR); Brown, Stanley C (DNR); Poydack, Joseph L (DNR); Quigley, Ryan L (DOT); Flint, Peter James (DNR)
Subject: RE: SLE Stuff

Good morning John,

No I have not heard back – other than that applicable parties had been contacted – but I don't think there's been enough time.

Please give us a few more weeks. As soon as I know something, you'll be the first on my list to notify.

Reminder emails are encouraged.

Regards,

George Horton, PLS, CFeds

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"It's a dangerous business going out of your door. You step into the Road, and if you don't keep your feet, there is no knowing where you might be swept off to." Bilbo Baggins

From: John Bennett <JBennett@rmconsult.com>
Sent: Sunday, March 14, 2021 12:47 PM
To: Horton, George C (DNR) <george.horton@alaska.gov>
Cc: Gervelis, Gwen M (DNR) <gwen.gervelis@alaska.gov>; Brown, Stanley C (DNR) <stanley.brown@alaska.gov>; Poydack, Joseph L (DNR) <joseph.poydack@alaska.gov>; Quigley, Ryan L (DOT) <ryan.quigley@alaska.gov>
Subject: RE: SLE Stuff

Hi George – Just checking back in regarding the SLE issue that I emailed about a couple of weeks ago to see if there is any news. After emailing you I emailed one of our DOT AAGs who typically reviews stuff like the DOT/DNR/MHT agreement for the Commissioner's Office. He told me that he actually didn't work on this one and forwarded my email to the Supervisory AAG, Jeff Stark in Anchorage. I've also not heard anything from that angle either. Hopefully someone at the state level is discussing this as it will make a difference with regard to SLE research and determination.

And then on top of that I see on Friday that we got our butts kicked by the Supreme Court in the Klutina Lake RS-2477 case. At least with regard to the Scope of Use issue which is pretty significant. That was quite a surprise to me and will likely require AGO guidance with regard to how the public's rights are asserted with regard to RS-2477 rights-of-way over private lands.

Looking forward to some DNR/DOT/AGO guidance so we know how to handle these situations and can understand the basis for the guidance. Thanks again. JohnB

John F. Bennett, PLS, SR/WA Senior Land Surveyor – Right of Way Services
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From: John Bennett

Sent: Wednesday, March 3, 2021 9:39 AM

To: 'Horton, George C (DNR)' <george.horton@alaska.gov>

Cc: Gervelis, Gwen M (DNR) <gwen.gervelis@alaska.gov>; Brown, Stanley C (DNR) <stanley.brown@alaska.gov>;

Poydack, Joseph L (DNR) <joseph.poydack@alaska.gov>

Subject: RE: SLE Stuff

George – regarding your last question: You are asking about the relationship between AS 19.10.015 that the MHT Agreement now claims to be the rule for determining federal section line widths and AS 19.10.010 which specifically addresses SLE widths. I have a concern about this also. In my mind, these two statutes were separate in order to first, address SLE widths (AS 19.10.010), including federal RS2477 based SLEs and then address RS2477 based trail widths in AS 19.10.015. Now while I have been happy with that distinction for the last 3 or 4 decades, the Supreme Court’s holding in Dickson blurs the line between the two statutes. Dickson doesn’t reference SLEs as the focus was on trails, but it addresses “RS2477 Highway Easements” which is what federal SLEs are. I may be wrong but it appears that the authors of the MHT/DNR/DOT Agreement latched onto AS 19.10.015 to define federal SLE widths as a result of the Dickson decision, otherwise, how did they get there? And as I said below, why did they stop there and not go further back to the 1949 PLO 601? Did they not recognize the statutory distinction between RS2477 SLEs and Trail widths? Or are they saying that the distinction is no longer effective? Clearly this is an important issue for both DNR & DOT to resolve and that resolution needs to be broadcast to all government and private professionals who make SLE width determinations. Looking forward to some clarification. Thanks! JohnB

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From: Horton, George C (DNR) [<mailto:george.horton@alaska.gov>]

Sent: Tuesday, March 2, 2021 3:18 PM

To: John Bennett <JBennett@rmconsult.com>

Cc: Gervelis, Gwen M (DNR) <gwen.gervelis@alaska.gov>; Brown, Stanley C (DNR) <stanley.brown@alaska.gov>;

Poydack, Joseph L (DNR) <joseph.poydack@alaska.gov>

Subject: RE: SLE Stuff

Hi John,

You always have good questions. Glad to have you around to keep us on our toes.

We need to look into this and get back to you in a few days.

Yes we were involved in the first two initial reviews of this agency agreement but were not included in reviewing any of the final drafts. Nowhere in any of the drafts we/I reviewed did we/I encounter any citation of AS 19.10.015.

One question I have (not directed to you necessarily, but to all others who read this email)

If AS 19.10.015 overwrites or repeals AS 19.10.010, which specifically notes SLEs at 100’ and 66’, why is AS 19.10.010 still listed in the statutes? What the agreement implies is that we only apply the portion of AS 19.10.010 applicable to State lands and ignore that portion applicable “all other sections in the state...”

Please give us a few days to consider the ramifications you note below.

Thanks.

Regards,

George Horton, PLS, CFeds

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From: John Bennett <JBennett@rmconsult.com>

Sent: Tuesday, March 2, 2021 9:53 AM

To: Horton, George C (DNR) <george.horton@alaska.gov>

Subject: SLE Stuff

Good Morning George – I'm assuming you are still the DNR Cadastral go-to person for SLEs? The reason I am contacting you today relates to how federal SLEs are researched. The first attachment is the chart in my Highways paper regarding how SLEs are determined to exist. The federal SLEs on the left side were pretty straightforward. The RS2477 offer was accepted by the Territory in 1923, lost in the recodification of statutes in 1949 and re-accepted in March of 1953. This ran until RS2477 was repealed or the federal land withdrawals made all lands "reserved". Most of this chart long preceded me and had been handed out in the BLM and DNR public rooms possibly starting in the '70s (?).

So the other day I received a copy of the DNR/MHT/DOT Agreement dated 12/30/20 discussing applicability of SLEs on MHT lands. This is good as we have had more than one discussion in the past about how SLEs might apply to these lands. But there is one thing that surprised me.

The Agreement has a footnote (No. 2) that says "This is the date (April 7, 1963) AS 19.10.015 was enacted, which provides that 'All officially proposed and existing highways on public land not reserved for public uses are 100 feet wide'. **This modified the width of federal section line easement that were accepted under AS 19.10.010, where the land was still unreserved federal land**".

My past research has indicated that AS 19.10.015 was implemented as a result of an adverse ruling against the Dept. of Highways in a condemnation of a parcel in the 1960's reconstruction of Farmer's Loop Road in Fairbanks. The court said that as there was no "officially" accepted width for an RS2477 trail, it would only allow "ditch to ditch". To avoid this in the future, AS 19.10.015 would assign a 100' width to future assertions of RS2477 trail easements.

What the MHT/DNR/DOT memo FN2 tells me is that AS 19.10.015 also should be considered as a modification to the Territorial April 5, 1923 acceptance of the RS2477 grant. So not only would RS2477 trails be accepted as 100' in width but also federal SLEs! This would suggest that the SLE chart for federal SLE's should be modified by inserting the April 7, 1963 date between the March 21, 1953 and December 14, 1968 date to show where federal SLEs were accepted at 66' before the date and 100' after the date!

I was wondering whether DNR Cadastral was involved in crafting this memo and whether they were aware that it suggests that federal SLEs should be 100' wide after the effective date of AS 19.10.015 (Assuming the other tests have been met). But it goes even further than that. Karen Tilton and I worked with DNR AAG Kent Sullivan on the Dickson RS2477 trail case and Karen was the State's survey/mapping expert. In that case, the State argued that the RS2477 width should be 100' by virtue of AS 19.10.015 – AND – the declaration by federal Public Land Orders that "Local" road widths would be 100' (See PLO 601 October 10, 1949). The Dickson's appealed to the Supreme Court and the court

upheld the Superior court's decision. They stated pretty clearly : *"But we agree with the superior court that the 100-foot width was dictated both by federal land orders and by AS 19.10.015"*

My question is this: If the Supreme Court holds that both PLO 601 and AS 19.10.015 fix the width of an RS2477 (SLEs included), why did the DOT/MHT/DNR Agreement accept the 1963 date of AS 19.10.015 instead of the earlier 1949 date for PLO 601?

This entire question can have quite an impact on those determining the widths of federal SLEs over private lands (and potentially MHT lands) in the future and brings into question the determinations that have been made in the past. I'm hoping this is not all news to you and that DNR recognizes this significant change in the law. Looking forward to hearing from you. Hope all is well down in the big city! JohnB

John F. Bennett, PLS, SR/WA *Senior Land Surveyor – Right of Way Services*

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