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Section Line Easements

Basis for section line easements:

Act of July 26, 1866	(RS 2477)	(43 CFR 2822, 43 USC 932)
Chapter 19 SLA	April 6, 1923	
Chapter 123 SLA	March 26, 1951	
Chapter 35 SLA	March 21, 1953	

The Mining Law of 1866 made an offer of free rights of way over unreserved public land for highway purposes. This offer became effective on April 6, 1923, when the territorial legislature passed chapter 19. Any lands in Alaska appropriated and patented after April 6, 1923 were subject to an easement along all sections, 4 rods (66 feet) wide.

The section line easement law remained in effect until January 18, 1949. On this date the legislature accepted the compilation of Alaska law which also repealed all laws not included. The section line easement law was repealed.

On March 26, 1951, the legislature passed an easement law which dedicated a section line easement 100 feet wide along all section lines on land owned by or acquired from the territory. This was modified on March 21, 1953, to include an easement 4 rods wide along all other section lines in the territory.

To have an easement on a section line means that the section line must be surveyed under the normal rectangular system. On large areas such as State or Native selections, only the exterior boundaries are surveyed, hence there are no section line easements in these areas (until further subdivisional surveys are carried out.)

Since all Federal land is reserved in Alaska at this time and since the section line easement attaches only unreserved public land (at the time of survey or at the same time after survey), it is unlikely that the section line easement will have much applicability on Federal lands in the future. In any case, the section line easements will have no applicability on any finalized D-2 land since the land will be reserved at the time of any survey.

Land surveyed by special survey or mineral survey are not affected by section line easements since such surveys are not a part of the rectangular net.

Section line easements relate solely to highway or road use by the public. They cannot be used for powerlines or restricted private access. The date of survey and appropriation of the land must be considered in determining the presence of a section line easement.

TERRITORY OF ALASKA

Office of the Secretary

JUNEAU ALASKA

Chapter 19 (S. B. 8)

AN ACT

To dedicate for highway purposes a tract four rods wide along each section line.

BE IT ENACTED BY THE LEGISLATURE OF THE TERRITORY OF ALASKA:

Section1. A tract four 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 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 April 6, 1923.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, DEPARTMENT OF HIGHWAYS, Appellant, v. GORDON E. GREEN, VIOLA GREEN, A. LEE GOODMAN, JOAN D. GOODMAN, Appellees.	)	File No. 3184 O P I N I O N [No. 1706 - September 1, 1978]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Eugene Wiles, Robert L. Eastaugh and Stephen M. Ellis, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for Appellant. Murphy L. Clark, Anchorage, for Appellees Green. David B. Loutrel, Croft, Thurlow, Loutrel & Duggan, Anchorage, for Appellees Goodman.

Before: Boochever, Chief Justice, Rabinowitz, Connor, Burke and Matthews, Justices.

RABINOWITZ, Justice.

The state brought eminent domain actions[1] in the superior court seeking portions of the lots owned by the Greens and Goodmans[2] for use in the planned widening of Tudor Road in Anchorage. The state claimed a right-of-way extending 50 feet on either side of Tudor Road's center line. The Greens and Goodmans argued that express provisions in the patents to their lots limited the state's right-of-way to 33 feet on either side of the center line. After the state had amended its complaints, the parties stipulated to consolidation of the cases for determining liability issues and also stipulated to resolution of right-of-way issues by

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1. The state's complaints were filed July 9, 1974. Initially, the complaints sought a 50 foot right-of-way and a 20-foot slope easement (for lateral support of the roadway). The state filed amended complaints on November 12, 1974. The amended complaints omitted the slope easement and instead sought to acquire:

> (1) an estate in fee simple for the 50 foot right-of-way on both the Green and Goodman parcels (excluding minerals lying more than 100 vertical feet below the roadway's surface), and
>
> (2) a temporary construction easement on and over additional portions of the Green and Goodman properties.

2. The Kerkoves and Urbaneks answered the state's complaint and alleged that "they are owners of a substantial property interest" in the Goodman parcel. They have not appeared in this appeal.

summary judgment if the parties could agree upon the facts.[3] Subsequently, both the state and the property owners moved for summary judgment. The superior court granted summary judgment in favor of the Greens and Goodmans on all liability issues.[4] The state then brought this appeal.

A brief history of the Green and Goodman parcels is necessary to an understanding of the parties' contentions in this appeal. The lots were originally owned by the United States and were among lands withdrawn "from all forms of appropriation under the public-land laws"[5] by the Secretary of the Interior in 1942. Pursuant to that withdrawal order, the lands were reserved for use by the War Department.[6] In 1949 the Secretary of the Interior, acting pursuant to executive order, terminated War Department jurisdiction but

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3. Five separate actions originally were consolidated; two of these involved the Green and Goodman properties. The parties' stipulation expressly reserved compensation and damages issues for separate trial or determination "on an individual basis."

4. The superior court ordered summary judgment for the property owners on July 26, 1976. Final judgment was entered on September 21, 1976, for the Greens, on September 27, 1976, for the Goodmans, and on October 28, 1976, for the Kerkoves and Urbaneks.

5. Public Land Order 5 (June 26, 1942).

6. Id.

provided that certain described lands, including the property which was eventually conveyed to the Greens and Goodmans, "shall not become subject to the initiation of any rights or to any disposition under the public land laws until it is so provided by an order of classification . . . opening the lands to application under the Small Tract Act . . . . ."[7] Such a classification order was issued the following year;[8] under that order, lots 11 (Green) and 12 (Goodman) were made available for small tract disposition.

The Goodmans and Greens contended that their predecessor patentees first occupied the lots pursuant to Small Tract Act leases and subsequently received patents to the land from the federal government.[9] The patents contained substantially identical reservations, including the following language:

> The reservation of a right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under any authority of the United States or by

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7. P.L.O. 615 (November 8, 1949; published in Federal Register, November 16, 1949).

8. Small Tract Classification No. 22 (March 23, 1950).

9. The Goodmans allege that their predecessor patentee occupied lot 12 on April 21, 1950, and received a patent on April 28, 1952. The Green parcel (lot 11) was leased from the United States on September 1, 1952, and patent was granted on December 1, 1953.

any state created out of the territory of Alaska in accordance with the Act of July 24, 1947 (61 Stat. 418, 47 U.S.C., § 321[d]).

The following typewritten language was added to the printed patent form:

> This patent is subject to a right-of-way not exceeding thirty-three (33) feet in width, for roadway and public utilities purposes, being located along the north and west boundaries of said land. 10 /

After the issuance of Small Tract Classification Order No. 22 but before issuance of patents to lots 11 and 12, the Secretary of the Interior issued Secretarial Order No. 2665[11] establishing the width of public highways in

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10. The quoted language appeared in the patent to the Goodmans' property. The typewritten language in the patent to the Greens' property stated that the right-of-way was located along the north and east boundaries of lot 11.

11. Secretarial Order No. 2665 reads, in part:

> RIGHTS-OF-WAY FOR HIGHWAYS IN ALASKA
>
> Section 1. Purpose. (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands of such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a).
>
> Sec. 2. Width of Public Highways. (a) The width of the public highways in Alaska shall be as follows:
>
> (1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. [Other highways listed] shall extend 150 feet on each side of the center line thereof.
>
> . . . .

Alaska which were under the jurisdiction of the Secretary of the Interior. For "local roads" -- all roads not classified as "through roads" or "feeder roads" -- the width set by Secretarial Order No. 2665 was 50 feet on each side of the road's center line. Tudor Road was not among the named "through" or "feeder" roads.[12]

(footnote 11 continued)

> (3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

12. The relevant chronology is as follows:

Small Tract Classification Order No. 22	March 23, 1950
Alleged date of "entry" on Goodman parcel pursuant to Small Tract Order No. 22	April 12, 1950
Secretarial Order No. 2665	October 20, 1951 (date of publication in Federal Register)
Date of patent to Goodmans' predecessor	April 28, 1952
Lease date of Green parcel under Small Tract Order No. 22	September 1, 1952
Date of patent to Greens' predecessor	December 1, 1953

In light of this administrative order and the chronology of events relating to these lands, appellant State of Alaska takes the position that the Green and Goodman parcels were subject to a 100 foot right-of-way for Tudor Road. Specifically, the state argues that the planning and construction of Tudor Road by the United States effectively appropriated land lying in the right-of-way and reserved such right-of-way to the United States. Prior to issuance of patents to lots 11 (Green) and 12 (Goodman), the 100 foot right-of-way reservation for local roads established by Secretarial Order No. 2665 became effective. Thus, reasons the state, a right-of-way extending 50 feet from the Tudor Road center line onto portions of lots 11 and 12 was validly reserved prior to the time private parties acquired vested rights in the lots through issuance of the patents. As an alternative to its motion for summary judgment, the state asserted that a genuine issue of material fact existed with respect to the Goodman property, i.e., that the date of Tudor Road's construction must be established before the respective rights of the parties could be determined.

The Greens argue that their property was unaffected by the Secretary's 100 foot right-of-way designation because regulations under the Small Tract Act had segregated these parcels from the operation of general right-of-way provisions prior to the date of issuance of Secretarial Order No. 2665.

Thus, only easements reserved by authority of the Small Tract Act apply. The Goodmans reiterate the Greens' position, but they further contend that their predecessor patentee had acquired vested rights under his lease pursuant to Small Tract Classification No. 22. Since the patent was obtained by operation of the same lease provisions, vested patent rights relate back to the date of lease for purposes of determining the applicable right-of-way. Because the issues regarding the Green and Goodman parcels differ somewhat, we shall discuss the two parcels separately.

The state argues that Tudor Road had been appropriated by the United States prior to any interest vesting in the Greens' predecessor patentee. Thus, the state contends, Secretarial Order No. 2665 established a 50 foot right-of-way for Tudor Road in the same manner as it did for other "local roads."

The Greens do not dispute the federal government's appropriation of Tudor Road to the extent of the actual roadway and abutting shoulder.[13] The Greens also acknowledge

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13. The Greens devote a substantial portion of their brief to the argument that the state's position is incorrect because appropriation of land for a roadway does not reserve a right-of-way beyond the width of the roadway and abutting shoulder as actually established by expenditure of funds or construction of the road. As we understand the briefs, however, the state does not argue that the 50 foot right-of-way was appropriated by the United States. Instead, the state contends that once Tudor Road was appropriated, Secretarial Order No. 2665 operated to establish a 50 foot right-of-way -- regardless of Tudor Road's original width.

that their predecessor in interest was not in possession of lot 11 until after the original construction of Tudor Road.[14] In addition, they agree with the state that Secretarial Order No. 2665 is valid within its proper sphere of application; but they contend that neither the statutory authority upon which Secretarial Order No. 2665 is based nor the order itself is applicable to lands classified under the Small Tract Act.

The Greens rely principally on this court's opinion in State, Department of Highways v. Crosby, 410 P.2d 724 (Alaska 1966), to support their contention that 48 U.S.C. §321a (1946) and Secretarial Order No. 2665 were inapplicable

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14. The relevant chronology for the Greens' property is as follows:

Secretarial Order No. 2665	October 20, 1951 (date of publication in the Federal Register)
Application for small tract lease by the Greens' predecessor in interest	August 26, 1952
Lease issued to the Greens' predecessor in interest	September 1, 1952
Patent issued to the Greens' predecessor in interest for lot 11	December 1, 1953

to lands classified under the Small Tract Act.[15] In Crosby this court determined that another statute, 48 U.S.C. § 321 d (1952), was not applicable to lands leased or sold pursuant to the Small Tract Act. The court relied upon congressional intent as reflected in the legislative history of the Act of July 24, 1947, codified as 48 U.S.C. § 321d (1952), and concluded:

> [T]he 1974 Act, in speaking of lands "taken up, entered, or located," had reference only to those public land laws where discretionary authority on the part of a government officer or agency to impose reservations for rights-of-way was absent, and was not intended to apply to those laws where such authority existed. 16 /

The Small Tract Act gave the Secretary of the Interior discretionary authority to sell or lease small tracts "under such rules and regulations as he may prescribe", and the Secretary had issued regulations prescribing a 33 foot right-of-way without providing for the right-of-way requirements contained in 48 U.S.C. § 321d (1952). Accordingly, the general right-of-way reservation in 48 U.S.C. § 321d (1952) did not apply, and only the discretionary right-of-way applicable specifically to Small Tract Act lands was operative.

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15. Act of June 1, 1938, 52 Stat. 609, 43 U.S.C. § 682 (a) (1964). The Small Tract Act was made applicable to Alaska by the Act of July 14, 1945, 59 Stat. 467.

16. State, Dept. of Highways v. Crosby, 410 P.2d 724, 727 (Alaska 1966).

In the case at bar, the state does not rely upon 48 U.S.C. §321d (1952); instead, it bases its argument exclusively on 48 U.S.C. §321a (1952) and Secretarial Order No. 2665.[17] The statute involved in Crosby was enacted July 24, 1947; the statute which authorized Secretarial Order No. 2665 had been enacted 15 years earlier on June 30, 1932. In addition, the subjects addressed by §321a differ markedly from those addressed by §321d. Section 321a governs the transfer of road construction and maintenance functions to the Secretary while section 321d requires certain right-of-way reservations to be included in "all patents for lands hereafter taken up, entered or located in the Territory of

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17. The Greens acknowledge that Secretarial Order No. 2665 was issued pursuant to the Act of June 30, 1932, c. 320, §2, 47 Stat. 446, 48 U.S.C. §321a (1946). That section directed the Secretary of the Interior to "execute or cause to be executed all laws pertaining to the construction and maintenance of roads . . . in Alaska."

Under the provisions of 48 U.S.C. §321a (1946), all appropriations made and available for expenditure by the board of road commissioners under the Secretary of the Army were transferred to the Secretary of the Interior "to be thereafter administered in accordance with the provisions of sections 321a-321d of this title." Id. The board of road commissioners was also "directed to turn over" property for the use of the Secretary of the Interior in constructing and maintaining roads and other works. Id.

Section 321a was repealed by Pub. L. 86-70, §21 (d)(7), June 25, 1959, 73 Stat. 146, effective July 1, 1959.

We note that both this court and the federal courts have treated Secretarial Order No. 2665 as valid, although no direct challenge to its validity has been raised. See Myers v. United States, 210 F.Supp. 695 (D. Alaska 1962); Myers v. United States, 378 F.2d 696 (Ct. Cl. 1967).

Alaska." The Crosby decision held that right-of-way reservations under 48 U.S.C. §321d (1952) did not apply to small tracts because Congress intended §321d to operate only if no discretionary authority was available to reserve rights-of-way when public lands were "taken up, entered, or located." Crosby did not conclude that right-of-way reservations under the Small Tract Act were exclusive or that additional discretionary right-of-way reservations were precluded.

Neither the Greens nor the Goodmans have cited any authority indicating the Secretary's intention to exclude other potentially applicable right-of-way reservations. Administrative regulations under the Small Tract Act stated:

> Unless otherwise provided in the classification order, the leased land will be subject to a right-of-way of not to exceed 33 feet in width along the boundaries of the tract for street and road purposes and for public utilities. The location of such access streets or roads may be indicated on a working copy of the official plat . . . . 18 /

Thus, while the regulation may be read restrictively ("Unless otherwise provided in the classification order . . . not to exceed 33 feet in width"), its apparent objective was to provide rights-of-way for "access streets or roads" and for public utilities, not to eliminate other potentially applicable reservations. As the state emphasizes, this

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18. 43 C.F.R. § 257.16 (c) (1954).

language and the parallel language of the lease[19] suggest the Secretary's concern with reserving access for other lots within the boundaries of the small tract lease area.[20] Such provisions do not indicate that other rights-of-way should be precluded. Nor does the language of the Small Tract Act or its legislative history show Congress' intention to preclude operation of all right-of-way reservations except those specifically applying to small tracts.

In the absence of some indication that Congress intended right-of-way reservations under the Small Tract Act to be exclusive or that rights-of-way reserved pursuant to the Small Tract Act are incompatible with other potentially applicable rights-of-way, we conclude that the various

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19. The lease for lot 11 provided, in part:

> (m) That this lease is taken subject to the rights of others to cross the leased premises on, or as near as practicable to, the exterior boundaries thereof, as a means of ingress or egress to or from other lands leased under authority of this act. Whenever necessary, the Regional Administrator may make final decision as to the location of rights-of-way. It has been determined that the land leased herein is subject to a 33-foot right-of-way along the north and west boundaries.

20. It should be noted that the case at bar involves rights-of-way for a bordering "local" road rather than rights-of-way for streets or utilities serving interior lots.

discretionary rights-of-way must be allowed to operate together.[21] Thus, unless the 50 foot right-of-way created by Secretarial Order No. 2655 is irreconcilable with the

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21. The Department of the Interior also contemplated the possibility of non-exclusive, overlapping rights-of-way from more than one source. The Assistant Solicitor, Department of the Interior stated:

> [T]here could be an overlapping of rights-of-way over a tract of land as where a right-of-way generally provided for under the act of 1947 . . . and specifically referred to in a reservation designating a certain width, could intersect or cross an access boundary road reserved under authority of 43 C.F.R. 257.17(b).

Memorandum of Opinion of the Solicitor, Department of the Interior, 1-59-2242.10 (Oct. 9, 1959). Although the memorandum is addressed to the express reservation of rights-of-way considered in Crosby, it is significant because it reflects the Department of the Interior's position that the 33 foot right-of-way appearing in small tract patents is not exclusive.

An administrative agency's interpretation of its own regulation is normally given effect unless palinly erroneous or inconsistent with the regulation. 1A C. Sands, Sutherland Statutory Construction § 31.06, at 362 (4th ed. 1972). See Udall v. Tallman, 380 U.S. 1, 4, 13 L. Ed. 2d 616, 619 (1965); Burglin v. Morton, 527 F.2d 486, 490 (9th Cir. 1975), cert. denied, 425 U.S. 973, 48 L. Ed. 2d 796 (1976). An administrative agency's interpretation of a statute is not binding upon courts since statutory interpretation is within the judiciary's special competency but where the statute is ambiguous, some weight may be given to administrative decisions interpreting it. Union Oil Co. of Cal. v. Department of Revenue, 560 P.2d 21, 23 (Alaska 1977).

33 foot right-of-way created by regulations[22] under the Small Tract Act, the Green's property is subject to the 50 foot right-of-way.

The Greens also argue that even if Secretarial Order No. 2665 applies to land conveyed pursuant to the Small Tract Act, the order establishing a 50 foot right-of-way and the administrative regulation establishing a 33 foot right-of-way must be construed together. The Greens contend that only by limiting the right-of-way to 33 feet in width will both the order and the regulation be permitted to operate without nullification of one or the other; in addition, the Greens argue, the 33 foot right-of-way is more specific and should control when applicable reservations are in conflict. The state counters by saying that the 50 foot right-of-way established by Secretarial Order No. 2665 is consistent with the 33 foot right-of-way established by administrative regulation because the purposes served by the two rights-of-way are different.

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22. Regulations promulgated pursuant to the Small Tract Act stated:

> Unless otherwise provided in the classification order, the leased land will be subject to a right-of-way of not to exceed 33 feet in width along the boundaries of the tract for street and road purposes and for public utilities. (emphasis supplied)

43 C.F.R. §257.16(c) (1954).

While we agree with the Greens that the 33 foot right-of-way reservation is more specific, it does not follow that the 50 foot right-of-way may not operate. That is, language of the administrative regulation, classification order and small tract patent show a progressively narrower focus on the Greens' lot; thus, the 33 foot right-of-way reservation appearing in the patent is more specific than the general right-of-way reservation contained in Secretarial Order No. 2665. Nevertheless, the rule of construction favoring specific provisions over general provisions need not be invoked unless it is impossible to give effect to both provisions. As Professor Sutherland explains:

> Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. 23 / (emphasis added)

We think there is no serious conflict between the two overlapping rights-of-way and no need to resort to the rule of construction favoring specific provisions over general provisions.

The Greens correctly point out that the 50 foot

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23. 2A C. Sands, Sutherland Statutory Construction §51.05, at 315 (4th ed. 1973) (footnotes omitted).

right-of-way makes the 33 foot reservation superfluous to the extent of overlap. However, no actual conflict exists between the two provisions. The primary purpose of both reservations is to protect rights-of-way and that purpose is served with regard to the 33 foot provision even if the actual right-of-way is larger than 33 feet. The other purposes of the reservation specifically applicable only to small tracts, street and utility access to interior lots, are not impaired if the Tudor Road right-of-way is 50 feet. However, the converse is not true; the purposes to be served by the larger reservation for local roads cannot be served as readily by a 33 foot right-of-way.[24]

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24. Other rules of construction also favor this outcome:

> As a general rule, where the language of a public land grant is subject to reasonable doubt such ambiguities are to be resolved strictly against the grantee and in favor of the government.

3 C. Sands, Sutherland Statutory Construction § 64.07, at 137 (4th ed. 1974)(footnotes omitted). See generally id. §§ 63.02, 63.03. Public grants must also be evaluated in light of other rules and aids of statutory construction. Id. § 63.10, at 103.

Administrative regulations which are legislative in character are interpreted using the same principles applicable to statutes. 1A C. Sands, Sutherland Statutory Construction § 31.06, at 362 (4th ed. 1972). See generally Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971). In the case of administrative regulations which deal with the same subject, their provisions should be considered together:

> Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable con-

In light of the foregoing considerations, we conclude that the superior court erred in granting the Greens' motion for summary judgment. Since there are no genuine issues of material fact with respect to the Green property, the state's motion for summary judgment should have been granted.

(footnote 24 continued)

> struction, both are to be so construed that effect is given to every provision in all of them.

2A C. Sands, Sutherland Statutory Construction § 61.02, at 290 (4th ed. 1973) (footnote omitted). In some circumstances, the interpretation of one provision is properly influenced by the content of another provision addressing similar purposes or objects. State v. Bundrant, 546 P.2d 530, 545 (Alaska 1976), appeal dismissed, 429 U.S. 806, 50 L. Ed. 2d 66. See also Stewart & Grindle, Inc. v. State, 524 P.2d 1242, 1245 (Alaska 1974). As Professor Sutherland explains:

> The guiding principle . . . is that if it is natural and reasonable . . . that members of the legislature . . . would think about another statute and have their impressions derived from it influence their understanding of the act whose effect is in question, then a court called upon to construe the act in question should also allow its understanding . . . to be influenced by impressions derived from the other statute.

2A C. Sands, Sutherland Statutory Construction § 51.03, at 298-99 (4th ed. 1973).

To the extent that the right-of-way width affecting the Goodmans' lot is dependent upon applicability of Secretarial Order No. 2665, our conclusions with respect to the Greens' property apply. However, the dispute between the state and the Goodmans centers on issues different from those discussed in connection with the Greens' lot. The relevant chronology for lot 12 is the primary reason for such divergence.[25]

The Goodmans contend that their predecessor patentee had received a small tract lease to lot 12 prior to construction of Tudor Road; therefore, when lot 12 was leased, the United States had not appropriated any portion of the roadway. The Goodmans further maintain that the original lease of lot 12 created vested rights in the lessee and that neither subsequent construction of Tudor Road nor issuance of Secretarial Order No. 2665 was effective to create a valid 50 foot right-of-way.

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25. The relevant chronology for the Goodman property is as follows:

Small Tract Classification No. 22	March 23, 1950
Alleged "entry" of the Goodmans' predecessor patentee pursuant to small tract lease	April 12, 1950
Secretarial Order No. 2665	October 20, 1951 (date of publication in Federal Register)
Patent issued to the Goodmans' predecessor patentee for lot 12	April 28, 1952

The state argues that the Goodmans' predecessor patentee acquired no vested interest in lot 12 until issuance of the patent in 1952. Thus, since it is undisputed that construction of Tudor Road had commenced prior to issuance of the patent to lot 12, the appropriation of Tudor Road and the operation of Secretarial Order No. 2665 combined to establish a 50 foot right-of-way. In the alternative, the state contends that summary judgment should not have been granted because a genuine issue of material fact exists with respect to whether construction of Tudor Road was begun prior to the issuance of a small tract lease for lot 12.

Although the parties have focused on the question whether the patentee's rights relate back to the date when the small tract lease was issued, we believe the matter may be resolved by examining the effects of the lease on general right-of-way provisions as implemented by Secretarial Order No. 2665. We already have concluded that the Small Tract Act and Small Tract Classification No. 22 did not segregate all small tracts from the operation of other discretionary right-of-way reservations. Accordingly, prior to issuance of a lease or patent, appropriation of a roadway on lands classified as small tracts and operation of Secretarial Order No. 2665 were sufficient to establish a 50 foot right-of-way. Our disposition of the state's appeal with regard to the Greens' lot illustrates such a situation.

Once a lease to a particular parcel had been issued,[26] circumstances were different. Essentially, the lease separated the land from other small tracts; the lessee took the property subject to both the general right-of-way reservations which applied at the time of lease and the specific right-of-way reservations which applied through the lease's provisions. Thus, the general right-of-way reservation in Secretarial Order No. 2665 applied to the Goodman property only if the effective date of lease was preceded by both the construction of Tudor Road and the issuance of Secretarial Order No. 2665. That is, until the Department of the Interior had acted to bring Tudor Road into existence, there was no basis for the Secretary's reservation of rights-of-way. Once construction of Tudor Road had begun, however, the full administrative authority granted by 48 U.S.C. §321a (1952) became operative and the lessee of lot 12 took his lease subject to such authority. The Secretary did not exercise that authority

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26. With respect to leases of other public lands in Alaska, the United States has been treated as having the same rights and obligations as any other lessor. See Standard Oil Co. of Cal. v. Hickel, 317 F.Supp. 1192 (D. Alaska 1970) aff'd. 450 F.2d 493 (9th Cir. 1970).

until he issued Secretarial Order No. 2665 in October 1951.[27] Thus, prior to October 19, 1951, no general right-of-way reservation for Tudor Road had been established. If the order became effective with respect to Tudor Road before issuance of the lease, we think the property was subject to the 50 foot right-of-way; this conclusion is consistent with our determination that the Small Tract Act and Small Tract Classification No. 22 did not segregate all small tracts from the operation of general, discretionary right-of-way reservations. However, if the general reservation became effective after the lease had been issued, we believe the Secretary must have intended that subsequent general reservations would not apply and that his discretionary reservation in the lease would operate instead of such later reservations. Any other construction either would make the general reservation entirely inapplicable to small tracts, a result which is not supported by legislative or administrative materials before this court, or would make small tract leases and the patents derived from such leases completely vulnerable to subsequent right-of-way acquisition during the term of the lease, a result which is inconsistent with Congress' apparent intention to transfer property interests

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27. Secretarial Order No. 2665 was issued on October 16, 1951; it was published in the Federal Register on October 20, 1951.

through the Small Tract Act.[28]

In the case at bar, the lease to the Goodman property is dated June 30, 1950[29] and Secretarial Order No. 2665 did not become effective until October 20, 1951. Thus, when the lease was executed, the 50 foot right-of-way had not been established and the second requirement noted above was not met.

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28. The potential multiplication of rights-of way under Secretarial Order No. 2665 is illustrated by considering the right-of-way applicable to a "new" local road pursuant to section 3(c) of Secretarial Order No. 2665, which provides:

> (c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) [establishing rights-of-way covering lands embraced in feeder roads and local roads] will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

Assuming that the lease provides for a 33 foot right-of-way, construction of a local road not in existence at the time of lease presumably could proceed within the expressly reserved width. Once in existence, the new road might qualify as a "local road" under Secretarial Order No. 2665, §§2(a)(3) and 3(c). The applicable right-of-way then would expand to 50 feet. If the Secretary subsequently reclassified the local road to a feeder road or through road, the right-of-way would expand still further. See Secretarial Order No. 2665. We do not believe that the United States intended to grant such an illusory property interest.

29. The Goodmans originally alleged that their predecessor patentee had entered lot 12 pursuant to a small tract lease as early as April 12, 1950. The state countered by arguing that Small Tract Classification Order 22 did not become effective until April 13, 1950. The date which appears on the lease to the Goodman's tract is June 30, 1950.

We therefore conclude that Secretarial Order No. 2665 did not operate to establish a 50 foot right-of-way on lot 12.

The state also contends that the express provisions of the lease to lot 12 reserved power in the federal government to designate rights-of-way after the date of lease. The state points out that the lease contained the following language:

> It is further understood and agreed:
>
> (l) That nothing contained in this lease shall restrict the acquisition, granting, or use of permits or rights-of-way under existing laws.
>
> (m) That this lease is taken subject to the rights of others to cross the leased premises on, or as near as practicable to, the exterior boundaries thereof, as a means of ingress or egress to or from other lands leased under authority of this act. Whenever necessary, the Regional Administrator may make final decisions as to the location of rights-of-way. It has been determined that the land leased herein is subject to a 33-foot right-of-way along the north and west boundaries.

The state argues that such language and the placement of the 33 foot right-of-way provision in paragraph (m) show the continuing "paramount power" of the United States "to establish rights-of-way until the patent issued."

While we agree that the lease's effects are best evaluated by examining the terms of the lease agreement, we

are not persuaded that the lessee of lot 12 obtained only an interest subject to the unlimited power of the federal government to reserve rights-of-way. As we view the Secretary's use of the specific right-of-way reservation in the lease and his use of the separate discretionary reservation in Order No. 2665, the Secretary made no attempt to "acquire, grant or use" a right-of-way other than the one to which the lease and patent both referred. That is, by issuing the small tract lease containing a specific, discretionary right-of-way reservation the Secretary intended to preclude subsequent operation of the general discretionary reservation in Order No. 2665. Even if Secretarial Order No. 2665 is regarded as an attempt by the Secretary to acquire a right-of-way after the date of lease, we note that the order was not in existence until after the date on which a lease to lot 12 was issued. The only relevant "existing law" at the time of the lease was 48 U.S.C. §321a (1952) and section 321a contained no reference to such reservations. As discussed above, the administrative authority contained in section 321a to reserve rights-of-way was not effective until after both construction of Tudor Road and issuance of Secretarial Order No. 2665.[30]

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30. Small Tract Classification No. 22 specifically provided:

> Leases will contain an option to purchase the tract at or after the expiration of one year from the date the lease is issued,

Although we have concluded that neither the lease agreement nor Secretarial Order No. 2665 operated to establish right-of-way extending 50 feet from the center line of Tudor Road, one additional matter remains to be considered. The parties apparently agree that actual physical appropriation of the roadway by the United States is sufficient to create a valid right-of-way. Thus, the question remains whether a 50 foot right-of-way actually had been appropriated prior to the

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(footnote 30 continued)

> provided the terms and conditions of the lease have been met.

The lease reflects this requirement by its inclusion of the following language:

> The lessee or his duly approved successor in interest may purchase the above described land at or after the expiration of one year from the date of this lease, provided the improvements required hereunder have been made and he has otherwise complied with the terms and conditions of this lease.

The option to purchase imposes no conditions which were not already applicable through the lease. We have concluded that the lease did not permit acquisition during the lease term of general rights-of-way which were not applicable to the leased land prior to the effective date of the lease; accordingly, we believe the interest transferred by the lease and option to purchase was not intended to be subject to unilateral reduction between the date the lease was executed and the date the option was exercised. Any other interpretation not only would violate the apparent intention of the parties as expressed in the option provision, but would contravene the principles governing leases with options to purchase. See generally I American Law of Property §§ 3.82, 3.84 (1952); II M. Friedman, Friedman on Leases § 15.1 (1974); 2 R. Powell, The Law of Real Property ¶ 245 [2] (Rohan ed. 1977).

date on which lot 12 was leased. In order to answer that question, it is necessary to determine what acts constitute physical appropriation and, if those acts are found to exist, how extensive the appropriation was. However, the materials before this court are not adequate to provide answers to these questions. The parties' briefs and the affidavits submitted with their respective motions for summary judgment do show that a dispute exists regarding the details of Tudor Road's early history.[31] We believe these uncertainties constitute genuine issues of material fact which must be resolved prior to determination of the merits.

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31. The state introduced an affidavit and other documents indicating that construction of Tudor Road was begun as early as April 1950. An affidavit introduced by the Goodmans states that actual construction of Tudor Road began in late May or early June 1950. Thus, although the parties apparently agree that construction had begun prior to the issuance of a lease to the Goodman's parcel, the extent of that activity and other facts relevant to the question of appropriation remain to be determined.

Accordingly, summary judgment was improper.[32] On remand, the superior court should determine the extent of Tudor Road's appropriation by the United States and the specific acts which constituted the appropriation. At a minimum, the superior court should make the following findings: the date Tudor Road was planned and the planned width, the date Tudor Road was staked and the designated width, and the date construction of Tudor Road began.[33]

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32. Civil Rule 56(c) provides, in part:

> Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Once the movant has satisfied his burden of establishing an absence of genuine issues of material fact and its right, on the basis of the undisputed facts, to judgment as a matter of law, the non-movant is required, in order to prevent summary judgment, to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of facts exists. Howarth v. First Nat'l Bank of Anchorage, 540 P.2d 486, 489-90 (Alaska 1975), aff'd on rehearing, 551 P.2d 934 (Alaska 1976). Mere assertions of fact in pleadings and memoranda are insufficient for denial of a motion for summary judgment. Brock v. Rogers & Babler, Inc., 536 P.2d 778, 782-83 (Alaska 1975); Braund, Inc. v. White, 486 P.2d 50, 53-54 (Alaska 1971).

33. We do not imply that such factors are the only relevant considerations for evaluating physical appropriation. Since the parties' briefs do not specifically address the question and the factual setting is murky, we decline to suggest criteria in the present appeal. However, with guidance from the parties and the above noted facts as a starting point, the superior court should be able to make a reasoned decision as to the date and extent of appropriation.

Our disposition of this matter does not preclude the superior court from considering administrative materials which are not before us on this appeal.

As discussed previously, the superior court's grant of the Greens' motion for summary judgment also must be reversed, and the case is remanded for entry of summary judgment in favor of the state.

Reversed and remanded in part.

THE SUPREME COURT OF THE STATE OF ALASKA

WOLFGANG HAHN and JANET ELAINE HAHN, Appellants, v. ALASKA TITLE GUARANTY COMPANY, Appellee.	File No. 2801 OPINION [No. 1342 - December 6, 1976]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, James K. Singleton, Jr., Judge.

Appearances: Lee S. Glass, Johnson, Christenson, Shamberg & Link, Inc., Anchorage, for Appellants. John P. Irvine, Anchorage, for Appellee.

Before: Boochever, Chief Justice, Rabinowitz, Connor, Erwin and Burke, Justices.

BOOCHEVER, Chief Justice.

Wolfgang and Janet Elaine Hahn purchased a title insurance policy from Alaska Title Guaranty Company. The policy, which was issued in 1969, indicated that there was a reservation for a right-of-way for roadway and public utility purposes over the east 33 feet of the premises as contained in the United States patent. Subsequently, the State of Alaska claimed an easement 50 feet in width, 17 feet more than the 33 foot easement indicated

in the policy, along the easterly boundary of the premises. The State claimed the easement under Public Land Order No. 601, issued by the Secretary of Interior on August 10, 1949[1] and filed with the office of Federal Register on August 15, 1949 in Washington, D.C. The public land order was not recorded under the Alaska Recording Acts, and neither the order nor the easement created by it is referred to in the original patent issued on June 28, 1961. The order was published in the Federal Register.[2]

In 1974, the State of Alaska, as successor in interest to the United States Government, constructed a paved road which occupied land 50 feet in width along the eastern boundary of the Hahn's property. The Hahns brought suit against the title company for the damages attributable to the loss of the 17 foot strip of property in excess of the 33 foot easement specified in the title policy. After the Hahns filed a motion for summary judgment, the trial court granted summary judgment to the title company. From that judgment, the Hahns appeal.

The basic issue to be determined is whether the title company was obligated to list the wider 50 foot easement as an encumbrance. The title company contends that their coverage is limited, by General Exception #1, to claims disclosed by "public

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1 The order was issued pursuant to the power granted the Secretary of Interior under Executive Order No. 9337 of April 24, 1943.

2 14 Federal Register at 5048.

records" as defined in the policy and that the definition does not include public land orders published in the Federal Register. "Public records" are defined in Paragraph 4(d) of the policy to be "records, which under the recording laws, impart constructive notice with respect to said real estate". Thus, we must decide whether a public land order filed with the office of the Federal Register constitutes a record which, under recording laws, imparts constructive notice with respect to the property in question.

Oddly enough, neither the efforts of counsel nor our independent research has uncovered a case squarely on point. This paucity of case authority may be explained in part by the introduction to Chapter 12 of Patton on Titles.

> A generation ago, there was only about half as many kinds of liens imposed by federal statute as at present. And of the classes then in existence, judgments, lis pendens, etc., the volume of items was so small in comparison to the number of land transfers that one seldom heard of a tract which was incumbered by a federal lien. To such an extent was this the case that, though in the majority of counties abstractors and examiners ignored them, there appear to have been but few losses from that source. Everyone recognizes however, that the United States, the same as the state in which a tract of land is situated, is a sovereignty, with power to prescribe the effect of judgments of its courts and of charges imposed by its statutes, and that such judgments and charges are now of considerable prevalence. A present-day examiner cannot, therefore, do his duty to his client without considering the possibilities of incumbrance on account of provisions of the federal statutes. . . . [Emphasis added] Patton On Titles, Vol. II, ch. 12, § 65 page 575.

Patton on Titles does not, however, discuss the effect of encumbrances arising under federal executive orders, which are published in the Federal Register.

In determining the construction of insurance policy provisions, it is well established that ambiguities are to be construed in favor of the insured.[3] Also in the insured's favor is the rule that provisions of coverage should be construed broadly while exclusions are interpreted narrowly against the insured.[4] These rules of construction have evolved due to the unequal bargaining power of insureds relative to insurance companies. Usually, as in this case, the insured is presented with a form policy and has no choice as to its provisions.[5]

Here, as indicated by the trial judge, in the absence of the definition portion of the policy, there would be little difficulty in construing the term "public records" to include

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3 Gillespie v. Travelers Insurance Co., 486 F.2d 281, 283 (9th Cir. 1973); Pepsi Cola Bottling Co. of Anchorage v. New Hampshire Insurance Co., 407 P.2d 1009, 1013 (Alaska 1965); Lumbermen's Mutual Casualty Co. v. Continental Casualty Co., 387 P.2d 104, 108 (Alaska 1963).

4 State Farm Mutual Automobile Ins. Co. v. Partridge, 10 Cal. 3d 94, 514 P.2d 123, 128, 109 Cal. Rptr. 811 (1973).

5 We have held that insurance policies are to be looked upon as contracts of adhesion for the purpose of determining the rights of parties thereto. The result of such a finding is to construe the policy so as to provide that coverage which a layman would reasonably have expected given his lay interpretation of the policy terms. Graham v. Rockman, 504 P.2d 1351, 1357 (Alaska 1972); Continental Ins. Co. v. Bussell, 498 P.2d 706, 710 (Alaska 1972); cf. National Indemnity Co. v. Flesher, 469 P.2d 360, 366 (Alaska 1970).

material published in the Federal Register. 44 U.S.C. § 1507 indicates that such material is a matter of public record.

> . . . [u]nless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. . . .

This appeal focuses on the definition in the policy of public records as "records, which under the recording laws, impart constructive notice with respect to said real estate". As indicated by 44 U.S.C. § 1507, the publication in the Federal Register does impart constructive notice. When Public Land Order No. 601 appeared in the Federal Register, constructive

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6 There is no question that Public Land Order No. 601 was authorized to be published under 44 U.S.C. § 1505(a)(1), which provides in part for publication in the Federal Register of Executive Orders.

notice was furnished with respect to the real estate described therein. The description of the easement reserved included a portion of the Hahns' property.[7]

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[7] Public Land Order No. 601 provided in part:

> Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway. 150 feet on each side of the center line of all other through roads. 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and revised for right-of-way purposes:
>
> THROUGH ROADS
>
> Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.
>
> FEEDER ROADS
>
> Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok-Eagle Road, Ruby-Long-Poorman Road, Nome-Soffmoir Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.
>
> LOCAL ROADS
>
> All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

The only part of the definition which is not clearly in favor of the Hahns' construction is the portion which refers to "the recording laws". The title company would have us construe the phrase as meaning "the recording laws of Alaska", but nowhere is the definition so limited. The most that may be said in support of the title company's position is that the language might be ambiguous, in which event it must be construed in favor of the Hahns. We see no reason why the term does not incorporate federal recording laws insofar as they are applicable to Alaska property.

Whether the statute providing for publication of orders, such as Public Land Order No. 601, in the Federal Register may be regarded as a "recording law" depends on the meaning to be given that quoted term. While we have been unable to find a case squarely on point, dictum in Hotch v. United States, 212 F.2d 280 (9th Cir. 1954) indicates that the Federal Register Act is a recording statute. In that case, Hotch appealed from a conviction for fishing in violation of a regulation of the Department of Interior extending the period closed to commercial fishing on the Taku Inlet, Alaska. He argued that the regulation was ineffective since it had not been published in the Federal Register. The government argued that the defense was inapplicable since Hotch had actual knowledge of the regulation. The court discussed two functions of the Federal Register Act; one, the requirement of publication in order to establish

the validity of certain documents; and the other, the furnishing of actual and constructive notice of government acts. It held the regulation to be invalid due to failure to comply with the statutory requirements of publication. Actual notice was held not to obviate the requirement that the regulation itself must be published. As pertains to the notice function of the Federal Register Act, the court's statement is particularly applicable here.

> While the Administrative Procedure Act and the Federal Register Act are set up in terms of making information available to the public, the acts are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. Hotch v. United States, supra, at 283. [Emphasis added] [Citations omitted]

The United States Court of Appeals for the Ninth Circuit thus clearly indicated that the Federal Register Act was a recording statute. There is no question but that publication of a record therein imparts "constructive notice".[8] Public Land Order No. 601 referred to the real estate in question. It follows that publication of Public Land Order No. 601 complies

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[8] See, 44 U.S.C. § 1507, quoted in part, supra.

with the policy definition of "records which, under the recording laws, impart constructive notice with respect to said real estate".[9]

Moreover, this construction conforms to the general meaning of the terms used. Black's Law Dictionary, Revised 4th ed. defines the verb, "record", as ". . . To transcribe a document . . . in an official volume, for the purpose of giving notice of the same, of furnishing authentic evidence, and for preservation."[10] This is exactly what is accomplished by publication in the Federal Register. Since such publication is authorized by statute, it constitutes a record under a "recording law(s)".

If it were an insurmountable burden to have title companies ascertain whether property has been affected by orders published in the Federal Register, we might have some difficulty with construing the policy language so literally and might find

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9 Other cases holding that the Federal Register is a recording statute imparting constructive notice under varying circumstances, are Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85, 92 L. Ed. 10, 15 (1947); United States v. Millsap, 208 F. Supp. 511, 516 (D. Wyo. 1962); Graham v. Lawrimore, 185 F. Supp. 761, 763-64 (D. S.C. 1960); Lynsky v. United States, 126 F. Supp. 453, 455 (U.S. Ct. Claims 1954); Bohannon v. American Petroleum Transport Co., 86 F. Supp. 1003, 1005 (D. N.Y. 1949); Toledo P&W R.R. v. Stover, 60 F. Supp. 587, 596 (D. Ill. 1945); Marshall Produce Co. v. St. Paul Fire and Marine Ins. Co., 98 N.W.2d 280, 291 (Minn. 1959).

10 Black's Law Dictionary, Fourth Revised Ed. 1437.

more persuasive an argument that we should look only to the Alaska recording laws. We note that the trial judge specifically inquired at the time of argument as to the difficulties that would be encountered by title companies in reviewing relevant public land orders. Counsel, in response, submitted affidavits indicating that such reviews were not customarily made. The affidavits, however, are significantly silent as to any burden involved in checking the Federal Register. Alaska's statutes regulating title insurance companies require that "[a] title insurance company shall own and maintain in the recording district in which its principal office in the state is located a title plant consisting of adequate maps and fully indexed records showing all instruments of record affecting all land within the recording district for a period of at least 25 years immediately before the date a policy of title insurance is issued by the title insurance company. . . ."[11] A public land order published in the Federal Register would appear to be such an instrument of record affecting the land, and therefore, copies should be available in the title company's plant.

Our construction of the policy has the additional function of requiring the companies to furnish that degree of protection which a purchaser of a title insurance policy is likely to expect. As we read the exception in the policy of

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[11] AS 21.66.200.

"public or private easements not disclosed by the public records", it is intended primarily to protect against unrecorded easements or rights of way acquired by prescription which could only be discovered by physical inspection of the land itself. The title companies do not undertake such a burden and therefore should not be responsible for failure to note such encumbrances.

By this opinion, we do not require title companies to insure against all defects which would be revealed by all documents kept by public bodies. Title companies are chargeable, however, with revealing defects ascertainable from documents published under statutory authority for the purpose of giving constructive notice in places, including Alaska.

In view of our discussion in this matter, it is unnecessary to reach the other issues raised on this appeal.

The summary judgment in favor of the title company is reversed and the case is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

August 23, 1976

Wesley M. Howe
Borough Manager
Matanuska-Susitna Borough, Inc.
Box B
Palmer, Alaska 99645

Re: Section line easements,
Our file A-3038.18

Dear Wes:

BACKGROUND

Determining the validity of any particular section line easement within the State of Alaska can be quite complicated. To understand some of the problems which may arise it is necessary to consider the principals which govern the creation of such easements.

To begin with, all such easements flow from a Federal statute first enacted in 1866. Now codified as 43 U.S.C. §932 it provides:

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

This statute standing by itself does not create an easement across public lands. However, where there has been either:

(a) "some positive act on the part of the appropriate public authorities of the State, clearly manifesting an intention to accept a grant", or
(b) "public user for such a period of time and under such conditions as to prove that the grant has been accepted", the easement is created. Namerly v. Denton, 359 P.2d 121, 123 (Alaska 1961).

The preoccupation with section lines in Alaska flows from the fact that the appropriate governmental authorities saw fit to accept the Federal statutory grant by reference to section lines. Our research discloses that the first Territorial act dedicating public lands for road purposes

was enacted in 1923. Section 1, Ch. 19, Laws of Alaska, 1923, dedicated a tract 4 rods wide between each section of land in the Territory of Alaska for use as public highways. The section line was to be the center of the highway. Since a rod is 16 1/2' wide this particular acceptance of the Federal statutory grant would result in creation of an easement 66' wide. That statute also included the following language:

> 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.

The provision enacted in 1923 was codified as §1721 of the Compiled Laws of Alaska, 1933 and remained on the books until 1949. In 1949 the laws of the Territory were compiled again and inexplicably the law passed in 1923 was excluded from the 1949 compilation. More than that, a table included with the Compiled Laws of Alaska in 1949 shows that the law in question is "invalid". No reason is given. A review of the session laws between 1923 and 1949 discloses that the law was not repealed. Thus, there is at least some ambiguity as to whether or not the law remained in effect after the 1949 compilation. In any event an acceptance of the Federal statutory grant did not appear again until 1951, and the acceptance was limited to land owned by the Territory of Alaska. Section 1, Ch. 123, Laws of Alaska, 1951 provides:

> A tract 100' 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, the 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.

In 1953 the statute passed in 1951 was amended to include an additional dedication of a tract 4 rods wide between all other sections located within the Territory.

Recently our Supreme Court recognized the efficacy of the 1953 law, now codified as AS 19.0.010. Recognition came in the case of Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (1975). A copy of this decision was sent to Georgia Estes on February 4, 1976. However, the Girves decision was not concerned with the validity of a section line easement allegedly created prior to 1953. Of course, even in cases where the creation of the section line easement is said to have taken place subsequent to 1953 there can be difficult questions of fact involved in any determination respecting the validity of the section line easement. These questions would revolve primarily around the status of the land across which the easement was to have been created. Was it at all pertinent times "public" land not dedicated to any public use and not subject to any private entry. For example, we know that a valid entry under the Homestead laws prior to the creation of the section line easement would prevent the creation of the section line easement. Hamerly v. Denton, supra. Needless to say this can involve complicated sets of records kept by the Bureau of Land Management as well as testimony by witnesses. Whenever the section line easement is alleged to have been created prior to 1953 there is a potential for dispute over the effect of the 1949 compilation and the 1951 statute which was limited to lands owned by the Territory. The 1949 compilation may have repealed the 1923 statute. If the 1949 compilation did not effectively repeal the earlier law, there is certainly room to argue that the 1951 statute did by implication, because it limited its effect to lands owned by the Territory. Our courts have not yet been asked to decide whether the 1949 or 1951 legislation would result in the return of the section line easements created under the 1923 law to the owners of record of the parcels across which a section line easement was originally created. However, that is certainly a possible result given the language of the 1923 statute referring to the results which take place whenever the highway is "vacated by any competent authority".

In cases where the proponent of the section line easement wishes to rely upon acceptance through actual public

use rather than through acceptance of the Federal statutory grant by the act of the State or Territorial legislature, there will always be questions of fact concerning the duration and extent of the use. Was the use sufficiently "public" to justify the court in concluding that the public accepted the offer contained in 43 U.S.C. §932? There have been cases holding that the use was insufficient. Thus, there will always be risk involved in relying upon the fact that a road has been in existence and used for a considerable period of time. It is possible that the current use of the road is not representative of the use which was made of it at the time when the acceptance must have been made if it is to be effective (i.e., prior to the time that the land passed from the public domain or was segregated for some particular public use). While there is always the possibility that an easement by prescription has been created as a result of the substantial use of the road in question, that possibility also raises numerous factual questions. Your attention is directed to my letter of October 21, 1975 addressed to you. A copy is enclosed for your convenient reference.

After clarifying the request contained in your letter of August 11, 1976, I prepared a suggested amendment to MSB 16.32.030 dealing with the section line easement. A copy of the proposed amendment is enclosed.

Very truly yours,

BURR, PEASE & KURTZ, INC.

J. W. Sedwick

JWS:swc
Enclosures

THE SUPREME COURT OF THE STATE OF ALASKA

IRENE GIRVES, Appellant, v. KENAI PENINSULA BOROUGH, Appellee.	File No. 2016 OPINION [No. 1168 - June 13, 1975]

Appeal from the Superior Court for the State of Alaska, Third Judicial District, Anchorage, James A. Hanson, Judge.

Appearances: Denis R. Lazarus, Anchorage, for Appellant. Kenneth P. Jacobus of Hughes, Thorsness, Lowe, Gantz & Clark, Anchorage, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Erwin and Boochever, Justices. [Fitzgerald, Justice, not participating.]

CONNOR, Justice.

This appeal presents questions concerning the Kenai Peninsula Borough's power and right, if any, to construct a road on property homesteaded by appellant, without providing compensation to her.

I.

In 1958 appellant, Irene Girves, entered upon a homestead, pursuant to a "Notice of Allowance" issued to her the Department of the Interior. In 1961 she obtained

a patent for the property from the United States.

The northern boundary of Girves' property constituted a section line within what is now the Kenai Peninsula Borough. Sometime subsequent to 1961 the Kenai Peninsula Borough constructed a junior high school on the land adjoining this northern boundary line.

Redoubt Drive, prior to construction of the school site, ran along the section line, but terminated approximately one-quarter mile east of the boundary line between appellant's property and the school site. In 1967 the city of Soldotna extended Redoubt Drive west in order to provide access to the school site.

The Kenai Peninsula Borough then constructed a "pad" which, in effect, extended Redoubt Drive for road purposes.[1/] Since this road extension rested partially on appellant's property, she brought suit against the borough, seeking damages for its alleged wrongful trespass. At the trial below, the court found that a right-of-way existed for road purposes along the section line. The jury found that the "pad" constructed by the borough was utilized for road purposes. Girves was awarded nothing, and the borough was awarded $6,500 in attorney's fees.

Girves' appeal from this adverse judgment raises three general issues:

1/ At trial Girves argued that the extended area was not developed for road purposes, but, on appeal, appellant concedes that the project was filled for road purposes.

(1) Did the Kenai Peninsula Borough have the power to build a road on appellant's property?

(2) Did a right-of-way exist so that the the borough need not compensate appellant for its encroachment on her property?

(3) Was the award to the borough of $6,500 in attorney's fees erroneous?

We shall address each of these questions in turn.

II.

Appellant contends generally that, at the time the borough constructed the road, it lacked the power to engage in such activity. Specifically, Girves asserts that the trial judge erred in refusing to give requested Instruction No. 19, which reads as follows:

> "The Court instructs the jury that the law of Alaska provides that second-class boroughs are governments of limited powers, and that second-class boroughs do not have the authority or power to acquire, construct or maintain rights-of-way, roads or streets."

In support of this assertion of error, appellant argues that, at the time of the road construction, the Kenai Peninsula Borough's powers were limited to those ennumerated in former AS 07.15.010 et. seq. (§ 3.01 et. seq., ch. 146, SLA 1961),[2/] which did not encompass road-building powers.

2/ Title 7 was repealed in 1972 and this section was superceded at that time by § 2, ch. 118, SLA 1972, now found in AS 29.48.03.

The borough initially responds to this claim by arguing that Girves failed at trial to specify her grounds for objecting to the court's refusal to give requested Instruction No. 19. The borough relies on Alaska Civil Rule 51(a) which states, in part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Civil Rule 51(a) is intended to ensure that a trial judge is clearly made aware of the precise nature of the alleged error.[3] In the present case we find that prior to the court's decision regarding instructions, appellant had argued, at great length, her contentions regarding the applicable law. Since the trial judge was made fully cognizant of appellant's reasons for the proposed instruction, the purpose for Civil Rule 51(a) has been realized.

The borough also seeks to overcome appellant's claim of error on substantive grounds. It argues, generally, that municipal governments possess implied powers which arise from or are essential to the powers and purposes which are expressly granted.[4] Specifically, the borough asserts that the educational powers conferred upon the borough by former AS 07.15.330(a) necessarily imply the power to provide road access to school buildings. That statute,

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3/ Saxton v. Harris, 395 P.2d 71, 73 (Alaska 1964).

4/ See generally 2 McQuillan, Municipal Corporations, Section 10.12 at 765 (3d ed. 1966).

road, provided:

> "(a) Each organized borough constitutes a borough school district and the first and second class borough shall establish, maintain, and operate a system of public schools on an areawide basis." 5/

We recognize that insofar as municipal corporations do possess implied powers, such powers are to be strictly construed against the entity claiming them. 6/ Nevertheless, we acknowledge that boroughs possess implied powers with regard to education to the extent that they are clearly necessary to the borough's exercise of its express powers in this regard. 7/

At the time that this road project was built, the Kenai Peninsula Borough possessed the express power to "establish, maintain and operate" schools within its borders. 8/ In addition, both the state and local school districts have, and did then have, certain express responsibilities concerning the administration, supervision, operation and subcontracting

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5/ Compare: AS 29.33.050 presently provides:

> "Each borough constitutes a borough school district and establishes, maintains, and operates a system of public schools on an areawide basis as provided in AS 14.14.060."

6/ See, e.g., Cochran v. City of Nome, 10 Alaska 425, 435 (D.C. Alaska 1944).

7/ See, e.g., East End School Dist. No. 2 v. Gaiser-Hill Lumber Co., 45 S.W.2d 504, 506 (Ark. 1932); Cedar Rapids Community School Dist. v. City of Cedar Rapids, 106 N.W.2d 655, 657 (Iowa 1960).

See also Lindsay v. White, 206 S.W.2d 762, 767 (Ark. 1947).

8/ See former AS 07.15.330(a) (repealed 1972).

of transportation systems for pupils.[9] Other states have recognized that school districts possess the power to construct transportation related facilities.[10]

It is apparent that a school which is inaccessible to transportation would have little or no value. We conclude, therefore, that, since the Kenai Peninsula Borough possessed the express power to "establish, maintain and operate" the school, it implicitly possessed the power to establish access to the site as well.

Appellant argues that the road project was not intended to provide access to the school. We have reviewed the transcript from the trial court and find that appellant never directly argued this point below. Furthermore, there was extensive collateral testimony which demonstrates that the road did provide access to the school. Appellant's assertion in this regard is simply not supported by the record.

III.

Appellant also argues that the borough had no right to build a road across her property without compensating her for it.

9/ AS 14.09.010.

See Kenai Peninsula Borough v. State, _____ P.2d _____, (Op. No. 1124, Alaska, March 12, 1975).

10/ Cf. City of Bloomfield v. Davis County Community School Dist., 119 N.W.2d 909, 912-13 (Iowa 1963); Austin Independent School Dist. v. City of Sunset Valley, 502 S.W.2d 670, 675 (Tex. 1973).

At the outset Girves notes that neither her "Notice of Allowance", nor her patent contained any express reservation of rights-of-way in favor of any public body. However, the absence of an express reservation of easement does not preclude the borough from showing that a right-of-way was established prior to the issuance of these documents.[11] /

The borough claims a right-of-way in reliance upon 43 U.S.C. § 932 (1964).[12] That statute provides:

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

Girves first contends that neither the territorial nor state governments of Alaska had the power to accept this grant from the United States. She supports this argument by reference to a 1962 Attorney General's opinion.[13] There the state's Attorney General opined that, pursuant to the Alaska Organic Act, 48 U.S.C. § 77 (1952),[14] "[t]he power to 'dispose

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11/ State v. Crawford, 441 P.2d 586, 590 (Ariz. App. 1968).

12/ This statute was originally enacted in 1866. See Act of July 26, 1866, ch. 262, §8, 14 Stat. 253.

13/ 11 Op. Att'y Gen. 1 (Alaska 1962).

14/ 48 U.S.C. § 77 provides, in part:

> "The 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 soil; . . . ."

Territorial Legislature and, in fact, such power was expressly denied the Territory."[15] In effect, the Attorney General's 1962 opinion reasoned that, since the territorial legislature could not interfere with the federal government's primary disposal of soil,[16] it was powerless to accept the right-of-way granted in 43 U.S.C. § 932 (1964).

In McGrath v. Kristensen, 340 U.S. 162, 176-78 (1950), Justice Jackson, in a concurring opinion, noted that an Attorney General's opinion may well be erroneous. Indeed, the Alaska Attorney General has expressly rejected the opinion on which appellant seeks to rely.[17] We hold that the 1962 Attorney General's opinion is in error insofar as it concludes that the territorial government of Alaska had no power to accept the right-of-way granted in 43 U.S.C. § 932 (1964).

Alaska's courts have long recognized the operation of 43 U.S.C. § 932 (1964) within the state or territory.[18] Numerous other territories and states, operating under organic and enabling acts forbidding interference with the primary disposal of soil by the United States, have effectively

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15/ 11 Op. Att'y Gen. at 3 (Alaska 1962).

16/ 48 U.S.C. § 77 (1952).

17/ 7 Op. Att'y Gen. 1, 8 (Alaska 1969).

18/ See, e.g., Hamerly v. Denton, 359 P.2d 121 (Alaska 1961); Clark v. Taylor, 9 Alaska 298 (D.C. Alaska 1938).

claimed the right-of-way granted under 43 U.S.C. § 932.

Appellant has not cited any case law which holds that the "primary disposal of soils" provision in 48 U.S.C. § 77 (1912) prevents, and renders nugatory, the right-of-way granted in 43 U.S.C. § 932 (1964). Under the circumstances, appellant's contention that the territory or state lacked power to claim the federal grant must be rejected.

19/ See, e.g., Walbridge v. Board of Commissioners 86 P. 473 (Kan. 1906); Hillsboro National Bank v. Ackerman, 189 N.W. 657 (N.D. 1922); Wells v. Pennington County, 48 N.W. 305 (S.D. 1891).

The relevant territorial organic acts are as follows:

(1) Kansas, ch. 59, § 24, 10 Stat. 285 (1 54);

(2) North Dakota, ch. 86, § 6, 12 Stat. 239 (1861);

(3) South Dakota, ch. 86, § 6, 12 Stat. 239 (1861).

The relevant state enabling acts are as follows:

(1) Kansas, ch. 20, § 3, 12 Stat. 127 (1861);

(2) North Dakota, ch. 180, § 4, 25 Stat. 677 (1889);

(3) South Dakota, ch. 180, § 4, 25 Stat. 677 (1889).

Girves also argues that Alaska's territorial legislature did not in fact effectively "accept" the grant at any time prior to her lawful entry on the land. Thus, she concludes, the lower court "erred in finding there existed a right-of-way on the section line" between appellant's and appellee's property.

The borough argues that "35 S.L.A. 1953 (now AS 19.10.010) constitute[s] the acceptance of the offer to dedicate made in 43 U.S.C.A. § 932 (1964). [Footnote omitted.]" Ch. 35, SLA 1953 provided as follows:

> "Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract four 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 strips shall inure to the owner of the tract of which it formed a part by the original survey." (emphasis added)

Girves contends that the territorial legislature's "dedication" of a four rod tract along all section lines in the territory "cannot be deemed an acceptance" of the federal grant contained in 43 U.S.C. § 932 (1964).

In Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961), we held that:

> "[B]efore 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." [Footnote omitted.]

In Hamerly the party claiming the right-of-way sought to do so by proving the existence of a public user. In the present case, the borough in effect claims that the enactment of ch. 35, SLA 1953 was a positive act on the part of an appropriate public authority which clearly manifested an intent to accept the grant in 43 U.S.C. § 932 (1964).

Ch. 35, SLA 1953 did not expressly refer to 43 U.S.C. § 932 (1964). But we cannot assume that the legislature was unaware of the grant or unwilling to accept it in behalf of the territory for highways. Tholl v. Koles, 70 P. 881, 882 (Kan. 1902).

Similarly, ch. 35, SLA 1953 did not expressly "accept" the federal government's dedication of rights-of-way. However, it is well recognized that a state or territory need not use the word "accept" in order to consummate the grant. Tholl v. Koles, supra.[20] 43 U.S.C. § 932 (1964) is, in effect, a standing offer from the federal government.[21] All that is needed to complete the transfer is a positive act by the state or territory which clearly manifests an intent to accept the offer. Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961).[22]

20/ See also Pederson v. Canton Township, 34 N.W.2d 172, 174 (S.D. 1948); Costain v. Turner County, 36 N.W.2d 382, 383 (S.D. 1949).

21/ See, e.g., Mills v. Glasscock, 110 P. 377, 378 (Okl. 1910); Wallowa County v. Wade, 72 P. 793, 794 (Ore. 1903).

22/ Accord: Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973), cert. denied, 411 U.S. 917.

We hold that the enactment of ch. 35, SLA 1953 was a positive act clearly manifesting the territorial legislature's intent to accept the federal grant. Our conclusion is bolstered by several observations.

First, if the legislature did not intend to accept the federal grant, then the "dedication" contained in ch. 35, SLA 1953 might be in contravention of the "primary disposal of soils" provision contained in 48 U.S.C. § 77 (1952). Since legislatures generally are presumed to know the law and to intend their enactments to be valid, it is fair to assume that the legislature intended the 1953 "dedication" to also constitute an acceptance of the grant under 43 U.S.C. § 932 (1964).

Second, a fundamental maxim in the analogous field of contract law holds that an acceptance may be implied from acts of conduct.[23] Since it is obvious that one cannot "dedicate" property to which one has no rights, the 1953 "dedication" must have also constituted an act of implied acceptance.

Finally, 43 U.S.C. § 932 (1964) does not make any distinction as to the methods recognized by law for the establishment of highways. Hence highways may be established by any method recognized by law in this state.[24] Dedication is a

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23/ Cf. Prokopis v. Prokopis, 519 P.2d 814, 817 n. 5 (Alaska 1974). See generally 1 A. Corbin, Contracts § 18, at 39-43, § 77, at 329 (1963).

24/ Accord: United States v. 9, 947.71 Acres of Land, etc., 220 F. Supp. 328, 335 (D.C. Nev. 1963); Wallowa County v. Wa[illegible] 72 P. 793, 795 (Ore. 1903); Smith v. Mitchell, 58 P. 667, 668 (Wash. 1899).

well recognized method of establishing highways.[25] Thus we conclude that the "dedication" contained in ch. 35, SLA 1953 effectively established the territory's claim to the federal right-of-way grant.

IV.

Finally, Girves contends that Judge Hanson erred in awarding $6,500 in attorney's fees to the Kenai Peninsula Borough. The claim of error is predicated on the assertion that the court based its award on the "percentage method" of determining attorney's fees, despite the fact that the prevailing party (the borough) did not recover a money judgment.[26]

25/ See, e.g., Lovelace v. Hightower, 168 P.2d 864, 867 (N.M. 1946). See also 23 Am. Jur.2d, Dedications, § 15, at 24 (2nd ed. 1965).

26/ Alaska Civil Rule 82(a) provides, in part:

> "(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:
>
> ATTORNEY'S FEES IN AVERAGE CASES
>
> | | Contested | Without Trial | Non-Contested |
> |---|---|---|---|
> | First $2,000 | 25% | 20% | 15% |
> | Next $3,000 | 20% | 15% | 12.5% |
> | Next $5,000 | 15% | 12.5% | 10% |
> | Over $10,000 | 10% | 7.5% | 5% |
>
> Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

requested $15,470.25 in attorney's fees. A supporting affidavit asserted that the borough's attorneys had spent over 400 hours of legal time on this case. Mrs. Girves opposed the request on the grounds that the amount requested was insufficiently documented and unconscionable.

Judge Hanson listened to oral argument regarding the merits of the requested amount of attorney's fees, and then took the matter under submission. Later he issued a memorandum order awarding the borough $6,500, instead of the $15,470.25 requested.

Our review of attorney's fee awards is limited to determining whether the trial court has exceeded the bounds of the wide discretion vested in it.[27] We will only overturn an award if it is manifestly unreasonable.[28]

26/ [contd.]

> (2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered."

27/ See, e.g., Malvo v. J. C. Penney Company, Inc., 512 P.2d 575, 586-87 (Alaska 1973).

28/ Id.

Under normal circumstances, we would affirm the award because it would be well within the confines of Civil Rule 82. But we are impressed with certain distinct aspects of this case which render it, in our opinion, unfair to impose attorney's fees upon appellant. This case concerns the implied powers of borough governments, as well as interpretations of public laws relating to rights-of-way. Appellant relied upon a 1962 Attorney General's opinion in support of her legal contentions although, as we have mentioned, that opinion, was negated by a later one in 1969.

We think that appellant, faced with these conflicting opinions, properly pursued her claims. In so doing she litigated several important public questions. She should not be penalized for having done this. We hold that it was error to award an attorney's fee to appellee and to that extent we reverse the judgment below.

AFFIRMED IN PART, REVERSED IN PART.

UNITED STATES GOVERNMENT

Memorandum

DM-A

DATE: April 24, 1973

In reply refer to:
2800 (932)

ROM : SD

Your reference:
(100)

JBJECT: Superior Court Opinion - Gibbs versus Campbell

Your April 17 memo raised some questions concerning the interpretation of this opinion. Following are the answers to the questions you raised based on our interpretation of the opinion:

1. Basically, lands that have been patented in Alaska since April 6, 1923, are subject to "section line" rights-of-way for public highways. This dedicated area is 100 feet wide on lands owned or acquired from the State, and four rods wide on other lands in Alaska. The act of July 26, RS 2477 → 1866, granted rights for highways over public lands. This grant was not effective until it was accepted by a state or territory. In 1923 the territory accepted this grant by enacting Chapter 19, SLA 1923. This acceptance called for a tract four rods wide along section lines. The 1949 compilation of Alaska laws in effect repealed the 1923 acceptance. In 1951 the Alaska legislature dedicated rights-of-way for public highways 100 feet in width along section lines. This dedication, however, was restricted to lands owned by the territory or acquired from the territory. In 1953 this dedication was amended to include rights-of-way four rods in width along all other section lines in Alaska. In summary, the dedication for highways has progressed as follows.

   a. April 6, 1923, to January, 1949 - A tract four rods in width along section lines.

   b. January, 1949-1951 - No dedication.

   c. 1951-1953 - A dedication of tracts 100 feet in width along section lines on lands owned or acquired from the territory.

   d. 1953 to present - A dedication of tracts 100 feet wide between each section owned by the territory or acquired from the territory, and tracts four rods in width between all other sections in the territory.

This dedication applys to patented lands and for use as public highways.

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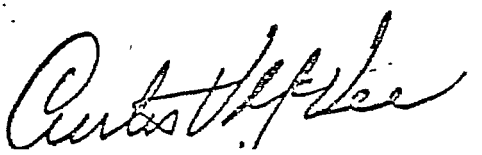
2. Since the dedication applys to section lines, it can only be utilized for highways when the particular area has been surveyed according to the rectangular system. The dedication is automatically in effect when public lands go to patent, but the dedication cannot be utilized until the rectangular survey is extended to the lands in point.

3. Since utilization of this type of dedication only applies in areas of rectangular survey, it is applicable to only a small portion of the State at this time. Unsurveyed sections within a township which has monuments at two-mile intervals are not subject to the exercise of this dedication.

4. Once an area has been surveyed according to the rectangular system, the State can exercise its dedication along the section lines if the lands involved were subject to the dedication at the time of patent. Lands that were described and patented by special surveys are generally not susceptible to this reservation because they do not become part of the rectangular grid when the rectangular system is extended to the area involved.

This automatic section line grant or dedication is something we should consider when we are making our recommendations for public access. In some cases specific public access reservations may not be necessary if the "section line" right-of-way is considered adequate.



May 8, 1972

Mr. John Mlakar
1525 East 5th Avenue
Anchorage, Alaska

Re: Right of Way on Section Line Between Section 17 and Section 8, Township 12 North, Range 3 West, Seward Meridian

Dear John:

In accordance with my letter of April 21, 1972, I contacted Mr. Don Beitinger of the State Highway Department. Enclosed herewith is Mr. Beitinger's letter to you dated May 5, 1972 in which Mr. Beitinger advises that the Alaska Department of Highways has no objection to the construction of a roadway along the section line between Section 8 and 17.

In my conversations with Mr. Beitinger, he also advised me that if you were going to build this road it would be incumbent upon you to establish the section line and build the road along the section line.

As indicated in Mr. Beitinger's letter, the Letter of Nonobjection only pertains to building a road along the section line to the now existing frontage road now existing along the east side of the New Seward Highway. This Letter of Nonobjection does not cover access to the New Seward Highway.

Prior to building any road along the section line, it would be my suggestion that you contact this office for further discussions relating thereto.

Yours very truly,

DELANEY, WILES, HOOPE,
HAYES & REITMAN, INC.

Eugene F. Wiles

EFW/cs
Encl.

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF HIGHWAYS

CENTRAL DISTRICT / 5700 TUDOR ROAD — P. O. BOX 8869
ANCHORAGE 99508

May 5, 1972

Letter of Nonobjection

52A-2901

Mr. John Mlakar
1525 East 5th Avenue
Anchorage, Alaska

Dear Sir:

This is to advise that the Alaska Department of Highways has no objection to the construction of a roadway along the section line between Section 8 and Section 17, Township 12 North, Range 3 West, Seward Meridian. It is understood that this road is to be built to join the frontage road now existing along the east side of the new Seward Highway.

Sincerely,

JACK M. SPAKE
Central District Engineer

D. E. Beitinger

Donald E. Beitinger
Central District Right of
Way Agent

DELANEY, WILES, MOORE, HAYES & REITMAN, INC.
ATTORNEYS AT LAW
360 K STREET
ANCHORAGE, ALASKA 99501

TELEPHONE 279-3581
AREA CODE 907

JAMES J. DELANEY, JR.
EUGENE F. WILES
DANIEL A. MOORE, JR.
GEORGE N. HAYES
STANLEY H. REITMAN
JOHN K. BRUBAKER
RAYMOND E. PLUMMER, JR.
RICHARD J. WILLOUGHBY
DANIEL A. GERETY
LYNN P. BARTLETT

April 21, 1972

Mr. John Mlakar
1525 E. 5th
Anchorage, Alaska

Re: Right of Way on Section Line Between Section 17 and Section 8, Township 12 North, Range 3 West, Seward Meridian

Dear Mr. Mlaker:

You have requested our opinion as to whether or not there is a dedicated right of way for the use of public as a highway on the section line between Sections 17 and 8.

A review of the Bureau of Land Management Land Office records reveals that the lands embraced in Sections 17 and 8 were included in the Chugach National Forest by proclamation dated February 23, 1909. The records further reveal that the lands were surveyed and the plat of survey was filed with the BLM on February 26, 1918. On May 29, 1925, the lands included within Section 17 and 8 were eliminated from the national forest, and on that date became subject to entry under the Public Land laws. The BLM records further reveal that there were no entries under the Public Land laws relating to Sections 8 and 17 until 1945.

Based on the foregoing information and upon the law set forth in the Attorney General's opinion of December 18, 1969, there is a dedicated right of way for public use as a highway on the section line between Sections 17 and 8, Township 12 North, Range 3 West, Seward Meridian. This right of way is 4 rods wide - 2 rods on each side of the section line.

I have contacted Mr. Dick Kerns, Assistant Attorney General for the State of Alaska for the Department of Highways and Mr. Kerns has advised me that the State Department of Highways will issue a letter of non-objection to a private party to construct a road over this dedicated right of way. Mr. Kerns also advised me, however, that if any objections were made by abutting land owners, the private party receiving the

letter of non-objection from the State would have the responsibility of settling or litigating the issue. Mr. Kerns further advised me that a letter of non-objection could be obtained from Mr. Don Bietinger, head of the State Right-of-Way Section located on Tudor Road.

We are enclosing herewith a copy of the Attorney General's opinion for your consideration. If you have any further questions, please advise.

Yours very truly,

DELANEY, WILES, MOORE,
HAYES & REITMAN, INC.

Eugene F. Wiles

EFW/cs
Encl.

PS: In accordance with our telephone conversation of this date, I will contact Mr. Bietinger of the State Right-of-Way Section concerning the obtaining of a letter of non-objection for the construction and use of the right of way along the section line between Sections 17 and 8.

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL — ANCHORAGE BRANCH

303 K STREET — SUITE 105
ANCHORAGE 99501

WRK Copy of KHO

Letter's of non Objection by AG No 4-7/78.

June 19, 1970 SEE ALSO:

AS 19.10.010
DEDICATION OF LAND FOR PUBLIC HIGHWAYS

MEMORANDUM

TO: Robert L. Beardsley
Commissioner of Highways
State of Alaska
Juneau

FROM: Richard P. Kerns
Assistant Attorney General
Chief, Highways Section
Anchorage

RE: Jurisdiction of Section Line Rights of Way for Highways

It has come to my attention that certain questions have arisen in connection with administering the use of section line rights of way by the public where these rights of way have not actually been utilized by the Department of Highways for the State highway system. As you know, 1969 Opinions of the Attorney General No. 7 concluded that "each surveyed section in the State is subject to a section line right of way for construction of highways" subject to certain exceptions defined in the Opinion. A copy of this Opinion is attached.

Since the publication of this Opinion, various members of the public, property owners and governmental agencies have attempted to utilize or exert jurisdiction over these rights of way resulting in a certain amount of conflict of opinion. This results in inquiries being directed either to the Department of Highways, the Division of Lands or the Office of the Attorney General which in turn does or could result in further inconsistent approaches to the use of these rights of way.

With this in mind, a meeting was held attended by representatives of the Division of Lands, the Department of Highways and the Department of Law. As a result of this meeting, it was suggested that a memo be directed to you with copies as indicated, suggesting that jurisdiction of these highway rights of way be asserted by the Department of Highways. This conclusion is in keeping with a former Memorandum Opinion issued by the Department of Law dated November 4, 1963 prepared by David B. Ruskin, then assistant attorney general. A copy of this memorandum is also attached. It is

By whom?

be directed to the District Right of Way Agents. If it is determined that the Highway Department has no objection to a proposed use, that a letter of non-objection be issued. The use of the term "non-objection" is emphasized so as to suggest that the State is not granting some sort of a permit but more to indicate that the State will not resist a particular use if it is otherwise in keeping with the interests of the State.

It has also been brought to my attention that certain of the boroughs have taken it upon themselves to vacate portions of these section rights of way. It is my opinion that the boroughs have no such authority. Jurisdiction over these rights of way is with the State of Alaska, Department of Highways and the Department of Highways is the only competent authority by which the same can be vacated. Possibly the boroughs are assuming this authority under A.S. 40.15.140. If this be the case, I believe the boroughs are misinterpreting the meaning of that statute. It is my opinion that the boroughs have authority to vacate only those streets which have been created by a subdivision plat.

Although it is our conclusion that the Highway Department has jurisdiction over these section line rights of way, it is suggested that because of the obvious interest that the Division of Lands has in these section line rights of way that it be emphasized to the Districts that the Division of Lands be advised as to any actions taken in connection therewith.

If you have any questions regarding the suggestions made in this memorandum, please do not hesitate to contact this office.

RPK:sm
cc: Donald E. Beltinger - Dept. Hwys
John K. Norman - Dept. Law
Joseph Keenan - Div. Lands

DELANEY, WILES, MOORE & HAYES
ATTORNEYS AT LAW
360 K STREET
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EUGENE F. WILES
DANIEL A. MOORE, JR.
GEORGE N. HAYES
JOHN K. BRUBAKER

TELEPHONE 279-3581
AREA CODE 907

February 20, 1969

Mr. Karl L. Walter, Jr.
City Attorney
City of Anchorage
P. O. Box 400
Anchorage, Alaska

Re: Right-of-Way along Section Lines

Dear Karl:

This is in response to your request for my opinion concerning the above subject.

As indicated in my memorandum to the Director, Alaska Road Commission dated September 12, 1956, it is my opinion that Ch. 19 SLA 1923 and Ch. 35 SLA 1953 were effective acceptances of a dedication made by the United States pursuant to the authority of the Act of July 26, 1866 (14 Stat. 254; R.S. 2477; 43 USC 932). My opinion on this matter has not changed notwithstanding Opinion No. 11 of the Attorney General of the State of Alaska dated July 26, 1962. 1/

Although it is my opinion that the foregoing laws were effective acceptances of dedications made by the Federal Government there are a number of legal principles that must be taken into consideration to determine whether or not a section line in Alaska has been effectively dedicated for highway purposes and to answer the questions set forth in your letter of January 14, 1969. These principles are:

1. The dedication by the United States pursuant to the Act of July 26, 1866, supra, does not take effect until the date of the acceptance of the dedication by State authority or by public use. 2/

1/ Attached hereto is previous correspondence with the Territorial Attorney General relating to this same subject. The correspondence includes: Letter from the Attorney General to Mr. Roger R. Robinson dated August 20, 1956; memorandum from Office of the Solicitor to Operations Supervisor BLM, dated August 31, 1956; and letter from the Attorney General to Mr. Roger R. Robinson dated September 25, 1956.

2/ Koloen v. Pilot Mound TP et al, 157 NW 672; Koy et al v. Itten, 169 P. 148; Lovelace v. Hightower, 168 P.2d 864; Hamerly v. Denton, 359 P.2d 121; Kirk v. Schultz, 119 P.2d 266.

2. The offer of the United States to dedicate public lands for highway purposes pursuant to the Act of July 26, 1866 terminates if not accepted prior to the issuance of patent by the United States. 3/

3. The dedication by the United States pursuant to the Act of July 26, 1866, relates only to public land of the United States, and does not apply to public land reserved for public uses or public lands validly entered under the public land laws. Accordingly, if public lands of the United States have been withdrawn or reserved by the United States for public uses, or entered under the public land laws by private individuals prior to the acceptance of the dedication, such lands are not subject to the dedication provided by the Act of July 26, 1866, so long as such lands remain withdrawn or reserved or are subject to a valid private right initiated prior to acceptance of the dedication. 4/

4. There can be no acceptance of the dedication provided by the Act of July 26, 1866, by virtue of Ch. 19 SLA 1923 or Ch. 35 SLA 1953 until the public lands have been surveyed and the section lines established. 5/

5. The dedication by the United States pursuant to the Act of July 26, 1866, once accepted by the State or by public use remains in effect unless vacated pursuant to applicable law. 6/

3/ Ball v. Stephens, 158 P.2d 207

4/ Korf v. Itten, 169 P. 148; Stofferman et ux v. Okanogan County, 136 P. 484; Leach v. Manhart, 77 P.2d 652; Atchison etc. R. Co. v. Richter, 148 P. 478.

5/ Cox v. Hart, 43 S.Ct. 154, 260 U.S. 427, 67 L.Ed. 332; Vaught v. McClymond, 155 P.2d 612; Carroll v. U.S., 154 F. 425; Smith v. Whitney, 74 P.2d 450; Bullock v. Rouse, 22 P. 919; Verdi Development Co. v. Dono-Han Min. Co., 296 P.2d 429; Phelps v. Pacific Gas and Electric Co., 190 P.2d 209; 43 USC Sec. 751 and 752. These cases hold in effect that a survey of public land does not ascertain boundaries but creates them and that therefore section lines have no existence prior to survey and are incapable of description or conveyance prior to survey.

6/ Huffman v. Board of Sup'rs of West Bay TP, Benson County, 182 NW 459; Costain v. Turner County, 36 NW 2d 382; Pederson v. Canton TP, 34 NW 2d 172; Faxon v. Lallie Twp., 163 NW 531, Writ of Error Dismissed (39 S.Ct. 491, 250 U.S. 634; 63 L.Ed. 1182)

In order to apply these legal principles to the situation in Alaska, it will be helpful to review the Alaska law relating to rights-of-way on section lines. The pertinent legislation is as follows:

1. Ch. 19 SLA 1923
Section. A tract of four 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 the 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 is formed a part by the original survey. Approved April 6, 1923. (codified as Sec. 1721 CLA 1933)

2. Ch. 1. Extraordinary Session Laws of Alaska 1949.

This Act provides in pertinent part as follows:

> * * * "All Acts or parts of Acts heretofore enacted by the Alaska Legislature which have not been incorporated in said compilation [i.e. ACLA 1949] because of previously enacted general repeal clauses or by virtue of repeals by implication or otherwise are hereby repealed.
> * * *
> Sec. 3: An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval. 7/
> Approved January 18, 1949

3. Ch. 123 SLA 1951
Section 1. A tract one hundred 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, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the resepctive strips shall inure to the owner of the tract of which it formed a part by the original survey.
Approved March 26, 1951

7/ Ch. 19 SLA 1923 as codified in Sec. 1721 CLA 1933 was not incorporated in ACLA 1949 and was therefore repealed effective January 18, 1949.

4. Ch. 35 SLA 1953
Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory and a tract four 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 strips shall inure to the owner of the tract of which it formed a part by the original survey. 8/
Approved March 21, 1953.

5. A.S. 19.10.010
Sec. 19.10.010. Dedication of land for public highways. A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a party by the original survey.

As can be seen, the foregoing legislation relates to rights-of-way on section lines of lands owned by the Territory and State of Alaska as well as public lands owned by the United States.

Consideration will first be given to section line rights-of-way over public lands of the United States.

PUBLIC LANDS OF THE UNITED STATES

As held in Costain v. Turner County, 36 NW 2d 382, Ch. 19 SLA 1923 would constitute the first statutory acceptance by the Territory of Alaska of the dedication by the Unites States pursuant to the Act of July 26, 1866 for section lines on the public lands of the United States.

To determine if a four-rod right-of-way has been established as to a specific section line on the public lands of

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8/ This statute in effect re-enacted Ch. 19 SLA 1923 as such chapter applied to public lands of the United States.

the United States by virtue of the acceptance of the dedication contained in Ch. 19 SLA 1923 or Ch. 35 SLA 1953, one must apply the principles of law set forth above to the facts in each particular instance. As these principles and facts are not readily susceptible to a broad general discussion, I will set forth certain questions and specific situations which can exist and my conclusions as to these situations based on the foregoing principles of law.

1. What is the effect of a section line being surveyed and in existence prior to April 6, 1923, the effective date of Ch. 19 SLA 1923?

(a) If the section line was surveyed prior to April 6, 1923, and the land abutting the section line was not patented or withdrawn or reserved for public uses, or entered by private parties under the public land laws on April 6, 1923, a 4-rod right-of-way, 2 rods on each side of the section line was created. This right-of-way would still be in existence today unless specifically vacated by competent authority.

(b) If the section line was surveyed prior to April 6, 1923, and the land abutting the section line was withdrawn or reserved for public uses or entered by a private party or patented to a private party on such date, no right-of-way was created. If a private entry existing on April 6, 1923 went to patent, the entryman patentee would take the land patented free of any section line right-of-way. Also, all public land patented prior to April 6, 1923 would not be subject to a section line right-of-way.

(c) If the section line was not surveyed as of April 6, 1923, no right-of-way was created as of that date.

2. If the section line was not established on April 6, 1923, what is the effect of a survey subsequent to April 6, 1923, the effective date of Ch. 19 SLA 1923 and prior to January 18, 1949, the date of the repeal of Ch. 19 SLA 1923?

(a) If the section line was surveyed between April 6, 1923 and January 18, 1949, and the land abutting the section line was not withdrawn or

reserved for public uses or entered by a private party at the time of the survey, a 4-rod right-of-way, 2 rods on each side of the section line, was created. This right-of-way would still be in existence today unless specifically vacated by competent authority.

(b) If the section line was surveyed between Arpil 6, 1923 and January 18, 1949, and the land abutting the section line was withdrawn or reserved for public uses or entered by a private party at the time of the survey, no right-of-way would be created at the time of the survey. In such circumstances, if a private entry existing on the date of survey goes to patent, the entryman patentee would take the land patented free of any section line right-of-way.

3. If the lands abutting a surveyed section line existing on April 6, 1923 were withdrawn or reserved for public uses or were entered by a private party on April 6, 1923, what would be the effect of a revokation of the withdrawal or reservation or relinquishment of the private entry made on or after April 6, 1923 and prior to January 18, 1949?

(a) Such land would become unappropriated public lands and a 4-rod right-of-way, 2 rods on each side of the section line, would be created. This right-of-way would still be in effect today unless specifically vacated by competent authority.

4. If the lands abutting a section line were withdrawn or reserved for public uses, or were entered by a private party at the time the lands were surveyed when such survey took place subsequent to April 6, 1923, what would be the effect of a revokation of the withdrawal or reservation or relinquishment of the private entry made on and after such survey and prior to January 18, 1949?

(a) Such lands would become unappropriated public lands and a 4-rod right-of-way, 2 rods on each side of the section line would be created. This right-of-way would still be in effect today unless specifically vacated by competent authority.

5. What was the effect of the repeal of Ch. 19 SLA 1923 on Jnauary 18, 1949?

(a) This repeal did not affect the rights-of-way that were previously established on section lines as set forth above. Such rights-of-way are still in existence unless specifically vacated by competent authority.

(b) The repeal of Ch. 19 SLA 1923 on January 18, 1949, however, did create a situation wherein section lines that were surveyed on the public lands in Alaska between January 18, 1949 and March 21, 1953, the date of Ch. 35 SLA 1953, may not be subject to the 4-rod right-of-way because of the repeal. An illustration of such a situation is where the right-of-way did not take effect prior to January 18, 1949 because the section lines were not surveyed prior to that time. Thereafter, subsequent to January 18, 1949, and prior to March 21, 1953, the lands were surveyed and entered by a private party and patented to such party. Such party would take patent free of any right-of-way on the section line.

A further example is where the lands were surveyed prior to January 18, 1949 but no right-of-way was created because at the time the land was surveyed, it was reserved for public uses. After January 18, 1949, the reservation was revoked and a private entry was made prior to March 25, 1953. This entryman, if he obtained patent to the land, would obtain such patent free of any section line right-of-way.

6. What is the effect of Ch. 35 SLA 1953 as now amended and codified in A.S. 19.10.010?

(a) It was in effect a re-enactment of Ch. 19 SLA 1923 as such chapter applied to public lands of the United States.

(b) It has no effect on the section line rights-of-way previously created over public lands of the United States by Ch. 19 SLA 1923. Such rights-of-way are still effective unless vacated by competent authority.

(c) If the section line was surveyed on public lands of the United States between January 18, 1949, the date of the repeal of Ch. 19 SLA 1923, and March 21, 1953, the effective date of Ch. 35 SLA 1953, and the land abutting the section line was not patented, or withdrawn or reserved for public uses or entered by a private party on March 21, 1953, a 4-rod right-of-way, 2 rods on each side of the section line was established. This right-of-way would still be in existence today unless specifically vacated by competent authority.

(d) If the section line was surveyed on public lands of the United States between January 18, 1949 and March 21, 1953, and the land abutting the section line was withdrawn or reserved for public uses, or entered by a private party or patented to a private party on March 21, 1953, no right-of-way was created. In such circumstances, if a private entry existing on March 21, 1953 went to patent, the entryman patentee would take the land patented free of any section line right-of-way. Also, all public land surveyed between January 18, 1949 and March 21, 1953, which was patented prior to March 21, 1953, would not be subject to a section line right-of-way.

(e) If the section line was surveyed between January 18, 1949 and March 21, 1953, and the land abutting the section line was withdrawn or reserved for public uses, or entered by a private party on March 21, 1953 and subsequent to March 21, 1953, the withdrawal or reservation was revoked or the private entry relinquished, such land would then become unappropriated public land and a 4-rod right-of-way along the section line would be created. This right-of-way would still be in effect today unless specifically vacated by competent authority.

(f) If a section line on public lands of the United States was surveyed after March 21, 1953, and the land abutting such section line was not withdrawn or reserved for public uses, or entered by a private party at the time of the survey, a 4-rod right-of-way, 2 rods on each side of the section line was created. This right-of-way would still be in existence today unless vacated by competent authority.

(g) If the section line was surveyed after March 21, 1953, and the land abutting such section line was withdrawn or reserved for public uses or entered by a private party on the date of the survey, no right-of-way along the section line would be created. If the private entry existing on the date of the survey went to patent, the entryman patentee would take the land patented free of any section line right-of-way.

(h) If the section line was surveyed after March 21, 1953 and the land abutting the section line was withdrawn or reserved for public uses or entered by a private party on the date of the survey, and subsequent to the survey the withdrawal or reservation was revoked or the private entry relinquished, such land would then become unappropriated public land and a 4-rod right-of-way along the section line would be created. This right-of-way would remain in effect unless and until vacated by competent authority.

TERRITORY OR STATE OF ALASKA LAND

The problems relating to section line rights-of-way on lan previously owned by the Territory or now owned by the State of Alaska are not as involved as those relating to such rights-of-way on public lands of the United States. The reasons for this are two-fold.

First: Almost all of the lands owned by the Territory wer granted to it by the Federal Government by Act of Congress. An example of such Act is the Act of March 4, 1915 (38 Stat. 1214, 48 USC 353) granting lands for school purposes to the Territory of Alaska. This grant of public lands by the United States to the Territory did not become effective to pass title to the Territory until the lands were surveyed and the section lines ascertained. 43 USC 751; U.S. v. State of Wyo., 67 S.Ct. 1319, 331 U.S. 440, 91 L.Ed. 1590. Accordingly, if the lands were surveyed subsequent to April 6, 1923, the effective date of Ch. 19 SLA 1923, the State would acquire title with a section line easement. If the lands were surveyed prior to April 6, 1923 and retained by the State subsequent to April 6, 1923, the lands would also be subject to such a right-of-way.

However, there are two situations where such lands acquired by the Territory from the Federal Government would not be subject to such a right of way. These are:

1. Where the land was surveyed and title passed to the Territory prior to April 6, 1923 and the Territory conveyed such land prior to April 6, 1923. (It is very unlikely that you will find such a situation.)

2. Where the land was surveyed and title passed to the Territory subsequent to January 18, 1949, the date of the repeal of Ch. 19 SLA 1923, and prior to March 26, 1951, the effective date of Ch. 123 SLA 1951 9/ and such land was conveyed by the Territory prior to March 26, 1951. (It is also very unlikely that this situation will arise.)

Second: By virtue of Ch. 123 SLA 1951 as now codified in A.S. 19.10.010, all lands acquired from the Territory or the State of Alaska on or after March 26, 1951, the effective date of such Act, are subject to a 100-foot section line easement, 50 feet on each side of the section line. Accordingly, there appears to be no section line right-of-way problems as to Territory or State lands transferred into private ownership on or after March 26, 1951.

When the foregoing conclusions are applied to the specific question asked in your letter of January 14, 1968, it can be ascertained that if a homesteader entered public lands of the United States subsequent to January 18, 1949, the date of the repeal of Ch. 19 SLA 1923, and prior to March 21, 1953, the date Ch. 19 SLA 1923 was re-enacted as to public lands of the United States, whether or not he would take the land subject to a section line right-of-way would depend upon the date of the survey of the section line in question. If the section line was surveyed prior to January 18, 1949, and the land abutting the section land was unappropriated public land at the time of the survey or any time prior to the homestead entry, the entryman would take the land subject to the section line easement. However, if the land was surveyed subsequent to January 18, 1949 and prior to March 21, 1953, the homestead entry initiated between such dates if it goes to patent would be patented free

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9/ Ch. 123 SLA 1951 re-established section line rights-of-way on all lands owned by the Territory.

of any section line right-of-way. The same principles would apply to one who made entry on January 17, 1949. If the lands were surveyed any time prior to his entry and the land abutting the section line was unappropriated public land at the time of the survey or any time prior to entry, the entryman would take the land subject to a section line right-of-way. However, if the land was surveyed subsequent to his entry and his entry goes to patent, he would take the land free of the section line right-of-way. Accordingly, the date of survey in most of the cases is the determining factor as to whether or not a section line right-of-way is established.

I feel that the foregoing discussion encompasses most of the situations you will encounter, however, if you have further questions, please let me know.

Yours very truly,

DELANEY, WILES, MOORE & HAYES

Eugene F. Wiles

EFW/cs
Enclosures

STATE OF ALASKA

KEITH H. MILLER, Governor

DEPARTMENT OF LAW

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RECEIVED
JAN 19 1970
Anchorage, Alaska

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 oninion 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.

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.

> 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.

> 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, ...

> ... 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; ***."

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

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

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G. F. BONEY
T. M. PEASE, JR.
L. S. KURTZ, JR.
W. W. MATTHEWS, JR.
R. A. NESBETT

March 21, 1966

Mr. Chris Evans
Planning Director
Greater Anchorage Area Borough
104 Northern Lights Boulevard
Anchorage, Alaska 99501

Re: Right of way easement on section lines

Dear Mr. Evans:

It is our conclusion that there exists along every section line in the State a right of way easement, unless the land in question was a Federal reservation on, or was entered upon by its subsequent patentee prior to April 6, 1923 and has never since been unreserved and owned by the Federal, State, or the Territorial governments other than during the period from January 18, 1949 to March 26, 1951.

In the case of lands never the property of the State or the Territory, and not reserved by the Federal government nor entered upon by their subsequent patentee prior to April 6, 1923, the easement is four rods wide centered upon the section line.

In the case of other lands, owned by the Territory at any time during the period from April 6, 1923 to January 18, 1949, there is a similar easement four rods wide centered upon the section line. Since the Territory did not have any section line easement statute from January 18, 1949, to March 26, 1951, the acquisition by the Territory of any land during that period did not give rise to a section line easement. In the case of lands held by the Territory on March 26, 1951, or acquired by the Territory or the State thereafter, there is a section line easement one hundred feet wide centered upon the section line.

In arriving at this conclusion, we considered the opinion of the Attorney General, 1962 Opinions of the Attorney General No. 11, which arrived at a contrary conclusion. It was our determination, however, that there were serious errors in reasoning in the opinion of the Attorney General.

DISCUSSION

The odd situation with respect to dates of acquisition of property arises from the statutory background. The Federal Congress passed a statute in 1866, 14 Stat. 253, which now appears at 43 U.S.C.A. §932, which provided that

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

This statute has been generally interpreted to be a dedication by the Federal government of Federal land for highway purposes, requiring an acceptance on the part of the public or some other government. This acceptance might be by use or by construction or establishment of a highway. Hamerly v Danton, 359 P 2d 121 (Alaska 1961). Those who enter upon the land after this acceptance by use or by government action take subject to the right of way.

A truly accurate determination of the existence or non-existence of a right of way across any particular portion of former public land would require a title search and an examination of the premises to determine whether there has been during the period of Federal ownership any public use of a path or right of way such as would establish a "private" acceptance of the Federal offer. Absent such a showing of public use, however, some action on the part of the State of Alaska or some other Alaskan government entity must be shown.

On April 6, 1923, the Territorial legislature passed an act ch. 19, SLA 1923, which purported to "dedicate" a right of way four rods wide between each section, based upon the section line. In our opinion this act constituted a proper acceptance of the Federal offer. It should be recognized that the 1962 Opinions of the Attorney General No. 11 came to a contrary conclusion; however, we believe this conclusion to be faulty. The Attorney General's opinion was based upon the fact that Alaska's act came 57 years after the Federal act, and the fact that the words of the Alaska Statute did not manifest a highway concept or an acceptance concept, since it "dedicated" "easements". The opinion goes on to rely upon the fact that the word "dedication" in proper usage has the same import as the word "convey". The Attorney General maintained that the State could not dedicate, or convey lands to which it did not have title.

It is our opinion that the 57-year gap is of no significance, there being no Alaska government in 1866, and, the gap being largely during the period of severe underdevelopment of the Territory. Further, we do not believe that it is necessary for the acceptance that a state or a territory use magic words such as "highway" or "acceptance". The Territorial legislature expressed the clear intention that there should be along each section line a road easement. In our opinion this is an adequate "acceptance" of the Federal "offer". The Kansas and North Dakota cases, Costain v Turner County, 36 NW 2d 382 (ND 1949) and Wallbridge v Russell County, 86 Pac 473 (Kan. 1906), which the opinion of the Attorney General purports to distinguish are in our minds indistinguishable. Where North Dakota and Kansas enacted "that hereafter all section lines in this territory shall be and are hereby declared public highways" it is said in the Attorney General's opinion that a valid acceptance has taken place; that Alaska chose to "dedicate" "rights of way" does not seem to us significantly different from Kansas and North Dakota "declaring" the existence of a "highway". The broad and generous offer of or authorization by the Federal government and the clear practical import of the Territorial legislation ought not be circumscribed by excessive technicality.

In our opinion then, there sprang into existence in 1923 along every section line in the Territory a four rod wide easement, excepting only where a valid private claim to the land had been established and led to patent. The act of the Territorial legislature was self-executing; its effect was instantaneous upon its coming into force and nothing was left for the statute to operate upon except subsequent acquisitions by the State or Federal government of land in private hands on April 6, 1923. It is true that this act of the Territorial legislature was omitted from the 1949 compilation of laws, and therefore repealed. And it is true that as a result of this repeal, acquisitions between 1949 and 1951 by the Territorial or Federal governments of land in private hands on April 6, 1923, no longer caused the creation of such an easement. But the easement which at once existed in 1923 did not vanish with the repeal of the 1923 statute. The easement would have to be vacated, and the repeal of the statute which established it is not the same thing as the passage of a statute vacating the easement so created. It is our opinion that the easements created by the 1923 act survived the repeal of the 1923 act.

On March 26, 1951, the Territorial legislature enacted a law, ch. 123, SLA 1951, dedicating a one hundred foot right of way centered upon section lines in the case of all lands owned by the Territory. This statute is still on the books (A.S. 19.10.010). The effect of this statute was to create a one hundred foot easement centered upon the section line in the case of all lands owned by the State or Territory at any time on or after March 26, 1951. This easement clearly exists in the case of all lands selected by the State under the Federal land grant program.

On March 21, 1953, the Territorial legislature reenacted a four rod easement statute, ch. 35, SLA 1953 (now also A.S. 19.10.010). This statute was without substantial effect; its only operation could be on lands subject neither to the 1923 law nor to the 1951 law, that is, lands passing out of pre-1923 private hands into the post-1949 public domain of the Federal government and still public domain in 1953. Such lands exist probably only in theory.

To determine the existence or nonexistence of an easement along a section line, it is necessary to search title to the land to discover whether it had passed into private hands prior to the 1923 statute. If it had, a second inquiry should be made to determine whether or not the land was held by the Federal government or by the Territory any time subsequent to the 1923 statute and prior to 1949, which fact would clearly establish the existence of a four rod easement. In addition, a third inquiry would in all cases be to determine whether the Territory or the Federal government held title at any time after the 1951 statute, for in such cases there is a one hundred foot easement. In the case of that limited class of lands which at the time of the 1923 statute were in private hands and which passed into and out of Territorial ownership during the hiatus in the statutes from January 18, 1949, to March 26, 1951, there would be no easement even though the lands privately held in 1923 had passed to the public at some point. It is again anticipated that very few lands fall within this category.

The general rule of thumb would be that in the case of all lands in the State not privately owned or entered on April 6, 1923, and in the case of all lands at any time owned by the Territory (not the State) thereafter and prior to January 18, 1949, there exists a section line easement four rods wide; that in the case of all lands now or at any previous time owned by the State or Alaska or by the Territory after March 26, 1951, there is a one hundred foot wide section line easement; and that in the case of all other lands, if any there be, there is no easement.

There is one further overriding exception, in the case of public lands of the Federal government reserved for some use. The prime example of such lands in the Anchorage area would be the Fort Richardson-Elmendorf military reservation. These are lands which, within the terms of the 1866 Federal statute, are "reserved for public uses". Here again we would get into a problem of juggling dates. In the case of all lands not yet reserved for public uses in 1923 there would exist an easement according to the terms of the 1923 statute. Where, however, the Federal land had been reserved for public uses prior to the 1923 statute, there would exist no easement. Thus, for example, in the case of the Fort Richardson Military Reservation, which according to our information was established in 1940, there may be a four rod section line easement on every section line within the reservation. Had the reservation been established prior to 1923 there would certainly be no such easements. The question of what effect a Federal withdrawal of land previously within the public domain and subsequent to the establishment of the easement would have upon those easements is one which at first impression does not seem to differ from the effect of the repeal of the 1923 statute previously discussed above. Before such an opinion was acted upon however, since we are operating within the area of absolute Federal authority, we would want to take the opportunity to research the matter further and see what was done at the time of the reservation of that land.

Very truly yours,

BURR, BONEY & PEASE

Theodore M. Pease, Jr.

TMPjr/sgp

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / BOX 2178 – JUNEAU

1962 Opinions of the
Attorney General No. 11

July 26, 1962

Mr. Donald A. McKinnon, Commissioner
Department of Highways
Douglas, Alaska

Attention: Mr. Alfred A. Baca
State Right of Way Agent

Re: Section Line Dedications;
An interpretation of Ch. 19,
SLA 1923, Ch. 123, SLA 1951
and Ch. 34, SLA 1953.

Dear Mr. McKinnon:

You have asked whether the State has a right of way easement along certain section lines, which can be used for highway purposes without compensation.

If the State has such an easement it must be based upon either Ch. 19, SLA 1923, Ch. 123, SLA 1951 or Ch. 35, SLA 1953. The relevant language of Ch. 19, SLA 1923 states:

> "Section 1. A tract of four 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 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."

The legislature could not be referring to sections which have passed to private ownership because dedication of easements on private property would be an infringement of vested property rights prohibited by the fifth amendment to the Constitution of the United States. Nor could the territorial legislature legally dedicate an easement in section lines over the public domain. Section 9 of the Alaska Organic Act (48 USCA § 77) reads in part as follows:

> "The 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; . . . " Cf. Betsch v. Umphrey, 270 Fed. Rep., 45, 48 (1921).

The preserving of an easement in the territory certainly would interfere with the primary disposal of the soil. Since the territorial legislature had no powers not conferred by federal statute, Ch. 19, SLA 1923 cannot be construed as a dedication of right-of-way easements on federal lands.

Ch. 19, SLA 1923 could only be effective to dedicate an easement on land owned by the Territory of Alaska and conveyed subsequent to the approval of the Act of April 6, 1923. However, this question is moot because according to the Bureau of Natural Resources, the Territory of Alaska from the period of its inception until statehood never possessed more than 105,000 acres. It is my understanding that this land is located in small parcels throughout the State and is used for school and public works purposes. It is doubtful if any of this land has ever been conveyed.

Ch. 19, SLA 1923 was included in the 1933 compilation of session laws but was omitted from the last compilation in 1949. All acts not included in the compilation were expressly repealed, Chapter 1, ESLA 1949.

In 1951 the Territorial Legislature enacted Ch. 123, SLA 1951 which stated:

> "Section 1. A tract of one hundred 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, the section line being the center of said highway. Byt 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."

The only real distinction between Ch. 19, SLA 1923 and Ch. 123, SLA 1951 is the increase in width of the easement from four rods to one hundred feet. Ch. 123, SLA 1951

is derived from House Bill No. 101. The Bill in its original form reiterated Ch. 19, SLA 1923 which had been repealed. On March 20, 1951 the Senate amended House Bill No. 101 to its present form. The amendments read in part as follows:

> "Page 1, line 11, delete the word 'in' and substitute therefor the words 'owned by' and after the word 'Alaska' insert a comma and the words 'or acquired from the Territory' and a comma." Cf. Senate Journal of Alaska 1951, Pages 789, 790.

These amendments indicate that the legislature was aware of its limited powers and therefore did not attempt to dedicate easements on lands not owned by the Territory of Alaska.

Ch. 35, SLA 1953 amended Ch. 123, SLA 1951 as follows:

> "Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract four rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, . . . " (emphasized)

However, the amendment was of no effect since a legislature operating under the limitations of 48 USC § 77 was without power to dedicate section line property not owned by the Territory. The power to "dispose of primary interests in the soil" was not delegated to the Territorial Legislature and, in fact, such power was expressly denied the Territory.

It might be argued that Ch. 19, SLA 1923 and Ch. 35, SLA 1953 can be supported on other grounds. An Attorney General's Opinion issued September 25, 1956 suggests that Ch. 35, SLA 1953 was not enacted in contravention of 48 USCA § 77 but was actually an implementation of 14 Stat. 253 (1866) 43 USC 932, enacted by Congress in July, 1866. There are two problems with this view. 14 Stat. 253 (1866) is a grant of right of way easements for the construction of highways over public lands, not reserved for public uses. This grant constituted an offer of dedication and does not become effective until accepted by the several states or territories. A recent Alaska case is in agreement with other courts in dictating the two methods of acceptance. Mr. Justice Dimond in Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961) states:

> "But 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)

The question of prescriptive user is well settled bu that is not what we are concerned with. Has the Territorial Legislature completed "some positive act, clearly manifesting an intention to accept"? Ch. 19, SLA 1923 and Ch. 35, SLA 1953 make no mention of 14 Stat. 253 (1866). The House and Senate Journals, 1923 and 1953, do not indicate that there was any discussion on the matter. There are no cases on the matter and the State has never done any positive act to exercise its "rights" to the section line easements.

Several other jurisdictions, notably North Dakota and Kansas, have accepted the federal grant by statute. A recent North Dakota case, Costain v. Turner County (N.D. 1949) 36 N.W. 2d, 382, 384, states, "The legislature of Dakota Territory enacted Ch. 33 S.L. 1870-1871 stating: 'That hereafter all section lines in this Territory shall be and are hereby declared public highways as far as practicable. . . .' The federal statute made the dedication, the territorial statute accepted it, . . . " Cf. Huffman v. Board of Sup'rs. of West Bay TP Benson County, 47 N.D. 217, 182 N.W. 459 (1921). In Wallbridge v. Russell County, 74 Kan. 341, 86 Pac. 473 (1906), the Supreme Court of Kansas agreed that Kansas Laws 1873, p. 230, C. 122, identical to the Dakota statute, constituted legislature acceptance of 14 Stat. 253 (1866). By legislative fiat these jurisdictions established highways on section lines within seven years after the federal grant.

Chapter 19, SLA 1923, passed 57 years after the federal grant, and Chapter 35, SLA 1953, passed 87 years after the federal grant, do not establish highways nor do they use language of acceptance. The Alaska territorial statutes "dedicate" easements. The word "dedicate" is synonymous with the word "convey". Cf. Quality Building & Securities Co. v. Bledsoe, 14 P.2d 128, 132 (Cal. 1932). Clearly the legislatur cannot accept a right of way by dedicating or conveying the same property. The reasonable interpretation of Ch. 19,

SLA 1923 and Ch. 35, SLA 1953, in that the legislature did not intend to accept the federal grant, but was reserving easements for the Territory. As I mentioned earlier, the legislature had no power to do this with property not owned by the Territory.

In summary, Ch. 19, SLA 1923 reserved the right of way easements on land owned by the Territory from April 6, 1923 until its repeal by Ch. 1, ESLA 1949 on January 18, 1949. There were no section line dedication acts between January 18, 1949 and March 26, 1951. Ch. 123, SLA 1951 did not attempt to dedicate easements on land not owned or acquired from the Territory of Alaska. Ch. 35, SLA 1953 approved on March 21, 1953 is restricted to dedication of easement on land owned or acquired from the Territory of Alaska. However, this act is still in effect and all property turned over by the Federal Government to the State of Alaska and all land which will in the future be turned over to the State will be burdened with right of way easements inuring to the benefit of the State.

Very truly yours,

GEORGE N. HAYES
ATTORNEY GENERAL

Michael M. Holmes

By
Michael M. Holmes
Assistant Attorney General

MMH:jj

cc: The Honorable William A. Egan
Governor of Alaska
State Capitol
Juneau, Alaska

The Honorable Floyd L. Guertin
Commissioner of Administration
Alaska Office Building
Juneau, Alaska

MEMORANDUM

To: Right of Way Section

From: Robert M. Redding, Right of Way Agent

Subject: Right of Way Easements in Alaska Lands

Date: September 30, 1958

On July 26, 1866 the Congress of the United States passed an Act pertaining to the rights of way for highways. This Act, now known as Revised Statute Sec. 2477 (43 U.S.C. 932) states:

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

This grant by the Federal Government constituted a dedication to the several States and Territories and did not become effective until it was accepted and implemented by them.

Several principles should be considered in order to have a comprehensive understanding of the effect of dedication statutes:

(1) No patent will be issued (43 USC 1151), nor can an entry be made on land which has not been surveyed, although such land may be lawfully occupied (43 USC 161, n. 34). Such a settler, neither patentee nor entryman, acquires no vested rights in the land until survey and subsequent entry;

(2) As against everyone but the United States, the date on which a homesteaders rights become fixed, or vested, is the date of entry not the date of patent, the title given in the patent relating back to the date of entry (43 USC 161, n. 30);

(3) A dedication by Act of Congress cannot be accepted until the land dedicated is surveyed and section lines established;

(4) A dedication which has once been accepted by an act of a State or Territorial Legislature is not lost on lands so dedicated.

On January 19, 1923, the Territorial Legislature of Alaska enacted Ch. 19, SLA 1923 (subsequently codified as Sec. 1721, CLA 1933), wherein the dedication made by Congress in R.S. Sec. 2477 was accepted and an easement in a strip of land 66 feet wide on the section line in all public lands lying within the Territory was created. All surveyed public lands lying within the territorial limits of Alaska which were acquired (patented or entered) prior to this enactment are held free and unencumbered by any Federal or Territorial right of way easement.

Persons who acquired land from either the United States or the Territory on or after January 19, 1923, took the land subject to the easement so created.

On January 18, 1949, a special session of the Legislature enacted Ch. 1, ESLA 1949, which purported to adopt the Alaska Compiled Laws Annotated 1949. The 1923 law was not included in the compilation and so was repealed by implication. In 1950 a decision was handed down by the District Court for the District of Alaska in the case of Ashley v. City of Anchorage, 13 A 168, 95 F Supp 189, which cast some doubt on whether or not ACLA 1949 was in effect. A reading of this case indicates that ACLA 1949 was adopted in 1949, but should there be any discrepancy between it and the session law it embodies, the session law will control. The repeal of any prior session law would be effective as of January 18, 1949. The effect of ACLA 1949 was to allow all lands surveyed after its adoption and acquired prior to March 21, 1953, to be held unencumbered by any Territorial right of way easement.

The status of lands acquired from the Federal Government on or after July 24, 1947, was further determined by 61 Stat. 418 (48 U.S.C. Sec. 321d) which made all lands acquired from the Federal Government subject to a right of way easement in the United States and the yet to be formed State of Alaska. The widths of these rights of way were established by Public Land Order 601 of August 10, 1949, as amended by Public Land Order 757 of October 16, 1951, and by Secretary of the Interior Order 2665 of October 16, 1951, at 600 feet for the Alaska Highway, 300 feet for through roads, 200 feet for feeder roads and 100 feet for local roads.

On March 26, 1951, the Territorial Legislature in Ch. 123, SLA 1951, dedicated an easement for a right of way 100 feet wide along section lines in all property owned by the Territory or acquired from the Territory. This law had the effect of giving the Territory an easement in all lands acquired from it after March 26, 1951, but did not provide for a right of way easement on lands acquired from the United States, the Act of 1947 (61 Stat. 418) being inapplicable to the Territory of Alaska.

On March 21, 1953, Ch. 123, SLA 1951, was amended by Ch. 35, SLA 1953, to include an additional 66 foot right of way easement in lands acquired from the Federal Government. This act constituted a re-acceptance of the dedication provided for by R.S. 2477 and which had lapsed with the adoption of ACLA 1949. Lands acquired after this date were subject to a Territorial easement of 100 feet along the section line if acquired from the Territory and to a Territorial easement of 66 feet along the section line if acquired from the Federal Government.

approved March 21 19[illegible]

Lands which were surveyed between January 18, 1949, and March 20, 1953, and had not been acquired would be treated similarly with lands surveyed after March 20, 1953.

SUMMARY

(1) Land (meaning surveyed land) lying within the Territorial limits of Alaska acquired (patented or entered) either from the Federal Government or the Territory of Alaska prior to January 19, 1923, is unencumbered by any right-of-way-easement of either the United States or the Territory.

(2) Land acquired either from the Federal Government or the Territory between January 19, 1923, and July 23, 1947, is subject to a Territorial 66 foot right of way easement along the section line.

(3) Land acquired from the Federal Government between July 24, 1947, and January 17, 1949, is subject to a Territorial 66 foot right of way easement along the section line and also a 100 to 600 foot right of way easement reserved to the United States and the State of Alaska.

Land acquired from the Territory during this period is subject to a 66 foot right of way easement along the section line.

(4) Land acquired from the Federal Government between January 18, 1949, and March 25, 1951, is subject to a 100 to 600 foot right of way easement of the United States and the State of Alaska. Such land is not burdened by any Territorial easement if the survey also took place between these dates.

Land acquired from the Territory during this period is subject to no right of way easement if surveyed between these dates.

(5) Land acquired from the Federal Government between March 26, 1951, and March 20, 1953, is subject to a 100 to 600 foot right of way easement of the United States and the State of Alaska. There is no Territorial easement on the land if it was surveyed during this period.

Land acquired from the Territory between these dates is subject to a 100 foot Territorial right of way easement along the section line.

(6) Land acquired from the Federal Government between March 21, 1953, and the day preceeding that on which the Territory of Alaska is proclaimed a State is subject to a 100 to 600 foot right of way easement

of the United States and the State of Alaska as well as a 66 foot Territorial right of way easement along the section line.

Land acquired from the Territory during this period is subject to a 100 foot Territorial right of way easement along the section line.

(7) Land acquired after the Territory becomes a State will be in the same status as that in paragraph 6.

Remember:

(1) Land must be surveyed.

(2) Date of entry controls.

These rules should be used in determining whether or not the Territory has any presently existing rights in property which may be under consideration for acquisition for highway right of way purposes.

GERALD WILLIAMS
ATTORNEY GENERAL

TERRITORY OF ALASKA
OFFICE OF
ATTORNEY GENERAL
JUNEAU

September 25, 1956

EDWARD A. MERDES
ASSISTANT ATTORNEY GENERAL
HENRY J. CAMAROT
ASSISTANT ATTORNEY GENERAL
DAVID J. FREE
ASSISTANT ATTORNEY GENERAL

Mr. Roger R. Robinson
Operation Supervisor
Area 4, Bureau of Land Management
Anchorage, Alaska

Re: Chapter 35, SLA 1953
OS:RRR
Anch. 029203; 031927; 031931

Dear Mr. Robinson:

This will acknowledge receipt of your letter dated September 4, 1956, and a copy of Mr. Wiles' August 31 memorandum wherein he comments upon my opinion of August 20. In my said August 20 opinion, it is stated that insofar as Chapter 35, SLA 1953 purports to make a primary disposal of the soil it is in contravention of 48 U.S.C.A. 77. I did not therein define what constitutes a "primary disposal of the soil" but assumed that the Chapter 35 dedication constituted such a disposal. Therein, as I analyze Mr. Wiles' memorandum, is where he disagrees with my conclusion. Mr. Wiles, in substance, states that 43 U.S.C.A. 932 as made applicable to Alaska by 48 U.S.C.A. 23, makes the actual primary disposal of the soil and Chapter 35 merely constitutes the Territorial acceptance and implementation of the same. He cites the North Dakota Supreme Court case of Costain v. Turner County, 36 NW 2d 32 (1949) in support of his conclusion.

Mr. Wiles, being a full-time attorney for the Bureau of Land Management and who, in such capacity, deals daily and continuously with land problems, is admittedly more qualified than the average attorney to pass upon a legal issue concerning public lands. I have carefully read and analyzed his opinion and I must state that I am impressed with his legal reasoning in support of the conclusion that Chapter 35 does not in fact make a primary disposal of the soil but instead merely implements a prior federal disposal.

Accordingly, my opinion of August 20 is modified to provide that since Chapter 35, SLA 1953 is not an attempt by the Territorial Legislature to make a primary disposal of the soil, the said statute is not in contravention or in violation of 48 U.S.C.A. 77.

Very truly yours,

J. GERALD WILLIAMS
Attorney General

By: Edward A. Merdes
Assistant Attorney General

EAM:mez
cc: Mr. Irving Reed,
Highway Engineer
Mr. W. A. Chipperfield,
Land Commissioner

TERRITORY OF ALASKA
OFFICE OF
ATTORNEY GENERAL
JUNEAU

J. GERALD WILLIAMS
ATTORNEY GENERAL

EDWARD A. MERDES
ASSISTANT ATTORNEY GENERAL
HENRY J. CAMAROT
ASSISTANT ATTORNEY GENERAL
DAVID J. PREE
ASSISTANT ATTORNEY GENERAL

August 20, 1956

Mr. Roger R. Robinson
Operations Supervisor
Bureau of Land Management
Department of the Interior
Land Office
Anchorage, Alaska

Re: Anchorage 029203
10.0 Grazing Lease
Anchorage 031927 and 031931
1.1 Homesteads - 48 U.S.C.A. Section 77 and
Chapter 35, SLA 1953

Dear Mr. Robinson:

We have your letter of July 30, 1956, relative to the above. Essentially, you desire an opinion on the question of whether the provisions of Chapter 35, SLA 1953, are applicable in order to retain a stock passage through lands presently under homestead application.

Chapter 123, SLA 1951, as amended by Chapter 35, SLA 1953 reads as follows:

> "Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract four 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 strips shall inure to the owner of the tract of which it formed a part by the original survey." (Underlining supplied.)

An examination of the legislative history of this Act discloses that the underlined portion was inserted by the 1953 Legislature. Taking the statute at its face value it would appear that it solves the problem posed by your letter and ostensibly a four rod wide tract could be established under the subject homestead and thereby create or preserve a stock passage through the land.

However, in view of 48 U.S.C.A. 77, I am of the opinion that

the underlined portion of the above Territorial statute which dedicates a four rod wide tract for public highways, at least insofar as it purports to grant rights-of-way across Federal land, is in conflict with the following provision of Section 77, which reads in part as follows:

> "The 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;***." (Underlining supplied.)
> Cf. Betsch et al. v. Umphrey, et al., 270 Fed. 45, 48.

In view of the Congressional restrictions on the Territorial Legislature's power to deal with Alaskan soil, manifested by 48 U.S.C.A. 77, supra, it is my opinion that Chapter 35, SLA 1953 cannot be construed or applied in any way to grant or protect an existing stock passageway across the lands referred to in your letter.

Very truly yours,

J. GERALD WILLIAMS
Attorney General

By: E. A. Merdes
Edward A. Merdes
Assistant Attorney General

EAM:mez

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Juneau Region
Anchorage Field Office
P.O. Box 480
Anchorage, Alaska

August 31, 1956

Memorandum

To: Operations Supervisor, Bureau of Land Management

From: Office of the Solicitor

Subject: Dedication of lands for highway purposes
Chap. 35 SLA 1953

You have referred the Territory of Alaska Attorney General's letter of August 20, 1956, concerning the above subject, to me for consideration and comment.

In this letter the Attorney General stated that in his opinion Chapter 35 SLA 1953, at least insofar as such statute purports to grant rights-of-way across Federal land, is in conflict with that portion of 48 U.S.C. 77 which prohibits the Territorial Legislature from passing laws which would interfere with the primary disposal of public lands, and that Chapter 35 SLA 1953 could not therefore be construed to grant or protect a right-of-way along section lines adjacent to public lands.

The pertinent portions of Chapter 35, SLA 1953 and 48 U.S.C. 77 read as follows:

Chapter 35 SLA 1953

> Section 1. A tract one hundred feet wide between each section of Land owned by the Territory of Alaska, or acquired from the Territory, and a tract four 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 strips shall inure to the owner of the tract of which it formed a part by the original survey."
> (Underlining supplied.)

48 U.S.C.A. 77

"The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistant with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; * * *." (underlining supplied.)

I am in complete accord with the Attorney General's conclusion that the underlined portion of 48 U.S.C.A. Section 77 set forth supra, prevents the Territorial Legislature from passing legislation which would in any manner attempt to permit the Territory to make a primary disposal of public lands; however, I do not believe that the underscored portion of Chapter 35 SLA 1953 set forth above should be considered as an attempt by the Territorial Legislature to make a primary disposal of public lands.

By the act of July 26, 1866 (14 Stat. 253; R.S. 2477; 43 U.S.C. 932), the Congress of the United States passed an act whereby rights-of-way for highway purposes were granted. This statute reads as follows:

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

In construing this statute, the courts have held that this section constitutes a dedication by the United States of any unreserved public lands for the construction of highways, and that such dedication may be accepted by a territorial statute similar to Chapter 35 SLA 1953. Costain v. Turner County (1949), 36 N.W. (2d) 382.

"

In the above cited case a petition was filed with the office of the county auditor of Turner County, S.D., requesting that a mile of land along a certain section line be opened for highway purposes. Notice of the petition was given and the petition was heard. Thereafter the Board of County Commissioners ordered that such land be opened for highway purposes. The Costain family as claimants of nearly all of the land affected by the Board's order, filed an appeal from such order in the Circuit Court. The Circuit Court affirmed the right of the County to construct the highway; however, the Court awarded the Costains the sum of $1,500 as damages. From this judgment the County appealed to the Supreme Court on the basis that the section line in question had been dedicated by the United States pursuant to the act of July 26, 1866, supra, and accepted by the Territory by virtue of Chapter 33 SL 1870-1871; thus creating an easement for highway purposes which would take precedence over any rights obtained by the Costains because of their entry on such lands, which entry was subsequent to the passage of Chapter 33 SL 1870-1871. The Supreme Court of South Dakota, in upholding the County's contentions and setting aside the award of damages, held in part as follows:

"(1) In the year 1866 Congress declared that: 'The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.' 8 U. S. Ch. 262, 14 Stat. 253, 43 U.S.C.A. § 932. The legislature of Dakota Territory enacted Ch. 33 S.L. 1870-1871 stating: 'That hereafter all section lines in this Territory shall be and are hereby declared public highways as far as practicable: * * *.' The law in effect at the time provided that public highways along section lines 'shall be sixty-six feet wide and shall be taken equally from each side of the section line' unless changed as provided by law. § 27, Ch. 13, S.L. 1867-1868 as amended by Ch. 14, S.L. 1874-1875; S.D.C. 28.0105. The federal statute made the dedication, the territorial statute accepted it, and at the same time designated the location of highways. When the Costains acquired the land by patent from the United States an area two rods wide on each side of the section line was burdened with an easement in favor of the public for highway purposes. Lawrence v. Ewart, 21 S.D. 580, 114 N.W. 709; Gustafson v. Gem Twp., 58 S.D. 308, 235 N.W. 712.")'

Chapter 33 SL 1870-1871 of S.D. is very similar to Chapter 35 SLA 1953, in that both acts appear to dedicate or set aside public lands for territorial highway purposes, which action would, if not authorized by Congress, be a primary disposition of public lands; however, as illustrated in the Costain case, the United States made the primary disposition of public lands for highway purposes by dedication by virtue of the act of July 26, 1866, supra, and the territorial legislation was merely an acceptance of such dedication.

In view of the holding in the Costain case, it is my opinion that Chapter 35 SLA 1953 would be an acceptance of a dedication made by the United States by virtue of the act of July 26, 1866,1/ rather than a primary disposal of public land, and therefore would not be in conflict with the above cited provision of 48 U.S.C. Sec. 77. For other cases where similar territorial statutes have been construed in the same manner, see: Huffman v. Board of Supvrs. of West Bay TP Brown County (1921), (182 N.W. 459, 47 N.D. 27); Walbridge v. Russell County (74 Kan. 341, 86 Pac. 473); Hillsboro Nat. Bank v. Ackerman (189 N.W. 657, 48 N.D. 1179); Schwerdtle v. Placer County (141 Pac. 448, 168 Cal. 589); Fenon v. Dollie Civil Tp. (163 N.W. 531, 36 N.D. 634), writ of error dismissed (39 S.Ct. 491, 250 U. S. 634, 63 L.Ed. 1182).

For the Regional Solicitor

Eugene F. Wiles

Eugene F. Wiles, Field Solicitor
Juneau Region

1/ The act of July 26, 1866 was made applicable to the Territory of Alaska by the act of August 24, 1912 (37 Stat. 512, 48 U. S.C. 23).

A BRIEF HISTORY OF PLO 1613

1. 4/23/42 E.O. 9145

This order reserved for the Alaska Road Commission in connection with construction, operation and maintenance of the Palmer-Richardson Highway (now Glenn Highway), a right-of-way 200' wide from the terminal point of the highway in the NE¼ of Sec. 36, T. 20 N., R. 5 E., S.M. to its point of connection with the Richardson Highway, in the SE¼ of Sec. 19, T. 4 N., R. 1 W., CRM. The area described is generally that area between Chickaloon and Glennallen.

2. 7/20/42 PLO 12

This order withdrew a strip of land 40 miles wide generally along the Tanana River from Big Delta to the Canadian Border. It also withdrew a 40 mile wide strip along the proposed route of the Glenn Highway from its junction with the Richardson Highway, east to the Tanana River.

3. 1/28/43 PLO 84

This order withdrew all lands within 20 miles of Big Delta which fell between the Delta and Tanana Rivers. The purpose of the withdrawal was for the protection of the Richardson Highway.

4. 4/5/45 PLO 270

This order modified PLO 12 by reducing the areas withdrawn by that order to a 10 mile wide strip of land along the now constructed highways. The highways affected by this order are as follows:

1. Alaska Highway - from Canadian Border to Big Delta.
2. Glenn Highway - from Tok Junction to Gulkana.

5. 7/31/47 PLO 386

Revoked PLO 84 and PLO 12, as amended by PLO 270. The order withdrew the following land under the jurisdiction of the Secretary of the Interior for highway purposes:

1. A strip of land 600' wide along the Alaska Highway as constructed from the Canadian Boundary to the junction with the Richardson Highway at Delta Junction.

2. A strip of land 600' wide along the Gulkana-Slana-Tok Road (Glenn Highway) as constructed from Tok Junction to its junction with the Richardson Highway near Gulkana. This order also withdrew strips of land 50' wide and 20' wide along the Alaska Highway for purposes of a pipeline and

telephone line respectively. Pumping stations for the pipeline were also withdrawn by this order, as well as 22 sites which were reserved pending classification and survey.

6. 8/10/49 — PLO 601

This order revoked E.O. 9145 as to 200' withdrawal along Glenn Highway from Chickaloon to Glennallen.

It also revoked PLO 386 as to the 600' wide withdrawal along the Alaska Highway from the Canadian Boundary to Big Delta and along the Glenn Highway from Tok Junction to Gulkana.

It withdrew lands for highway purposes along the highways given below. The width of each withdrawal is shown to the right of the name of the highway. Those underlined are in the Anchorage Land District.

Alaska Highway: 600' wide
Richardson Highway: 300' wide
Glenn Highway (Anchorage to Glennallen): 300' wide
Haines Highway: 300' wide
Tok Cut-Off (Tok Jct. to Gulkana): 300' wide

The above roads were designated as "through roads" by this order. The following roads were designated as feeder roads and a strip of land 200' wide was withdrawn for each of them. Only those underlined are within the Anchorage Land District.

Steese Highway
McKinley Park Road
Anchorage-Potter-Indian Road
Tok-Eagle Road
Fairbanks-College Road
Anchorage-Lake Spenard Road
Elliott Highway
Ruby-Long-Poorman Road
Nome-Solomon Road
Kenai Lake-Homer Road
Circle Hot Springs Road

All other roads were classified as local roads and a strip of land 100' wide was withdrawn for each of them.

7. 10/16/51 PLO 757

This order accomplished two things:

1. It revoked the highway withdrawal on all "feeder" and "local" roads established by PLO 601.

2. It retained the highway withdrawal on all the "through roads" mentioned in PLO 601 and added three highways to the list.

After issuance of this order the only highways still withdrawn are those listed below. Also shown is the total width of the withdrawal. Highways in the Anchorage Land District are underlined.

Alaska Highway - 600'
Richardson Highway - 300'
Glenn Highway - 300'
Haines Highway - 300'
Seward-Anchorage Highway - 300'
(exclusive of that portion in the Chugach National Forest)
Anchorage-Lake Spenard Highway - 300'
Fairbanks-College Highway - 300'

The lands released by this order became open to appropriation, subject to the pertinent easement set by Secretarial Order No. 2665, discussed below.

8. 10/15/51 Secretarial Order No. 2665

This order, issued on the same date as PLO 757, fixed the width of all public highways in Alaska which were established or maintained under the jurisdiction of the Secretary of the Interior. It restated that the lands embraced in "through roads" were withdrawn as shown under PLO 757 above. It also listed all the roads then classified as feeder roads and set the right-of-way or easement (as distinguished from a withdrawal) for them at 200'. The right-of-way or easement for local roads remained at 100'.

9. 7/17/52 Amendment No. 1 to Secretarial Order No. 2665

This amendment reduced the 100' width of the Otis Lake Road, a local road not withdrawn in the Anchorage Land District, to 60' in Section 21 of T. 13 N., R. 3 W.

10. 9/15/56 Amendment No. 2 to Secretarial Order No. 2665

This amendment added the following highways to the list of "through" roads:

Fairbanks-International Airport Road
Anchorage-Fourth Avenue-Post Road
Anchorage-International Airport Road
Copper River Highway
Fairbanks-Nenana Highway
Sterling Highway
Kenai Spur from Mile 0 to Mile 14
Palmer-Wasilla-Willow Road

Steese Highway from Mile 0 to Fox Junction
The Anchorage-Lake Spenard Highway was redesignated the Anchorage-Spenard Highway
The Fairbanks-College Highway was deleted from the list of through roads.

The following highways were deleted from the "feeder" road list:

Sterling Highway
University to Ester Road
Kenai Junction to Kenai Road
Palmer to Finger Lake to Wasilla Road
Paxson to McKinley Park Road
Steese Highway from Mile 0 to Fox Junction

The following roads were added to the list of "feeder" roads:

Kenai Spur from Mile 14 to Mile 31
Nome-Kougarok Road
Nome-Teller Road

11. Act of August 1, 1956 Public Law 892

The purpose of this Act was to provide for the disposal of public lands within highway, telephone and pipeline withdrawals in Alaska, subject to appropriate easements. This Act paved the way for the issuance of a revocation order (PLO 1613) which would allow claimants and owners of land adjacent to the highway withdrawal a preference right to acquire the adjacent land.

12. April 7, 1958 PLO 1613

This order accomplished the intent of the Act of August 1, 1956. Briefly, it did the following:

1. Revoked PLO 601, as modified by PLO 757, and provided a means whereby adjacent claimants and owners of land could acquire the restored lands, subject to certain specified highway easements. The various methods for disposal of the restored lands are outlined in the order.

2. Revoked PLO 386 as to the lands withdrawn for pipeline and telephone line purposes along the Alaska Highway. It provided easements in place of the withdrawals.

13. Act of June 11, 1960 Public Law 86-512

This Act amended the Act of August 1, 1956. This was a special act to allow the owners and claimants of land at Delta Junction and Tok Junction a preference right to purchase the land between their property

and the centerline of the highway. The Act was necessary since the land in both towns was still reserved for townsite purposes, even after the highway, telephone line, and pipeline withdrawals were revoked.

Reference No. 1684

Register Data

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Page:

PLO No.: 1613
Date PLO signed: 4/7/58

TITLE 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

Appendix—Public Land Orders

[Public Land Order 1613]

[22508]

ALASKA

REVOKING PUBLIC LAND ORDER NO. 601 OF AUGUST 10, 1949, WHICH RESERVED PUBLIC LANDS FOR HIGHWAY PURPOSES, AND PARTIALLY REVOKING PUBLIC LAND ORDER NO. 388 OF JULY 31, 1947

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, and the act of August 1, 1956 (70 Stat. 898) it is ordered as follows:

1. Public Land Order No. 601 of August 10, 1949, as modified by Public Land Order No. 757 of October 18, 1951, reserving for highway purposes the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway, is hereby revoked.

2. Public Land Order No. 388 of July 31, 1947, so far as it withdrew the following-described lands, identified as items (a) and (b) in said order, under the jurisdiction of the Secretary of War for right-of-way purposes for a telephone line and an oil pipeline with appurtenances, is hereby revoked:

(a) A strip of land 50 feet wide, 25 feet on each side of a telephone line as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 20 feet wide, 10 feet on each side of a pipeline as located and constructed generally parallel to the Alaska Highway from the Alaska-Yukon Territory boundary to the junction of the Alaska Highway with the Richardson Highway near Big Delta, Alaska.

3. An easement for highway purposes, including appurtenant protective, scenic, and service areas, over and across the lands described in paragraph 1 of this order, extending 150 feet on each side of the center line of the highways mentioned therein, is hereby established.

4. An easement for telephone line purposes in, over, and across the lands described in paragraph 2 (a) of this order, extending 25 feet on each side of the telephone line referred to in that paragraph, and an easement for pipeline purposes, in, under, over, and across the lands described in paragraph 2 (b) of this order, extending 10 feet on each side of the pipeline referred to in that paragraph, are hereby established, together with the right of ingress and egress to all sections of the above easements on and across the lands hereby released from withdrawal.

5. The easements established under paragraphs 3 and 4 of this order shall extend across both surveyed and unsurveyed public lands described in paragraphs 1 and 2 of this order for the specified distance on each side of the centerline of the highways, telephone line and pipeline, as those center lines are definitely located as of the date of this order.

6. The lands within the easements established by paragraphs 3 and 4 of this order shall not be occupied or used for other than the highways, telegraph line and pipeline referred to in paragraphs 1 and 2 of this order except with the permission of the Secretary of the Interior or his delegate as provided by section 3 of the act of August 1, 1956 (70 Stat. 898), provided: that if the lands crossed by such easements are under the jurisdiction of a Federal department or agency, other than the Department of the Interior, or of a Territory, State, or other Government subdivision or agency, such permission may be granted only with the consent of such department, agency, or other governmental unit.

7. The lands released from withdrawal by paragraphs 1 and 2 of this order, which, at the date of this order, adjoin lands in private ownership, shall be offered for sale at not less than their appraised value, as determined by the authorized officer of the Bureau of Land Management, and pursuant to section 2 of the act of August 1, 1956, supra. Owners of such private lands shall have a preference right to purchase at the appraised value so much of the released lands adjoining their private property as the authorized officer of the Bureau of Land Management deems equitable, provided, that ordinarily, owners of private lands adjoining the lands described in paragraph 1 of this order will have a preference right to purchase released lands adjoining their property, only up to the centerline of the highways located therein. Preference right claimants may make application for purchase of released lands at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph not claimed by and sold to preference claimants may be sold at public auction at not less than their appraised value by an authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the office in the Territory in which their title to their private lands is recorded. Such notice shall give the preference claimant at least 60 days in which to make application to exercise his preference right; and if the application is not filed within the time specified, the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to pay for the lands within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 30 days.

1684

8. The lands released from withdrawal by paragraphs 1 and 2 of this order, which at the date of this order, adjoin lands in valid unperfected entries, locations, or settlement claims, shall be subject to inclusion in such entries, locations and claims, notwithstanding any statutory limitations upon the area which may be included therein. For the purposes of this paragraph entries, locations, and claims include, but are not limited to, certificates of purchase under the Alaska Public Sale Act (63 Stat. 679; 48 U. S. C. 364a–e) and leases with option to purchase under the Small Tract Act (52 Stat. 609; 43 U. S. C. 682a) as amended. Holders of such entries, locations, and claims to the lands, if they have not gone to patent, shall have a preference right to amend them to include so much of the released lands adjoining their property as the authorized officer deems equitable, provided, that ordinarily such holders of property adjoining the lands described in paragraph 1 of this order will have the right to include released lands adjoining such property only up to the centerline of the highways located therein. Allowances of such amendments will be conditional upon the payment of such fees and commissions as may be provided for in the regulations governing such entries, locations, and claims together with the payment of any purchase price and cost of survey of the land which may be established by the law or regulations governing such entries, locations and claims, or which may be consistent with the terms of the sale under which the adjoining land is held. Preference right claimants may make application to amend their entries, locations, and claims at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph, not claimed by and awarded to preference claimants, may be sold at public auction at not less than their appraised value by the authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the appropriate land office, or if the land is patented, in the Territory in which title to their private land is recorded. Such notice shall give the claimant at least 60 days in which to make application to exercise his preference right, and if the application is not filed within the time specified the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to make any required payments within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

9. (a) Any tract released by Paragraph 1 or 2 of this order from the withdrawals made by Public Land Orders Nos. 601, as modified, and 386, which remains unsold after being offered for sale under Paragraph 7 or 8 of this order, shall remain open to offers to purchase under Section 2 of the act of August 1, 1956, supra, at the appraised value, but it shall be within the discretion of the Secretary of the Interior or his delegate as to whether such an offer shall be accepted.

(b) Any tract released by Paragraph 1 or 2 of this order from the withdrawals made by Public Land Orders Nos. 601, as modified, and 386, which on the date hereof does not adjoin privately-owned land or land covered by an unpatented claim or entry, is hereby opened, subject to the provisions of Paragraph 8 hereof, if the tract is not otherwise withdrawn, to settlement claim, application, selection or location under any applicable public land law. Such a tract shall not be disposed of as a tract or unit separate and distinct from adjoining public lands outside of the area released by this order, but for disposal purposes, and without losing its identity, if it is already surveyed, it shall be treated as having merged into the mass of adjoining public lands, subject, however, to the easement so far as it applies to such lands.

(c) Because the act of August 1, 1956 (70 Stat. 896; 48 U. S. C. 420–420c) is an act of special application, which authorizes the Secretary of the Interior to make disposals of lands included in revocations such as made by this order, under such laws as may be specified by him, the preference-right provisions of the Veterans Preference Act of 1944 (58 Stat. 747; 43 U. S. C. 279–284) as amended, and of the Alaska Mental Health Enabling Act of July 28, 1956 (70 Stat. 709; 48 U. S. C. 46–3b) will not apply to this order.

10. All disposals of lands included in the revocation made by this order, which are under the jurisdiction of a Federal department or agency other than the Department of the Interior may be made only with the consent of such department or agency. All lands disposed of under the provisions of this order shall be subject to the easements established by this order.

11. The boundaries of all withdrawals and restorations which on the date of this order adjoin the highway easements created by this order are hereby extended to the centerline of the highway easements which they adjoin. The withdrawal made by this paragraph shall include, but not be limited to the withdrawals made for Air Navigation Site No. 7 of July 13, 1954, and by Public Land Orders No. 388 of July 31, 1947, No. 622 of December 15, 1949, No. 808 of February 27, 1952, No. 975 of June 18, 1954, No. 1037 of December 16, 1954, No. 1059 of January 21, 1955, No. 1129 of April 15, 1955, No. 1179 of June 29, 1955, and No. 1181 of June 29, 1955.

ROGER ERNST,
Assistant Secretary of the Interior.

APRIL 7, 1958.

[F. R. Doc. 58-2686; Filed, Apr. 10, 1958; 8:45 a.m.]

1573-1
S.O. 2665
9-15-56

#1139 10/14/56

Office of the Secretary

[Order 2665, Amdt. 2]

ALASKA

RIGHTS-OF-WAY FOR HIGHWAYS

SEPTEMBER 15, 1956.

1. Section 2 (a) (1) is amended by adding to the list of public highways designated as through roads, the Fairbanks-International Airport Road, the Anchorage-Fourth Avenue-Post Road, the Anchorage International Airport Road, the Copper River Highway, the Fairbanks-Nenana Highway, the Denali Highway, the Sterling Highway, the Kenai Spur from Mile 0 to Mile 14, the Palmer-Wasilla-Willow Road, and the Steese Highway from Mile 0 to Fox Junction; by re-designating the Anchorage-Lake Spenard Highway as the Anchorage-Spenard Highway, and by deleting the Fairbanks-College Highway.

2. Section 2 (a) (2) is amended by deleting from the list of feeder roads the Sterling Highway, the University to Ester Road, the Kenai Junction to Kenai Road, the Palmer to Finger Lake to Wasilla Road, the Paxson to McKinley Park Road, and the Steese Highway, from Mile 0 to Fox Junction, and by adding the Kenai Spur from Mile 14 to Mile 31, the Nome-Kougarok Road, and the Nome-Teller Road.

FRED A. SEATON,
Secretary of the Interior.

[F. R. Doc. 56-7683; Filed, Sept. 20, 1956; 8:45 a. m.]

1139
Sec'y. O. 2665
10-16-51

Office of the Secretary

[Order 2665]

Rights-of-Way for Highways in Alaska

October 16, 1951

Section 1. *Purpose.* (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 48 U. S. C. 321a).

Sec. 2. *Width of public highways.* (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.

(2) For feeder roads: Abbott Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram road, Steese Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasilla Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Slana to Nabesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Eureka Road, North Park Boundary to Kantishna Road; Paxson to McKinley Park Road, Sterling Landing to Ophir Road, Iditarod to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 100 feet on each side of the center line thereof.

(3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

Sec. 3. *Establishment of rights-of-way or easements.* (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

Sec. 4. *Road maps to be filed in proper Land Office.* Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public.

Oscar L. Chapman,
Secretary of the Interior.

[F. R. Doc. 51-12586; Filed, Oct. 19, 1951; 8:46 a. m.]

1951 - A 10752

— R/W —

PLO-757
Oct. 16, 1951
R/W Order 10-16

[Public Land Order 757]

ALASKA

AMENDMENT OF PUBLIC LAND ORDER NO. 601 OF AUGUST 10, 1949, RESERVING PUBLIC LANDS FOR HIGHWAY PURPOSES

By virtue of the authority vested in the President and pursuant to Executive Order 9337 of April 24, 1943, it is ordered as follows:

The sixth paragraph of Public Land Order No. 601 of August 10, 1949, reserving public lands for highway purposes, commencing with the words "Subject to valid existing rights", is hereby amended to read as follows:

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway and within 150 feet on each side of the center line of the Richardson Highway, Glenn Highway, Haines Highway, the Seward-Anchorage Highway (exclusive of that part thereof within the boundaries of the Chugach National Forest), the Anchorage-Lake Spenard Highway, and the Fairbanks-College Highway are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for highway purposes.

Easements having been established on the lands released by this order, such lands are not open to appropriation under the public-land laws except as a part of a legal subdivision, if surveyed, or an adjacent area, if unsurveyed, and subject to the pertinent easement.

OSCAR L. CHAPMAN,
Secretary of the Interior.

OCTOBER 16, 1951.

[F. R. Doc. 51-12078; Filed, Oct. 19, 1951; 9:02 a. m.]

Office of the Secretary

[Order 2665]

RIGHTS-OF-WAY FOR HIGHWAYS IN ALASKA

OCTOBER 16, 1951.

SECTION 1. *Purpose.* (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands for such highways. Authority for these actions is contained in section 2 of the act of June 30, 1932 (47 Stat. 446, 43 U. S. C. 221a).

SEC. 2. *Width of public highways.* (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads: The Alaska Highway shall extend 300 feet on each side of the center line thereof. The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.

(2) For feeder roads: Abbott Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram road, Steese Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasilla Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Sitka to Nakesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Tanana Road, North Park Boundary to Healy Road, Parson to McKinley Park Road, Sterling Landing to Ophir Road, Tanacross to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 150 feet on each side of the center line thereof.

(3) For local roads: All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

SEC. 3. *Establishment of rights-of-way or easements.* (a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 10, 1949, as amended by Public Land Order No. 757 of October 16, 1951. That order operates as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the widths of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska, when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

SEC. 4. *Road maps to be filed in proper Land Office.* Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the proper Land Office at the earliest possible date for the information of the public.

OSCAR L. CHAPMAN,
Secretary of the Interior.

[F. R. Doc. 51-12080; Filed, Oct. 19, 1951; 9:03 a. m.]

See PLO 1613

957

PLO. 601
Aug. 10, 1949

[Public Land Order 601]

ALASKA

RESERVING PUBLIC LANDS FOR HIGHWAY PURPOSES

By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Executive Order No. 9145 of April 23, 1942, reserving public lands for the use of the Alaska Road Commission in connection with the construction, operation, and maintenance of the Palmer-Richardson Highway (now known as the Glenn Highway), is hereby revoked.

Public Land Order No. 386 of July 31, 1947, is hereby revoked so far as it relates to the withdrawal, for highway purposes, of the following-described lands:

(a) A strip of land 600 feet wide, 300 feet on each side of the center line of the Alaska Highway (formerly the Canadian Alaskan Military Highway) as constructed from the Alaska-Yukon Territory boundary to its junction with the Richardson Highway near Big Delta, Alaska.

(b) A strip of land 600 feet wide, 300 feet on each side of the center line of the Gulkana-Slana-Tok Road as constructed from Tok Junction at about Mile 1319 on the Alaska Highway to the junction with the Richardson Highway near Gulkana, Alaska.

Subject to valid existing rights and to existing surveys, and withdrawals for other than highway purposes, the public lands in Alaska lying within 300 feet on each side of the center line of the Alaska Highway, 150 feet on each side of the center line of all other through roads, 100 feet on each side of the center line of all feeder roads, and 50 feet on each side of the center line of all local roads, in accordance with the following classifications, are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved for highway purposes:

THROUGH ROADS

Alaska Highway, Richardson Highway, Glenn Highway, Haines Highway, Tok Cut-Off.

FEEDER ROADS

Steese Highway, Elliott Highway, McKinley Park Road, Anchorage-Potter-Indian Road, Edgerton Cut-Off, Tok Eagle Road, Ruby-Long-Poorman Road, Nome-Solomon Road, Kenai Lake-Homer Road, Fairbanks-College Road, Anchorage-Lake Spenard Road, Circle Hot Springs Road.

LOCAL ROADS

All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior.

With respect to the lands released by the revocations made by this order and not rewithdrawn by it, this order shall become effective at 10:00 a. m. on the 35th day after the date hereof. At that time, such released lands, all of which are unsurveyed, shall, subject to valid existing rights, be opened to settlement under the homestead laws and the homesite act of May 26, 1934, 48 Stat. 809 (48 U. S. C. 461), only, and to that form of appropriation only by qualified veterans of World War II and other qualified persons entitled to preference under the act of September 27, 1944, 58 Stat. 747, as amended (43 U. S. C. 279–284). Commencing at 10:00 a. m. on the 126th day after the date of this order, any of such lands not settled upon by veterans shall become subject to settlement and other forms of appropriation by the public generally in accordance with the appropriate laws and regulations.

OSCAR L. CHAPMAN,
Under Secretary of the Interior.

AUGUST 10, 1949.

[P. R. Doc. 49-6642; Filed, Aug. 18, 1949; 8:46 a. m.]

9-1-49-1500

[CHAPTER 313]

AN ACT

July 24, 1947
[H. R. 1554]
[Public Law 220]

To amend the Act entitled "An Act providing for the transfer of the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alaska to the Department of the Interior, and for other purposes", approved June 30, 1932.

Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An Act providing for the transfer of the duties authorized and authority conferred by law upon the board of road commissioners in the Territory of Alaska to the Department of the Interior, and for other purposes", approved June 30, 1932 (47 Stat. 446), is hereby amended by adding at the end thereof the following new section:

48 U. S. C. §§ 321a-327.

Reservation of right-of-way for roads, etc.

"SEC. 5. In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds by the United States hereafter conveying any lands to which it may have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right-of-way thereon for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or of any State created out of the Territory of Alaska. When a right-of-way reserved under the provisions of this Act is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops thereon if not harvested by the owner, and for the value of any improvements, or for the cost of removing them to another site, if less than their value."

Payment for value of crops, etc.

Approved July 24, 1947.

[CHAPTER 314]

AN ACT

July 24, 1947
[H. R. 2007]
[Public Law 230]

To declare the ownership of the timber on the allotments on the Northern Cheyenne Indian Reservation, and to authorize the sale thereof.

Northern Cheyenne Indian Reservation
Sale of timber, etc.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of the Act of June 3, 1926 (44 Stat. 690), the timber on the allotments on the Northern Cheyenne Indian Reservation, whether or not the lands were hitherto classified as chiefly valuable for timber, are hereby declared to be the property of the allottees and may hereafter be sold pursuant to the provisions of section 8 of the Act of June 25, 1910 (36 Stat. 857; 25 U. S. C., sec. 406). Nothing contained in this Act shall be construed to require the payment to the allottees of the proceeds of sales made prior to the passage of this Act.

Approved July 24, 1947.

[CHAPTER 315]

AN ACT

July 24, 1947
[H. R. 2825]
[Public Law 231]

To provide additional funds for cooperation with public-school districts (organized and unorganized) in Mahnomen, Itasca, Pine, Becker, and Cass Counties, Minnesota, in the construction, improvement, and extension of school facilities to be available to both Indian and white children.

Minnesota.
Appropriation authorized for school facilities.
54 Stat. 1020.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, in addition to the amount authorized to be appropriated by the Act of October 8, 1940 (Public, Numbered 804, Seventy-sixth Congress), there is hereby authorized to be appropriated, out of any funds in the Treasury not

SECTION LINE EASEMENTS IN ALASKA:
THE STATE OF AFFAIRS IN FEBRUARY, 1983

I. INTRODUCTION

In Alaska, a section line easement is a right-of-way for a public highway which is either 66 feet or 100 feet wide and centered on the section line. This simple definition raises only one obvious question: When is the easement only 66 feet wide? Unfortunately, there are many less obvious questions--some whose answers are unclear or disputed--which must also be examined before one can claim to understand section line easements. For example, in 1981 Alaska's Supreme Court said that construction of a public highway does not necessarily entitle the builder to use the entire width of the easement.[1] Paradoxically, the same court recently said that it is not necessary to construct a public highway in order to use a section line easement.[2]

Section line easements are not peculiar to Alaska. They are found in a number of other states. Where they exist they are generally said to have resulted from the actions of two governments. The first action was an offer by the federal government to allow construction of public highways on unreserved portions of the public domain. The second was acceptance by a territorial, state or local government providing for the construction of highways along section lines. In Alaska, it can also be maintained that section line easements on state lands result directly from a dedication by the Alaska legislature.

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1 Anderson v. Edwards, 625 P.2d 282 (Ak 1981).

2 Fisher v. Golden Valley Electric, (Op. No. 2606 Jan. 28, 1983).

II. THE FEDERAL OFFER

Ten months before the Senate ratified the Treaty of Cession[3] by which Alaska was purchased from Russia, Congress passed the Mining Law of 1866.[4] Section 8 (14 Stat. 253) of the law reads in its entirety as follows:

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

When the federal laws were reorganized in 1878, this section was redesignated as section 2477 of the Revised Statutes. This section was later codified as part of the United States Code at section 932 of Title 43, but it is still commonly called R.S. 2477.

The law is applicable in Alaska.[5] When Congress passed the landmark federal land use planning law, the Federal Land Policy and Management Act of 1976, or FLPMA,[6] R.S. 2477 was repealed.[7] In its place a much more complex scheme for securing rights-of-way

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3 The Treaty of Cession of the Russian Possessions in North America was ratified May 28, 1867 (15 Stat. 539).

4 The Act of July 26, 1866 (14 Stat. 251 et seq.) was actually titled "An Act granting the Right-of-Way to Ditch and Canal Owners over the Public Lands, and for other Purposes," but is commonly known as the Mining Law of 1866.

5 E.g., Hammerly v. Denton, 359 P.2d 121, 123 (Ak 1961).

6 P.L. 94-579 (90 Stat. 2743 et. seq.).

7 §706(a) of FLPMA (90 Stat. 2793). FLPMA was effective October 21, 1976.

across the federal public domain was enacted,[8] but a savings clause protecting existing rights-of-way was included.[9]

III. ALASKA'S ACCEPTANCE

According to Alaska's Supreme Court acceptance of the federal offer can occur in either of two ways: "...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."[10] Situations involving acceptance by public user are outside the scope of this material, but two points deserve mention: (1) proving adequate public use may be very difficult,[11] and (2) where for some reason such as an early conveyance into private ownership a section line easement for an existing road cannot be established through reliance on acceptance by statute, there may be facts to support acceptance by actual public use.

Acceptance by Alaska's public authorities is generally said to have occured through passage of an acceptance statute by the territorial legislature. This was first done in 1923.[12] The 1923 statute created a right-of-way which was four rods or 66 feet wide.

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8 Title V, §§501-511, of FLPMA codified at 43 U.S.C. §§1761-1771.

9 43 U.S.C.A. §509(a).

10 Hammerly v. Denton, 359 P.2d 121, 123 (Ak 1961).

11 See for example Hammerly, supra.

12 Ch. 19 SLA 1923 approved April 6, 1923.

Inexplicably this statute was repealed in 1949 when it was left out of the 1949 compiled laws.[13] In 1951 the legislature enacted a statute which dedicated a tract 100 feet wide between each section of land owned by or acquired from the Territory.[14] In 1953 the legislature amended the 1951 law by adding the dedication of a tract four rods wide between all other sections of land in Alaska.[15] The latest version of the Alaskan acceptance statute was held to create a right-of-way along a section line[16] and prominent Alaskan attorneys have said that the original 1923 act has the same effect.[17]

IV. THE EFFECT OF PRIVATE ENTRY

If land is acquired by a private owner from the federal government before an R.S. 2477 easement is established across it,

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13 Section 1, Ch. 1 SLA 1949 approved January 18, 1949 expressly repealed all acts of the Alaska Legislature not contained in the compilation. Ch. 19 SLA 1923 was not included. The only explanation is what can be gleaned from correspondence tables accompanying the compiled laws. Instead of giving the 1949 section number for Ch. 19 SLA 1923, the table merely states, "Invalid." The same curious result appears in the opposite §1721 CLA 1933 (which is where Ch. 19 was compiled in 1933).

14 Ch. 124 SLA 1951, approved March 26, 1951.

15 Section 1, Ch. 35 CLA 1953, approved March 21, 1953.

16 Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Ak 1975).

17 E.g., Letter of September 19, 1977 from Tom Meachem, Esquire to the Anchorage Daily Times; 1969 Opinions of the Attorney General No. 7 (December 18, 1969); Opinion letter of February 20, 1969 from Eugene F. Wiles, Esquire to the City of Anchorage, Opinion letter of March 21, 1966 from Theodore M. Pease, Jr. to the Greater Anchorage Area Borough.

then no easement can thereafter be established, because the land would not be part of the unreserved public domain. Moreover, it is the date of the entry not the date of patent which is critical.[18] The consequence for Alaskan section line easement law is that lands entered prior to April 6, 1923 are not subject to section line easements and most Alaskan lawyers would probably agree that federal lands entered between January 18, 1949, and March 21, 1953, are not subject to section line easements.[19]

V. THE NEED FOR SURVEY

Thus far the discussion has assumed that survey of the section line antedates the private entry, but the survey establishing a section line could either precede or follow the private entry. One state court has suggested that the passage of a state acceptance statute similar to Alaska's law providing for highways along section lines is effective upon passage and that later survey of the section line relates back to the date of passage[20] and one

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18 See, Hammerly v. Denton, supra.

19 There is no judicial authority in point but three of the four lawyers who have written on the topic in the materials cited in footnote 17 above take this view.

20 Faxon v. Lallie Civil Township, 36 N.D. 634, 163 N.W. 53, 533 (N.D. 1917) (dictum). The North Dakota court said that the territory's right to the highway right-of-way took effect as of the date of the acceptance statute (1871) even though the survey was done in (1875). But, the landowner did not enter until 1904, and the relation back of the survey was not necessary to the court's decision.

federal court appears to have accepted this proposition.[21] This approach is, however, contrary to the rule recognized by the U.S. Supreme Court that it is the survey which creates the section line.[22] This would mean that until the survey is completed there is nothing to which the acceptance statute could attach any right. Consider the practical aspects; until the section line is surveyed, an entryman would have no way to determine where he could erect an improvement.

In his 1969 opinion, the Attorney General concluded that survey of the section line is necessary before the section line easement can be created. However, the Attorney General's opinion indicates in a footnote that protracted section lines are sufficient subject to confirmation by actual survey.[23] This conclusion is supported by no analysis. It is inconsistent with the emphasis on a complete official survey as a necessary predicate for creation of section lines established by the U.S. Supreme Court.[24] To the extent that the conclusion is based upon the belief that protracted section lines will be very close to the actual surveyed line in all cases, it is inconsistent with the realities of surveying. Since no section line exists before the official survey, the better view is

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21 Bird Bear v. McLean County, 513 F.2d 190 (8 Cir. 1975) (semble).

22 Cox v. Hart, 260 U.S. 427, 436, 43 S.Ct. 154, 157 (1922). See also U.S. v. Northern Pacific Ry. Co., 311 U.S. 317, 344, 61 S.Ct. 264, 277 (1940).

23 1969 Opinions of the Attorney General No. 7, p. 7, n. 15.

24 Cox v. Hart, supra.

that an actual survey, not a protracted survey projection, is necessary before the easement can exist.

VII. THE EFFECT OF PUBLIC RESERVATIONS

If the land in question is reserved for a public use, it ceases to be land which falls within the ambit of the 1866 federal offer. The consequence is that federal lands reserved for a public purpose before a section line easement is created are not subject to such an easement.[25] It is not so clear that state lands reserved for a public use would, without more, be free of section line easements. The reason is simply that there is no exclusion for public reservations in the state law. It dedicates an easement along the section line over all state lands.[26]

Much of the federal land in Alaska has been reserved for one public purpose or another. Under the prevailing view, none of these reserved lands would be subject to section lines easements unless the reservation took place after April 6, 1923, but before January 18, 1949, or after March 26, 1953, and the land was officially surveyed prior to the reservation. In the event of a dispute, it is not clear that the federal government would subscribe to this orthodox view. The Solicitor for the United States Department of the Interior has taken the position that section line easements on federal lands in Alaska exist only if a public highway was actually constructed upon the lands prior to the repeal of R.S. 2477.[27] The Solicitor's reasoning goes like this:

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25 E.g., Bennett County v. U.S., 394 F.2d 8 (8 Cir. 1968).

26 AS 19.10.010 (Ch. 123 SLA 1951 as amended by Ch. 35 SLA 1953).

27 The basis for this position is explained in an opinion by Deputy Solicitor Ferguson dated April 28, 1980.

(1) R.S. 2477 literally gives a right-of-way for the "construction" of highways.

(2) The interpretation of R.S. 2477 is a matter of federal law.

(a) The sizable body of section line easement law which exists consists of interpretations of the federal law by state courts in cases to which the federal government was not a party.

(b) The federal government is not bound to acquiesce in the state court interpretations.

(3) Interpretations of the word "construction" in R.S. 2477 through use of the ordinary canons of statutory interpretation requires that the term be given its ordinary meaning.

(4) The administrative difficulty in distinguishing cases of sufficient public use to constitute acceptance from those of insufficient use can be avoided by resort to the construction test, a test which requires more than mere use and which would focus on objective observable facts such as placement of culverts, fill, etc.

(5) The only interpretation which can avoid a serious conflict with the "roadless" review concept of §603 of FLPMA is the "construction required" interpretation.

The Solicitor's opinion cannot be accepted without difficulty. First, while it is true that the bulk of the judicial opinions on the subject are by state courts, such decisions are

numerous and of long standing. Moreover, federal courts have written opinions which accept the orthodox view[28] and the federal government has taken a position in litigation which implies that it has not subscribed to the "construction required" theory.[29] Second, the Solicitor's position is not consistent with the practice followed by the Department's Bureau of Land Management over the years.[30] Regulations dealing with R.S. 2477 easements have generally indicated that the federal offer can be accepted by construction or by establishment of highways in accordance with state laws.[31]

On the other hand, the Solicitor's position really is much more consistent with the language of the 1866 law. Moreover, the literal interpretation of "construction" would sharpen the application of the law to the point where it would operate only where actual construction demonstrated a present need, not only for a road, but for one laid out on a section line. Thus, the Solicitor's opinion would tacitly recognize the fact that not all sections are bounded by stretches of land flat enough upon which to construct a

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28 Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir 1973), cert. den. 411 U.S. 917; Bird Bear v. McLean County, supra.

29 Bennett County v. U.S., supra at 394 F.2d 12.

30 One example of the Department's acceptance of the orthodox view is found in a memorandum dated April 24, 1973, signed by the State Director of the BLM in Alaska, and intended to provide official guidance on the subject.

31 E.g., 43 C.F.R. §244.53 (1962); 43 C.F.R. §2234.2-5(b) (1970); 43 C.F.R. 2822.2-1 (1974).

road. This would save several state legislatures from the apparent folly of assuming that every section line is on flat level ground.

Moreover, the Solicitor's position carries the added advantage of assuming that Congress did not act so rashly in 1866 as to give a large measure of control over management of the federal public domain to the states by allowing them to create highway easements anywhere without regard to actual need. The Solicitor's interpretation would (as he has noted[32]) observe the rule of construction that federal statutory grants must be construed narrowly.[33]

Finally, the Solicitor has contrived ways around both the problem in the regulations--or establishment according to state law must mean construction plus anything else by way of formal action which might be required in addition to mere construction--and the practices of the agency--Congress has plenary power over federal land and no federal employee can exceed his actual authority delegated by Congress.

The Solicitor's position is somewhat persuasive, but it would be an uphill struggle to make the argument in view of a hundred years or so of state court precedents which are contrary. In any event, the validity of a section line easement on federal land will not depend on whether the Solicitor's view is accepted, unless the land in question was surveyed prior to October 21, 1976 while still a part of the unreserved federal public domain and not

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32 See the material cited in footnote 27, - supra.

33 Caldwell v. U.S., 250 U.S. 14, 20, 39 S.Ct. 397, 398 (1914).

later conveyed to the state. Situations involving these criteria should not arise frequently.[34]

In the case of state lands which have been reserved for some public purposes, there will be a section line easement unless the easement has been vacated. This results from the fact that AS 19.10.010 is applicable to all state lands. In addition to formal vacation procedures, it is possible that a court might find an implied vacation where the reservation is created by statute and the purpose of the reservation would be frustrated if the land were criss-crossed by highways.

One special category of state lands which might be accorded different treatments is trust lands. At one time there were three principal categories of trust lands: mental health lands, school lands and university lands. Assuming the validity of Ch. 182 SLA 1978, mental health lands and school lands are now a part of the state's public domain. However, university lands[35] remain subject to the trust obligations imposed by federal law.[36] It is quite possible that the Alaska Supreme Court would choose to

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34 Of course, if protracted surveys could be substituted for actual surveys, the argument would be of vastly greater significance.

35 University lands are lands granted to the state by the Act of March 4, 1915 (38 Stat. 1214) and the Act of January 21, 1929 (45 Stat. 1091).

36 State v. University of Alaska, 624 P.2d 807 (Ak 1981) (construing the 1929 Act). The University Board of Regents was given an option. It could accept or reject conversion of university lands to public domain in exchange for a special trust fund. The Board rejected the exchange of trust lands for trust fund revenues as permitted by §24, Ch. 182 SLA 1978. No such option applied in the case of school and mental health lands. Conversion of the mental health lands is presently the subject of litigation.

interpret AS 19.10.010 narrowly in order to avoid what would otherwise be a conflict between the state law and the federal trust obligation. Otherwise, the court would be forced to find that the University is owed compensation for each section line easement.[37] Computation of the damages would be a difficult proposition which could be avoided through the narrow construction of the section line easement statute necessary to save it from conflict with the federal law.

VIII. If A Section Line Easement Exists, What Is The Permissible Extent Of Its Use?

At the outset mention was made that a section line easement is an easement for highways across unreserved public lands which is 66 or 100 feet wide. By now the discerning reader will have answered the one obvious question this over simplified definition suggests. If the underlying fee is or was federal land when the easement attached, the easement is 66 feet (four rods) wide; if state land, the easement is 100 feet wide. One constructing a public highway may not, however, be privileged to make use of the entire width of the section line.

In Anderson v. Edwards, 625 P.2d 282 (Ak 1981), Alaska's Supreme Court was confronted with a dispute between property owners in McCarthy, Alaska, named Edwards and a joint venture known as Wrangell Mountain Enterprises (in which Mr. Anderson was an indirect participant). Wrangell Mountain Enterprises was developing property near McCarthy in connection with which it was constructing three

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37 This result would be dictated by State v. University, supra.

miles of public roads partially along a section line across property owned by James and Maxine Edwards. The court found that the state had reserved a 100 foot right-of-way along the section line when it sold the land in question and that pursuant to AS 19.10.010 the right-of-way was dedicated for use as a public highway. Before it commenced construction, the developer obtained a letter from the Division of Lands confirming the width of this easement and a letter of non-objection from the Department of Highways. The roadway constructed by the developer was only about 25 feet in width, but the developer cleared the trees across an expanse nearly equal to the full 100 foot width. The Edwardses sued to recover damages for the cutting of the trees and sought treble damages under AS 09.45.730 which authorizes a triple recovery for the wrongful destruction of trees. Following a jury verdict against the developer, the case reached the Supreme Court. Among other things the court held that the language of the dedication statute means that only that amount of land actually necessary for use as public highway is dedicated. The court concluded that the developer was, "entitled to make only reasonable use of the right-of-way." 625 P.2d 287.

Whatever one thinks of the reasoning in Anderson, it is probable that the decision is contrary to the expectations of most lay persons who would, not surprisingly, assume that a right-of-way said to be 100 feet wide is in fact 100 feet wide. Moreover, the decision clearly has the potential to generate litigation over the reasonableness of the use of the easement which could have been

avoided by more straight forward interpretation of the applicable statutes. However, the Supreme Court did not think this consideration outweighed the fact that its ruling, "will prevent needless destruction of property by insuring that the construction of roadways will be accomplished with care." §625 P.2d 287. The court did soften the blow against the expectations of those who use section line easements by holding that the person complaining that the use is more than reasonable has the burden of proving this to be true. I.d.

In its most recent decision dealing with section line easements, Fisher v. Golden Valley Electric, (opinion no. 2606, January 28, 1983), the Alaska court held that a utility company could construct a powerline on an unused portion of a section line easement without paying the owner of the underlying fee for the privilege. First the court noted that in some other states the construction of a powerline which does not interfere with highway travel is considered an incidental or subordinant use of the highway easement which does not constitute an additional burden on the underlying fee. The Alaska court said that the rationale for these decisions is one of technological progress. As the court put it:

> The reasoning underlying this position is that electric, and telephone, lines supply communications and power which were in an earlier age provided through messengers and freight wagons traveling on public highways. So long as the lines are compatible with road traffic they are viewed simply as adaptations of traditional highway uses made because of changing technology....

(Slip opinion at P. 6). The court recognized that other states take differing views. Some apply the technological progress rule in urban areas but not rural areas. Others hold that an easement for

electrical transmission does not constitute an additional burden on the fee only if the electricity is used for highway purposes such as street lighting. Finally, the court recognized that there are states in which courts have held that the use of highway easements for powerlines is an additional burden on the fee. The Alaska court then went on to quote AS 19.25.010 which states that a utility facility may be constructed in a state right-of-way only in accordance with regulations prescribed by the Department of Transportation and Public Facilities. The court said this statute placed Alaska among those states which permit powerline construction as an incidental or subordinant use of a highway easement.

The appellants in Fisher sureties on a bond posted by the owner of the fee) urged that federal rather than state law governed the issue because the right-of-way was based upon an offer from the federal government to grant the easement. The Supreme Court said that argument failed, because absent some contrary indication in federal law the conveyance of an interest in federal land would be construed according to the law of the state where the land is located. The court said that no contrary federal rule had been called to its attention. Appellants apparently overlooked the fact that federal regulations governing section line easements did not

contemplate their unrestricted use for powerlines.[38]

One criticism which can fairly be leveled at the court for its decision in Fisher is a lack of sensitivity for the distinction between section line easements over lands still owned by the state and lands which have been purchased by others for valuable consideration. There is absolutely nothing in the statutory language or in the prior decisions of the Alaska Supreme Court which would lead any reasonable person to conclude that if he purchased land from the state subject to a section line easement for a highway, it would also be subject to an easement for electric transmission lines or other facilities. Not only do electric transmission lines and other facility pose a different set of inconveniences and risks from those posed by roads, but on the basis of topography, proximity of other roads, or other factors, one who purchases lands might well conclude that the chances of a public highway being built on a section line are virtually nil. However, those factors which would cause one to reach that conclusion with

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38 For example, a pertinent regulation in 1970 was 43 C.F.R. 2234.2-5(b) which included the following: "Rights-of-way granted by R.S. 2477 do not include rights-of-way for facilities with respect to which any other provision of law specifically requires the filing of an application for a right-of-way. Where the holder of such highway right-of-way determines that such facility will not seriously impair the scenic and recreational values of an area and its consent is obtained, the Department waives the requirement of an application for a right-of-way for all facilities usual to a highway along the highway right-of-way granted by R.S. 2477 except for electric transmission facilities, designed for operation at a nominal voltage of 33kv or above or designed for conversion to such operation..." The same provision is found in later regulations. E.g., 43 C.F.R. §2822.2-2(a) (1974).

respect to the construction of a highway might not apply with respect to the construction of some other facility such as an electric transmission line. At a minimum, the Fisher court should have examined the reasonable expectations of those who acquire land from the state before concluding that the lesser included interest rule which it has adopted should apply to section line easements which cross land not owned by the state.

One instruction to be taken from Fisher is that a section line easement may be used for a variety of purposes. If an electric utility can construct a transmission line, it follows that a local government or utility authority could construct a sewer line or a water line on the section line easement. A second point of interest is this: the decision in Fisher poses a potential threat to public reservations such as state parks, at least in cases where the parks have been officially surveyed. While it may be asserted that the legislation creating areas such as the Chugach State Park vacated any section line easements by necessary implication, this proposition has yet to be tested in court.

IX. SUMMARY

The following summary represents the current state of section line easement law in Alaska. As the preceeding sections of this material have shown there are some areas of uncertainty and some differences of opinion which have not yet been resolved. With that warning in mind, the generalizations are as follows:

(1) A section line easements is an easement for the construction of a public highway or other facility such as a powerline, water line or sewer line.

(2) The maximum width of the section line will be 100 feet if established on state owned land or land acquired from the state, but 66 feet if established on federal land or land acquired from the federal government. One making use of the section line easement is not, however, automatically entitled to use its maximum width. The user may only take advantage of so much of the section line easement as is reasonably necessary for the construction and maintenance of the public highway or other facility.

(3) Section line easements cannot exist prior to the official survey which creates the section line.

(4) Section line easements will exist on all surveyed lands in Alaska except the following:

   (a) Lands which went into private ownership or were reserved for public purposes prior to April 6, 1923;

   (b) Lands which went into private ownership or were reserved for public purposes between January 18, 1949 and March 21, 1953 except that for lands owned by the Territory March 26, 1951 is the end date.

(c) Lands which went into private ownership or were reserved for a public purpose at any time prior to the survey which establishes the section line;

(d) Lands which were unsurveyed federal lands on October 21, 1976;

(e) University grant lands.

Not all of the points made in the preceeding summary are accepted by all of the authorities or knowledgeable attorneys who have examined the issues. Perhaps the most significant dispute revolves around the effect of protraction surveys. The state of Alaska takes the position that such surveys are effective to create section line easements, though the state's Department of Natural Resources does admit that section line easements cannot be used until the section lines are actually surveyed.