From: John Bennett
To: "Brad Sworts"
Subject: RE: Use of Section Line Easement for railroad embankment precluding road development and property access
Date: Tuesday, February 21, 2017 4:04:00 PM

Brad, I've returned from the conference and have a couple of comments and thoughts on your dilemma. While I was at the conference and have known Gerald Jennings and John Kerr for years, I decided to bring the issue up so I could understand a bit more of the background. My first exposure to this rail segment came up when I was under contract with DOT Central Region to facilitate the land exchange between DOT, ARRC and DNR Chugach Park for the Seward Highway realignment. One of the outstanding issues in that case as well as other discussions is whether ARRC's land constitutes "state land" for the purpose of creating new section line easements. Another question is whether they are subject to federal section line easements. The federal SLE issue doesn't come up much because so much of the main line ROW was established prior to the 1923 Territorial acceptance of the RS-2477 grant that created federal SLE's in Alaska. However, the spur from Fairbanks to Eielson is an area where it is likely that ARRC is subject to federal SLE's. They might argue otherwise, but the reality as I see it is that they are an Alaska corporation that is subject to Alaska law. And Alaska case law as fairly well defined the scenarios that create federal SLE's and have made them applicable to lands subject to state law. Your case is a bit different in that these were clearly lands owned by the state and subject to state section line easements. So when the railroad comes along they may be beneficial in that they may be available for the railroad's use or detrimental in that they are also available for everyone else's use.

John K. told me that he had taken a package to DNR and DOT to vacate these SLE's but that DOT had so far refused to sign off. The rule is that a vacation requires both the approval of DNR and DOT. The lack of a signature is a veto of the vacation. This makes sense because they are easements for highway purposes. And the rule regarding federal SLE's is that the management all RS-2477 ROW (including federal SLE's) that are not a part of a highway on DOT's highway system inventory automatically default to DNR. The same appears to be true for State SLE's as clearly, if they are occupied by a DOT highway, they must be under DOT management. There used to be concern about SLE's that crossed state managed airports and it was thought that all had to be vacated to prevent the public from crossing the runway at will. Some were vacated but eventually it was realized that a vacation wasn't necessary because the authority under AS02 for control and security of airports pretty much gives the airport manager full control over who crosses the runway. I questioned during my Seward Highway project whether ARRC had a similar authority. My recollection was that Brian Lindamood, who participated in the meetings said that they did not and as a result, they would never operate a railroad on the Pt. McKenzie route as long as the SLE's were in place.

Regarding your land owner who relied upon the SLE's to access his borough approved subdivision, I can think of one similar situation in my DOT experience. About 20 years ago we reconstructed the first 7 miles of Chena Hot Springs Road. A lot of this stretch runs along section lines subject to SLEs and widened using other authorities. The grade pretty much followed the natural topography through the valleys and over the hills. So each adjoining property had direct access to CHSR at grade meaning that it wouldn't be real expensive to construct a driveway. Our new project essentially cut down the hills and filled in the valleys to improve the highway grade. DOT had to design and build

some fairly complex and expensive driveways as a result. But DOT's obligation to construct driveways is limited to those that were in existence at the time of construction. This makes sense because there is no way that DOT can predict the future development of the adjoining land. Where would the driveway need to be located and what capacity would be required. So in the future, the property owner who wants to apply for a driveway permit that they will construct themselves may find that access is quite a bit more expensive than before the DOT reconstruction project. While the project did change the grades and make access to the adjoining properties more expensive, it did not serve to restrict access. That could only be done if DOT had purchased direct access rights which is commonly done on freeways and expressways to control the location where traffic enters the highway. To my knowledge, there was no acquisition of "access control" for the Pt. McKenzie alignment although it might have been viewed that by purchasing the additional railroad easement over the SLE, that this had the same effect. I can't help but think that the rights of the public to use the SLE continue to exist until vacated. John K. suggested that an old highway rule might be applicable.
The rule is that an adjoining land owner has a right of access to a highway. But the courts have ruled that they don't have a right to direct access as long as reasonable alternative access is provided. I think the difference in the cost to construct the alternative access will be a factor in determining whether it will be considered "reasonable".

Another question that comes up in my mind is the authority of the railroad to occupy the SLE to the exclusion of all other uses. We do have case law in Alaska that allows utilities to be placed in a federal SLE on the theory that they are an allowable, but subordinate use of the SLE. The railroad is clearly not a highway agency but DOT, for permitting purposes considers them akin to a utility. Utilities occupy and use SLEs all the time, but generally their occupation leaves plenty of room for subsequent access by road to be constructed. Utilities can be placed in in SLE's on grades that could never accommodate a road. So in many situations the pole line can go right up the middle without causing any problem. My experience with DOT doesn't carry over very well with regard to how a private individual would be handled. Under DOT's statutes and regs, relocation of an existing utility either under permit within an DOT facility or occupying a valid public ROW would be relocated by DOT at DOT's expense. I just re-read your time line below and see that the Borough purchased an additional easement over the SLE for the rail project. So it would seem that everyone must have reached the conclusion that the railroad could not be constructed solely within the SLE and that an additional specific easement was required.

So how might this translate to your situation. The land owner went through a Borough sanctioned process to subdivide his land which was approved on the basis of an existing SLE(?). And now the Borough is responsible in part for making that access unusable. Although alternative access might be available at certain ARRC sanctioned crossings, I understand it could add a couple of miles of road construction to serve this property. It would sound as if this would make the property economically land locked. This leads me to think that the Borough has some kind of liability because it was a party to both transactions. I'm not sure how large of a tract of land we are talking about but one alternative to litigation would be to purchase it and possibly marketing it to an adjoiner at a later date.

I could probably keep on going for a while but I'm not sure I have a silver bullet that would result in

a conclusion that the land owner is just out of luck. This is just a summary of random thoughts that were assisted by conversations I had at the conference so I'm not submitting anything for compensation. I would be interested to hear how this finally gets handled and of course, if I've totally missed the point of your question, please let me know. JohnB

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

R&M CONSULTANTS, INC. | 212 Front Street, Ste. 150 | Fairbanks, Alaska 99701
907.458.4304 direct | 907.687.3412 mobile

Facebook | LinkedIn | rmconsult.com

Innovating Today for Alaska's Tomorrow

From: Brad Sworts [mailto:Brad.Sworts@matsugov.us]
Sent: Tuesday, February 14, 2017 4:52 PM
To: John Bennett
Cc: Sheila Armstrong
Subject: RE: Use of Section Line Easement for railroad embankment precluding road development and property access

John,
Yes, construction of the embankment made it physically impossible to use the SLE to access the property. No car/truck or pedestrian/bike use will be allowed due to strict FRA rules. The embankment took up the whole width of the SLE plus more. I am attaching a tax map with notes that may help clarify the situation.

Brad Sworts

MSB Pre-Design & Engineering Division Mgr.
Capital Projects Department

1-907-861-7715 office
mailing: 350 E. Dahlia Ave., Palmer, AK 99645
physical: 533 E. Fireweed Ave., Palmer, AK 99645
web: www.matsugov.us

From: John Bennett [mailto:JBennett@rmconsult.com]
Sent: Tuesday, February 14, 2017 1:30 PM
To: Brad Sworts
Cc: Sheila Armstrong
Subject: RE: Use of Section Line Easement for railroad embankment precluding road development and property access

Hi Brad, I'm just getting on a plane to Anchorage for the surveying conference so it will be a few days before I can get into this. Did construction of the embankment make it physically

impossible to use the SLE to access the property or is it being suggested that it cannot be used for access now that it will be used for railroad purposes. Anything you can add to give me a more complete picture would be helpful and would allow me to provide a better estimate. Johnb

Sent via the Samsung Galaxy S7, an AT&T 4G LTE smartphone

-------- Original message --------
From: Brad Sworts <Brad.Sworts@matsugov.us>
Date: 2/14/17 12:28 PM (GMT-09:00)
To: John Bennett <JBennett@rmconsult.com>
Cc: Sheila Armstrong <Sheila.Armstrong@matsugov.us>
Subject: Use of Section Line Easement for railroad embankment precluding road development and property access

John,
I have attended many of your classes and figured you have probably heard every scenario possible regarding section line easement use. I am the MSB project manager for the Port MacKenzie Rail Extension project. We have constructed a railroad embankment on all but one of six segments from the ARRC mainline near Houston down to Port MacKenzie (approximately 32 miles). In several areas our rail embankment covers short segments of section line easements (100'wide by ¼ to ½ mile long). In one of these locations there is a resident who is claiming we have blocked access to property he sold. At the time of subdivision, by 40 acre exemption, his application indicated that the section line easement was his intended constructible access. The timeline was this:

The 40 ac. Exemption was recorded in 2012

The MSB purchased an additional easement over the SLE for the rail project in 2013

The MSB constructed the rail embankment on the SLE in 2013-14

The owner sold a portion of the property that only had access along the SLE in 2015

Have you ever run into this kind of issue? Our bottom line is does the Borough now have to provide him alternate access or not since we were the first to construct in the easement?
If you could provide me a cost quote we could issue a purchase order for some research if needed.
Thanks,

Brad Sworts

MSB Pre-Design & Engineering Division Mgr.
Capital Projects Department

1-907-861-7715 office
mailing: 350 E. Dahlia Ave., Palmer, AK 99645
physical: 533 E. Fireweed Ave., Palmer, AK 99645
web: www.matsugov.us

NOTICE OF CONFIDENTIALITY

This communication may contain confidential, privileged, or other protected information. If you are not the intended recipient of this communication, its use, reproduction, disclosure, or distribution is strictly prohibited. If you have received this communication in error, please destroy it immediately and notify the sender by telephone at (907) 861-7715.