OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
2002 Alas. AG LEXIS 13
File No: 665-01-0201
July 17, 2002

Request By:

John F. Bennett, PLS, SR/WA
Right of Way Chief
DOT/PF, Northern Region

Opinion

Opinion by: Paul R. Lyle, Assistant Attorney General

Question

What public uses are authorized within the R.S. 2477 right-of-way for the Klutina Lake Road?1

Ahtna, Inc., the landowner whose lands are traversed by the Klutina Lake road, claims that travelers may use the road only for continuous travel. According to Ahtna, the traveling public may not make rest stops, park for any purpose within the right-of-way except for emergencies, or camp overnight within the right-of-way.

Ahtna also claims that R.S. 2477 easements are of no effect until established by a court judgment. In addition, Ahtna asserts that the state's R.S. 2477 right-of-way for the Klutina Lake road is superceded by an overlapping ANCSA 17(b) easement reserved for the road in the interim conveyances conveying the lands traversed by the road from BLM to Ahtna and Kluti-Kaah Corporation, hereinafter collectively referred to as "Ahtna."

Summary of Advice

In our opinion, the public may make reasonable use of the right-of-way for the activities listed above. Department of Transportation and Public Facilities (DOT&PF) may make improvements to the road reasonably necessary to accommodate the uses made of the road from its establishment circa 1898 through October 21, 1976 (the date R.S. 2477 was repealed) and may take reasonable steps to render the road convenient for those public uses.

A judgment is not necessary to perfect R.S. 2477 easements. The state's R.S. 2477 right-of-way is not superceded by the overlapping ANCSA 17(b) easement contained in Ahtna's conveyances. Rather, the overlapping R.S. 2477 right-of-way is impressed on the land by operation of law and is enforceable even if it is of greater scope than the ANCSA 17(b) easement.

Legal Analysis

We first address the uses to which the right-of-way may be put and then address Ahtna's arguments that the state's R.S. 2477 right-of-way must be perfected by litigation and is supplanted by the ANCSA 17(b) easement for the Klutina Lake road included in Ahtna's conveyances.

1. The uses the public may make of a perfected R.S. 2477 right-of-way are those uses to which the public has traditionally put the road.

The issue of what public uses of a right-of-way are authorized by law is an issue concerning the "scope" of the right-of-way.

The "scope" of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as **the uses to which it has been put.**

Sierra Club v. Hodel, 848 F.2d 1068, 1079 n. 9 (10th Cir. 1988), overruled in part on other grounds, *Village of Los Ranchos de Albuquerque v. Marsh,* 956 F.2d 970, 973 (10th Cir. 1992) (emphasis added).2

Because the Klutina Lake road was established under a federal statute, we must, as a threshold matter, examine whether state or federal law controls the scope issue.

a. The uses to which an R.S. 2477 may be put will probably be controlled by state law.

There is controversy over whether state or federal law controls the perfection of R.S. 2477 rights-of-way. The controversy centers on whether R.S. 2477 required actual road construction in order to perfect a right-of-way, as opposed to establishment by user or an act of a public authority. *See North Dakota Op. Att'y Gen. No. 2000-05,* 2000 WL 146636 (N.D.A.G.

Jan. 26, 2000)(containing a general summary of this controversy and of state and federal cases addressing this issue).

The "actual construction" controversy is irrelevant to your question. The perfection of an R.S. 2477 right-of-way for the Klutina Lake road through actual construction by a public authority is not an issue in this case. The road was constructed and state funds expended on improvements well before R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA) on October 21, 1976, with a savings provision for existing rights-of-way. *See* 701(a), 706(a) Pub.L. 94-579, 90 Stat. 2743, 43 U.S.C. 1701 (note). Nevertheless, we have examined federal and state cases to ascertain whether state or federal law controls the scope of an R.S. 2477.

(i) Decisions of the Ninth Circuit Court of Appeals indicate that the Ninth Circuit would probably apply state law to the issue of the scope of an R.S. 2477 right-of-way unless federal law expressly dictates otherwise.

At least one circuit applies state law to determine the scope of an R.S. 2477 right-of-way. In *Sierra Club v. Hodel,* 848 F.2d at 1080-83, the Tenth Circuit unequivocally held that state law controls the scope of an R.S. 2477 right-of-way, including the uses to which the road may be put.

No Ninth Circuit decision directly holds that the scope of an R.S. 2477 is a matter to be determined under state law where federal law is otherwise silent on the issue of which law controls. However, several Ninth Circuit decisions imply that state law would be applied to determine the uses to which an R.S. 2477 may be put where, as here, the perfection of the R.S. 2477 right-of-way by actual construction is not in doubt. *See Shultz v. Dep't of Army,* 10 F.3d 649, 655 n. 8 (9th Cir. 1993) (holding that both the establishment and scope of an R.S. 2477 right-of-way is a question of state law, citing *Standage Ventures, infra.* and *Hodel, supra.*), *withdrawn,* 96 F.3d 1222 (1996) n3; *Standage Ventures, Inc. v. Arizona,* 499 F.2d 248, 250 (9th Cir. 1974); *Adams v. U.S.,* 687 F.Supp. 1479, 1490 (D.Nev. 1988), *affirmed in part, reversed in part on other grounds,* 3 F.3d 1254 (9th Cir. 1993) ("[A] right of way could be established by public use under terms provided by state law."); *U.S. v. Rogge,* 10 Alaska 130 (D. Alaska Terr. 1941), *affirmed,* 128 F.2d 800 (9th Cir. 1942); *see also,* lower court decisions within the Ninth Circuit, *e.g., U.S. v. 9,947.71 Acres of Land,* 220 F.Supp. 328, 332, 335-36 (D.Nev. 1963); *Berger v. Ohlson,* 9 Alaska 389, 395 (D. Alaska Terr. 1938), *vacated on other grounds,* 9 Alaska 605 (D.Alaska Terr. 1939); *Clark v. Taylor,* 9 Alaska 298, 305 (D. Alaska Terr. 1938).

In *Vieux v. East Bay Regional Park District,* 906 F.2d 1330, 1341 (9th Cir. 1990), cert. denied, 498 U.S. 967 (1990), a case concerning a public highway established within a railroad right-of-way under 43 U.S.C. 912, the Ninth Circuit, held that:

State law determines what is a "public highway legally established" for the purposes of federal land grant statues....

(quoting 43 U.S.C. 912, citing *Standage Ventures, supra.*); accord, *King County v. Burlington Northern Railroad Corp.,* 885 F.Supp. 1419, 1422 n. 5 (W.D. Wash. 1994).

While *Vieux* did not address R.S. 2477, its holding is broadly applicable to all "federal land grant statutes" of which R.S. 2477 was a part.4 *Vieux,* 906 F.2d at 1341. Therefore, there is a good argument that the holding in *Vieux* applies to the establishment of R.S. 2477 rights-of-way as well.

Furthermore, in a case that arose out of the Supreme Court of California, the U.S. Supreme Court recognized that R.S. 2477 authorized the creation of highways over the federal public domain in any manner consistent with state law. *Central Pacific Railway Co. v. Alameda* County, 52 S.Ct. 225, 226-27, 229 (1932). The right-of-way at issue in *Central Pacific* was a road first established by public use and subsequently laid out and improved by the county before R.S. 2477 was enacted.5 The Court held that R.S. 2477 applied retroactively to validate pre-existing roads crossing public domain lands. *Id.* at 227. The Court also held that R.S. 2477 rights-of-way are "controlled by the same general principles" applicable to cases concerning appropriation of water from the public domain under section 9 of the Act of July 26, 1866.6 *Id.* at 228. Section 9, in turn, provided that water appropriation issues would be determined under local customs and laws. The Court twice noted that the road was established under state law. *Central Pacific,* 52 S.Ct. at 226, 229. *Central Pacific* thus lends support to the argument that state law controls the scope of an R.S. 2477 right-of-way.

There is one Ninth Circuit decision that indicates the Ninth Circuit may apply federal law to determine the scope of an R.S. 2477 right-of-way. We believe that case is distinguishable. In *U.S. v. Gates of the Mountains Lakeshore Homes, Inc.,* 732 F.2d 1411, 1413 (9th Cir. 1984), the court, construing R.S. 2477, held that the scope of a federal land grant is a question of federal law. The court recognized that federal law sometimes adopts and applies state law to federal land grants, but found that federal statutes passed after R.S. 2477 was enacted dictated a distinctly federal rule applicable to the placement of electric power transmission lines within R.S. 2477 roads. *Id.*

Hodel distinguished the holding of *Gates of the Mountains,* reasoning that it was limited to the issue of placing utilities within R.S. 2477s.7 *Hodel,* 848 F.2d at 1081. Unlike the situation in *Gates of the Mountains,* we can find nothing in federal law that controls **other uses** to which an R.S. 2477 may be put or that specifies a width for R.S. 2477 rights-of-way. Federal law is silent on both of these "scope" issues. Thus, because there is no federal law to apply with

respect to the scope issues related to the Klutina Lake road, we believe it likely that the Ninth Circuit would apply state law to resolve these issues.

Although we believe a strong argument can be made that state law controls both the establishment and scope of R.S. 2477 rights-of-way, you should be aware of a recent Tenth Circuit decision that refused to apply state law to determine the **validity** of an R.S. 2477 crossing federal lands. In *South Utah Wilderness Alliance v. BLM,* 147 F.Supp.2d 1130, 1141-43 (D.Utah 2001), the court upheld the BLM interpretation of R.S. 2477 that requires actual road construction to perfect the easement. The court deferred to BLM's interpretation of R.S. 2477 because federal law requires federal courts to "give some deference to the agency interpretation of the statute" and because the court found BLM's "actual construction" interpretation to be reasonable. *Id.* at 1135, 1143.

The holding in *South Utah* would probably not apply to the Klutina Lake road situation. First, *South Utah* is not controlling precedent in the Ninth Circuit. Second, *South Utah* addresses the perfection of an R.S. 2477, not the allowable uses to be made of an R.S. 2477 after it is perfected. Thus, BLM's statutory interpretation of R.S. 2477 as to what actions are sufficient to perfect an R.S. 2477 easement would likely be irrelevant to the issue of the allowable uses of the Klutina Lake road.

On balance, we believe that the Ninth Circuit would apply state law to determine the allowable uses within an R.S. 2477 because there is no federal law to apply. In such circumstances, the federal courts will most likely look to state law. *Hodel,* 848 F.2d at 1083; *Gates of the Mountains,* 732 F.2d at 1413.

(ii) Cases from Alaska and other state courts.

The Alaska Supreme Court has long held that R.S. 2477 grants are to be interpreted in accordance with Alaska law. *Fitzgerald v. Puddicombe,* 918 P.2d 1017, 1019 (Alaska 1996); *Girves v. Kenai Peninsula Borough,* 536 P.2d 1221, 1226 (Alaska 1975); *Hamerly v. Denton,* 359 P.2d 121 (Alaska 1961). Other states also hold that state law controls the scope of an R.S. 2477 right-of-way. *See, e.g.,* cases cited in *Hodel,* 848 F.2d at 1082 & n. 13 ("We are not aware of any state that even considered the possibility of a federal rule."); *North Dakota Op. Att'y Gen. 2000-05,* 2000 WL 146636 at *10 ("All state court decisions look to state law.")

b. The uses authorized within an R.S. 2477.

In *Hodel,* the court, applying Utah law, held that the uses authorized within an R.S. 2477 right-of-way are those that are "reasonable and necessary" as measured "in light of traditional uses to which the right-of-way was put." *Hodel,* 848 F.2d at 1083. Moreover,

because the grantor, the federal government, was never required to ratify a use on an R.S. 2477 right-of-way, each new use of the [right-of-way] automatically vested as an incident of the easement. Thus, all uses before October 21, 1976, not terminated or surrendered, are part of an R.S. 2477 right-of-way.

Hodel, 848 F.2d at 1084. The court ruled that the county had authority to improve the road at issue in *Hodel* to the extent reasonably necessary to ensure safe use of the right-of-way consistent with its historical uses. 848 F.2d at 1083. We believe the same conclusion would be reached under Alaska law.

In *Simon v. State,* 996 P.2d 1211 (Alaska 2000), the court was asked to address the scope of an easement set out in a Department of Interior public land order. The court applied the common law of easements and held that, "where the terms of the easement are ambiguous, then the holder of the easement is only entitled to use the property within reason." 996 P.2d at 1214. The court found that a public land order granting an easement "over and across" a parcel of property was ambiguous as to its scope. 996 P.2d at 1215. The language of R.S. 2477 granting a "right of way for the construction of highways ... for public uses" is no less ambiguous than the easement language at issue in *Simon.*

Where the language of an easement is ambiguous, the "easement gives the holder the right to use the land to the extent necessary to serve the purpose of the easement." *Simon,* 996 P.2d at 1215. While *Simon* did not involve an R.S. 2477 right-of-way, it did involve a public right-of-way granted under federal law. Therefore, it is likely that Alaska courts will apply the *Simon* standard to determine the uses to which the Klutina Lake road may be put under R.S. 2477.

The historical uses of the Klutina Lake road include vehicular and pedestrian travel, rest stops, parking for recreational uses of the Klutina River, and overnight camping. The law authorizes the reasonable use of the right-of-way for these purposes.

However, in assisting the public in making these uses convenient, the department should bear the following in mind:

The holder of a right-of-way, private or public, "cannot lawfully take dominant possession and deal with the land upon which the easement exists as if he were the owner of the land," because he is not the owner of the land:

Easements do not carry any title to the land over which the easement is exercised, and work no dispossession of the owner. Since the interest itself is nonpossessory, the holder of the easement does not have the degree of control over the burdened property that is enjoyed by the owner of the servient estate; complete dominion is inconsistent with a claim of easement.

28A C.J.S. *Easements* 144, at 347 (footnotes omitted). At the same time, the owner of the servient estate must abstain from acts that impermissibly interfere or are inconsistent with the proper use or enjoyment of the easement. *Id.* at 143.

U.S. v. Garfield County, 122 F.Supp.2d 1201, 1242-43 (D.Utah 2000) (construing competing rights as between the National Park Service and a county government to regulate an R.S. 2477 traversing a national park). A similar rule applies in Alaska. *Simon,* 996 P.2d at 1213, 1215 (The owner of an easement is entitled to reasonable use of the easement consistent with the purposes for which it was granted.); *Berger,* 9 Alaska at 395 (owners of overlapping railroad and R.S. 2477 easements can not use their easements "to the detriment of the other.")

Thus, the public may use the Klutina Lake road in a reasonable manner necessary to enjoy the uses to which the road was historically put between 1898 and October 21, 1976, the date R.S. 2477 was repealed. Department of Transportation and Public Facilities may not unilaterally authorize new uses of the road. Concomitantly, Ahtna has no right to interfere with members of the public who use the road in a manner consistent with its historic uses. Specifically, Ahtna has no legal authority to regulate the highway by requiring the purchase of permits or the payment of tolls or by prohibiting historic uses of the road by corporate fiat.

Department of Transportation and Public Facilities may make reasonable improvements to the road to support its historic uses, such as widening the road to provide for two-way travel and constructing turnouts for rest stops. Although we have not been asked to offer an opinion on the width of this road, it appears the road would be 100 feet wide under AS 19.10.015(a) . However, a court may find that using the full width of this right-of-way would not be authorized if use of the full width were not reasonably necessary given traffic volume, anticipated use in the reasonably near future, and the historic uses of the road. *Andersen v. Edwards,* 625 P.2d 282, 286-87 (Alaska 1981).

Andersen held that clearing the full width of a 100-foot wide easement reserved in state patents was a trespass on the privately owned servient estate because clearing the full width was not reasonably necessary for access. The court held that an award of treble trespass

damages would be appropriate for cutting the trees outside of a 25-foot wide area, the area considered reasonably necessary for access under the circumstances of that case. *Andersen,* 625 P.2d at 289. Therefore, we recommend that DOT&PF limit improvements in the right-of-way to those that are reasonably necessary to support the historic public uses of the Klutina Lake road.

2. Litigation is unnecessary to perfect R.S. 2477 rights-of-way. R.S. 2477 rights-of-way are not supplanted by overlapping ANCSA 17(b) easements.

Ahtna asserts that an R.S. 2477 can only be perfected when recognized by declaratory judgment. Ahtna alleges that the only easement for the Klutina Lake road is a reserved ANCSA 17(b) easement included in the patent and interim conveyances for Ahtna's lands and claims authority to regulate the use of this easement by the public.

Ahtna's legal theories are not viable. R.S. 2477 was a self-executing congressional offer of a right-of-way that could be accepted by construction, by public user, or by some positive act of appropriate public authorities. *State v. Alaska Land Title,* 667 P.2d 714, 727 n. 21 (Alaska 1983), *cert. denied,* 464 U.S. 1040 (1984); *Girves v. Kenai Peninsula Borough,* 536 P.2d 1221, 1225-26 (Alaska 1975); *Hamerly v. Denton,* 359 P.2d 121, 123 (Alaska 1961); *Wilderness Society v. Morton,* 479 F.2d 842, 882 n. 90 (D.C. 1973) (en banc), *cert. denied,* 411 U.S. 917 (1973); *Hodel,* 848 F.2d at 1083-84; *U.S. v. Rogge,* 10 Alaska at 151; *Central Railway,* 52 S.Ct. at 226, 229. Neither R.S. 2477 nor case law requires a public authority to obtain a judgment to perfect an R.S. 2477 right-of-way.

Ahtna's claim that ANCSA 17(b) easements supplant perfected R.S. 2477 rights-of-way is unsupported by either ANCSA or case law. First, under ANCSA, lands were conveyed to Native corporations "subject to valid existing rights." ANCSA 14(g), 43 U.S.C. 1613 (g).

Subsection 14(g) protects the rights and expectations of persons who previously received an interest in land pursuant to federal law.

U.S. v. Atlantic Richfield Co., 435 F.Supp. 1009, 1023 (D.Alaska 1977), *affirmed,* 612 F.2d 1132 (9th Cir. 1980), *cert. denied,* 449 U.S. 888 (1980). The state's R.S. 2477 right-of-way for the Klutina Lake road was a valid existing right when ANCSA was enacted in 1971.

Second, ANCSA 17(b)(2) expressly **preserved** pre-ANCSA access rights. It did not supplant them. ANCSA 17(b)(2) provides:

Any valid existing right recognized by this chapter shall continue to have whatever right of access as is now provided for under existing law and this subsection shall **not** operate in any way to **diminish or limit** such right of **access.**

(emphasis added).

Construing ANCSA 17(b)(2), the court in *Alaska Public Easement Defense Fund v. Andrus,* 435 F.Supp. 664, 678 (D.Alaska 1977) held that:

Subsection 17(b)(2), ... which protects access to valid existing uses appears to stand independently from the portions of the section which apply to the reservation of public easements. Its purpose is to ensure that those who have valid existing uses do not lose access rights because of the public easement section. **It maintains prior access in spite of the public easement section rather than serving as a limit on the scope of public easements.**

(emphasis added). Thus, ANCSA 17(b) was not intended to supplant pre-existing public access perfected under R.S. 2477. Moreover, Ahtna's conveyances for the lands traversed by the Klutina Lake road expressly make the conveyances subject to section 17(b)(2) access rights. *See, e.g.,* Patent No. 50-80-0108 (July 18, 1980); Interim Conveyance No. 346 (July 18, 1980).

Third, the Department of the Interior recognizes that 17(b) easements and R.S. 2477 rights-of-way may overlap and that neither easement supplants the other. The Interior Board of Land Appeals has long held that

where "BLM seeks to reserve a sec. 17(b) public easement over an existing road constructed by the State and claimed by the State as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision **specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way" if valid.**

Alaska Dep't of Transp., 88 IBLA 106, 107, 110 (1985), quoting *State of Alaska (On Reconsideration),* 7 ANCAB 188, 198, 89 I.D. 346, 350 (1982) (emphasis added) n8; accord, *City of Tanana, Tozitna, Ltd.,* 98 IBLA 378, 383 (1987).

Fourth, highways are not subject to revocation by the federal government once established under R.S. 2477. *Alaska Land Title,* 667 P.2d at 727 n. 21. The Klutina Lake road was

established well before ANCSA and FLPMA were enacted. Both ANCSA and FLPMA preserved prior valid existing access, as we explained above.

Fifth, even though an express easement of definite scope is included in a federal patent, an unexpressed overlapping easement of greater scope may be impressed upon the conveyed land if it were perfected under federal law before conveyance by the federal government to third parties. *Alaska Land Title,* 667 P.2d at 726-27. The unexpressed overlapping easement is impressed on the land by operation of law. *Id.* Thus, a prviously perfected R.S. 2477 right-of-way unexpressed in a federal patent may be enforced to its full scope even if it overlaps an ANCSA 17(b) easement of lesser scope expressed in a patent.

Sixth, the ANCSA 17(b) easements included in Ahtna's conveyances are expressly made "subject to applicable Federal, State, or Municipal corporation regulation." *See* Patent No. 50-80-0108 (July 18, 1980), Interim Conveyance 346 (July 18, 1980). Thus, the state, not Ahtna, has legal authority to regulate 17(b) easements. Ahtna was not granted regulatory authority over the 17(b) easements included in its conveyances.9 Where 17(b) road easements overlap with R.S. 2477 rights-of-way, the state may reasonably regulate the road consistent with the scope of the greater of the two easements. *Alaska Land Title,* 667 P.2d at 720 (easement implied by law in patent controls over express patent easement of lesser width).

Ahtna's legal position is unsupported by ANCSA, federal and state case law, controlling rulings of the IBLA and the conveyances of ANCSA lands to Ahtna.

Conclusion

Alaska courts will apply state law to determine the scope of an R.S. 2477 right-of-way and will most likely apply the common law of easements applicable to private parties to decide the uses to which R.S. 2477 rights-of-way may be put. The allowable improvements to an R.S. 2477 right-of-way and the allowable uses thereof by the public will most likely be measured by that which is "reasonably necessary" in light of the historic uses made of the road before October 21, 1976.

We believe Ninth Circuit precedent supports the application of state law to determine the scope of an R.S. 2477. Although it is not certain that the Ninth Circuit would apply state law to determine whether an R.S. 2477 right-of-way crossing private lands was perfected, perfection is not an issue with respect to the Klutina Lake Road, and no contrary federal statute dictates otherwise.

If you have questions concerning this advice, please do not hesitate to contact us.

Footnotes

Footnotes

1 This opinion assumes the validity of an R.S. 2477 right-of-way for the Klutina Lake road. This office has reviewed considerable evidence concerning the establishment of this road by users circa 1898 and the improvement and expenditure of state funds on this road in the 1960s.

2 *Marsh* overruled *Hodel* as to the standard of judicial review applicable to certain agency decisions. However, *Hodel's* R.S. 2477 holding is still good law.

3 The Ninth Circuit withdrew the *Shultz* decision after rehearing because the claimant had "not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law." Thus, while the withdrawn *Shultz* opinion is not controlling precedent in the Ninth Circuit, it is informative and, in conjunction with the other Ninth Circuit cases herein cited, persuasive evidence that the Ninth Circuit may apply state law to determine R.S. 2477 "use" issues.

4 R.S. 2477 was enacted as section 8 of the Act of July 26, 1866, c. 262, 14 Stat. 253, which gave citizens the right to locate and obtain patents to mining claims on open federal lands. *Humboldt County v. U.S.,* 684 F.2d 1276, 1281 (9th Cir. 1982). Therefore, it was part of the federal land grant statutes passed in the mid-nineteenth century.

5 It may be argued that the fact that the road pre-dated enactment of R.S. 2477 distinguishes *Central Pacific* from cases arising after R.S. 2477's passage in that, before R.S. 2477 was enacted, there was no federal law addressing the establishment of rights-of-way across the public domain. However, as noted in the text, the Supreme Court held that R.S. 2477 applied retroactively. Once the retroactivity issue was determined, the Court in *Central Pacific* exhibited no concern with applying state law to determine the validity of an R.S. 2477 and, in fact, read the local law requirement of section 9 of the 1866 act into section 8 (R.S. 2477).

6 R.S. 2477 was enacted as section 8 of the same act. *See* footnote 4, *supra.*

7 In *Fisher v. Golden Valley Electric Ass'n.,* 658 P.2d 127, 130 (Alaska 1983), the Alaska Supreme Court held that electric utilities may be placed within R.S. 2477 rights-of-way. Therefore, there is a direct conflict between the Alaska Supreme Court and the Ninth Circuit on this point. This conflict is not an issue in the present case.

8 The R.S. 2477 claim at issue in *Alaska Department of Transportation* was not adjudicated. *Alaska Department of Transportation,* 88 IBLA at 107-08. The board noted that Department of Interior policy "favors identification of unadjudicated third-party interests in conveyance documents." 88 IBLA at 109. All the state submitted to the board was the documentation in its possession on which its claim for R.S. 2477 trail status relied. 88 IBLA 107. Therefore, a judgment confirming the perfection of an R.S. 2477 is not a prerequisite to having an R.S. 2477 claim noted in BLM conveyance documents.

9 Of course, Ahtna possesses the right of any private landowner to take judicial action to redress trespass upon its lands that are adjacent to, but outside of, an R.S. 2477 right-of-way.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
1983 Alas. AG LEXIS 383; 1983 Op. Atty Gen. Alas. No. 13
File No. 566-104-83
February 1, 1983

Request By:

Jim Frechione
Natural Resource Officer
Retained Lands Section
Div. of Land & Water Mgmt.

Opinion

Opinion by: Norman C. Gorsuch, Attorney General; Larry D. Wood, Assistant Attorney General

MEMORANDUM

Your December 21, 1982, memorandum posed essentially two questions: first, may a public right of way accepted by actual use under provisions of R.S. 2477 (43 USCA 932) be restricted to recreational uses only? Secondly, is it necessary to reserve an easement in State land disposal documents along the Circle-Fairbanks Trail where physical existence of the trail is no longer apparent?

In brief, a highway created by public user under provisions of R.S. 2477 cannot be narrowly restricted to a particular type of public travel except in those situations where road closure to certain vehicular use is necessary to protect road surfaces during certain seasons of the year. Also, the cases seem divided on the question of whether a public right of way created under this federal grant may be legally abandoned by non-use. For this and other reasons, we therefore recommend that the Circle-Fairbanks Trail be expressly reserved in those areas where its physical existence is no longer apparent.

Both the Northcentral District office and the North Star Borough have agreed that the Circle-Fairbanks Historic Trail, the old route to Circle, is a "highway" within the meaning of 932, Title 43 USCA, which provides:

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted. Public Highway Act of July 26, 1966, 14 Stat. 253, R.S. 2477, 43 USCA 932 (1964) [Repealed. Pub. L. 94-579, Title VII, 706(a), October 21, 1976].

The operation of this statute in Alaska has been long recognized within the State and former territory. *Clark v. Taylor*, 9 Alaska 298 (D. Alaska 1938); *Hammerly v. Denton*, 359 P.2d 121 (Alaska 1961); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975); *Mercer v. Yutan Construction Co.*, 420 P.2d 323 (Alaska 1966). The historical conditions leading up to the enactment of this federal grant and the circumstances of its operation are set out and explained in *Central Pacific Railway v. Alameda Co.*, 284 U.S. 463, 52 S.Ct. 225, 76 L.Ed. 402 (1932). The statute is an express dedication of a right of way for roads over unappropriated government lands, acceptance of which by the public results from "use by those for whom it was necessary or convenient." It is not required that "work" shall be done on such a road or that public authorities take action with regard to it. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices. *Anderson v. Richards*, 608 P.2d 1096, 1098 (Nev. 1980) (*citing: Brown v. Jolley*, 387 P.2d 278 (Colo. 1963)). Although the act constitutes a congressional grant of right of way for public highways across public lands, before a highway may be created, there must be either some positive act on the part of the appropriate public authorities, 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. *Hammerly v. Denton*, *supra*, 359 P.2d at P. 123.

Here, you submit that the Circle-Fairbanks Trail constitutes a "highway" under the terms of the federal grant which was accepted by public use. If there are lingering concerns regarding the nature and extent of public use required for court recognition of such rights of way, you may wish to consider these opinions: *State of Alaska v. Fowler*, Alaska Superior Court, Civil Action No. 61-320 (4th District, September 26, 1962) (Farmer's Loop Road); *Pinkerton and Pinkerton v. Yates*, Alaska Superior Court, Civil Action No. 62-237 (4th District, September 10, 1963) (Good Pasture Trail); *Hammerly v. Denton*, *supra*; *Ball v. Stephens*, 158 P.2d 207 (Cal. App. 1945).

Central to the borough's request that the State limit use of the Circle-Fairbanks Trail in some locations only to recreational use is the meaning of "highway." Given the state's own definition, recreational limitations placed on use of the trail (hiking, skiing, horseback riding, etc.) are clearly too restrictive:

"Highway" includes a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right of way thereof, and further includes a ferry system, whether operated inside the state or to connect with a Canadian highway, and any such related facility. AS 19.45.001(8) .

Whether designated a part of the State highway system (AS 19.10.020) or not, highways granted under the federal legislation cannot be narrowly restricted to a few particular uses. Indeed, even where the Department of Transportation and Public Facilities has accepted management and maintenance responsibilities of particular roads, vehicular restrictions and highway closures are not predicated upon a particular mode of public travel alone, but upon the extent and nature of vehicular traffic during certain seasons of the year or under certain road conditions. AS 19.10.060 ; 19.10.100. It would be a rare case indeed where road conditions called for recreational means of travel only. There has also been doubt expressed as to the ability of a public authority to waive a right of way granted under this federal legislation inasmuch as it serves only as a trustee for the public to manage and protect the easement. *Small v. Burleigh County*, 225 N.W. 2d, 295, 298 (N.D. 1974). Arguably, restriction of such highway use may usurp the very public access rights the federal statute was created to protect and to provide. In short, where a R.S. 2477 highway exists, public users are free to use those means of transportation compatible with the trail's integrity. The notion of "highway" also suggests that users may maintain and upgrade the road to the extent necessary to facilitate use of the right of way. I agree with your analysis that an R.S. 2477 highway cannot be arbitrarily limited to specific recreational uses.

Where a highway is clearly designated and delineated by use, State reservation of a R.S. 2477 road in disposal documents is unnecessary. Once unreserved public domain was appropriated for highway use under the federal grant, subsequent patents, the legal effect of which is tantamount to a quitclaim deed (*Cypress Co. v. Del Paszo y Marcos*, 236 U.S. 635 (1915); *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1329 (Alaska 1979)), passed title already subject to this public right of way. *Ball v. Stephens*, 153 P.2d 207, 210 (Cal. App. 1945). Land affected by those portions of the Circle-Fairbanks Trail which constitute a R.S. 2477 "highway" will remain impressed with the right of way even after State conveyance. Yet, to avoid later claims of surprise I would recommend that the highway's existence be noted in sales brochures.

The width of a R.S. 2477 right of way may also be of concern to you since there has been talk of dedication of a 300 foot easement along portions of the Circle-Fairbanks Trail.

Now Supreme Court Justice Jay Rabinowitz ruled squarely on this issue in a 1962 Superior Court matter, *State of Alaska v. Fowler*, Civil Action No. 61-320, *supra*. Here the width of Farmer's Loop Road, established under provisions of R.S. 2477 by public user, was at issue. Justice Rabinowitz determined that only the 1962 width of of the road would be considered a part of that right of way and deemed "a reasonable width necessary for the use of the public generally." *Id.* He calls our attention to *Bishop v. Hawley*, 238 P.2d 284, 286, note 10 (Wyo. 1925), in determining the question of the width of a R.S. 2477 right of way:

From the cases concerning the width or height of rights of way arising from private grant, we find that it is a general principle that, when such an easement is granted but not defined, the privilege must be a reasonable one for the purposes for which it was created . . . .

Practically the same rule is applied to determine the width of highways established by prescription or adverse user. The right of way for such a road "carries with it such a width as is reasonably necessary for the public easement of travel" . . . .

Similarly, Justice Rabinowitz drew support from *Montgomery v. Somers*, 90 P. 674, 678 (Or. 1907): "Where the right to a highway depends solely upon user by the public, its width and the extent of the servitude imposed on the land are measured and determined by the character and the extent of the user, for the easement cannot on principle or authority be broader than the user . . . ." The State of Alaska in the *Fowler* case relied primarily upon the approach taken by the court in *City of Butte v. Mikosowitz*, 102 P. 593 (Mont. 1909) in support of its contention that the width of the Farmer's Loop right of way was 66 feet. At pages 595 and 596 of that opinion, it is stated:

In using the term "highway" the Congress must have intended such a highway as is recognized by the local laws, customs and uses; and, since in this state public highways generally are 60 feet in width . . ., the Court did not err in its judgment in this record . . . .

Justice Rabinowitz rejected the State's further argument that provisions of SEC. 1, Ch. 19, SLA 1923 (establishing public highways between each section of land in the territory) indicated the local law and reflected the local custom as to the width of rights of way established pursuant to R.S. 2477. He concluded that taking into consideration the character and extent of user as disclosed by the evidence in *Fowler*, the "reasonable width necessary for the use of the public" constituted only the present width of Farmer's Loop Road, thirty feet. In a later decision he found the width of another trail R.S. 2477 right of way, the Good Pasture Trail, to be eight feet. *Pinkerton and Pinkerton v. Yates*, *supra*, p. 6, n. 8.

As if in response to Justice Rabinowitz's decisions, the State legislature enacted Sec. 1, Ch. 35, SLA 1963:

Establishment of Highway Widths. (a) It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet. AS 19.10.015 .

Hence, there is an argument that the 1963 legislature accepted the R.S. 2477 grant as it might pertain to those portions of highways still traversing unreserved public lands to the extent of

100 feet even where actual use of such highways was much more restricted. Until that time and as regards lands which were already withdrawn from the public domain in 1963 but burdened only in part by R.S. 2477 rights of way, the *Fowler* decision and the precedent upon which it was predicated seem controlling: "the right of way for such a road carries with it such a width as is reasonable and necessary for the public easement of travel." That determination will obviously call for analysis of various portions of the Circle-Fairbanks trail since the character and extent of user may vary from location to location.

Finally, I would recommend that especially those portions of the Circle-Fairbanks Trail which have disappeared over time be specifically reserved in State disposal documents. Three reasons support this suggestion: first, the State and Borough share an obvious interest in maintaining the trail's identity and use in future years and such designation would reiterate that commitment; secondly, specific designation of trail location and width will prevent or help avoid conflicts with respect to lands assertedly burdened by the trail right of way after State disposal; and, thirdly, some cases have suggested that R.S. 2477 rights of way may be abandoned by public non-use. If this is indeed the rule later adopted in Alaska, designation of indiscernable portions of the Circle-Fairbanks Trail will assure a public right of way.

The division of authority on the question of non-user is best explained by a legal encyclopedia, 39 Am. Jur. 2d, *Highways, Streets, and Bridges*, Sec. 151 , pps. 524-525:

It has been held or intonated in a number of cases that neither the character of a public highway as such nor the right of the public at all times to use it can be lost by non-user. It has also been held that mere non-user will not operate to discontinue a legally established highway unless coupled with affirmative evidence of an intent to abandon, particularly where there is no use of the premises adverse to the right in the public. In other cases it has been held, however, that the right of the public to use a highway may be abandoned by non-user for a considerable length of time. The trend of authority seems to be that mere non-user for the period fixed by the statute of limitations for acquiring title by adverse possession affords a presumption, though not a conclusive one, of extinguishment, even in a case where no other circumstance indicating an intention to abandon appears ***

In the determination of whether a highway has been abandoned, it is proper to consider the mode in which the abutters and the public acquire their rights, as well as what the necessity and convenience brought about by subsequent progress and growth may require. Some courts make a distinction, in this connection, between the case where the public right has been acquired by user and the case where it has been acquired by grant, *holding that where an easement has been acquired by grant, a mere non-user, without further evidence of an intent to abandon it, will not constitute abandonment*. (Emphasis added)

Disuse of many portions of the circle-Fairbanks Trail right of way occurred following construction of the present Steese Highway. At least one case has said that whether relocation of a highway and non-user of its former site constitute an abandonment of the public interest by implication depends upon two factors: (1) the character of the interest originally acquired by the public and (2) compliance with statutory formalities. *Smith v. Ricker*, 37 Cal. Rptr. 769, 772 (Cal. App. 1964). In the absence of statute a proprietary interest in the highways site, acquired by deed or dedication, may be lost only through express abandonment; but a public interest acquired by occupancy and use, without a formal grant, may be extinguished by non-user, relocation or other evidence of an intent to abandon. *Id.* If statutes provide a method for abandonment or vacation of roads, that method is exclusive under further ruling of the California court. The Department of Transportation and Public Facilities is vested with the authority to vacate or dispose of property acquired for highway purposes. AS 19.05.040 ; 19.05.070. Here, however, it is absolutely clear that no official proceedings were ever taken to officially vacate this formerly important link to Circle. As noted above, doubt has even been expressed as to the power of a public authority to waive a right of way grant under the federal statute. *Small v. Burleigh County*, *supra*. Hence, it may be argued that a right of way effected through a grant to the public under R.S. 2477 may not be extinguished by non-user, relocation or other evidence of intent to abandon. Indeed, this is a result also suggested by *People v. Miller*, 41 Cal. Rptr. 645, 647 (Cal. App. 1964). Yet, cause for concern is raised by those cases which state that, although abandonment must be demonstrated by clear and cogent proof, and although it is not important how extensively a road was used, or whether it was used at all, after acceptance of the right of way under R.S. 2477, it may become subject to *legal* abandonment (*Ball v. Stephens*, 153 P.2d 207, 210 (Cal. App. 1945) determined by the "acts and doings of the parties entitled to the [road], and not from the adversary or hostile possession of others." *Connell v. Baker*, 458 S.W. 2d 573, 577 (Mo. App. 1970). However, an additional caveat is that by the term "legally abandoned" even *Ball* suggests that some statutory procedure must be implemented to abandon or vacate a public highway grant. Nonetheless, the issue need not be decided now. Instead, I would only recommend that these portions of the Circle-Fairbanks Trail be specifically reserved to avoid the question entirely.

This memorandum has assumed that the Circle-Fairbanks Trail was established as an R.S. 2477 right of way through public user. I must caution that prior entry on public lands will defeat such an easement in most circumstances. The State must be careful not to warrant the existence of a R.S. 2477 highway unless acceptance by public use over unreserved public lands has been carefully researched. Where established, a R.S. 2477 right of way cannot be limited to specific modes of travel unless some public authority has taken those lawful steps necessary to restricting or closing portions of the road due to season or road conditions. Although discernible portions of the trail need not be reserved in State disposal documents, where the road has lost its physical appearance, the Northcentral District office may wish to specifically designate the highway location and width to positively avoid later incompatible uses and argument.

Please let me know whether our office may be of further assistance to you.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
1982 Alas. AG LEXIS 314; 1982 Op. (Inf.) Atty Gen. Alas.
File No. F66-124-81
September 23, 1982

Request By:

Robert Venusti, Director
Planning and Programming
Department of Transportation
600 University Avenue, Suite D
Fairbanks, Alaska 99701

Opinion

Opinion by: Linda Walton, Assistant Attorney General, 604 Barnette, Room 228, Fairbanks, Alaska 99701

MEMORANDUM

At your request, I have researched the authority of the National Park Service to restrict access to the Kantishna Road, via the McKinley Park Road. The combined Park and Kantishna Road crosses the northern part of the area formerly known as Mt. HcKinley Park and passes from the northern park border on to the Kantishna through the area known as the Denali National Honument (Preserve). The Park Service purports to have regulatory authority pursuant to 36 CFR 1 - 7, as authorized by 16 USC 3, which provides:

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2 and 4 of this title shall be punished by a fine of not more than $ 500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings . . . . He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations provided for under section 2 of this title, but for periods not exceeding thirty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public . . . . And provided further, That no contract, lease, permit, or privilege granted shall be assigned or transferred by such grantees, permittees, or licensees without the approval of the Secretary of the Interior first obtained in writing: . . .

The State, on the other hand, received, pursuant to the Alaska Omnibus Act, a quitclaim deed to the road from the Department of Commerce. The quitclaim deed covers the road only from the northern park boundary to Kantishna airfield and is 200 feet wide by authority of PLO 2665 where it is mentioned as a "feeder road. There may be some limitation on the right to federal government's legal control over access via the McKinley Park Road, based on a written or implied easement, but the legal remedy is unclear. However, to determine the true status of the McKinley Park road, additional research into U.S. or territorial government archives will be necessary. I will outline below the relevant history and law which leads to my tentative conclusion.

HISTORY

Hount McKinley Park was first created in 1917, and its boundaries were extended in 1922 and 1932, by 39 Stat. 938, 42 Stat. 359, and 47 Stat. 68, codified at 16 USC 347 and 355. Until 1932, the Park did not extend as far as Wonder Lake.

I have researched the records of the Alaska Road Commission (A.R.C.), and discovered the following:

The commission was created by act of 1/27/1905 under the authority of the War Department. There were several entities with authority over roads, in the years following. In 1916, the Department of Agriculture was given control of the Bureau of Public Roads, by the Highway Act of July 11, 1916. However, this act was, according to the Alaska Road Commission, largely inapplicable in Alaska and roads remained under the War Department. The Federal Highway Act of 1921 transferred responsibility from the Council of National Defense to agriculture, but excepted the powers and duties of agencies dealing with national parks and of military agencies dealing with highways used primarily for military purposes. This law apparently did not affect any roads in Alaska, as the A.R.C. continued under the jurisdiction of the War Department. Agriculture had jurisdiction in Alaska only over national forests in Southeast Alaska and Chugach. In 1919, the Territorial Road Commission (TRC) was created by H.B. 25, 1919 Session Laws Ch. 11. The act provided in part:

Section 2. The Territorial Board of Road Commissioners shall have *authority to enter into co-operative agreements, with the Board of Road Commissioners for Alaska, and the Secretary of Agriculture of the United States, or other federal authority, for the construction, repair and maintenance of any public road, bridge or ferry, within the Territory of Alaska.* In the case of co-operative work, the Territorial Treasuror is authorized to deposit in the United States Treasury, the funds agreed upon to Cover the share of the Territorial Road Commission in such co-operative projects as are entered into, in accordance with the provisions of this Act. Such funds shall be expended by the Disbursing Officer of the federal authority designated in

the co-operative agreement, and a detailed statement of expenditures from such funds so deposited shall, upon the completion of the project for which they were deposited, be furnished to the Territorial Treasurer. Any unexpended balance of such Territorial funds shall be returned.

It is probable that a legal document of some type exists which outlines the expectations of the A.R.C., the T.R.C. and the National Park Service, because of the below described sequence of events, regarding this road.

The first mention of a road to Kantishna is found in the 1921 reports of the Alaska Road Commission, which designate it as Route 46, and note expenditures by the Alaska Road Commission of $ 4,571.63. However, the 1922 road Commission reports make it clear that the 1921 Kantishna road extended from Lignite to Kantishna, not through the Park. The 1922 report labels the Lignite-Kantishna road as 46B. The 1922 report also notes plans to build route 46D, *in cooperation with the National Park Service,* from Mile 344 on the railroad through the Park to the Kantishna Post Office and then in a loop back to Mile 63 on the railroad "through the finest hunting around in Alaska". This route is the route followed by the present Kantishna road, through the Park, as far as Kantishna. By act of Congress on April 9, 1924, the National Park Service was authorized to construct roads within Park boundaries, and the first funds were appropriated to the Park Service for the McKinley Park road on March 3, 1925.

The Alaska Road Commission reports concerning this road in subsequent years are attached. It appears from these that the read was constructed through the section of land within then existing Park boundaries, primarily with Park Service funds, although the Alaska Road Commission, Territorial Road Commission, and private individuals also contributed. Clearly, the section of the road outside the Park boundaries (as they existed before 1932) was not paid for by the Park Service, but by the Alaska Road Commission and Territorial Road Commission. It also appears that work was first performed on the road within the then existing Park boundaries by Alaska Road Commission funding and private contributions in 1923, before the Park Service had funds to contribute. The road was used for access to mining claims and hunting areas, and by trappers, prospectors, and tourists; the Commission notes that one of the primary purposes of the road was to develop traffic for the government railroad (Alaska Railroad). Since the purpose of construction was obviously for public use, it may well be that before the ARC or private contributors began construction through the Park, they had some type of access agreement with the NPS.

The portion of the road beyond the Park Boundaries, as they existed before 1932, became a public right of way pursuant to RS 2477, through public use and the acts of the ARC and TRC. 43 USC 932 (RS 2477) was repealed October 21, 1976, but without affecting rights previously acquired thereunder. It provided:

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

Thus, if a road or trail existed prior to 1976 and prior to withdrawal of the relevant portions of the land for Park purposes, that right-of-way would still exist. This law is clearly helpful as to the Denali Preserve portion of the road and to the portion outside the pre-1932 Park boundaries, but probably does not apply to the rest of the Park portion, unless my information is incorrect, and a trail was, in fact, there before the 1917 act creating the Park, withdrawing the land from entry, and reserving it for public uses. In *Colorado v. Toll,* 268 U.S. 228, 69 L.Ed. 927 (1925) the Supreme Court allowed the State of Colorado to maintain a suit intended to prove that an RS 2477 right of way existed prior to creation of Rocky Mountain National Park and that therefore, the Park Service could not regulate the public road. I do not know the ultimate decision regarding this road, as it is not again reported after remand. Subsequent cases, *infra,* have questioned the holding in *Colorado v. Toll.*

In 1932, by 48 USC 321, control over and responsibility for construction of roads in Alaska was transferred from the Alaska Road Commission, under the War Department, to the Department of the Interior. The Department of the Interior also at that time had control over the national parks, and in that same year the Park Boundaries were extended beyond wonder Lake. The records of the ARC probably were also transferred to Interior, including any possible agreement regarding the road.

The Highway Act of 1956 (P.L. 627) transferred road authority from the Department of the Interior to the Department of Commerce. The 1956 act gave authority ever forest service highway appropriations to the Department of Commerce for apportionment in the states and in Alaska (Sec. 103). The Act also appropriated funds for expenditures in areas administered by the National Park Service (Sec. 104a), without stating who would apportion and administer the appropriation. Money was also appropriated for expenditure within Indian reservations on roads "provided that the location, type, and description and . . . . construction shall be under the general supervision of the Secretary of Commerce" (Sec. 104(c)). Presumably, construction of Park roads was also intended to be under Commerce authority.

Thus, if this road was improved after 1956, (my understanding is that road improvements or expansion did occur in the 1950's but, but I have been unable to verify this) it was probably improved with funds under Commerce control. This would not necessarily mean that the Park Service is deprived of regulatory authority, but again there may be some memorandum of agreement regarding public access.

Section 107(a) authorized the Territory of Alaska to share in funds "herein or hereafter authorized for projects on the Federal-aid primary and secondary highway systems . . . with

the money to be expended by the Secretary of Commerce directly or in cooperation with the Territorial Board of Road Commissioners, and Section 107(b) provides:

. . . functions, duties and authority pertaining to the construction, repair and maintenance of roads, tramways, ferries, bridges, trails and other works in Alaska, conferred on the Department of the Interior under the act of June 30, 1983 (47 Stat. 446; 48 USC 321a), are hereby transferred to the Department of Commerce and thereafter shall be administered by the Secretary of Commerce or under his direction by such officers as may be designated by him.

The legislative history found at 1956 U.S. Code Cong. & Ad. News 2893, provides in part "with the transfer of functions there is to be transferred the personnel, funds and property used or held in connection with those functions."

However, the responsibility for the Park Service roads was not conferred on the Department of Interior by 48 USC 321 (a), but, rather, by national park legislation previously cited, and by the act of 1/31/31, 46 Stat. 1053, 16 USC 8a -c. Thus, this law did not transfer Park Service roads from Interior to Commerce. It would, however, have transferred any interest in the Kantishna Road (including rights of access to it via the Park Road) held by the Alaska Road Commission pursuant to an agreement between the TRC, ARC and NPS, and the commerce quitclaim deed would have transferred the same interest to the State of Alaska.

On December 1, 1980, Congress again extended the boundaries of McKinley Park by adding Denali Preserve, and renamed the whole, Denali National Park and Preserve, by Section 202(3)(a) 16 USC, 410 hh-1 of the Alaska National Interest Lands Conservation Act. Section 203 provides in part "*subject to valid existing rights,* the Secretary shall administer the lands, waters and interests therein, added to existing areas or established by the foregoing sections . . . as new areas of the National Park System pursuant to . . . 16 USC 1 *et seq.*"

Thus, whatever rights the State had in the road prior to December 1, 1980, it clearly retained thereafter. As to that portion of the newly withdrawn ("Denali Preserve" or "Monument"), the State surely had unfettered rights to regulate and develop and maintain the road from the time of the Commerce deed forward. The State would also have, in the absence of an agreement to the contrary, an RS 2477 right of way in that portion of the Park Road beyond the pre-1932 boundaries. And if there was an agreement of some type regarding a right of public access across the McKinley Park portion of the road it night remain in effect or might have expired by its own terms. I have not yet searched for TRC archives, as you may not wish to have that extra time spent in view of the conclusion below.

COMMON LAW DOCTRIRES POSSIBLY APPLICABLE

In the absence of a written agreement, common-law doctrines such as easement by implication or necessity may protect the State and the public's right to gain access via the Park road to that part of the Kantishna Road beyond the Park Boundary, which clearly is a State highway.

An easement by implication can be deemed to exist by operation of law if, upon conveyance to a third party there exists and obvious servitude over one part of land owned by the grantor, to the portion conveyed. However, an easement will not be implied where there is evidence that no easement is intended.

In this case all the property was once in common ownership of the United States, and in fact upon passage of 48 USC 231 (a) the road through the Park, and the continuation of the road beyond to the Kantishna, were both under the common ownership of the Department of Interior. thus it could be argued that upon conveyance of a portion of the road to Commerce, and then to the State, an easement by implication arose over the unconveyed portion within Park Boundaries. Whether an easement will be implied depends upon the apparentness, permanency, continuousness and necessity of the use implied. Since this road probably was the primary access road to the Kantishna at the time of Statehood and had probably been used continuously by those residing in the Kantishna, and since the road is reasonably necessary for access, there is a good argument that an easement by implication exists. However, I have not found a case one way or the other which indicates whether the doctrine of implied easements may be applied against governmental entities. Certainly a prescriptive right cannot be acquired against a sovereign since no one can adverse possess against the sovereign. But an easement by implication does not arise from adverse possession, thus an implied easement might be found to exist over government land.

Although the State has a possible legal claim that the entire Kantishna Road is a public road, based either on an agreement or an easement by implication or necessity, any lawsuit over the same would be in federal court, and I suspect public (and perhaps the judge's) sympathy would favor the federal government's right to control the road. Moreover, it is doubtful that the State or private residents would have a right to an injunction against the Park Service to protect their legal property rights, in light of recent case law. Several cases, *Switzerland Co. v. Udall,* 337 F.2d 59 *cert den* 380 U.S. 914, and *Arthur v. Fry,* 300 F. Supp 622 (1969) have undermined the holding in *Colorado v. Toll, supra* and held that neither a State nor private parties may sue the federal government or federal Park Service employees to enjoin obstruction of roads because the doctrine of sovereign immunity precludes suits for injunctive relief. The opinions have suggested that the Park Service may take public or private right of way, away from their owners, and that the only remedy is in damages (i.e. tort or inverse condemnation.

ANSWERS TO SPECIFIC QUESTIONS

In the absence of an agreement to the contrary,

(a) The Park Service probably does have authority to restrict travel, to the extent deemed by the Park Service reasonably necessary for accomplishment of Park Service goals. Attempts to "unconditionally restrict travel" could be resisted by the State, but because of the above cases an injunction might not be obtainable, and damages may be the only remedy.

(b) The Park Service can restrict public use of the road at night, after shuttle bus service ceases, so long as some recognized purpose of the Park Service is furthered by such restriction. I assume reasons such as protection of wildlife could be argued, as well as conflicts with daytime bus traffic.

(c) The question of whether the Park Service can allow some classes of citizens access, but not others, is a very close one. Absent public or private easement of some type, the Park Service is fully empowered to decide which classes of vehicles, i.e., commercial, or tourist will have access, and discrimination between types of users has been repeatedly sustained pursuant to 16 USC 3. However, if there is an easement by implication over the Park road, to the portion of the road which is State-owned, the easement is a public easement, not a private one. The logical conclusion would be that the Park Service, therefore, cannot discriminate against members of the public, depending on their business in the Kantishna. However, some cases involving implied private easements have held that the use of the easement cannot become excessive, that the easement is only implied for the types of travelers and uses expected at the time it was created. I suspect that a court would apply this reasoning and conclude that the Park Service can differentiate between classes of citizens including beneficiaries of public or private casements, in allowing access even if an easement or public right of way does exist. Moreover, if may member of the public, or the State sued over Park Service restrictions, as stated above the probable remedy would be in damages, rather than injunctive relief.

(d) Continued expenditure of public funds, including State funds, is legal even though the Park Service can land lock the public highway, so long as the Park Service has not yet taken action totally to cut off access. There is nothing in State statutes which specifically precludes expenditure of State funds in a situation of this type. However, public funds may be expended only for public purposes. The "purpose" section at AS 19.05.125 is probably most relevant to this question. It provides:

The purposes of ch. 5 - 25 of this title is to establish a highway department capable of carrying out a highway planning, construction, and maintenance program which will provide a common defense to the United States and Alaska, a network of highways linking together cities and

communities throughout the state (thereby contributing to the development of commerce and industry in the state, and aiding the extraction and utilization of its resources), and otherwise improve the economic and general welfare of the people of the state.

I believe that expenditure of State funds is justifiable here on the theory that even though access to the State road is subject to federal restriction, the State road aids in the extraction and utilization of State resources, and links together communities. However, the advisability of expenditures is subject to question. In view of the fact that the Park Service probably could entirely shut down the road with the State's only remedy being damages for its loss, it may well be more beneficial to expend State funds on development of a new unrestricted road to the Kantishna, rather than on a road which may not be usable in the future. Moreover, if expansion of use by private property owners, mandated a widening of the road within the Park or Preserve boundaries, it is highly unlikely that the State could secure additional lands or federal financial assistance for such a project.

The relevant statute involving expenditure of federal funds is 23 USC 138, which provides:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Irban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuse of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. In carrying our the national policy declared in this section the Secretary in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas.

Any additional rights or way granted would be revocable without compensation pursuant to 36 C.F.R. 14.9m, which provides:

That [a] right-of-way herein granted shall be subject to the express covenant that it will be modified, adapted, or discontinued if found by the Secretary to be necessary, without liability or

expense to the United States, so as not to conflict with the use and occupancy of the land for any authorized works which may be hereafter constructed thereon under the authority of the United States.

CONCLUSION

In summary I would say that if the State wishes to pursue a claim that it has an easement to the Kantishna Road via the McKinley Park Road, such an argument would be supportable, especially if a search into Territorial Road Commission or federal government archives revealed a written agreement. However, the federal government could elect to pay compensation rather than allowing access, and there is little the State could do to prevent extinguishment of its rights by compensation. The impediments to further development of this road outlined above should cause the State to give serious consideration to development of an alternative route, if indeed the same is justified by present and projected future activity in the Kantishna area.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
1981 Alas. AG LEXIS 429; 1981 Op. (Inf) Atty Gen. Alas.
File No. A66-404-81
September 14, 1981

Request By:

Reed Stoops, Director
Division of Research and
Development
Pouch 7-005
Anchorage, Alaska 99510

Opinion

Opinion by: WILSON L. CONDON, ATTORNEY GENERAL; Barbara J. Miracle, Assistant Attorney General; Thomas E. Meacham, Assistant Attorney General, AGO - Anchorage

MEMORANDUM

By memorandum to this office you have requested an opinion concerning the State's management authority over section line and public-user highways created pursuant to 43 U.S.C. 932, Revised Statutes 2477.

The short answer to your question is that the Alaska Department of Transportation and Public Facilities has management authority over R.S. 2477 highways where they occur on non-state land. Where such highways occur on state land, the Alaska Department of Transportation and the state agency having management authority over the state land in question have concurrent authority over the highway.

Congress by act of July 26, 1866 granted the right-of-way for construction of highways over unreserved public lands:

The right-of-way for the construction of highways over public lands not reserved for public uses is hereby granted. 43 U.S.S. 932, R.S. 2477.

In *Hamerly v. Denton,* 359 P.2d 121, 123 (Alaska 1961), the Supreme Court of Alaska stated the general rule regarding acceptance of this federal grant:

. . . 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.

Our territorial legislature accepted the federal grant by designating public highways of a specified width on all section lines within the Territory. *See* Ch. 19, SLA 1923; Ch. 123, SLA 1951; Ch. 35, SLA 1953; 1969 Opinion of the Attorney General No. 7. The state statute accepting the federal grant is presently cofified in AS 19.10.010 , which states as follows:

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 this strip inurs to the owner of the tract of which it formed a part of the original survey.

In addition to section line highways created by legislative designation there are numerous highways, not necessarily conforming to section lines, which have been created by public use alone throughout the State of Alaska.

Our Supreme Court, along with a majority of courts which have considered the issue, has stated that roads created pursuant to R.S. 2477, whether by public authority, such as section line rights-of-way, or by public user alone, are public highways. *Hamerly, supra* at p. 123.

The term "highways", which is used in R.S. 2477, has an accepted meaning. A highway is a way open to the general public at large without distinction, discrimination or restriction except that which is incident to regulations calculated to secure the best practical benefit and enjoyment of the highway to the public. *Prillman v. Commonwealth,* 100 S.E.2d 4 (Va. 1957). The primary characteristics of a highway are the right of common enjoyment on the part of the public at large (*Karl v. City of Bellingham,* 377 P.2d 984 (Wash. 1963)) and the duty of public maintenance. *Prillaman, supra.* The term "public" highway therefore is tautological. *Detroit International Bridge Co. v. American Seed Co.,* 229 N.W. 791, 793 (Mich. 1930). There is an old line of cases which holds that the R.S. 2477 right-of-way grant is available to privately owned and operated railroads. *See Flint & P.M. Railroad Co. v. Gordon,* 2 N.W. 648 (Mich. 1879). Most of these cases are very old, and the principle has not been extended beyond railroads to include essentially "private" public utilities or conveyances. *See* Opinion of the Attorney General of September 7, 1976 at 18.

The State has broad police power to manage its public highways. *United States v. Rogge,* 10 Alaska 130, 153 (1941); *see* discussion of state's police power to regulate public highways in Opinion of the Attorney General of September 7, 1976 at 21 - 29. The Alaska Legislature has conferred broad powers upon the Department of Transportation and Public Facilities to regulate the use of public highways, including the control of highways under AS 19.05.030 , power to control access to highways under AS 19.05.040 , the power to vacate highways under 19.05.070, and the power to close highways under AS 19.10.100 .

When an R.S. 2477 highway crosses state land, the Department of Transportation and the state agency having management responsibility for the underlying fee, usually the Department of Natural Resources, have concurrent responsibility for management of the highway.

You have also inquired whether the State has authority to enforce AS 19.40.210 with regard to R.S. 2477 rights-of-way which may exist adjacent to or radiating from the Dalton Highway from the Yukon River to the Arctic Ocean. AS 19.40.210 states,

Off-road vehicles are prohibited on land within five miles of the right-of-way of the highway. However, this prohibition does not apply to a person who holds a mining claim in the vicinity of the highway and who must use land within five miles of the right-of-way of the highway to gain access to his mining claim.

The term "land" is not defined in the legislation, and must be presumed in this context to include both state and federal public land. (The Legislature could not, of course, authorize or prohibit vehicular use of private lands without consent of the landowner unless the public health, safety and welfare clearly required it.) The term does not appear to be limited to "state land", since, in the preceeding section, the Legislature specifically addressed the concept of "state land" with regard to its prohibition against land disposals. AS 19.40.200 . There is no inherent ambiguity in state regulation of means of access over both state and federal lands, so long as the United States has not, by statute or regulation, adopted inconsistent provisions with regard to its own land. The federal lands in question were not included within the areas of exclusive federal jurisdiction listed in Sections 10 and 11 of the Alaska Statehood Act. However, if the United States were to adopt inconsistent statutes and regulations which permitted, or further restricted, the use of off-road vehicles on federal land adjacent to the Dalton Highway, those statutes or regulations would supercede inconsistent provisions of state law pursuant to the Supremacy Clause of the United States Constitution (Article VI, Section 2) and the property clause of that Constitution (Article IV, Section 3). *Kleppe v. New Mexico,* 426 U.S. 529 (1976).

The authority of the State to enforce AS 19.40.210 with regard to public use of acknowledged R.S. 2477 rights-of-way should not be in question. The original offer of the United States to the public to create rights-of-way for public highways over public lands (which was made by R.S.

2477 in 1866) did not specify or contemplate any particular means of travel in order to validly establish such a right-of-way; nor did it guarantee that such a right-of-way, once established by public use, could forever remain available for use by any specific means of conveyance. So long as the right-of-way has been validly established by public use and is thereby acknowledged to exist, it remains free for public use, though the means of conveyance of the public over that right-of-way is subject to reasonable regulation to achieve other public purposes, such as minimization of terrain damage, avoidance of wildlife harassment, and other reasonable restrictions to achieve such goals. Notwithstanding the fact that a person may have, in the past, have a certain means of conveyance on an R.S. 2477 right-of-way, subsequent state enactments (including the statute in question) are valid as against that person, so long as the right-of-way continues to be available for public use by whatever reasonable means which are authorized by law or regulation.

The proviso in AS 19.40.210 which permits mining claim holders "in the viciniy of the highway" to in essence ignore the off-road vehicle prohibition contained in the remainder of the statute presents particular enforcement problems, as I am sure you are aware. First, the statute gives no guidance as to what is to be considered in the "vicinity" of the highway. Second, it does not require that the mining claim supporting the exception pre-date the enactment of the statute, or that the claim be a valid one; this could obviously lead to the location of spurious mining claims simply to circumvent the off-road vehicle prohibition. Third, the statute by its terms does not require that the use of land to gain access to the mining claim be reasonable, so as to avoid a proliferation of parallel or duplicate access routes to the same general area, or to otherwise avoid significant terrain damage or wildlife impact. Because the intention of the Legislature in enacting the exception appears to be clear (i.e., that the mining claim is presumed to be *bona fide* and that the need for access to the claim is to be met by means which are reasonable), this appears to be a subject for appropriate regulations which implement the exception to the off-road vehicle prohibition in a manner which protects the general public interest in the area.

If you have further questions regarding this subject, please contact us at your convenience.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
1979 Alas. AG LEXIS 526; 1979 Op. (Inf) Atty Gen. Alas.
File No. A-66-499-79
March 8, 1979

Request By:

Claud M. Hoffman
Chief Cadastral Engineer
Department of Natural Resources
Anchorage

Opinion

Opinion by: AVRUM M. GROSS, ATTORNEY GENERAL; Thomas E. Meacham, Assistant Attorney General, AGO - Anchorage

MEMORANDUM

Your memorandum of February 21, 1979, has been referred to me for a response. I have examined the transcribed copy of the instrument recorded by the Department of Highways and the Department of Public Works at Book 14, page 37 in the Bethel Recording District, which purports to accept a right-of-way on unreserved public lands for highway purposes along all section and half-section lines in the state of Alaska, pursuant to 14 Stat. 253, 43 U.S.C. 932 (also known as R. S. 2477). I have also reviewed the statutory authorities cited in the recorded document, and the general statutory authority applicable to the acceptance of the federal right-of-way offer over unreserved public lands. The specific question which you have raised is whether the Department of Highways or the Department of Public Works had authority to declare public rights-of-way along half-section lines under authority of 43 U.S.C. 932. My legal conclusion is that they did not, and that the purported half-section line reservations are ineffective to accomplish such a result.

The federal offer of public rights-of-way over land which was ". . . not reserved for public uses . . ." was extended to the states and territories by the Act of July 26, 1866 14 Stat. 253, R.S. 2477, 43 U.S.C. 932 (since repealed by the Federal Land Policy and Management Act of 1976). The Territory of Alaska, through its legislature, accepted the federal offer of rights-of-way in ch. 19, SLA 1923. This legislative act was effective to accept the federal right-of-way offer as to a tract four rods wide between each section of public land within the territory.

This acceptance and dedication was effective until January 18, 1949, when it failed to be included in the 1949 compiled laws of the territory. In 1951 the Territorial Legislature enacted

ch. 123, SLA 1951, which dedicated a tract 100 feet wide between each section of land owned by the territory or acquired from the territory. In 1953 the Territorial Legislature enacted ch. 35, 1953, which amended the 1951 dedication and dedicated a tract 100 feet wide between each section of land owned by the territory or acquired from the territory, and a tract four rods wide between all other sections of public land in the territory. I am enclosing a copy of the 1969 Opinion of the Attorney General No. 7, which sets forth in detail the sequence of dedications by the legislature of section line rights-of-way, pursuant to the standing federal right-of-way offer.

In none of the above-mentioned instances was the acceptance of the federal offer accomplished by any action other then an official legislative act. Further, the legislature in accepting the federal offer, provided no mechanism by which an administrative agency of the state had the authority to accept or broaden the standing federal offer. To the contrary, the legislature itself undertook that responsibility.

It has been clear since 1923 that the vacation of a section line right-of-way could be accomplished ". . . by any competent authority," and this would certainly include the Division of Highways or the Division of Lands or both. However, there is no mechanism established by the legislative acceptance of the standing federal right-of-way offer which would vest the power in any state administrative agency to broaden the legislative acceptance and dedication by declaring, for example, that all half-section lines on public lands within the state are henceforth 100 foot wide public rights-of-way. To the extent that the recorded document that you have furnished me merely repeats the existing section line dedication pursuant to 43 U.S.C. 932 and ch. 35, SLA 1953, it adds nothing to the right-of-way dedication previously accomplished.

The statutes cited by the recorded document as authority for the Department of Public Works' and Department of Highways' "acceptance" and "declaration" of half-section line rights-of-way are very general recitations of these agencies' general purposes and authority, and do not constitute specific legislative grants of power to broaden the prior acceptance of the standing federal offer by accepting half-section line rights-of-way on behalf of the State of Alaska.

While it is apparent that the existence of recorded instruments declaring half-section line rights-of-way on public lands will create clouds on title in subsequent transfers into private ownership of the affected lands, this should occur only due to an excess of caution by title insurance companies. I am not aware of the extent to which such documents have been recorded in the state generally, but the cleanest way to remove such clouds would be to accomplish the "vacation" of the "dedicated" half-section line rights-of-way in all recording districts in which such instruments have been recorded. Because these declarations of half-section line rights-of-way have, in my opinion, no legal force or effect, they should not be taken into consideration in determining the patterns for state land disposal pursuant to the current land disposal programs and requirements.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
1978 Alas. AG LEXIS 524; 1978 Op. (Inf) Atty Gen. Alas.
[NO NUMBER IN ORIGINAL]
February 22, 1978

Request By:

Donald Harris, Commissioner
Department of Transportation
and Public Facilities
Pouch Z
Uneau, Alaska 99811

Opinion

Opinion by: Thomas E. Meacham, Assistant Attorney General, AGO - Anchorage

MEMORANDUM

I have been requested by Gary Vancil of the Transportation Section of the Attorney General's Office in Fairbanks to analyze the request by Claud M. Hoffman, Chief Cadastral Engineer for the Alaska Division of Lands, for permission to use a width of 10 feet along the exterior of dediciated section-line rights-of-way for the purposes of placement of public utilities in connection with land disposals which the State Division of Lands will be making under the homesite provisions of AS 38.08.010 . This request was made in a letter dated January 16, 1978 from Mr. Hoffman to Woodrow Johanson, Fairbanks Regional Engineer of the Department of Transportation and Public Facilities. Gary Vancil's request to me on this subject arose as a result of our discussion of the legal status of section-line rights-of-way dedications contained in federal and state law, in relation to other subjects.

My initial reaction to the request by Mr. Hoffman, which appears to be supported by the language of federal and state statutes, is that the use of dedicated section-line rights-of-way for purposes other than "public highways" is outside the scope of the grant and dedication, and is therefore inappropriate. Chapter 262 of the Act of July 26, 1866, 43 USC Section 932 (sometimes referred to as R.S. 2477) states,

The righs-of-way not for the construction of *highways* over public lands, not reserved for public uses, is hereby granted. [Emphasis supplied]

Thus the limiting term of the federal grant, which conditions the purposes for which the State can accept the section-line grant, requires use of the land granted for *"highways* over public lands".

As 19.10.010, which has been held to be the territorial (and later state) acceptance of the federal R.S. 2477 grant, states,

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 of 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 inurs to the owner of the tract of which it formed a part by the original survey. [Emphasis supplied]

The dedication by the State of the grant received from the federal government is also strictly in terms of use of the land for "public highways". Thus the state acceptance is consistant with the terms of the federal grant, does not exceed it, and becomes an effective acceptance of the R.S. 2477 offer of dedication. *Uamerly v. Denton,* 359 P.2d 121 (Alaska 1961), *Gibbs v. Campbell,* No. 72-462, Sup. Ct., Third Judicial District, Alaska (January 8, 1973); *Girves v. Kenai Peninsula Borough,* 536 P.2d 1221 (Alaska 1975); *Nercer v. Yukon Construction Co.,* 420 P.2d 323 (Alaska 1966).

Since the State's acceptance of the federal offer of dedication cannot exceed the offer itself, and in fact did not, the section-line rights-of-way accepted by territorial and state legislation are limited for use as "public highways". The use of the exterior 10 feet of these rights-of-way for public utilities is inconsistant with that dedicated purpose, and in fact exceeds the dedication. It might be physically possible to construct under-ground utilities beneath portions of the section-line right-of-way actually used for highway construction, without materially interfering with the use of that easement as a public highway. However, this involves the use of the subsurface, a subject not addressed in either R.S. 2477 or the state legislation accepting the federal grant. Since neither the grant nor the acceptance and dedication speak to the use of the sub-surface, presumably sub-surface uses consistent with use of the surface as a public highway could be accommodated. Nevertheless, the use of the surface of a valid section-line right-of-way for any purpose other than public highways is precluded by the language quoted previously.

As a practical matter, to implement the request of the Division of Lands might be quite difficult, since it would require a determination, as to each tract of land, of the applicable width of the section-line right-of-way, which has varied from time to time according to the history of acquisition of the land by the State and by private parties. This determination in itself might be premature, since there may be no present intention of the Department of Transportation and Public Facilities to construct highways in this area to the full width which might be permissable (or to construct any highways at all).

Furthermore, the legislation at AS 38.08.010(c) (5) does not require that "existing services" be presently "inaccessible" from a right-of-way or easement standpoint in order to disqualify such lands for homesite disposition; instead, a reasonable interpretation of that provision might be that the legislature desired to disqualify lands which were *physically* inaccessible from reasonable extension of existing services. Certainly as natural gas, electricity, and telephone services are provided to new areas, easements and rights-of-way are requlary acquired by utility companies in order to facilitate such extension. The lands thus served are not considered "inaccessible" simply because no existing utility easements were present when consideration was first given to the extension of services to new areas.

It is not clear from the Hoffman letter whether the lands being considered for homesite disposal are "inaccessible" because no utility easements were reserved, or will be reserved, on state lands which will be disposed of under the program, or whether they are considered "inaccessible" simply because such easements would need to be acquired from existing private landowners in order to bring these services to the state lands being disposed of. In the former case the State could easily reserve utility easements at the time of the disposal; in the latter case such easements could be acquired under existing public utility authority at the time services are extended. In neither case would the lands involved appear to be physically "inaccessible" to existing services by virture of the fact that no public utility easements presently exist, nor by the fact that the State's section-line rights-of-way are limited to use as "public highways".

I hope that this memorandum is helpful in clarifying the issues raised by the Hoffman letter of January 16, 1978.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
1976 Alas. AG LEXIS 125; 1976 Op. Atty Gen. Alas. No. 38
[NO NUMBER IN ORIGINAL]
September 7, 1976

Request By:

Dr. Robert LeResche
Director
Division of Policy Development & Planning
Office of the Governor
Pouch AD -- State Capitol
Juneau, Alaska 99811

Opinion

Opinion by: AVRUM M. GROSS, ATTORNEY GENERAL; Sanford Sagalkin, Assistant Attorney General; Jonathan K. Tillinghast, Assistant Attorney General; Peter B. Froehlich, Assistant Attorney General

I. *Introduction*

You have asked that we analyze the legal constraints on differing management options for the Trans-Alaska Pipeline Haul Road. The Haul Road (hereinafter "road") designated as Federal Aid Secondary (FAS) Route No. 681 on the Federal Aid Highway System, extends from Livengood, Alaska, across the Yukon River to Prudhoe Bay, Alaska. It includes 52.5 miles of previously constructed road between Livengood, Alaska and the Yukon River, 4.5 miles of connecting road, a newly constructed bridge over the Yukon River and 367 miles of newly constructed road between the Yukon River and Prudhoe Bay, Alaska. The road north of the Yukon River was constructed and is being used presently by Alyeska Pipeline Service Company. It will be offered to the State as a State highway when the first oil flows through the pipeline.

The basic issue addressed by this opinion is whether the road is a "public highway" or a "development road." Different management options result depending on the answer. Our analysis of this issue has led to an examination of the relevant documents pertaining to the grants of right-of-way, the gravel permits, federal highway funding, and the agreements with Alyeska. On the basis of that examination, it is our opinion that the Haul Road is a public highway.

Certain legal obligations attach to a public highway and those obligations were examined for their bearing on management options. We have tried to cover the gamut of options available to the State, from complete and permanent closure at one end of the spectrum, to unrestricted access, at the other. In the middle of the spectrum would be the broad range of "police power" regulations which control or qualify, rather than prohibit, the use of the Haul Road. It is in this middle ground where we see the most promise for developing viable management options for the State. Opening the road without any restrictions whatsoever, we believe would cause no legal problems. We assume, however, it would create serious problems for both the public safety and the public welfare, since there are presently no facilities for public use on the road and no plan to insure protection for the areas through which the road traverses. The option of permanent closure would result in a high level of exposure to the State: exposure to losing the right-of-way, to paying for the free gravel used in highway construction, to having additional federal highway funds withheld, and to paying Alyeska for the loss to them of the value of the road for pipeline maintenance. By way of contrast our examination of the statutes and case law leads us to conclude that properly framed regulations reasonably restricting the use of the road would withstand judicial challenge and afford a high degree of management flexibility to the State without undue exposure to liability. There are, of course, limitations on such restrictions and we will deal with them in this opinion.

For clarity we have divided our opinion into two sections. The first is a section dealing with the factual background of the legal issues--that is, the facts pertaining to the grants, permits, funds and agreements. The second section contains our analysis of the legal issues concerning use of the road.

II. *Factual Background*

This section of the opinion deals with the facts pertaining to:

--the rights-of-way granted by the Department of the Interior;

--the gravel permits granted by the Department of the Interior;

--the federal funds granted by the Federal Highway Administration; and

--the agreements between the State and Alyeska.

The facts disclose that it was the clear intention of the parties that the road was to be a public facility. In analyzing the facts it is important to separate the above topics because they involve

transactions with and therefore obligations to, three different entities, two of which are departments of the federal government, and one of which is a private corporation.

A. *The Right-Of-Way Grant.* The chronology of events leading up to the grant of right-of-way for the Haul Road have an ironic twist. Following the discovery of oil at Prudhoe Bay, Alaska in 1968, several oil companies developed plans to transport the oil to market through a pipeline extending to Valdez, Alaska. Because the proposed pipeline would cross federal lands, the oil companies had to seek rights-of-way from the Bureau of Land Management (BLM). First in June, 1969 and later in December, 1969, the Trans-Alaska Pipeline System (TAPS), agent of the oil companies, applied to BLM for a right-of-way for the pipeline under the Mineral Leasing Act, and for Special Land Use Permits for the construction of a haul road. *See Wilderness Society v. Morton,* 479 F.2d 842, 848-850 (D.C. Cir. 1973).

Apparently to pave the way for granting the right-of-way, on January 7, 1970, Interior published Public Land Order No. 4760, 35 Fed. Reg. 424 (1970), modifying Public Land Order No. 4582, 34 Fed. Reg. 1025 (1969) which on January 17, 1969, had imposed a "freeze" on all unreserved public lands in Alaska to protect native Alaskan land claims. The modification of the order allowed Interior to grant a pipeline right-of-way under the Mineral Leasing Act and other rights-of-way "reasonably necessary or convenient for the construction, maintenance and operation of the oil pipeline system." P.L.O. No. 4760. However, before any rights-of-way could be issued, on March 23, 1970, a group of conservation organizations filed suit against Interior to enjoin the granting of the rights-of-way as violative of the width limitations under the Mineral Leasing Act. On April 28, 1970, an injunction issued. *Wilderness Society v. Morton,* 479 F.2d at 850.

Thus, up to the time of the injunction, the focus was on obtaining a right-of-way for a *construction* or haul road. Only when the court suit was filed did the State become involved in seeking rights-of-way for a State public highway under 43 U.S.C. 932. The latter Act provides in its entirety:

The right-of-way for the construction of highways over public lands, *not reserved for public uses,* is hereby granted. (Emphasis added)

Apparently, former Governor Miller sent a telegram to then Secretary of Interior Hickel stating that he, the Governor, had authorized construction of the Haul Road under 932. This was followed by a letter to BLM by the Commissioner of Highways on April 7, 1970, with a location map. These were the earliest attempts to accept the grant under 932 (a 932 right-of-way is commonly referred to and will be described hereinafter as a "R.S. 2477" right-of-way). There were other attempts in 1971. See letter of former Commissioner Campbell to BLM, dated October 10, 1972.

Generally, no affirmative act was required by Interior to vest the right-of-way under R.S. 2477 in the State. The language of the Act operates as a present grant which may be accepted either (1) by positive act on the part of appropriate State authorities clearly manifesting an intention to accept the grant or (2) by public use for such time and under such conditions as to prove the grant has been accepted. *Hamerly v. Denton,* 359 P.2d 121, 123 (Ak. 1961). See also 43 C.F.R. 2822-1. But in this case, an affirmative act on the part of the government became necessary because P.L.O. No. 4582 withdrew all unreserved public lands in Alaska. While P.L.O. No. 4582 was modified on January 7, 1970 by P.L.O. 4760, the modification spoke of the "issuance of any other permit or right-of-way as may be reasonably necessary or convenient for the construction, maintenance or operation of the oil pipeline system. . . ." The wording that the right-of-way had to be *issued,* and then only if it was "*reasonably necessary or convenient",* implies that affirmative acts on the part of the federal government were required before the R.S. 2477 right-of-way could vest. This interpretation is supported by 43 C.F.R. 2822.1-2 which is the section of the Code of Federal Regulations which pertains to the granting of R.S. 2477 rights-of-way over reserved public lands. The regulation requires an application, a modification of the reservation, and a grant of right-of-way which may be subject to conditions. This is in direct contrast to grants over unreserved public land which require "no action on the part of the Government". Id. at 2822.1. *See also Wilderness Society v. Morton,* 479 F.2d at pp. 892, n. 90 and 893.

What began as an application for a Haul Road, turned in the midst of controversy, to focus on a public facility. The parties seeking to dissolve the court injunction argued that the right-of-way was for a public highway. *See Wilderness Society v. Morton,* 479 F.2d at 879-883. See also letter of former Commissioner Campbell to BLM, dated September 13, 1972, where the proposed highway is described as a "public facility."

No rights-of-way were issued under 43 U.S.C. 932 (R.S. 2477). The only grant of right-of-way ever issued to the State for the Haul Road was after the passage of and pursuant to the Trans-Alaska Pipeline Authorization Act (TAP Act), 43 U.S.C. 1651 *et seq.* Section 1652(b) authorized the Secretary of the Interior to issue rights-of-way and permits necessary for or related to the construction, operation, and maintenance of the pipeline system including roads and airstrips. Section 1655 provided that a right-of-way granted under 1652(b) for a road or airstrip as a facility related to the pipeline might provide for the construction of a *public* road or airstrip. Pursuant to these sections, on May 2, 1975, the State Director of the BLM issued the State a "Grant of Right-of-Way for a Public Road." This was the only right-of-way ever issued for construction of the road. The grant was expressly made subject to the provision that "the right-of-way shall be used for only the construction, operation and maintenance of the State of a *public* road and related *public* facilities" (emphasis added).

B. *Permits For Gravel.* Approximately 130 Free Use Permits for gravel were granted to the State by Interior on April 15, 1974. Authorization for the permits was pursuant to 1652(b) of the TAP Act, and incorporated the provisions of the Cooperative Agreement between the United

States Department of the Interior and State of Alaska dated January 8, 1974, and Exhibit A, Highway and Airport Stipulations. In Part III of the Agreement, entitled *State Highway and State Airports,* the Haul Road is referred to initially as "a public highway" and repeatedly thereafter as "the highway." The Stipulations, at 1.1 define the (Haul Road) highway as "the State Highway from the Yukon River to Prudhoe Bay".

The intent of the parties that the gravel would be used in a *public* highway would have been important from the standpoint of obtaining the gravel free of charge. Free Use Permits were authorized by 30 U.S.C. 601 which states that the Secretary of the Interior must charge for the use of materials extracted from public land except that he:

is authorized in his discretion to permit any. . . . State. . . to take and remove, without charge, materials and resources subject to this subchapter *for use other than for commercial or industrial purposes or resale.* (Emphasis added)

It would be difficult to argue now on the basis of the facts that it was not the intent of the parties that the gravel would be used for a public facility. Moreover, the explicit finding of the court in *Wilderness Society v. Morton,* (479 F.2d at 884) was that the gravel was for use in a public highway.

The total value of the gravel extracted pursuant to the approximately 130 Free Use Permits and used in construction of the Haul Road is currently between $ 2.8 and $ 5.25 million according to different estimates. More gravel still may be used.

C. *Federal Highway Funds.* On December 5, 1973, the route of the Haul Road from Livengood, Alaska to Prospect Creek was placed by the Federal Highway Administration ("FHWA") on the Federal Aid Highway System as a secondary highway route designated as FAS-681. This System is established and governed by Title 23, United States Code and the corresponding Title of the Code of Federal Regulations. On March 8, 1974, the route of FAS-681 was extended from Prospect Creek (the intersection of FAS-145 to Nome) to Prudhoe Bay, Alaska. The placement of the route on the Federal Aid System made it eligible for the expenditure of funds from the Federal Highway Administration.

Under a Project Agreement dated May 23, 1974, the FHWA obligated over $ 17 million of Federal funds for the costs of constructing the Yukon River bridge. This commitment was increased later to over $ 24 million of Federal funds toward an estimated overall cost of more than $ 40 million for the bridge, its approaches, and pump sites. The Department of Highways currently anticipates that nearly all of this authorized Federal funding will be used on the bridge.

Under another project agreement dated May 23, 1974, for the portion of the road between the Yukon River and Prudhoe Bay, Alaska, the FHWA obligated nearly $ 3 million of Federal funds for construction of the Haul Road. This money was intended for and is being used for environmental surveillance of the construction of the road. The Department of Highways expects that about half of this total or approximately $ 1.5 million will be used.

Unlike the permits for gravel, or the grants of right-of-way, the FHWA Project Agreements make no mention of the Cooperative Agreement and Highway and Airport Stipulations. No formal documents, executed by the parties, describe the nature of the road as either a public highway or a development road. The correspondence between the State and the FHWA can support either interpretation. Under Title 23, U.S.C., Federal Highway funds are available for either public highways or, under a special Alaska provision, for development roads. 23 U.S.C. 118 (d).

The various Project Agreements with the FHWA were signed on May 23, 1974. In December of 1973, Deputy Commissioner of Highways Matlock wrote to the FHWA that the road would be a State highway and "may be opened for use by the public at such time as the State determines it is safe to do so." But as late as March of 1974 Commissioner Campbell wrote the FHWA that the road was within the intent of 118(d), which is the special Alaska provision allowing development roads. To complicate matters, subsequent correspondence sent by State officials after the Project Agreements were signed indicated that the road was deemed to be a public highway.

Notwithstanding the sometimes contradictory language of the correspondence mentioned above, the context within which the federal highway funds were sought and received must take account of (1) the passage in 1970 of AS 19.40 which authorized the contruction of a *public* highway running from Prudhoe Bay, Alaska and (2) the contentions raised by the State in the Wilderness Society lawsuit, supra, that the Haul Road would be a "public highway." Even if some statements by State officials might be construed to mean that funds were solicited and received for a development road, on the whole, the facts support the contrary view.

There is one additional point that bears mention here. The Project Agreements mentioned above include the following standard provision which is generally intended to "protect the investment" of the FHWA in a highway:

12. MAINTENANCE. The State highway department will maintain, or by formal agreement with appropriate officials of a county or municipal government cause to be maintained, the project covered by this agreement. (See also 23 U.S.C. 116)

Thus, whatever the nature of the highway - public or development - the State, by virtue of this promise, has agreed to maintain the highway for whatever its use might be.

D. *Agreements With Alyeska.* On June 11, 1971 the State and Alyeska agreed that Alyeska would construct a "highway" for the State from a point on the Livengood to Yukon River highway to Prudhoe Bay, Alaska (Part 1). The agreement provided that the State would secure rights-of-way and free use permits for gravel pertaining to Federal and State lands (Part 2), and that the State would maintain the highway after its acceptance (Part 10). The contract specifically provided:

"The Highway shall be a State highway and may be used by (Alyeska) . . . for the construction and operation of the Trans-Alaska Pipeline without incurring any State-imposed tolls or costs for such use of the highway, except for applicable motor vehicle taxes, licenses and fees, such as the Alaska Motor Fuel Oil Tax, and other fees and costs imposed by law, regulations and customary conditions of its utility permits." (Part 3).

The construction of the Yukon River Bridge was covered by another agreement executed on June 11, 1971. Under this agreement the State agreed to construct the bridge while Alyeska agreed to construct the approaches and pay the State $ 6.5 million (later amended to $ 13.5 million) for the right to place the pipeline on the bridge. The State also agreed to maintain the bridge in a condition sufficient to support both traffic it would be required to bear and the pipeline as long as it should be used. On February 11, 1974 and June 17, 1975, the agreement was amended and Alyeska agreed to pay the State maximums of $ 2.2 million and $ 485,000 for direct and indirect costs of modification to Pier No. 4 of the bridge and to pay the sum of $ 594,000 as a bonus for early completion of the bridge. Not all of this amount has been collected from Alyeska to date and some of the amount is in litigation.

Another State-Alyeska road construction agreement was entered into in February 1974 and provided that the State would build and maintain as part of the State Highway System 4.5 miles of "highway" between the south approach of the Yukon River Bridge and the existing Livengood-Yukon River highway. Alyeska agreed to reimburse the State for the cost of such construction.

These then are the principal facts which form the background for our legal opinion. We now move to the legal analysis itself.

III. *Legal Analysis*

A. *The Haul Road is a Public Highway.* With a few exceptions, the facts previously noted indicate that the parties to the various transactions involving the Haul Road believed that the road was a "public highway", as opposed to a "development road." That intent is significant for the term "highway" has an accepted meaning. A highway is a way open to the general public at large without distinction, discrimination or restriction except that which is incident to regulations calculated to secure the best practical benefit and enjoyment to the public. *Prillaman v. Commonwealth,* 100 S.E. 2d 4 (Va. 1957). The primary characteristics of a highway are the right of common enjoyment on the part of the public at large (*Karl v. City of Bellingham,* 377 P.2d 984 (Wash. 1963)) and the duty of public maintenance. *Prillaman, supra.* See also 23 C.F.R. 470.2(b)(3). The term "public highway" is tautological (*Detroit Int'l Bridge Co. v. American Seed Co.* 229 N.W. 791, 793 (Mich. 1930)), but is used often nevertheless.

Two arguments could be raised in support of the view that the Haul Road is not a public highway, but both arguments are weak. The first involves the possibility that the Haul Road was funded under 23 U.S.C. 118 (d), the special Alaska provision of law which allows the use of Federal highway funds for the construction of development roads. The evidence supporting this contention is a letter from former Commissioner Campbell to the FHWA in March, 1974 which describes the road as being within the intent of 118 (d). There is no explanation for this reference. Moreover, the totality of evidence suggests that the Commissioner's reference was in error.

In analyzing whether FHWA funds were solicited and used for a "public highway" or a "development road," it is appropriate to turn to the facts surrounding the execution of the Project Agreements to ascertain the meaning of the Agreements themselves. The Project Agreements between the State and the FHWA are contracts, to be interpreted according to principles of contract law. *Flynn v. State,* 280 N.Y.S.2d 512, 516 (Ct. Cl. 1967). Under either Federal principles of contract interpretation (*see generally Pearl Assur. Co. v. School Dist. No. 1,* 212 F.2d 778 (10th Cir. 1954)) or Federal choice of law reaching Alaska contract law (*National Bank of Alaska v. J.B.L. & K. of Alaska, Inc.,* 546 P.2d 579 (Ak. 1976)), the courts would look to the extrinsic facts surrounding the solicitation of funds and execution of Project Agreements to determine the intention of the parties on the purpose of the Haul Road. Almost all of the facts support the conclusion that the road was intended to be a public highway. Chief among these facts earlier reviewed were the declaration of the State Legislature in AS 19.40 that the Haul Road was a public highway and the vigorous contentions made by the State that the highway was to be public in the *Wilderness Society* lawsuit.

The second legal argument which, if correct, would modify our conclusion that the road must be managed as a public highway would be that the right-of-way vested under 43 U.S.C. 932, instead of under the TAP Act. In the "Factual Background" section of this letter, we stated our opinion that a 932 right-of-way was never issued and did not automatically vest. But even assuming that the right-of-way vested under 932, the result concerning the nature of the road as public would probably be the same. Section 932 uses the word "highways," which as we

have noted courts take to mean public highways. There is an old line of cases (*see e.g. Flint & P.M. Ry. Co. v. Gordon,* 2 N.W. 648 (Mich. 1879)) which hold that the R.S. 2477 right-of-way is a grant available to privately owned and operated railroads. One could argue that if the Haul Road right-of-way was granted under R.S. 2477 then its purposes would be served by a development road, citing the railroad cases; however, it is our opinion that this argument has little merit, and would be unsuccessful. Most of these cases are old, and the principle has not been extended beyond railroads.

Our conclusion that the Haul Road is a public highway gives rise to several important consequences. Most important, the road must be managed as a public highway. If it is not, if it is managed in such a way as to defeat its basic nature (i.e. permanently closed or unreasonably restricted) the State will have breached its obligations to the FHWA and will become liable for the repayment of the federal construction funds. Since the free federal gravel would have been used for a commercial or industrial purpose, the State might well become liable for its value. The State would be vulnerable to an action by the Department of the Interior to reclaim the right-of-way for breach of the condition that it be used for a public road. Finally, if the road was not maintained by the State, the State might be liable to Alyeska for the value of the use of the road for pipeline maintenance.

If it could be maintained that the Haul Road was a development road, instead of a public highway, and if the road continued to be managed as a development road, then the State would not have to reimburse the FHWA for the federal highway funds. But such a holding would mean that while the State was relieved of liability to the FHWA, it would still be liable to the Department of the Interior, since a promise of public highway management was independently made to that agency.

The State, of course, could relieve itself of all or some of its obligations to the FHWA for management and maintenance of the road by negotiating with the FHWA for the removal of all or part of the Haul Road from the federal-aid system. *Bogart v. Westchester County,* 57 N.Y.S.2d 506 (Sup. Ct. 1945) *aff'd* 59 N.Y.S.2d 77 (App. Div. Second Dept. 1945); *see also FHWA Policy & Procedure Memorandum* 10-1, May 28, 1965, in effect at the time of execution of the project agreements for the road, and 23 C.F.R. 470.6(b) July 1, 1976, now in effect. The FHWA would probably require repayment of the federal funds involved before approving such a removal. (See December 19, 1975 memo from FHWA to former Commissioner of Highways Parker stating the FHWA position that not opening the road to the public would require repayment of federal funds.)

In conclusion, since the Haul Road is a public highway, any attempt to completely close the road would involve a high degree of exposure to the State, exposure for both monetary damages and to possible loss of the right-of-way. The next section of this opinion deals with options other than closure. There are a number of management options available through reasonable regulation of the road. The limits of these regulations is that they cannot be used

unreasonably or in a discriminating manner. If they were so used, the purposes of the road as a public highway could be frustrated. In theory, this would trigger the same types of remedies as would be provoked by complete closure.

B. *Reasonable restrictions may be placed on the use of the Haul Road.* While the complete closure of the Haul Road to any form of public and/or industrial traffic would give rise to a host of legal and practical problems, the State nonetheless possesses wide latitude in the actual management of the highway. It is our opinion that this discretion is sufficiently broad to permit the State to postpone the opening of the road so as to best mitigate the adverse environmental, social and economic impacts of an immediate opening, and to afford increased protection for the public. Moreoever, the State retains an exceptionally wide range of options with regard to restrictions covering the number, type or seasonal usage of vehicles upon the Haul Road.

In delineating the legal parameters of the State's management authority over the Haul Road as a public highway, we are faced with a body of case law which, while numerically significant, is also inconsistent and uninformative. Broad and confusing phrases, used inconsistently, and often in conflict with the results of the case, make precision impossible.

The general rule, however, can be succinctly stated. While courts often speak of the public's "right" to unencumbered access over State highways (*U.S. v. Barner,* 195 F. Supp. 103 (N.D. Cal. 1961)) and a corresponding obligation by the State to allow access (*Id.*), courts likewise make it clear that this "right of usage" is subject to the State's broad power to regulate and restrict usage in order to protect the public health, safety, and welfare. This power by the State has been termed "exceptionally broad" (*State v. Cotten,* 516 P.2d 709, 711 (Ha. 1973)), and as constituting one of those areas of peculiar State concern "with respect to which the State has exceptional scope for the exercise of its regulatory power." *Southern Pacific Company v. Arizona,* 325 U.S. 761, 783 (1945). Restrictions on highway usage must "reasonably tend to correct some evil or promote some interest of the State" (*Peden v. City of Seattle,* 510 P.2d 1169, 1171 (Wash. 1973)) and courts will not interfere with this exercise of regulatory authority unless the regulation or restriction is "so manifestly unjust and unreasonable as to destroy the lawful use of property, and hence. . . not within the proper exercise of the police power." *Dade County v. Palladino,* 302 So.2d 692, 694 (Fla. 1974). It is also well settled that this broad power to regulate is in no manner compromised by the fact that the highway was built in whole or in part with federal funds. *Whitney v. Fife,* 109 S.W.2nd 832 (Ky. 1937); *Southern Bell Tel. & Tel. Company v. Commonwealth,* 266 S.W. 2nd 308 (Ky. 1954).

Of course, limits on the State's authority do exist. Even this generous standard could be contravened if, for example, the State were to restrict access to the road on the basis of arbitrary classifications (cf. *South Carolina Highway Department v. Barnwell Brothers,* 303 U.S. 177 (1938)), were to close or restrict the highway for patently non-public purposes (*Bogart v. City of New York,* 93 N.E. 937 (N.Y. 1911)) or were to indefinitely delay opening the road for

such a long period of time as to evidence an intent to abandon the road as a public facility. *District of Columbia v. Thompson,* 281 U.S. 25 (1930).

In reviewing specific management options, the breadth of the State's power becomes clear. First, let us assume that the State wished to delay opening the road to public traffic for some reasonable period in order to permit the preparation and completion of a land-use plan for the area, and to insure that adequate facilities exist to protect the public welfare and safety--for example, trooper stations and other facilities thought necessary for public protection. It is clear that a mere temporary delay in improving, completing and opening a right-of-way to the public would not violate the State's obligations to open and maintain the right-of-way as a public thoroughfare. As one court succinctly put it:

"To require a city to open and improve all its streets at once without reference to the need of such improvement at the peril of forfeiting them would be absurd as a matter of public policy. . ." *City of Jamestown v. Miemietz,* 95 N.W. 2nd 897, 903 (N.D. 1959); in accord, *Drane v. Avery,* 231 P.2d 444 (Arizona 1951).

The case of *District of Columbia v. Thompson, supra,* is instructive in this regard. In that case, the District of Columbia acquired through condemnation a right-of-way for a public street. Special assessments were then levied against adjoining landowners to improve and maintain the public thoroughfare. After a period of 14 years from the date of the assessments, no effort at all had been made to improve the road to make it passible to the public; no policy or obstacle which would inhibit or prevent the opening of the thoroughfare existed; and the city had in fact erected physical obstructions over the right-of-way in the interim. In that case, the Supreme Court held that this combination of affirmative acts and prolonged inaction, when combined with the fact that the city had no future plans for opening the road, evidenced an intent on the part of the city to abandon the right-of-way as a public street. As a result, the court ordered the return of the special assessments previously imposed.

The extreme nature of the city's action in that case should be contrasted with the alternative under discussion here--that is, a finite delay in opening the road to accomplish certain specific legitimate state goals. It is clearly within the State's police power to protect the public from the kinds of hazards that would result if the road was immediately opened to unrestricted travel without adequate support facilities and services. Neither the road nor the right-of-way will lose its public character simply because a delay in opening the road to the general public is necessary in order to ameliorate these vital public problems.

Turning now to a second alternative, let us consider the possibilities that the State wished to restrict in some way the use of private automobiles over all or a portion of the road. The extreme case would be that of confining public utilization of the road to forms of public transportation such as buses. The purposes of such an extreme restriction on private vehicles

would be similar to those which would motivate a delay in opening--i.e., protection of the environment and the public safety. It is instructive, we feel, to analyze whether even such an extreme restriction might be valid, since if it were, obviously less restrictive measures would be equally valid. We are, of course, not meaning to recommend such a restriction - merely using it as a vehicle for analysis.

A good deal can be learned on this question from a review of the cases which have challenged the establishment of exclusive bus and carpool lanes in order to conserve fuel, and to reduce air pollution. These types of road restrictions are clearly valid. In *Peden v. City of Seattle, supra,* the city instituted a program whereby certain on and off ramps, and certain lanes on a freeway were restricted to buses. A road user complained that his "right" to traverse the road in his private car was being improperly impaired by this regulation. In holding that this "impairment" of the plaintiffs' "right" to utilize his private auto on a public way was "of no constitutional consequence," the court noted:

"The legislature had declared that separate and uncoordinated development of public highways and urban public transportation systems is wasteful of the State's natural and financial resources." 510 P.2d at 1171.

Similarly, in *Dade County v. Palladino, supra,* the court stated quite explicitly that it would not second guess the State's judgment that the establishment of bus and carpool lanes on public highways was necessary to promote the public welfare.

In both cases, however, certain lanes on the highway remained open to the use of private automobiles. The question then becomes: can the holding of these cases--to wit, that the State may designate what forms of public transportation are appropriate on public rights-of-way in order to protect the environment and public welfare--be extended to cover an exclusive designation of mass transportation systems on the right-of-way as a whole? As one court noted in *District of Columbia v. Train,* 521 F.2d 971 (C.A.D.C. 1975), highway systems often aggravate the great social, environmental and economic problems which the private automobile has wrought. It is thus appropriate the court suggested, that in this era of increased public responsibility, governments now utilize the highway system to ameliorate those same ills. If in a particular situation, such as the Haul Road, the problems associated with the use of private automobiles can be ameliorated not merely by their restriction, but by their prohibition, then the logic of the "bus lane" cases should apply. To rule to the contrary would require the court to hold that the "public right" of travel over public highways automatically implies the right to use a private automobile. We cannot predict with certainty what view a court will take, but there is a strong possibility that a court would hold that in providing the public with reasonable opportunity to traverse the right-of-way through use of mass transportation systems, important public values would receive protection and the public's right of passage across the corridor would be satisfied.

From the possible total prohibition of the use of private automobiles upon the road follow a host of lesser possible restrictions. Given the exceptionally broad nature of the State's regulatory power over the road, and the compelling public interests involved, we believe that it needs no prolonged discussion to conclude that restrictions such as seasonal closure or a controlled access scheme (whereby only a particular number of vehicles would be allowed on the road at one time) clearly would constitute valid exercises of the State's police power. Similarly, the same power would support controls on the way vehicles are used, controls for instance that would allow stopping or camping only at designated places along the road.

A cautionary word might be said regarding any restrictions which would involve discrimination among users. An example of such a restriction would be the allowance of industrial traffic only during the temporary delay period which we have previously discussed, or alternatively the permanent bar or restriction of certain types of users. At the outset, it should be stressed that a discrimination in terms of users is not unlawful as such. There are two tests which courts use to review the propriety of legislative or administrative classifications. In the case of discrimination among road users, the less rigorous "rational basis" standard applies. *Whitney v. Fife, supra; South Carolina Highway Department v. Barnwell Brothers, supra.* Under Alaska law, a discrimination among highway users would be valid if the classification bears a fair and substantial relationship to the purpose of the State action. *Isakson v. Rickey,*

P.2d

, Op. No. 1267 (Alaska S. Ct., May 21, 1976). This would involve an inquiry into the actual purpose of the regulatory scheme for the Haul Road and whether the classification of users fairly and substantially furthers that purpose. With regard to a classification which would permit only industrial users during an interim delay, we assume that the purpose of the restrictive scheme would be to prevent degradation of the Arctic environment before any reasonable plans were implemented to deal with the opening of a public right-of-way in this isolated area. By definition, these impacts would be caused by individual automobile access. It is thus neither necessary nor appropriate to apply the same restrictions to tightly controlled industrial activity. Moreover, the fairness of the classification, at least with regards to pipeline-related activity, would be enhanced by the factors of reliance on access and existing usage. Thus, under *Isakson v. Rickey, supra,* we believe a classification along these lines would withstand judicial review.

We have spoken to this point only of the general range of the State's police power with regards to the Haul Road. An additional word might be said with regard to the authority which the legislature has in fact conferred upon the Commissioner of Highways with regard to the Haul Road. The Commissioner of Highways is given broad authority to regulate the usage of public roads, including the power to control access (AS 19.05 .-040(5)) and to close highways. AS

19.10.100 ; AS 28.05.010(4) . See also AS 28.05.020 . There seems little doubt that the Commissioner possesses sufficient authority to impose any of

the restrictions which we have discussed in this opinion. Nor do we doubt that the Commissioner has the ability to impose these restrictions for purposes which we have stated. The Commissioner is specifically given the power to "regulate roadside development" and to "preserve and maintain the scenic beauty along state highways." AS 19.05.040(6) - (7). There are many goals which the legislature sought to accomplish through the Haul Road--ranging from resource development "consistent with the public interest" (AS 19.40.010(a) (1)), to public accessibility to the Arctic area ((a) (2) and (a) (4)), to alleviating the present problem of inaccessibility ((a) (4)) and to protecting the environment. Section .010(b)-(c). Thus, the statute recognizes, rather than restricts the rather comprehensive balancing analysis which must go into responsible public management. Accordingly there is nothing in this statute which would significantly limit the broad regulatory discretion of the Commissioner.

An issue related to the management of the Haul Road is whether the costs of opening and maintaining the road, can be placed upon its users. There is no simple answer to this question. On the one hand, Title 23 of the United States Code which governs the Federal-Aid Highway System contains a prohibition against the charging of tolls on "all highways constructed under the provisions of [Title 23]." 23 U.S.C. 301. The term "highway" includes "bridges" within the meaning of the Title. *Id.* 101. On the other hand, the courts have said that not all charges imposed on users of the public highways are "tolls" within the statutory proscription. *Carley & Hamilton v. Snook,* 281 U.S. 66 (1930).

In *Carley & Hamilton, supra,* the charges being challenged were graduated motor vehicle registration fees imposed upon vehicles carrying passengers or property for hire. The appellants argued that the fees were tolls prohibited by the Federal Highway Act. In rejecting appellants' argument, the court said:

"The present registration fees cannot be said to be tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or bridge, exacted when and as the privilege of passage is exercised." *Id.* at 73.

The court reasoned that the fees were "exactions, made in the exercise of the state taxing power, for the privilege of operating specified classes of motor vehicles over public highways" (*Id.* at 71) and were not tolls. *Id.* at 74.

In *Johnson Transfer & Freight Lines v. Perry,* 47 F. 2d 900 (N.D. Ga. 1931), in finding valid a cents per mile tax imposed on private and common carriers of persons or property over public highways, the court reasoned:

"Considering the great damage done by freight trucks continually using the same road, and the great benefits to the carrier thus provided with a track which he does not have to maintain, or pay property taxes on, it is just that such carrier should, in proportion to his use of the road, contribute to the public treasury which maintains it." (at.904)

In holding that the tax was not a toll, the court said the imposition was on the business of carriage, which is not an ordinary, but an extraodinary use of the road.

In *Deppman v. Murray,* 5 F. Supp. 661, 668 (W.D. Wash. 1934), a 1% tax on gross revenues was upheld as a tax, not a toll, on carriers operating on public highways and in *Liberty Highway Co. v. Michigan Public Utilities Commission,* 294 F. 703, 708 (E.D. Mich. 1923), the court upheld a privilege tax on common carriers using public highways. The court said that the charge was not a toll, and that it may be based upon anticipated highway repair and improvement costs. As to charges on business and industrial users of highways, see also *Smallwood v. Jeter,* 244 P. 149, 156 (Idaho 1926); and *Sanger v. Lukens,* 24 F. 2d 226, 229 (D.C. Idaho 1927), *rev'd on other grounds,* 26 F. 2d 855 (Ninth Cir. 1928).

The principle which emerges from the cases is that imposition of graduated registration fees, privilege taxes, or charges, on certain classes of users of public highways, to help defray the public costs of such highways is a valid exercise of a state's taxing power, and is not a toll, proscribed by the Federal Highway Act. Unfortunately, none of the cases discuss the specific question of whether a state can impose a charge on the use of only one road in its system. The problem which we see is that by singling out one road for the charge, the aura of a toll is created, which could invalidate the charge on that basis. The preferred practice would be to impose a charge on certain classes of highway users that create extraordinary impacts on highway maintenance needs on a state-wide basis and include those classes which would impact most the Haul Road. Thus, a tax could be imposed on companies which used heavy equipment, or trucks upon the highways. Such taxes could be imposed and graduated on the basis of mileage, weight, type of vehicle, or other classification as long as the classification had a rational basis.

Alternatively, the State could negotiate the removal of part or all of the Haul Road from the Federal Aid Highway System, therby removing the prohibition against the imposition of tolls, or accomplish the same result through Congressional action. This could entail the repayment of some or all of the Federal funds expended, but there may be ways to limit the impact of this approach. For example, the State may be able to negotiate the removal of only that portion of the road north of the Yukon River. Or, the State may be able to obtain agreement on the removal of the road immediately, while reimbursing the Federal Government over a period of years, with a payment schedule tied to expected tolls.*

Thus, there are several avenues available to the State to have the heavy commercial users of the Haul Road bear their fair share of the costs.

In conclusion, a reasonable delay in the opening of the Haul Road is a legally available option should such a delay be necessary to prepare for reasonable use of the road. Likewise, the State may restrict or close the highway to certain classes of users if that restriction bears a fair and substantial relationship to the protection of the environment and public safety. The authority of the State to establish seasonal, load or traffic volume restrictions seems clear beyond doubt. While the ability of the State to limit the use of private automobiles on the Haul Road is not settled beyond doubt, we believe that courts would uphold such restrictions as long as some reasonable access is provided to the general public, either by restricted use of private vehicles or by a means of public transportation. Finally, tolls may not be charged as long as the road remains part of the Federal Aid System although industrial or business users may be charged a reasonable fee for the privilege of using the public highways for their businesses. We should add that all of the options discussed above can be applied to a part of the road as well as to all of it.

IV. *CONCLUSION*

The conclusion to be drawn from this opinion is that the State has a large number of management options available to it in planning for use of the Haul Road. The most restrictive type of management, that of closure, is in our view not an option in the practical sense since it would be fraught with a great deal of exposure to liability for both monetary damages and loss of the Haul Road right-of-way. Thus, it may be in what we have termed the middle ground of reasonable regulation of access and charges on industrial users (or negotiated removal of the road from the Federal Aid System) that turn out to be the options which, as a practical matter, can be implemented. This middle ground covers a broad range of possibilities and we mean to intimate no opinion as to the desirability of any of these possibilities. We only conclude that if such reasonable restrictions were imposed, either by legislation or regulation, they would be legally sound.

Footnotes

* It should be noted that, at least as to Alyeska, the State-Alaska road construction agreement of June 11, 1971 prohibits the State from imposing any tolls or costs on Alyeska for use of the Haul Road, except for "fees and costs imposed by law, regulations and customary conditions of its utility permits." This would certainly relieve Alyeska of at least direct charges on the use of the Haul Road.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
1969 Alas. AG LEXIS 18; 1969 Op. Atty Gen. Alas. No. 7
[NO NUMBER IN ORIGINAL]
December 18, 1969

Request By:

Mr. F. J. Keenan, Director
Division of Lands
Department of Natural Resources
Anchorage, Alaska 99501

Opinion

Opinion by: G. KENT EDWARDS, ATTORNEY GENERAL; John K. Norman, Assistant Attorney General

Reference is made to your request for an opinion 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:

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)

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 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 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:

... 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:

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.

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.

Footnotes

Footnotes

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).

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.

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.

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.

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, ...

11 *United States v. Rogge, supra* note 2.

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; ***."

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 subsequent conformation with the official public land surveys.

16 For further discussion of section line right-of-way width, see Opinion No. 29, 1960 Opinions of the Alaska Attorney General.