

MEMORANDUM
DEPT. NATURAL RESOURCES

State of Alaska
DIVISION OF LAND
Cadastral Survey Unit

TO: Denny Daigger, Chief
Technical & Data Management

TO: Carol Shobe, Chief
Realty Services

FROM: William S. Brown
Cadastral Surveyor I

Date: July 26, 1996

FILE: ASCS 92-118

PHONE: 269-8517

SUBJ: T17N, R3E
Solicitor's Opinion

The July 22, 1996 Department of the Interior Solicitor's Opinion is very vague and subject to more than one interpretation. Specifically; what is meant by the statement - "The 1979 Federal survey controlsfor the purpose of issuing patents; for all other purposes, the 1972 State survey controls."

After reviewing the opinion, I called Steve Hamrick and asked him what he thought of it. Steve agreed that it was subject to interpretation but stated that he and Linda Ressaquie were interpreting it to mean that the 1990 unapproved plat controls the location of the 1988 conveyance to Eklutna and that Linda was going to move forward towards finalizing the plat. I told Steve that I had some concerns about this because I want'd the opinion clarified. Steve responded by suggesting that we make up a list of specific questions we wanted answered and he would forward it to their solicitor for a response. At this point I asked Steve for a copy of the questions the solicitor was initially asked to address. A couple of hours later Steve called to say that a copy of the letter was being faxed over and that he and Linda had contacted Keith Goltz by phone for verbal clarification. Mr. Goltz told them that the opinion meant that the 1990 plat should be approved. He also said that he thought it would be inappropriate for him to respond to direct questions raised by the state and suggested that we seek an opinion from the A.G.'S Office. I told Steve that the state wasn't going to drop the issue based on an inconclusive opinion and that was the end of our conversation.

This leaves us with three options:

1. Drop the issue and accept the 1990 BLM survey. This will not solve the problem.
2. Get an opinion from the A.G.'S Office and if the opinion supports our position a formal protest of the BLM survey could be filed. This could be a lengthy process with no assurance of the outcome. ~~The~~ Mat-Su Boro has been waiting for a solution for three years and they are getting impatient.

3. Try to work it out with George Oviatt. This is my recommendation as it is past the point where the working group is going to resolve it. We may stand a fair chance of being successful if we take the position that what we are trying to do is fair and equitable to all parties, and avoid arguing over which survey is technically the most correct.

The solution to this problem is really very simple if we could get BLM to cooperate. If BLM would conform their survey to accept the state monumentation and create a common boundary so that there are no gaps or overlaps the bona fide rights of all parties would be protected. The only negative aspect would be that a couple of sections would be created that are warped out of regularity. This should not be a great concern because it has occurred many times in the past. **It is important to bear in mind that the paramount reason for doing surveys and preparing plats is to protect bona fide rights and land title, not to create ideal sections.** In my opinion it is derelict to protect the rights of Eklutna and not protect the rights of the other parties. All the parties should have equal standing. BLM argues that their survey needs to stand as is in order to protect the patent of Eklutna because they apparently feel that the only way to do this is to protect the acreage figures as "returned" on the 1979 plat. I disagree with this argument because the scenario proposed above not only would protect Eklutna's patent it would give them about 6 more acres more than which they have been charged for.

If the solicitor's opinion is accepted as fact it makes a mockery of TA being the same as title which was affirmed by Congress in 1980. The 1990 survey amounts to an unjust taking without consideration of established rights.

The big question that remains to be answered is: Under what authority was the 1990 BLM survey executed? There are several court cases cited in Title 43 Code of Federal Regulations which state that title is conveyed by patent and once a patent has been issued the Federal interest is terminated. BLM admits that they made a mistake by issuing a patent without the benefit of an approved survey and now argues that they are obligated to survey Eklutna's patent according to federal rules. The fact that BLM is obligated to do a survey is not in dispute; what is being disputed is that federal rules apply. Why should federal rules apply when the federal interest has been conveyed away? I believe that this is a situation in which state guidelines should apply.

Paragraph 3 under note #58 Title 43 states that "A patent purporting to grant lands in which the government has no title is void as evidence of title and may be so declared in an action at law at the instance of any one in possession lawfully or under color of title." This could be applied to the Ag. parcel in Section 29.

It is interesting to note that the solicitor's opinion conveniently avoids any discussion of authority or the validity of the patent to Eklutna.

Additional Comments on the opinion:

1. The opinion did not specifically address the questions asked.
2. The 1990 unapproved survey was not discussed.
3. The applicability of the acquired lands opinion was not addressed although it appears to have been rejected without citing the reason. This is what I thought the solicitor was being asked to opine upon.
4. State bona fide rights do not appear to have been considered.
5. Paragraph 1 under DISCUSSION on page 3 appears to contradict the SUMMARY.

Attachments:

Questions to the Solicitor
Solicitor's opinion
Extract Title 43 CFR
Definition of Acquired Lands