ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672
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Interior Village Association
IVA

CORPORATE DEVELOPMENT AND
TECHNICAL SERVICES FOR
VILLAGE BUSINESS CORPORATIONS

1274 MINNIE STREET
FAIRBANKS, ALASKA 99701
TELEPHONE: (907) 452-1601

October 23, 1984

Dan Alex, President
Alaska Native Land Managers Association
Pouch 6699
Anchorage, AK 99502

Dear Dan:

Enclosed are copies of a recent MOU between BLM, DNR and DOT/PF (in Fairbanks), and a DOT/PF briefing paper on RS2477 Rights-of-Way. I have serious objections to them from both a land title and a land management perspective.

To begin, RS2477 Rights-of-Way are rights-of-way which, if valid, are rights granted outside the statutory realm of ANCSA or FLPMA, i.e., 43 USC 932. Basically, if a right-of-way is to be determined valid, the land over which it crossed had to be vacant, unreserved, public lands at the time use began and there has to be a determination, (frequently in court if the landowner objected), that there was sufficient public use or expenditure of public funds, to qualify under the statute. If determined valid, the right-of-way width was usually ditch to ditch. The only entity with the authority to adjudicate these rights is a court of law, not the BLM.

What this means in practical terms is that these rights-of-way have never been identified in title documents granted to private landowners in this state or elsewhere in the lower 48 until the State of Alaska pressured BLM to insert these rights-of-ways in native conveyances. Since BLM cannot, by law, adjudicate these rights, they are considered assertions until they are proven.

If a trail or road crossed a private landowners property and the landowner questioned the public's right to use the trail, the owner may block the trail. If the user objects, he can take the landowner to court to protect his right of access, or vice versa.

The MOU, needless to say, was written without native input. It establishes a de facto adjudication process which places these rights-of-way on BLM's land status documents and ultimately in Native Land conveyances. The Native landowner has no opportunity to protest. The State, on the other hand, has gained another leg up on the private landowner by having these assertions of rights placed on the public land records and Native land title without

an opportunity for complete adjudication in the proper forum. (Please read their briefing paper closely.) If the RS2477 assertion ends up in the land conveyance, the Corporation receives a clouded title document and faces potentially significant management problems.

The management problems can be significant. First, most of these RS2477 assertions are made on cold winter trails. With modern technology many people want to use these trails in the summertime, a period when it is impractical to use the trail in its winter location, so they begin to move this way and that to avoid the pot holes and permafrost areas creating new trails and often serious surface damages. This creates surface damage problems for the landowner. There is also a question whether the public has the right to use a winter trail in the non-winter months.

Secondly, as the DOT/PF briefing paper points out, even if an RS2477 is determined to be valid, the state has reserved the right to decline to maintain the rights-of-way. This leaves the landowner with continued resource destruction and the public using a potentially unsafe public right-of-way. In simple terms, the state wants its cake and eat it, too. I say that if they want the rights of ownership, they should accept the obligation to manage and maintain them!

My recommendation to the Native Land Managers is to consider these points and, if they agree, develop a strategy involving our congressional delegation and state legislators to remove these assertions from the public land records until proven valid in the proper forum and seek legislation that would require the state to accept management responsibility when they assert title.

Sincerely,

Paul C. Costello
President

PCC/bap

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1274 MINNIE STREET
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November 1, 1984

Lavelle Black
Dept. of Interior
Alaska Program Staff (311)
18th and "C" Streets, N.W.
Washington, D.C. 20240

Dear Lavelle:

Here is the letter and enclosures we discussed today. As I indicated, they create problems in three related areas.

1). To begin, if I were a native landowner, I would be offended that BLM drafted such a document without any visible effort to involve the native community. As my lawyer friends would say, "It flies in the face of ANCSA."

2). Next, the MOU establishes a de facto adjudication of less than fee interests when BLM does not have the authority to adjudicate RS 2477 interests. The only forum to properly adjudicate them is with the landowner, or if that proves to be unsuccessful, in court. The only Federal land title to be prejudiced with these questionable assertions are native lands. In my experience I have never found a Federal patent in the Lower 48 which purported to adjudicate an RS 2477.

3). It represents land management philsophy at its least, i.e., the State would like title any way they can get it, but want "the right to refuse service" (maintenance) to anyone. This creates a conflict between the unsuspecting user and the landowner when a user attempts to use a damaged trail and finds that he cannot because of permafrost degradation, for example. He makes the choice of not going or just moving the trail over a bit to avoid the impassable section. Hence, he infuriates the landowner by destroying surface resources and trespassing. The user then faces an irate landowner, possible criminal charges and the State who chooses to do nothing. The Seventy Mile Trail in Eagle is a good example.

My solution is simple. Revoke the MOU and let the landowners and the State decide in the manner most practical which right is valid and who is responsible for that right. If a right is valid because there is a continuing public use and need, then let the State seek the funds to maintain the right-of-way on a case by case basis. BLM is helping neither themselves

nor the Native community nor, in the run, the taxpayers of this state, in trying to decide what is best for a situation that they have no legal obligation to be involved in.

I hope that this finds you well and enjoying the fall season in Washington. Give my regards to Bob.

Sincerely,

Paul C. Costello
President

Enc: Letter to Dann Alex
Briefing Paper
MOU

PCC/bap

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: SJR 10

Title: RS 2477 Identification

Sponsor: Mahill; et al

Requestor:

Date of Request:

FISCAL DETAIL

Agency Affected: DNR, DOT/PF

Program Category Affected: Management of Land & Water Resource

BRU, Program or Subprogram(s) Affected: ; Land & Water Public Use

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		92.0	92.0	92.0	92.0	92.0
200 TRAVEL		4.0	4.0	4.0	4.0	4.0
300 CONTRACTUAL		34.0	34.0	34.0	34.0	34.0
400 SUPPLIES		1.0	1.0	1.0	1.0	1.0
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING		131.0	131.0	131.0	131.0	131.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		131.0	131.0	131.0	131.0	131.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		2.0				
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Provides for two full-time positions (Natural Resource Officer II) to identify and compile information necessary to assert in court those roads and trails which quali: as RS 2477's. Includes funding for agency and public input, printing of maps and road/trail atlas, copying, public notice and advertisements. Also travel in suppor of research and to conduct public/agency meeting.

Prepared By: Garv Gustafson Phone: 265-4347

Division: Land & Water Management Date:

Approved by Commissioner: Milton D Arnold, Deputy Date: 2/21/85

Agency:

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

DNR FISCAL NOTE

7/1/84

BRIEFING PAPER

Alaska Department of Transportation and Public Facilities

Northern Region

Division of Planning

REVISED STATUTE 2477 RIGHTS-OF-WAY

Legal Basis for RS 2477

Congress by the Act of July 26, 1866 granted rights-of-way for highways over unreserved public lands, and by doing so, established an extensive network of public rights-of-way in Alaska. This Act, now codified as 43 U.S.C. 932, Revised Statute (RS) 2477, states in full:

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

Although RS 2477 was repealed October 21, 1976 by Public Law 94-579, section 706 (90 stat. 2793), those rights-of-way previously established remain valid.

Geographic and Historical Development

In Alaska, RS 2477 rights-of-way are concentrated mainly in the Interior, Western and Southwestern regions of the state and in the Copper River basin. In Southeastern and along the Southcentral gulf coast, RS 2477 was not as important to transportation because of the accessibility via water.

RS 2477 highways have provided much of the access to areas of Alaska in the past and continue to do so. Historically, these roads were used for trade routes and access to mining areas. Today, they serve as access for mineral development , forestry, recreation, agriculture, hunting, fishing, inter-village travel, and access to homesteads, homesites, and other land disposals. Most of the well established, frequently traveled trails appearing on U.S.G.S. topographic maps are RS 2477 highways.

Since the RS 2477 statute was written in such a brief and nonspecific manner, it does not establish criteria for determining the location or width of the rights-of-way nor does it define what constitutes a "highway." What was considered a "highway" 118 years ago when the law was passed differs greatly from the modern concept. Further, a procedure for identifying and claiming rights-of-way was not established.

At this time, there is confusion and differences of opinion regarding the location, validity and extent of RS 2477 highways in Alaska. Although RS 2477 highways exist in several states, this issue has taken on special significance in Alaska because of the remoteness and inaccessibility of much of the state.

Additionally, the Alaska Statehood Act, the Alaska Native Claims Settlement Act (ANCSA), and the Alaska National Interests Lands Conservation Act (ANILCA) all initiated major changes in land ownership in Alaska. As land is transferred from the Public Domain to the State, Native corporations, private individuals, and other Federal agencies, there is a diversity of views regarding access and land management policies. Some landowners wish to regulate use by type of vehicle, weight, time of year, etc. Some favor preserving

DOT/PF HISTORICAL ANALYSIS

access for local residents. Others prefer no access at all. Furthermore, as land is conveyed, the validity of RS 2477's is being questioned. Currently, in land conveyance documents, RS 2477 rights-of-way are protected only with the clause, "valid existing rights," with no visible evidence of them on the Federal or State land status plats. The existing Trail Inventory File, which catalogs many RS 2477 roads, is at a scale of 1:250,000 (standard U.S.G.S quad map) and does not show the the location of RS 2477's in sufficient detail to allow them to be entered on the land status plats.

Need for Procedures

Confusion among State and Federal agencies and private landowners as to the implementation of RS 2477 continues to hinder management and use of these highways. It has become apparent that the public requires assistance in identifying RS 2477 roads. State, Federal and local governments, Native corporations, and other property owners need to know the location and authorized uses of RS 2477 roads in order to reasonably manage their lands.

For rights-of-way, land selection, land claims and other land transfer actions, land status plats serve as part of offical records of land ownership for both the Federal government (through BLM) and the State government (through DNR). It is in the State's and the public's interest to establish these RS 2477 claims on both State and Federal land status plats, thereby asserting the RS 2477 claim and identifying its location. Placing the roads on the status plats would give more credibility to the State's claims and would establish, for the record, both a file and a geographic document asserting the claims. Thus, when land is conveyed, the State and public RS 2477 claims would be much more viable than simply a "valid existing rights" clause in a conveyance document. The location of each trail would be generally established, therefore it would be obvious to anyone researching land status that a right-of-way claim exists across a particular parcel.

If the State documents its claims, other parties are put in the position of challenging the State's claim rather than vice versa. Presently, the State would have to prove "valid existing rights," on conveyed land. If the trails were already on the status plats, anyone who disareed would be in the position of challenging the State's claim. Asserting an RS 2477 claim in this manner is only an administrative determination since BLM does not adjudicate RS 2477 claims. If someone were to challenge the State, the State's claim would still have to be proven in court; however, we certainly would be in a much better position to do this.

Other Findings

Discussions with DNR personnel in Anchorage who had been investigating regulations and court decisions relating to RS 2477's revealed the following points:

1) It appears that the definition of what constitutes a "highway" (which is the term used in the statute), is a matter for each state to determine. In Alaska, AS 19.45.001(8) defines a highway as that which "...includes a highway (whether in the primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure an other similar or related structure or facility, and right-of-way thereof..."

2) DOT&PF has management authority on RS 2477 where they occur on non-state land. Where RS 2477's occur on state land, DOT&PF has concurrent authority with the state agency having management authority over the land (usually DNR).

3) The courts have held that acceptance of an RS 2477 does not "impose on the public authority the duty to maintain." Therefore, a perfectly valid management decision might be to provide little maintenance or not to maintain a particular trail at all. Additionally, lack of maintenance over the years does not imply abandonment.

4) There are contradicting legal opinions regarding use restrictions, right-of-way vacations, and the role of a local government (ie. boroughs) in the management of RS 2477's.

Task Force on RS 2477

This issue was discussed at the Annual Meeting between the Bureau of Land and Regional Management (BLM) Fairbanks District Office and DOT&PF Northern Region on April 27, 1984. At that meeting it was decided to form a regional "task force" to discuss the situation. The Alaska Department of Natural Resources (DNR) was invited to join.

The Task Force on RS 2477 rights-of-way held its first meeting June 15, 1984. BLM, DNR and DOT&PF were present. The meeting established guidelines and procedures for asserting RS 2477 claims and having them established on the land status plats. The procedure is as follows:

1) A claim can be asserted by the State or any private individual.
2) A cover letter asserting a claim or accepting an RS 2477 grant must be submitted along with documentation suporting the date claimed. The date should preferably be based on expenditure of funds (public or private) or the earliest known date of public use. (An individual's time in constructing a road could be "translated" into funds).
3) A map at a scale no smaller than 1:63,360 depicting the route must be submitted with the supporting documentation and cover letter.
4) The trail number and quad number from the existing Trail Inventory File should be noted (if applicable) for clarification and cross-reference.
5) BLM will review each claim to verify that the land was "unreserved public land" as of the date claimed.
6) BLM will issue a serial number and establish a case file for each claim, as will DNR and DOT&PF. All correspondence should reference these numbers.
7) BLM will plot each trail claimed on their Master Title Plats and DNR will plot each one on the State's land status plats.
8) In order to prevent confusion, either DNR or DOT&PF will have the responsibility of submitting all necessary information to BLM.
9) All files, including maps, supporting data, etc., established by one agency should be duplicated and forwarded to the other agencies.

RS 2477 Coordination Committee for Northern Alaska

To provide a orderly manner for claiming RS 2477's and to avoid duplication of effort, the Task Force has suggested establishing an "RS 2477 Coordination Committee for Northern Alaska." This committee would consist of representatives from BLM, DNR and DOT&PF. Its purpose would be to coordinate and

prioritize efforts on asserting RS 2477 claims, to discuss any areas of disagreement and to keep each agency informed on the other agencies' efforts.

RS 2477 Management Review Board for Northern Alaska

Regarding the management of these roads, the Task Force has recommended establishing an "RS 2477 Management Review Board for Northern Alaska." This board would provide a forum to discuss differences relating to the management of RS 2477's. Problems which have come up in the past such as use restrictions, requests to vacate, and alignment, will continue. With contradicting legal opinions, an inter-agency forum for handling these issues would benefit all concerned and provide a multi-agency response to problems. Discussions could lead to possible solutions. Recommendation passed by this board would show a concerted effort by all agencies involved to provide thoughtful management actions. This would also provide one agency with the means to seek additional support in making a management decision. Additionally, any decision would be the result of the actions of several agencies rather than the decision of just one. DOT&PF as manager or co-manager of these roads would have veto power over any board recommendation.

Composition of this board would consist of two members from BLM, DNR and DOT&PF, with one member from the Citizens' Advisory Commission on Federal Areas and one invited member from a related professional organization (i.e., an officer of the International Right-of-Way Association). Temporary membership could be extended to governmental land managing agencies affected by matters under discussion and to private land owners affected. The board would meet as needed at the request of any board members.

Memorandum of Agreement

To implement the Task Force recommendations, a preliminary Memorandum of Understanding (MOU) between BLM, DNR and DOT&PF has been drafted. At this time, the MOU would exist only between BLM's Fairbanks District Office, DNR's Northcentral District, and DOT&PF's Northern Region. Northern and Interior Alaska is most affected by RS 2477 roads. Since the Fairbanks offices of these agencies have begun efforts, and established a precedent with the Bulenberg Trail, it was felt that an MOU at the District/Regional level would serve as a "testing area" for this procedure. Also, the archives of the University of Alaska-Fairbanks are the largest in the state, making Fairbanks better suited for the historcial research. Should this procedure succeed (as we are confident it will) then this MOU, or one similar, could be extended to other regions. A copy of the draft MOU is attached.

The participating agencies are in agreement that an effort such as this seems long overdue. It has the enthusiastic support of the BLM Fairbanks District Manager, Carl Johnson, who will be presenting this issue and the MOU concept to the BLM Advisory Council meeting on August 15, 1984 and to the Haul Road Meeting on August 23, 1984. It also has the support of the DNR Northcentral District Manager, Division of Land and Water Management, Jerry Brossia.

Program Needs

In order to complete this project, a commitment by DOT&PF and the other agencies is necessary. The prioritization and assertion of RS 2477 roads would be an ongoing process over several years (estimated 5 years for 100-150 trails). Historical research, personal interviews and preparation of maps are the

specific tasks needed for asserting the claims and having them plotted on land status plats. A rough estimate indicates that this effort would require approximately $100,000 per year which would provide for the research of 20 - 25 trails per year. This estimate is based on the time and effort actually spent for the Bulenberg Trail acquisition.

In order to accomplish this, there are a number of alternatives for DOT&PF to consider.

1) Funding Sources

a) A current source of capital money is in the Bulenberg Trail Aquisition project which has $95,000 remaining. This money was appropriated by the State Legislature for the purpose of aquiring the right-of-way of the Bulenberg Trail. DNR researched historical data and interviewed several people and asserted an RS 2477 claim. Since the right-of-way was secured in this manner (by DNR) most of the existing DOT&PF funds remains unspent. However, legislative action would be necessary to enable us to use the money on other trail acquisitions.

b) An item could be included in the FY 86 CIP Submittal which would change the existing Bulenberg Trail legislation and appropriate additional funds.

c) The RS 2477 activities could be included in the FY 86 DOT&PF operating budget as contractual and/or personal services.

2) Organization/Staffing

a) Should in-house staff be used, this project could be handled by either Planning, Right-of-Way or Special Projects. The decision of which group(s) to use would depend upon the manpower available and the funding levels of each section.

b) An alternative is to contract this project out to an independent firm which would prepare maps and research historical data for our use. This would require project management within DOT&PF.

c) Another alternative is a cooperative agreement with the University of Alaska-Fairbanks, using a Reimbursable Services Agreement (RSA). A university student could research historical data and provide the map(s) for the trails. This alternative has the advantage that DOT&PF would have more direct control over the person(s) doing the work. In addition this would probably be the least expensive alternative. Since this work is not so much difficult as it is time consuming, this project would be ideal for a student.

Recommendations

The MOU between BLM, DNR and DOT&PF should be reviewed and signed so this project may begin in a timely manner. First it must be decided whether

DNR or DOT&PF shall have the responsiblity to submit the supporting documentation to BLM.

We recommend that DOT&PF seek a revisied program change from the interim legislative committees to use the Bulenberg Trail appropriation for RS 2477 right-of-way acquisition. This amount could be used for the first year's work, beginning in FY 85.

Further, we recommend that an agreement with the University of Alaska-Fairbanks be entered into to establish a cooperative arrangement with a graduate level student(s) to research the historcial data for the trails and possibly to provide the maps needed.

The Coordination Committee should be appointed and meet promptly to establish the "first priority" trails so that the first efforts will begin with interagency cooperation.

Adequate funds should be budgeted in the FY 86 Capital and Operating Budgets to continue this activity.

DP:dp

TO: Thomas E. Meacham
Assistant Attorney General

DATE: August 31, 1977

FROM: Ruth Malman
University of Denver Extern

RE: [redacted]

INTRODUCTION

The "Federal Land Policy and Management Act of 1976", Pub. L. 94-579, 90 Stat. 2493, Oct. 21, 1976 (herein also cited as the 1976 BLM Organic Act) provides a comprehensive plan for the management of the public lands of the United States. Title V of that Act contains provisions for obtaining rights of way "over, upon, under or through" the public lands and national forest system. Title VII of the Act recites the effect on existing rights and lists those statutes which were repealed upon the October 21, 1977 effective date of the Act. One such statute repealed in its entirety was R.S. §2477. That statute provided that: "the right of way for the construction of highways over public lands, not reserved for public uses, is granted". 43 U.S.C. §932, Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253. The statute has been construed as an offer by the Federal government for a right of way for public highways across public lands, said offer being effective upon acceptance by the State or by public use. The case law interpreting the effect of this statute was concerned with such issues as:

a. What constitutes "acceptance" of the grant;

b. What effect acceptance had on mining homstead and other claims;

c. The date used in determining what constitutes "public lands, not reserved for public use" and;

d. The width of the public highway.

These issues will necessarily be important to the issue which is the subject of this memorandum. That issue is

whether or not the repeal of R.S. §2477, effective upon the enactment of the 1976 Federal Land Policy and Management Act, has any effect upon the rights granted and accepted before the repeal. Title VII of the 1976 Act provides that: "Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act". Sec. 701(a), Title VII, 90 Stat. 2793. Moreover, Section 509(a) of the 1976 Act states that "nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this title." [emphasis added.] The main issue of this memorandum can therefore only be resolved through an examination of the character and extent of the rights which were granted and existed under R.S. § 2477 prior to its repeal in 1976.

I.

AN OVERVIEW OF THE NATURE OF THE OFFER AND THE ACCEPTANCE OF THE R.S. § 2477 HIGHWAY GRANT

A. Nature of the Grant

R.S. §2477 was an offer to dedicate any unreserved public lands for the construction of highways. The offer has been generally recognized as a present grant of an easement over public lands for highways. E.G. Wallowa County v. Wade, 72 P. 793 (Ore. 1903). It is also generally held that the grant becomes effective upon the date of acceptance. That a grant does not become effective until accepted by the grantee was said to be "almost elementary" by the Court in Ramstad v. Carr, 154 N.W. 195 (N.D. 1915). Similarly, the Court in Lovelace v. Hightower, 168 P.2d 864 (N.M. 1946), recognized that an offer to dedicate land must be accepted to become effective. Before looking at what

constitutes acceptance and the effect of such acceptance on the grant, it is important to inquire into the nature of the grant itself. This will be the scope of the following section.

1. R.S. § 2477 WAS A PRESENT, ABSOLUTE GRANT OF A RIGHT-OF-WAY OVER THE PUBLIC LANDS.

In reviewing plaintiff's claim for damages for the appropriation of his property lying along section lines for use as a public highway, the Court in Wells v. Pennington County, 48 N.W. 305 (S.D. 1891) construed the R.S. § 2477 grant as follows:

> Its words . . . import an immediate transfer of interests, not a promise of a transfer in the future . . . The object of the grant was to enable the citizens and residents of the states and territories where public land belonging to the United States were situated to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. And when the location of the highway and roads was made by competent authority or by public use, the dedication took effect by relation as of the date of the Act; the Act having the same operation upon the lines of the road as if specifically described in it.

48 N.W. at 306. [emphasis added.] The Court further recited the opinion of Justice Field in his decision in Railroad Co. v. Baldwin, 103 U.S. 426 (1880) which concerned a right-of-way grant to the railroad company in a similar type of congressional grant R.S. §2477. Quoting Justice Field, the Court in Wells stated:

> The language of the Act here, and of nearly all congressional acts granting lands, is in terms of a grant in praesenti. The Act is a present grant. 'There is hereby granted' are the

words used, and they import an immediate transfer of interests, so that, when a route is definitely fixed, the title attached from the date of the Act. The grant of the right-of-way . . . is a present absolute grant, subject to no conditions except those necessarily implied, -- such as that the road shall be constructed and used for the purposes designated. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby . . . we see no reason, therefore, for not giving to the words of present grant, with respect to the right-of-way, the same construction . . . [as] to the grant of lands . . . (emphasis added.)

The Court then addressed the contention that the grant was not an absolute grant but only a general offer effective when accepted under the theory that a grant "like any other contract" must have a grantor and grantee and an offer not accepted is not a contract. In the words of the Court, it was held that:

> It may, however, be admitted that the right acquired by the territory or the public was necessarily imperfect until the land accepted for highways was surveyed, and capable of identification; but when the land was surveyed, and the various section lines were designating it to be public highways as far as practicable, the right of the territory attached to them for that purpose, and took effect as of the date of the territorial law . . . The Act of Congress giving the right-of-way for the construction of highways over public lands, and the territorial law declaring all such lines, as far as practicable, to be public highways, and designating such highways to be 66 feet

wide, are noticed to all persons filing on public lands subsequent to the passage of these laws that they take them subject to the right-of-way for highway purposes . . . The territorial law located the highways upon all public lands upon the section lines, and this public grant or dedication was so accepted, and became valid as against the government, and therefore valid as against its subsequent grantee . . .

[48 N.W. at 307-308.] (emphasis added:)

It can thus be concluded that, according to this opinion of the South Dakota Supreme Court, the R.S. §2477 was an absolute, present grant effective upon acceptance, acceptance in that case being the territorial law declaring all section lines to be rights-of-way.

The courts have generally followed the opinion of the Wells Court. Thus, the Nebraska Court in Streeter v. Stalnaker 85 N.W. 47 (Neb. 1901), stated that R.S. §2477 "was a standing offer of a free right-of-way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself, the highway was established". 85 N.W. at 48. Accord, Tholl v. Koles, 70 P. 881 (Kan. 1902). See also, McRose v. Bottyer, 22 P. 393 (Cal. 1889). In Town of Rolling v. Emrich, 99 N.W. 464 (Wis. 1904), the Court said that R.S. § 2477 "is doubtless a present grant of a right-of-way over public lands, but it does not become effective until accepted by the public". 99 N.W. at 465. Accord, Hillsboro Nat. Bank v. Ackerman, 189 N.W. 647 (N.D. 1922). Moreover, the Court in Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. den. 411 U.S. 917, concerned with the rights-of-way and special land-use permits for the trans-Alaska oil pipeline, stated that R.S. §2477 "acts as a present grant which takes effect as soon as it is accepted by the State". 479 F.2d at 882.

2. THE MEANING OF "PUBLIC LANDS NOT RESERVED FOR PUBLIC USE" UNDER R.S. §2477.

The above-cited cases stand for the principle that the highway grant was a present, absolute grant for rights-of-way across any public lands not reserved for public use which were owned by the United States at the time of the grant. The effect of the grant being a "present" one is that upon acceptance, the acceptance will relate back and become effective from the date of the grant. Faxon v. Lallie Civil Tp., 36 N.D. 634, 163, N.W. 531 (1917), citing, Township v. Skauge, 6 N.D. 388, 71 N.W. 544; Wells v. Pennington Township, to S.D. 6, 48 N.W. 305, 39 Am. St. Rep. 758; Railway Co. v. United States, 92 U.S. 733, 23 L.Ed. 634; Railway Co. v. Baldwin, 103 U.S. 426, 26 L.Ed. 578; Wright v. Roseberry, 121 U.S. 506, 7 S.Ct. 985, 30 L.Ed. 1042; French v. Fyan, 93 U.S. 169, 23 L.Ed. 8812; Northern Pac. Ry, Co. v. Barlow, 26 N.D. 159, 143 N.W. 903. That is to say that if the lands granted belonged to the United States at the time of the grant in 1866, or upon subsequent acquisition of lands by the United States, the 1866 Highway Act was made to apply to those lands. The acceptance, as long as the lands remain unreserved public lands at the date of acceptance, would relate back to the date of the grant. This is important in determining whether or not lands subject to a right-of-way were "public lands not reserved for public use" at the time of the grant and the acceptance of the grant. "The Federal Government's Section 932-type [R.S. §2477] offer to dedicate unreserved lands for highway purposes clearly does not become ripe until the government assumes ownership." Hayes v. Government of Virgin Islands, 392 F.Supp. 48 (D.Ct. Virgin Islands 1975). In that case the Court concluded that R.S. §2477 was made applicable to the Virgin Islands with the enactment of R.S. §1891, 48 U.S.C. §1490. enacted in 1875. R.S. §1891, repealed in 1933, related to the application of the United States Constitution and laws to all organized territories and to every territory subsequently organized

reasoned that the repeal of that statute before the acquisition of the Virgin Islands by the United States in 1935 did not affect the applicability of the laws of the United States, including R.S. §2477, to the territory, having found no intention by the Congress to indicate a contrary conclusion. Rather, the Court found that the objective of the repeal statute was a wholesale repeal of many statutes determined to be "obsolete" and noted that newer laws had replaced the statutes at least for the territories of Alaska and Hawaii. Moreover, Section 3 of the 1933 repeal statute provided that no rights or liabilities already existing before the appeal would be affected. Thus, upon acquisition of the lands by the United States in 1935, the highway grant was "ripe" for acceptance. The Court in United States v. Rogge, 10 Ak. 130 (D.Ct., 4th Div. Fairbanks, 1931), reached a similar result in finding that R. S. § 1981, effective when Alaska became an organized territory in 1884, allowed for the operation of R. S. §2477 to be ripe for acceptance in Alaska. Therefore, upon acquisition for public lands by the United States, the highway grant could be accepted as to those lands. However, the acceptance could only be effective, by the terms of the grant, as to "public lands, not reserved for public use".

In Paxon v. Lallie Civil To., 36 N.D. 634, 163, N. W. 531 (1917), writ of error dism. 250 U.S. 634 (1919), the plaintiff contended that the R. S. §2477 grant could not be accepted as to lands which have been part of an Indian reservation, reasoning that once the reservation was set aside for the Indians, the land was no longer public lands and the prior grant was therefore forever repealed by the congressional action. The Court disagreed. It held that the highway rights were vested rights where, prior to the establishment of the Indian reservation, the Highway Act had been in effect

for eight years and had been accepted by the territory for three years through enactment of a law declaring all section lines to be public highways. Act of Jan. 12, 1871, ch. 33 of Session Laws of Territory of Dakota of 1870-71. The Court stated that:

> It is also clear that the right granted to the State was not in the nature of a license, revocable at the pleasure of the grantor, but that highways once established over the public domain under and by virtue of the act became vested in the public, who had an absolute right to the use thereof which could not be revoked by the general government and whoever thereafter took the title from the general government took it burdened with the highways so established.

[163 N.W. at 533.] The Court believed that even though an Indian reservation was created that there was no intention by Congress in establishing the reservation to divest the public of highways rights already accepted. In 1915, the township had declared, as highways, four miles of section lines over these lands which were once reserved as an Indian reservation. In holding that the township need not compensate the owners for the 33-foot strip on either side of the section line, the Court reasoned that, since the highway rights were vested rights upon the opening of the reservation for settlement in 1904, the rights for the highways reverted to the original grantee, that being the State. The Court was of the opinion that if the public lands, after acceptance of the statutory grant, are then reserved for public use, once the use is abandoned the rights in the lands revert back to the grantee just as the right-of-way of a railroad company would revert to the property owners or the State if the railroad use discontinued. Thus, while the lands had not been surveyed until after the reservation was established, the Court held that the right of the Territory attached as soon as the section lines were identified as far as practicable for public highways and took effect as of the date of the territorial law. Therefore the plaintiff had no rights in the dedicated land upon his settlement of the lands in 1904.

The Court in Faxon v. Lallie, supra, held that the grant to the State under the Highway Act had vested prior to the establishment of the Indian reservation, so that subsequent grantees of the land could not claim the lands were not subject to the Act. The Court stated that the determinative time of deciding whether the lands are "public lands" is whether or not at the time of the grant and the subsequent acceptance, the lands belonged to the United States. The Court in Bird Bear v. McLean Cty., 513 F.2d 190 (8th Cir. 1975) agreed with the Faxon holding. In Bird Bear, the Indian trust-patentees brought an action for trespass and unlawful diminishment of their allotment. The issue was whether the Highway Act of 1866, 43 U.S.C. §932 (1970) granted an easement for section line roads over their property even though that property was held pursuant to a trust patent issued by the United States. The two roads in question were constructed along section lines in accordance with the N.D. Code, [C.C. §24-07-03 (1970), derived from ch. 330 of SL of Territory of the Dakota, 1870-71], said statute being an acceptance of the right-of-way grant of 43 U.S.C. §932. The Court in Bird Bear distinguished Bennett Cty., S.D. v. United States, 394 F.2d (8th Cir. 1968). In that case, it was held that the county could not maintain a road within the Pine Ridge Reservation without permission from the United States government for condemnation proceedings because the Treaty of 1851 was a recognition of Indian title. Thus, even though the Treaty had not spoken of the "reservation", land was in fact reserved for the use of the tribes and so these lands were not public lands upon the passage of the 1866 Highway Act. In Bird Bear, the Court held that the allotment of the Indian patentees was not part of the Reservation until 1880, so that in 1866, when the grant of the right-of-way initially attached, the land was still public land. Upon acceptance of the grant in 1871 by the Territory of Dakota, the grant became effective

as to these lands. In concluding that a right-of-way of individually-allotted land was not inconsistent with the congressional Indian policy, the Court affirmed the decision that the land allotted was subject to the prior statutory grant of right-of-ways to the State.

Other cases have dealt with public lands being subject to individual claims, so as to effectively withdraw the public lands from the terms of the R.S. § 2477 grant. If land was patented to an individual by the United States before acceptance of the grant, the public would have no right to assert over such lands. Ball v. Stephens, 158 P.2d 207 (Calif. 1945). Thus, if lands have been reserved, withdrawn, or subject to individual entry or patent prior to acceptance of the highway grant, the grant is ineffective as to these lands because the grant is only for "public lands not reserved for public uses." However, if these lands again become part of the unreserved public domain lands, according to Faxon, supra, they were again subject to acceptance as public lands under the R.S. § 2477 grant.

3. Summary

The R.S. § 2477 grant was a present transfer of interest in the public lands of the United States for highway purposes. Wells v. Pennington County, 2 S. D. 1, 48 N. W. 305 (1891); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. den. 411 U.S. 917 (1973). Upon acceptance, a highway right-of-way was established. Streeter v. Stalnaker, 61 Neb. 205, 85 N.W. 47 (1901). The grant was ripe for acceptance at any time the government acquired ownership of the lands. Hayes v. Government of Virgin Islands, 392 F. Supp. 48 (D.Ct. Virgin Is. 1975). As long as the grant was accepted while the lands were public lands, the acceptance was effective against the federal government

and its subsequent grantees. Ball v. Stephens, 158 P.2d 207 (Calif. 1945). Moreover, the rights of the public, upon acceptance, became vested rights. Faxon v. Lallie Civil Tp., 26 N.D. 634, 163 N.W. 531 (1970). In light of these foregoing premises, it can then be concluded that the repeal of R.S. §2477 can have no effect as to properly accepted right-of-ways for highway purposes. Since the grant was a present transfer, it is necessary to inquire if the lands were unreserved public lands as of the date of acceptance of the grant. In Alaska, the grant has been held to be ripe for acceptance in 1884 when Alaska became an organized territory, the United States having acquired the territory in 1867. United States v. Rogge, 10 Ak. 130 (D.Ct. Ak. 1941). If it can be shown that the lands were public lands not reserved for public uses and were therefore ripe for acceptance, the grant will vest the highway rights in the public upon appropriate acceptance.

B. Nature of Acceptance.

1. ACCEPTANCE OF THE FEDERAL GRANT UNDER R.S. § 2477 CONSISTS OF ACTION BY THE PUBLIC OR THE PUBLIC AUTHORITIES SUFFICIENT TO MANIFEST THE INTENTION TO ACCEPT.

It has been held that R.S. §2477 created a standing offer of a free right-of-way over public lands and that as soon as it is accepted in an appropriate manner by the agents of the public or by the public itself, a highway is then established. Streeter v. Stalnaker, 61 Neb. 205, 85 N.W. 47 (1901). In that case, the Supreme Court of Nebraska held that there was sufficient evidence of a general and long continuous user as well as proof that the public authorities had exercised control over the road to establish an acceptance of the dedication of a public highway across plaintiff's lands. The claim was not based on adverse possession, but rather that the road became a public highway by dedication and acceptance

by the public use. Since the public authorities had not followed the "appropriate manner" in establishing a road under the general road laws, the Court relied more heavily on the evidence establishing continuous use by the public of the road since 1877. This rather concise opinion points out the various problems in proving that an acceptance of the offer of R.S. §2477 has been made. Acceptance made "in the appropriate manner" by public authorities means according to state or local laws and regulations. Thus, if the acceptance is to be so made, there must be inquiry into the laws of the State governing the establishment of roads within the state. For instance, the Board of County Commissioners is often given the jurisdiction over the roads within its jurisdiction and, to constitute a valid acceptance, the Board must have acted within its regulations as well as any applicable state law. Acceptance can also be found where the public has claimed to accept the federal grant. Proof of such acceptance is shown by evidence of continued use of the land as a "public highway". The cases diverge as to how long the use must continue in order to claim the right-of-way. Some courts have relied on the easement by prescription time period, while others, like Streeter, recognize that the use need only be enough to show the intent to accept, and need not be for a period of time sufficient to ripen the use into a right by prescription, there being no adverse claim but rather a claim to unreserved public land dedicated to the public by the federal government.

Under the laws of the Territory of Dakota, enforced since 1884, public highways could be established in one of three ways:

(1) Section lines, whether traveled or not, were already highways by virtue of legislative declaration and might be traveled and subjected to such use as far as practicab Sec. 1, ch. 29, Pol. Code. 1877;

(2) Roads, other than on section or quarter lines, established by the Board of County Commissioners on the petition of twelve freeholders; and

(3) by user for 20 years.

Koloen v. Pilot Mound Tp., 33 N.D. 529, 157 N.W. 672 (1916). In that case, the highway ran across the plaintiff's quarter-section of land. The Court first noted that the 1871 legislative enactment involving highways established on section lines was an acceptance by the territory of the federal grant and had remained in force in the territory and state ever since. It was the public act by the public authorities necessary to constitute acceptance. Here, however, the Court was not concerned with a section line highway. Therefore, the Court looked at whether there had been appropriate action by the Board or sufficient user to constitute acceptance. It was found that the county officials never exercised control over the alleged highways and that the highways surveyed by the county had been abandoned. Moreover, the public use had been obstructed so that the use could not be found to be continuous for the statutory 20 years. No highway was then found to be established in accordance with the State law.

As discussed previously, the Court in Faxon v. Lallie Civil Tp., supra, also held that the section line legislation of the Territory of Dakota constituted acceptance of the R.S. §2477 grant. There the court found that the 1881 acceptance was sufficient to deny plaintiff's claims for compensation on lands which had once been part of an Indian reservation. The Court held that, when the public use was abandoned, the right to maintain a highway on section lines revested in the public. While the legislative enactment of the Act of 1871 declaring that "all section lines in this territory shall be and are hereby declared public highways as far as practicable" was the necessary action to manifest the intention to accept the grant, a survey was necessary to perfect the right-of-way into a highway. However, the court found that

the effective date of the survey would relate back to the date of the original acceptance of the right-of-way.

In the case of Walcott Tp. v. Skaugo, 6 N.D. 382, 71 N.W. 544 (1894), cited with approval in Faxon, supra, the township brought suit to enjoin the defendant from obstructing an alleged highway. The highway was claimed as such by virtue of continuous user for 20 years. The defendant claimed that the lands were part of the public domain and could not therefore be subject to adverse user which is ineffective as against the government. The Court pointed out that highways by user are based either upon legal establishment or dedication, the continuous user for a period of 20 years being regarded only as conclusive evidence of either an original legal establishment or of a dedication. The other major argument of the defendant concerned the fact that the site in issue was upon an even-numbered section within the limits of the grant of odd-numbered sections to the Northern Pacific Railroad Company made in 1864. The Court held that if the Railroad Grant removed the odd-numbered sections from the operation of the highway grant, the highway grant could still be effective as to the even-numbered sections. A highway by prescription could certainly be established over the privately-owned railroad lands and thus the highway by prescription could run over the entire length of the road.

In the subsequent North Dakota case of Hillsboro National Bank v. Ackerman, 48 N.D. 1179, 189 N.W. 657 (1922), the Court reaffirmed the principles stated above. It was further noted by the court that the statutory right of establishing a highway by prescription had been repealed in 1897, and that since that time a highway by prescription could only be established by virtue of the common law. Later cases

then apply the common law to conclusively find that a highway grant had been accepted by the public. The court in Hillsboro National Bank further observed that section lines are public roads in accordance with the North Dakota statutes, and they may be open for use upon compliance with the relevant laws relating thereto by persons having the jurisdiction to do so. This could be done "without any survey being had", except where necessary by variations caused by natural obstacles." 189 N.W. at 659.

The plaintiff in Ball v. Stephens, 158 P.2d 207 (Calif. 1945), sought declaration of the existence of the public road across defendant's land which was necessary to the plaintiff for access to his mine. The Court first addressed the ways in which highways might be established under the federal highway grant in R.S. §2477. The Court noted that Congress had not specified or limited the methods to be followed and that it was then only necessary that a highway be established in accordance with the state in which it is located. The method of selection of a route and establishment as a public highway by public authorities was not involved in the case. The alternative method of public use was found to be the method whereby a public road had been established over the defendant's land. The Court stated that "dedication could also be effected without action by the state or county, by the laying out of a road and its use by the public sufficient and long to constitute an acceptance by the public of an offer of dedication. Evidence of user was properly received for the purpose of determining whether there had been sufficient use to prove acceptance . . . " 158 P.2d 208. The Court held that the defendant took its patent in 1928 subject to the right-of-way if the evidence substantiated that the road had been used by the public before patent had issued. The evidence noted by the Court included use of the road over the mountainous terrain as a trail, then for horse-drawn vehicles and later as one suitable for automobiles and

trucks. It was found that in about 1905 mining claims were located in the area and oil companies had moved in. The evidence, however, was unclear as to whether the road used by these people went as far down as the defendant's present land. But the Court was convinced that from 1910 the road was used for travel and that by 1918, when another oil development was undertaken, automobiles were driven over the road. The court concluded that while the travel over the road prior to patent in 1928 was irregular due to the terrain, and that only a limited number of people had occasion to go that route, the use of the road by hunters, vacationers, miners, and oil operators was sufficient to constitute acceptance of a federal grant for public use. The Court then held that if the road existed before patent, it was immaterial whether the route was used by the public after that time so long as it had not been legally abandoned. The Court held that the act of the defendant in constructing a gate across the road could not divest the right which the public had acquired before patent. It should be noted that the case did not turn on the length of time of use, but rather stands for the proposition that the existence of the dedication is a conclusion of fact to be made in each case based on sufficiency of evidence; that time is only one element involved in such evidence.

The time element for dedication by public use was also discussed in Lovelace v. Hightower, 168 P.2d 864 (N.M. 1946). Defendant claimed that the plaintiff had to show that the road was used for the 10 year statute of limitations time as applied to ways established by prescription. The New Mexico court held that the 10-year time period is not a factor in establishing highways by dedication. Rather, acceptance of the federal offer

to dedicate public lands for highways could be shown by general use for a long enough period to constitute acceptance. Therefore, each state may determine whether dedication is founded upon a prescriptive time period or merely by a factual continued use sufficient according to the trier of fact to constitute acceptance. Thus, in Brown v. Jolley, 387 P.2d 278 (Colo. 1963), the court found that a highway over public lands had been established over the defendant's land by use of the public for the statutory 20-year period. The fact that the roads had been removed from the county road system did not destroy the right of the public to use the road by virtue of their adverse continuous use.

The cases heretofore cited stand for well accepted principles relating to the acceptance of the highway grant under R.S. §2477. The grant constitutes an offer by the federal government to dedicate unreserved lands for highway purposes, said offer becoming effective upon acceptance by the public. Ball v. Stephens, supra; Lovelace v. Hightower, supra. Whether such offer is accepted is an issue to be determined under state law. Ball v. Stephens, supra. Acceptance can be made either by some positive act on the part of the public authorities authorized to establish or maintain highways or by public use sufficient to constitute acceptance. Streeter v. Stalnaker, supra; Koloen v. Pilot Mount Tp., supra; Ball v. Stephens, supra. It has been held that a legislative enactment to the effect that all section lines are declared public highways is sufficient to constitute acceptance by the public authorities. Faxon v. Lallie Civil Tp., supra; Koloen v. Pilot Mound Tp.; Hillsboro National Bank v. Ackerman, 48 N.E. 1179, 189 N.W. 657 (1922). The sufficiency of use by the public to constitute a highway by dedication has been held to be a factual determination made on a case-by-case basis, e.g., Lovelace v. Hightower, supra; based on a statutory prescriptive time period, e.g., Brown v. Jolley, supra;

or by the prescriptive period based on the common law, e.g., Hillsboro National Bank v. Ackerman, supra. These general principles from other jurisdictions as to what constitutes acceptance of the federal highway grant have been followed in Alaska.

2. IN ALASKA, THERE MUST BE SOME "POSITIVE ACT" BY THE PUBLIC AUTHORITIES CLEARLY MANIFESTING AN INTENTION TO ACCEPT THE GRANT, OR PUBLIC USER UNDER CONDITIONS SUFFICIENT TO PROVE ACCEPTANCE OF THE GRANT.

Clark v. Taylor, 9 Ak. 298 (D.Ct. 4th Div. 1938), involved an action to restrain the employees of the Alaska Road Commission from completing a bridge and constructing approaches to connect to the old road on plaintiff's placer mining claim. The Alaska Road Commission claimed that it had a right to maintain a road and bridge across the placer mining claim by virtue of the act of May 14, 1906, 34 Stat. 119, 48 U.S.C.A. §322, which authorized construction and maintenance of wagon roads and pack trails between mining or industrial camps to further the mining industry. It also claimed, under R.S. §2477, a right-of-way for the construction of highways over public lands. However, the Court held that no such right existed in 1917 because the locators of the mining claim had been granted by the Congress the exclusive right of possession and enjoyment, and thus R.S. §2477 was ineffective as against the plaintiff. While a road could be maintained it could only be the road already established by public use. The court discussed acceptance by the public of the R.S. §2477 dedication by adverse user, citing Bishop v. Hawley, 33 Wyo. 271, 238 P.274, Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N.W. 606, Montgomery v. Sommers, 50 Or. 259, 90 P.274 as authority for acceptance of the R.S. §2477 dedication by public user. The Court stated

that since the original bridge had been used for 20 years by the public, under conditions creating a prescriptive right, the right became vested in the public. The court declined to decide whether the length of time required in Alaska for prescriptive rights-of-way is 20 years (as recognized by other courts in determining the creation of highways by adverse user) or 10 years (the local statute fixing the time for bringing an action for land). The remainder of the case dealt with the width of the right-of-way. Since the right-of-way was established by public user, the court held that the extent of the servitude is to be determined by the character and the extent of the user, and that the Commission had no right to extend the road beyond the width so established.

In Berger v. Ohlson, 911 Ak. 389 (D.Ct. 3rd Div. 1938), plaintiff alleged that the Alaska Railroad, through the defendant, had obstructed the public roadway leading to the City Dock. The railroad filed a demurrer, which was overruled, claiming that the railroad had been given the right-of-way to maintain a railroad over the road. The Court merely noted in this proceeding that the allegations of the plaintiff that the road existed before the railroad was established, must be taken as true and thus two mutual right-of-way easements existed. The court cited Hatch Bros. Cos. Co. v. Black, 25 Wyo. 109, 165 P. 578 as authority for the acceptance of the R.S. §2477 highway grant by the public without acceptance by public authorities, through continued use of the road under circumstances clearly indicating their intention to accept. The court held that the railroad, coming in after the highway had been established under the grant, took the right-of-way subject to the public use.

The court in United States v. Rogge, 10 Ak. 130 (D.Ct. 4th Div. 1941), discussed the right-of-way provisions of R.S. §2477 in great detail. The action was brought by the United States to establish its rights to

collect tolls on freight transported over the Richardson Highway pursuant to the regulations set out by the Secretary of the Interior. Defendant, as a ferry owner affected by the tolls, claimed that the highway had been used by the public from 1903 through 1906, before the government took charge of the maintenance of said highway, and that therefore, a right-of-way for a free highway was vested in the public under the grant. The government claimed that R.S. §2477 did not apply in the Territory of Alaska until 1912. R.S. §1891 provided that all the laws of the United States which were not general land laws but were locally applicable would be made applicable to the Territory of Alaska. The government claimed that since R.S. §1891 was not included in the 1900 Act, providing for various provisions for the territorial civil government, but was included in the 1912 Act, R.S. §1891 would not have applied to Alaska between 1900 and 1912. The court held that the 1900 Act did not purport to be a comprehensive codification of all the laws of Alaska and that the statute did not impliedly repeal R.S. §1891. The court concluded that the laws of the United States which were not locally inapplicable and were not general land laws were thus in effect in Alaska from 1903 and thereafter. The court then looked at whether R.S. §2477 was a general land law. It stated: "Clearly, a right-of-way is not the land itself, though it is classified as incorporeal hereditament. Section 2477 seems not to have been a general land law, but more of a law incident to the land laws." 10 Ak. at 149. The court found that owners of the mining claim and homesteaders had a right under R.S. §2477 for a right-of-way incident to their claims. The court stated:

> That Congress considered §2477, R.S.U.S. in effect is shown in the act approved May 14, 1898, wherein it mentioned that public highways now located should not be lost where railroads took rights-of-way under said act. Again, in the same act, it mentioned that the toll roads provided for in the act to be constructed by private individuals or corporations should not injuriously affect the public in its use of a road or trail in common use. If section 2477 was not in force, there was no possible way for there to have been public highways or roads in common use in Alaska at the time the act approved March 14, 1898 was enacted.

10 Ak. at 150. The court decided that R.S. §2477 was not a general land law because the right-of-way could be obtained without any public record and without procedures for filing applications and maps as required under the general land laws. The court further cited Nicholas v. Grassle, 83 Colo. 536, 267, P.196, and Leach v. Manhart, 1020 Colo. 129, 77 P.2d 652, as authority that R.S. §2477 was an express dedication of a highway and that acceptance was accomplished by use by those for whom it was necessary or convenient. The court upheld the defendant's contention that the right-of-way for a highway by public use between 1903 and 1906 was vested in the public but that the Congress was still free to impose toll regulations in the public interest.

Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) involved an action to enjoin the obstruction of a road. The road crossed Hamerly's property and gave access beyond to Denton's homestead. Denton claimed that the road was a public highway. The court, in discussing R.S. §2477, 43 U.S.C.§ 932, stated:

> The operation of the statute in Alaska has been recognized. [Berger v. Oilson, D.C.D. Ak., 1938, 9 Ak. 389, Clark v. Taylor, D.C.D. Ak. 1938, 9 Ak. 298, U.S. v. Rogge, D.C.D. Ak. 1941, 10 Ak. 130] The territorial district court and the highest courts of several states have construed the act as constituting a congressional grant of right-of-way for public highways across public lands. But before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention

to accept a grant, or there must be public uses for such a period of time and under such conditions as to prove that the grant has been accepted. [See Berger v. Olson and Clark v. Taylor, supra; Kirk v. Schultz, 1941, 63 Idaho 278, 119 P.2d 266; Leach v. Manhart, 1938, 102 Colo. 128, 77 P.2d 652; Lovelace v. Hightower, 1946, 50 N.M. 50, 168 P.2d 864; Hatch Bros. Co. v. Black, 1917, 25 Wyo. 107, 165 P.518; State ex rel. Dansie v. Nolan, 1920, 58 Mont. 167, 191 P.150; Montgomery v. Somers, 1907, 50 Cr. 259, 90 P.674] 359 P.2d at 123.

Since there was no claim of establishment of the highway by public authority, the court held that the defendant then had the burden of proving that the road was "over public lands" and that the character of the use was sufficient to constitute acceptance. The court stated that "public lands" did not include lands which are subject to valid and existing homestead claims. During the period when the land in question was not so subjected to the homesteaders' claims, the court found that its use was infrequent, sporadic, and not necessary or convenient for public use. The court concluded that no public highway existed, for there had been no showing of dedication by the homesteaders to the public, nor an acceptance by public user.

The width of a proposed highway along the existing Farmers' Loop Road near Fairbanks was in issue in State v. Fowler, 1 A. L. J. No. 4, 7, Superior Ct., 4th dist, Civil Action No. 61-320, Sept. 26, 1962. The opinion by the Honorable Judge (now Justice) Rabinowitz cited Hamerly, supra for the proposition that the State had the burden of proving that the Farmers Loop Road was located over the public lands and that the character of the use constituted acceptance by the public under the 43 U.S.C. §932 grant. The extent of the user was held to be the applicable measure by which to determine the allowable width the State could claim rather than reliance on local laws and customs applicable to highways established by the public authorities.

Mercer v. Yukon Construction Co., 420 P.2d 323 (Ak. 1966), was primarily concerned with the Access Roads Act, AS 19.30.010-19.30.100, by which the State could contract for low standard, low-cost roads in areas rich in natural resources in order to promote development. The appellant contended that his grazing permit precluded a right-of-way road for public access. The court disagreed, holding that the lands under lease were public lands and that the State's contract with the Yukon Construction Co. to build a road under the Access Roads Act was a valid acceptance of the grant under 43 U.S.C. §932. Hamerly was held to be inapplicable here because in that case the homesteaders' rights would ripen into title, whereas the plaintiff in Mercer had only leasing rights. Moreover, Section 4(f) of the appellant's grazing lease stated that "nothing herein shall restrict the acquisition granting, or use of permits or rights-ofways under applicable law." The grazing rights were thus subordinated to the right-of-way.

The section line legislation in Alaska, under the provisions of AS 19.10.010, came under attack in Gibbs v. Campbell, No. 72-462, Superior Ct. 3d Jud. Dist., Jan. 8, 1973. The plaintiffs sought compensation for the State's taking of property through the construction of a pioneer access road along the section line of plaintiff's property pursuant to a petition of the local landowners. The State claimed it had title under color and claim of title for more than seven years in accordance with AS 09.25.050, that the action was barred because it had not been brought within 10 years after the cause of action accrued, and that the right for a 33-foot easement over plaintiff's property became vested in the State under 19.10.010. Plaintiff urged that the language of AS 19.10.010 did not meet the test of "clearly manifesting an intention to accept a grant" as required by the Alaska Supreme Court in Hamerly, supra. The court found

three separate reasons, "any of which is sufficient", to defeat plaintiff's claims. First, the court held that the plaintiff took his patent subject to the right of the State to construct a roadway along the section lines. The court, relying on the 1969 Opinion of the Attorney General No. 7 (December 18, 1969), held that the Territory of Alaska had accepted the R.S. §2477 highway grant by enactment of Ch. 19, S.L.A. 1923, and that such acceptance was being continually effective from 1923 until 1949 when the acceptance was repealed. The court then found that the federal grant was again accepted by Ch. 35, SLA 1953. Since the plaintiff had not entered the property until 1955, and only received patent in 1961, he took his land subject to the right of the State to construct a public highway along the section line without compensation therefor. The court also stated that the plaintiff was estopped to claim compensation because of his involvement in trying to get the road constructed, and further concluded that the action was barred by the statute of limitations.

While Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. den., 411 U.S. 917, involved many issues relating to the granting of right-of-ways and special land use permits for the Trans-Alaska oil pipeline, those will not be discussed herein except insofar as the opinion was concerned with the operation of the highway grant under 43 U.S.C. §932. The environmental groups challenged the Secretary's authority to issue a right-of-way to the State for a State highway. Alyeska Pipeline Service Company was to build the highway primarily for pipeline purposes but ultimately for use by the public. The Honorable Judge J. Skelly Wright held that the State only needed to manifest its intention to accept the highway grant by some positive act. Such intention had been so manifested by the passage of AS 19.40.010(a) declaring a need for a public highway from the Yukon River to the Arctic Ocean. 43 U.S.C. §932 was found to act "as a present grant

which takes affect as soon as it is accepted by the State". 479 F.2d at 882. In the footnote to this holding, the court recognized that, since R. S. § 2477 acts as a present grant, it is not generally necessary for the builder of the highway to apply for a right-of-way; however, the lands involved here were lands reserved for public use. Thus the section was not applicable and it was necessary for the State to request revocation or modification of the reservation in order to build the highway. The court concluded that an intention to build is all that is needed to accept the highway grant. Since the proposed highway was found to be needed by the public, according to State officials, the issuance of the right-of-way was properly within the authority of the Secretary, necessary only because of the prior public reservation of the lands in question.

The most recent Alaska Court opinion on the applicability of 43 U.S.C. §932 is Cirves v. Kenai Peninsula Borough, 536 P.2d 1221 (Ak. 1975). In that action, the appellant contested the right and power of the borough to construct a road on homesteaded property without any compensation to her. Appellant received a "notice of allowance" from the Department of Interior in 1958 to the property, and in 1961, received patent. The northern boundary of her property was the section line. Subsequent to 1961, the borough had constructed a junior high school adjoining the land on the northern boundary. Redoubt Drive, which ran along the section line prior to the school's construction, terminated one-quarter mile east of the boundary line between the boundary and the school site. That road was extended by the City of Soldotna in 1967 to provide access to the school. The borough subsequently extended Redoubt Drive by constructing a "pad" which rested partly on Cirves' property, and as a result of which she

brought this trespass action. The court held that the Kenai Peninsula Borough implicitly possessed the power to establish access to the school site through its powers to "establish, maintain and operate schools". Moreover, although no express reservation of the easement was included in Girves' patent, the court held that this did not preclude the borough from showing that a right-of-way had been established before Girves entered onto the property. The court accepted the borough's argument that Ch. 35, SLA 1953 constituted an acceptance of the 43 U.S.C. §932 highway grant, the enactment of Ch. 35 being the "positive act" needed under Hamerly v. Denton, 359 P.2d 121 (Ak. 1961) to manifest an intention to accept. The 1953 dedication of section lines as public highways was said to have been an implied acceptance of the highway grant, for the legislature could not dedicate something to which it had no right.

These Alaska cases reiterate the general legal principles concerning acceptance of R.S. §2477, the federal highway grant. The public may accept the grant by continued use, although it is not clear from the cases whether a specific time period of use be proved, or whether mere use manifesting an intention to accept is sufficient. Compare Clark v. Taylor, 9 Ak. 298 (D.C. D. Alas. 1938) and United States v. Rogge, 10 Ak. 130 (D.C.D. Alas. 1941). The State may accept the grant through legislation, which would constitute the necessary "positive act" indicating the intention to accept the grant. It has been held that the State accepted the grant through the legislation concerning access roads, Mercer v. Yukon Construction Co., 420 P.2d 323 (Ak. 1966), and with the enactment of Ch. 19 SLA 1923 and Ch. 35 SLA 1953 concerning highways along section lines, Gibbs v. Campbell, No. 72-462, Superior Court, Third Judicial District, January 8, 1973 and Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Ak. 1975).

3. SUMMARY

R.S. §2477 was a dedication by the United States of unreserved public lands for the establishment of highways. A showing of acceptance of the highway grant is all that is necessary in order to establish a highway under the grant. The acceptance can be shown by legislative acts or by continued public user. Once there has been an acceptance, the dedication is affective as of the date of acceptance. Koloen v. Pilot Mound Township, 33 N.D. 529, 157 N.W. 672 (1916), Lovelace v. Hightower, 168 P.2d 864 (N.M. 1946), Hamerly v. Denton, 359 P.2d 121 (Ak. 1961). This is true even if no survey has as yet been made, for the right takes effect on the date of acceptance. Faxon v. Lallie Civil Tp., N.D. 634, 163 N.W. 531 (1917). If acceptance of the grant is made before patent, the owner takes the land subject to the right-of-way. Ball v. Stephens, 158 P.2d, 207 (Ca. 1945). The width and extent of the right-of-way is determined according to State law. State v. Crawford, 441 P.2d 586 (Ariz. App. 1968). Thus when acceptance is made by public use, the easement is no greater than that which was reasonably necessary for the public use. Clark v. Taylor, 9 Ak. 298 (D.C.D. Alas. 1938), State v. Fowler, 1 ALJ No. 4, 7 Superior Ct. 4th Jud. Dis., C.A. No. 61320, September 26, 1962. If the right-of-way was established by the legislature, the applicable laws would apply in determining the extent of the right-of-way. State v. Crawford, supra. Moreover, upon acceptance, the rights of the public become vested rights for use of the designated public lands under the grant for highway purposes. Faxton v. Lallie Civil Tp., supra.

II

THE EFFECT OF THE REPEAL OF THE R.S. §2477

R.S. §2477 was a present, absolute grant of right-of-way for construction of highways over public lands not reserved for public uses. Wells v. Pennington County, 2 S.D. 1 48 N.W. 305 (1891); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert den. 411 U.S. 917 (1973); 1976 U.S.C.C.A.N. 6175, 6204. The grant became effective upon acceptance as long as the acceptance related to lands which were public lands of the United States and thus subject to acceptance. Faxon v. Lallie Civil Tp., 36 N. D. 634, 163 N.W. 531 (1917); Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975). Acceptance of the grant could be evidenced by some positive act on the part of the appropriate public officials. The declaration by the legislature that all section lines are public highways has been held to fulfill the requirement that public officials must demonstrate an intention to accept the highway grant. Wells, supra; Cirves v. Kenai Peninsula Borough, 536 P.2d 1221 (Ak. 1975). Acceptance could also be made by public use, the character and extent of which could prove that the grant is accepted. Hamerly v. Denton , 359 P.2d 121 (Ak. 1961).

According to the 1976 Federal Land Policy and Management Act, all rights-of-way granted under statutes superceded or repealed by the provisions of the Act are protected. 1976 Federal Land Policy and Management Act, Pub. L. 94-579, 90 Stat. 2793, Oct. 21, 1976; 1976 U.S.C.C.A.N. 6175, 6197. An acceptance by the public authorities, or by the public, of the highway grant under R.S. §2477 should therefore be protected as an existing right-of-way for highway purposes, and would be uneffected by the repeal. This is in accordance with the general principle that the dedication of land for public use can be withdrawn prior to acceptance, or may be rejected by revocation, or may be abandoned, by the grantee. See 23 Am. Jur. 2d Dedication, cited in 1969 Op. of the Attorney General

Dec. 18, 1969). Thus, after a proper acceptance of the offer, the withdrawal of the grant is immaterial.

In Alaska, the legislature accepted the R.S. §2477 grant first in 1923 and again in 1953. In 1923, the territorial government enacted ch. 19 SLA 1923 which read as follows:

> Section 1. A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strip shall inure to the owner of the tract of which it formed a part of the original survey. Approved April 6, 1923.

Therefore, all lands acquired from either the United States or the Territory after April 6, 1923, the effective date of the statute, was burdened with a 66-foot (one rod equals 16 1/2 feet) section line right-of-way. The law was codified in the 1933 Compiled Laws of Alaska, Section 1721. When the territorial laws were again compiled in 1949, the table of statutes indicated that Section 1721 was "invalid". No reason has been found for this apparent misconception. It has ready been seen that an organized territory could accept the highway grant. United States v. Rogge, supra; Hayes v. Government of Virgin Is., 392 F.Supp. 48 (D.Ct. V.I. 1975). However, the declaration of "invalidity" seems to have worked a repeal of the statute and therefore lands acquired on or after January 18, 1949 were not burdened with the highway easement until a reacceptance was made. It should be noted, however, that the repeal of the statute is not a repeal of the rights-of-way; therefore all land acquired in Alaska between April 6, 1923 and January 18, 1949 is subject to a territorial 66-foot section line right-of-way for highway purposes.

In 1951, the Territory of Alaska enacted the following provision in chapter 123, SLA 1951:

Section 1. A tract 100 feet wide between each section of land owed by the Territory of Alaska, or acquired from the Territory is hereby dedicated for use as public highways, the section line being the center of said highway . . . Approved March 23, 1951.

Thus the legislature limited the acceptance of lands owned by the territory. Thus would appear to bolster the argument that the 1949 declaration of invalidity of the 1923 statute was truly a repeal of the section line right-of-way acceptance across public lands of the United States. In 1953, the statute was amended to include "a tract four rods wide between all other sections in the territory". Ch. 35 SLA 1953. The 1953 statute is currently codified as AS 19.10.010. Thus, since 1953, land owned by either the Territory or the United States government is subject to this section line easement. The 1953 statute, effective continuously since March 21, 1953, constitutes the acceptance of the highway offer to dedicate public land for highway purposes which is necessary to complete the grant. The repeal of the grant by the 1976 BLM Organic Act would, therefore, have no effect on lands acquired since 1953; that is, lands would be burdened with the appropriate easement as long as the statute remains unrepealed in Alaska.

The history of acceptance of the highway grant in Alaska has necessarily presented many questions as to what lands are burdened by the section line the easement. These questions, however, may be answered through an analysis of the nature of the grant and acceptance as reviewed in the first section of this memorandum. It should initially be remembered that the repealing statute in the 1976 BLM Act provides that all existing rights of way are to be preserved. Federal Land Policy and Management Act, 1976, Title VII, Sec. 701(a), 90 Stat. 2793. In determining that there is a continuing right of way over every section line in the State of Alaska, it need only be shown that the land was public land on

Unreserved

the United States [or land owned or acquired by the territory or state] at the time of the acceptance of the grant; specifically, that the land was public land between April 6, 1923 and January 17, 1949 or since March 21, 1953. [redacted] right; Wells v. Pennington County, supra. Thus, in the 1969 Opinion of the Attorney General, No. 7, Dec. 18, 1969, Mr. Norman states at p. 6 that:

> 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 the section line dedication. Public lands which come open through cancellation of an existing withdrawal, reservation, or entry, and subsequently acquired by the territory (or state), are all subject to the right-of-way.

As long as AS 19.10.010 is law in the State of Alaska, this statement of the law should hold true regardless of the fact that the federal offer has been withdrawn. Again, this is true because the offer has been accepted as to all of the section lines of the State as they become eligible for dedication, and an offer once accepted is not subject to withdrawal. Rather, the section line easement falls into the category of the "right-of-way heretofore granted" under Section 509 of the BLM Organic Act and is thus unaffected by that Act.

In conclusion, the repeal of R.S. §2477 should have no effect on those rights of way for highway purposes which were accepted prior to the repeal. The acceptance can be proved on a case-by-case basis if the acceptance is by public use. The territory and state authorities have accepted the grant as to all section lines in the State through the enactment of Ch. 19, SLA 1923 and Ch. 35, SLA 1953. Such declarations are all that is needed to constitute the "positive act" necessary to show the intention to accept as required in Hamerly. Upon survey, the section line highway may be established and the effective date of the right-of-way will be the date of the legislative acceptance. Thus, whether or not land is burdened with a highway easement will depend on the status of the land when the grant was accepted. That the grant is no longer operative has no affect on the prior acceptance or on the status of the land when accepted.

IN REPLY REFER TO
2800 (932)

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Alaska State Office
701 C Street, Box 13
Anchorage, Alaska 99513

November 28, 1984

Instruction Memorandum No. AK-85-72
Expires 9/30/ 85

To: DM's and DSD's

From: State Director, Alaska

Subject: Notation of R.S. 2477 Right-of-Way Assertions on the Public Land Records

This memorandum is intended to supplement manual guidance on notation of R.S. 2477 right-of-way assertions. The BLM manual policy on notation of claimed R.S. 2477 is intended to facilitate BLM management of those lands it administers. BLM needs a sound transportation plan in order to effectively manage those public lands it administers; therefore, it is necessary to identify existing access routes on the Bureau's official records.

Notation of any particular R.S. 2477 assertion of right to these records is discretionary. The manual merely provides BLM a procedure of noting R.S. 2477 claims on its records, if BLM agrees that the assertions have at least potential validity. The manual procedure is not intended to force BLM to note assertions it believes to be questionable or invalid.

It should, however, be remembered that an R.S. 2477 grant is created by taking. The rights acquired thereunder attached immediately when the facility was first appropriated or constructed under the statute. Once a right-of-way is established under R.S. 2477, it may be abandoned only under procedures established by State law.

The BLM should work with the State of Alaska to identify those existing access roads and trails which may be potentially valid R.S. 2477 assertions. When BLM agrees that a right may exist (i.e. the assertion may be valid) under the statute, it should note the assertion on its official land status records. If BLM does not agree that the right may exist, the assertion should not be noted to the records. BLM's notation of a potential right does not validate an invalid assertion and its failure to note a valid assertion does not void such assertion. The actual validity or nullity of an R.S. 2477 assertion can only be determined by a court of competent jurisdiction.

If an R.S. 2477 is asserted on a road or trail historically used only as a winter trail and use begins to occur during the other seasons which causes environmental damage, BLM's recourse is to try to get the State to maintain the trail or for BLM to sue for damages on Federal lands. Seasonality of use should

BLM NOTATION MEMO

be defined by the type of use which existed at the time the trail or road was established or appropriated. The background and history of the trail may need to be checked to determine if use has been seasonal.

BLM will note potentially valid R.S. 2477 assertions only across lands which it administers. Notations will not be made on lands withdrawn for other agency use, unless BLM has an MOU regarding notation with that agency having jurisdiction over the land. Assertions of rights will not be noted on land which have been Interim Conveyed or Patented to a Native Corporation or Tentatively Approved or patented to the State of Alaska.

The BLM does not need comment or concurrence from Native Corporations to note assertions on lands that it manages (including lands that are merely selected by such corporations.) BLM is only acknowledging a claim of a valid existing right to such lands. Such an acknowledgment does not change the validity or invalidity of the right. The existence of such a potential right will not be cited in any conveyance document as an encumbrance. A Native Corporation is free to challenge the assertion, in court, after it acquires title.

BLM will not specifically reference an R.S. 2477 claim, assertion or notation in the deeds or patents it issues for any claim or entry made under the public land laws, unless the inclusion of a reference to such claim has been agreed to, in writing by all affected parties.

There may be situations where the State of Alaska may find it advantageous to acquire a right-of-way under Title V of the Federal Land Policy and Management Act in lieu of an R.S. 2477 notation. Patents for entries made after granting of a Title V right-of-way are made subject to the right-of-way.

It should also be noted that the BLM cannot impose restrictions or stipulations restricting the use of an R.S. 2477 road or trail for those purposes authorized by statute. Only the State can impose restrictions on such uses. However, R.S. 2477 did not authorize the construction of non- access facilities such as powerlines, pipelines, etc. Such facilities, if not covered by a granted right-of-way constitute unauthorized use.

In deciding whether to note an assertion on the BLM records, BLM may perform a field examination and/or prepare a report to substantitate its decision as to disposition of the assertion. However, such action is not required.

Fred Wolf
Fred Wolf
State Director
Acting

Distribution:
D-DSC (D-558A)

United States Department of the Interior
OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

IN REPLY REFER TO

May 21 1980

MEMORANDUM

To: Acting Area Director
Bureau of Indian Affairs
Juneau

From: David S. Case
Attorney/Advisor

Subject: Rights of Way on Allotments --
R.S. 2477 and Other Access Questions

I. INTRODUCTION

A. Your Requests

Over the last twelve months you have directed three opinion requests to this office regarding access to and across Native allotments. Your first request (dated May 22, 1979) asked about the effect of Native occupancy on the establishment of section line road easements under R.S. 2477.[1] Your second request (dated July 6, 1979) was for general guidance about the method for assuring access to landlocked Native allotments you had advertised for sale. You also asked if you have to disclose any access problems in your sale advertisement. With respect to R.S. 2477 easements, you asked whether a section line easement for public access would suffice for private access to an otherwise landlocked

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[1] The request was entitled "Effect of Statutory Reservations on Native Allotments" and was answered in a memorandum by Dennis Hopewell of this office, dated September 4, 1979. The section line easement question was specifically excluded from that response pending this reply.

Exhibit III

B.I.A. MEMO

allotment. Your final request (dated April 4, 1980) reduced to its essentials, asked whether the Indian right of way laws and regulations apply when the right of way on or through a certified allotment coincides with a surveyed section line easement arguably granted under R.S. 2477.

B. R.S. 2477 in Brief

R.S. 2477 is an 1866 Act "granting" highway rights of way over public lands in the following deceptively simple terms:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. Act of July 26, 1866, c. 262, sec. 8, 14 Stat. 253.

This act was initially codified as Revised Statute (R.S.) 2477 and later as 43 U.S.C. 932. It was repealed by Section 706(a) of the Federal Land Policy and Management Act (FLPMA) of October 21, 1976, PL 94-576, 90 Stat. 2743, 43 U.S.C. 1701, et seq.

Your questions focus on the section line easements appropriated by the Territory and State of Alaska under this federal authorizing legislation. The State statute appropriating the section line easements is codified as Alaska Statute (AS) 19.10.010. However, the the R.S. 2477 grant includes other kinds of rights of way other than those appropriated under this statute. On the other hand, you should note that the R.S. 2477 grant is specifically limited to rights of way over "public lands." The latter point is significant, because it is our opinion that Alaska Native use and occupancy sufficient to qualify for a certificate of allotment is also sufficient to withdraw the land occupied from "public land" status.

Finally, the State's acceptance of the R.S. 2477 grant along section lines has had an on-again, off-again history that must be taken into account when determining whether the easements granted under R.S. 2477 have ever been accepted by the State. Thus, the answers to your questions require some background in the meaning of the term "public lands" and in the history of the application of R.S. 2477 in Alaska. In order to give some direction to that discussion, however, we have provided short answers to each of the questions posed in your opinion requests.

II. SHORT ANSWERS

A. May 22, 1979 Request

We agree with the conclusion expressed at page 2 of your opinion request about the effect of Native use and occupancy on the establishment of a section line easement. However, we would state your conclusion more definitely: If use and occupancy were initiated after survey of the section line, then the section line easement is superior to the allottee's rights and a right-of-way across the allotment does not require the consent of the allottee or a grant from the United States. If use and occupancy began any time before the survey, then the easement can only be granted with the consent of the allottee and according to the applicable Indian right of way laws.

B. July 6, 1979 Request

We know of no principle requiring you to disclose whether or not there is access to advertised parcels; furthermore, otherwise valid section line easements can be used to provide private access, but they are also open to the public. Under some circumstances, however, easements by necessity can be implied across otherwise unencumbered lands to afford private access to landlocked parcels.

C. April 4, 1980 Request

Whether the Indian right of way laws apply to a Native allotment depends on whether the allottee commenced use and occupancy before or after a section line right of way was appropriated by survey.

III. DISCUSSION

A. R.S. 2477

1. History and Purpose of R.S. 2477

U.S. Supreme Court and Ninth Circuit cases have cast some doubt on whether R.S. 2477 applies in Alaska. A narrow reading of the U.S. Supreme Court's opinion in Central Pacific Railway Co. v. Alameda County, 284 U.S. 463 (1932), and the Ninth Circuit's later decision in U.S. v. Dunn, 478 F.2d 433, 445 (9th Cir. 1973) would indicate that R.S. 2477

was only a recognition of pre-existing rights rather than a grant of new rights. Strictly construed, this interpretation could mean that R.S. 2477 was never applicable to Alaska, since it was enacted in 1866, one year prior to the purchase of the Territory.

The Territorial and State cases, on the other hand, consistently characterize R.S. 2477 as "in effect, a standing offer from the federal government" for the grant of a right of way, Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (Alaska 1975). Under this interpretation, the right of way has been held to come into existence upon the "acceptance" of the standing offer. See Berger v. Ohlson, 9 Alaska 389 (D. Alaska 1938); Clark v. Taylor, 9 Alaska 298 (D. Alaska 1938); United States v. Rogge, 10 Alaska 130 (D. Alaska 1941); State v. Fowler, 1 Alas. L.J. 7 (April 1963); Hammerly v. Denton, 359 P.2d 121 (Alas. 1961). Given the weight of authority in this jurisdiction and the historical reliance placed upon R.S. 2477 in Alaska as a source of rights of way across the public domain, we are unwilling to conclude that the statute has no applicability to Alaska. We suspect that if the question were squarely presented to the Ninth Circuit Court of Appeals it would agree.

It has been held that R.S. 2477 first became applicable in Alaska by the Organic Act of May 17, 1884, 23 Stat. 24, whereby Alaska first became an organized territory. Section 9 of that Act, among other things, provided that the laws of the United States be extended to the Territory of Alaska, U.S. v. Rogge, 10 Alaska, supra at 147. As noted previously, R.S. 2477 is construed as a standing offer from the federal government for the creation of a right of way, Girves v. Kenai Peninsula Borough, 536 P.2d, supra at 1226. Under this construction, it has been held that the offer can be accepted (and the right of way created) either (1) by a positive act of the state or territory clearly manifesting an intent to accept the offer, Hammerly v. Denton, 359 P.2d, supra at 123.[2/]

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

or (2) by public use of the right of way for such a period of time and under such conditions as to prove that the offer has been accepted, id.

Statutory acceptance of the grant, formal expression on the part of public officials of an intention to construct a highway or actual public construction of a highway may all constitute acceptance of the R.S. 2477 grant by the "positive act" of the appropriate public authorities. Thus, in Girves, supra, the Alaska Supreme Court held that AS 19.10.010 (establishing a highway easement along all section lines in the State) was sufficient to establish a right of way along the boundary of plaintiff's homestead coinciding with a surveyed section line. In Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), it was held that the State's application to the Bureau of Land Management to construct a "public highway" from the Yukon River to Prudhoe Bay, along with enabling State legislation, was sufficient to establish an acceptance of the federal grant. In addition, the actual construction or public maintenance of a highway may constitute acceptance. See Moulton v. Irish, 218 P.2d 1053 (Montana 1923), construction of highways; Streeter v. Stalnaker, 85 NW 47 (Nebraska 1901), public maintenance and improvement of highways.

Public use (sometimes called "public user") may also constitute acceptance of the grant in the absence of any positive official act. Whether any claimed use constitutes acceptance of the grant, however, is a question of fact to be decided by the court. It appears that continued and consistent use of a right of way across the public lands by even one person with an interest in the lands to which the road gives access may be sufficient to establish public user, State v. Fowler, 1 Alas. L.J., supra at 8 (April 1963). See also Hamerly v. Denton, supra at 125. However, the Alaska Supreme Court has held that mere desultory or occasional use of a road or trail does not create a public highway, id.3/

3/ Of course, it is no longer possible to accept the R.S. 2477 grant by any of these methods, because R.S. 2477 was repealed by FLPMA, supra, in 1976.

2. Allotments As "Public Lands"

By its terms, R.S. 2477 is only an offer for a right of way across "public lands." In discussing this term in the context of R.S. 2477, the Alaska Supreme Court has noted:

> The term "public lands" means lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler. Hammerly v. Denton, supra at 123.

Beginning with the 1884 Organic Act, previously discussed, Congress has specifically provided for the protection of lands used or occupied by Alaska Natives. Section 8 of the Organic Act provided in part:

> That the Indians or other persons in [Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. 4/

Federal decisions have long recognized the statutory protection afforded Alaska Native use and occupancy. See, e.g., U.S. v. Berrigan, 2 Alaska 442 (D. Alas. 1904); U.S. v. Cadzow, 5 Alaska 125 (D. Alas. 1914). Departmental regulations and policy reinforce the statutes. See, e.g., 43 CFR §§ 2091.1(e), 2091.2-1, 2091.5, 2091.6-3; see also Government Appropriation of Rights-of-Way in Alaska, Opinion of the Associate Solicitor, Public Lands (M-36595, March 15, 1960, copy attached).

In analogous circumstances, the U.S. Supreme Court has consistently recognized that railroad land grants are not to be construed in derogation of Native use and occupancy

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4/ Similar provisions appear in the following acts: Act of March 3, 1891, c. 561, 26 Stat. 1095, § 14; Homestead Act of May 14, 1898, c. 299, 30 Stat. 412, § 7; Act of June 6, 1900, c. 786, 31 Stat. 330, § 27.

rights. That is particularly true where those rights have been protected by treaty, Leavenworth L & GR Co. v. United States, 92 U.S. 733 (1875), or specific statutory exceptions, Buttz v. Northern Pacific Railway Co., 119 U.S. 55 (1886). See generally, Bardon v. Northern Pacific Railway Co., 145 U.S. 535, 540-543 (1892). Most significantly, the U.S. Supreme Court has specifically protected rights of individual Native occupancy against competing federal grants even in the absence of any statutory or treaty protections where those rights flow "from a settled government policy." Cramer v. United States, 261 U.S. 219, 229 (1923). Whether from the statutory protection afforded in the 1884 Organic Act and the other legislation specifically noted or from the settled government policy of protecting Alaska Native use and occupancy, we think it is clear that lands used and occupied by individual Alaska Natives are not "public lands" within the meaning of R.S. 2477 and that the R.S. 2477 grant cannot attach during any period of such occupancy.

3. Acts Accepting the R.S. 2477 Grant

(A) Section Line Easements. You have noted that AS 19.10.010 establishes rights of way of varying widths along the section lines in the State. As noted earlier, the Alaska Supreme Court has concluded this statute is a positive official act constituting acceptance of the R.S. 2477 grant, Girves, supra. The Territorial statute accepting the grant was originally enacted on April 6, 1923 (19 SLA 1923), but was subsequently repealed (perhaps inadvertently) on January 18, 1949. Op. Ak. Atty. Gen. No. 7 at 3 (December 18, 1969). The statute was subsequently reenacted in substantially its present form by the 1953 Territorial legislature (Act of March 21, 1953, 35 SLA 1953). Id. Thus, whether a section line easement has attached to Native occupied land must be viewed against the backdrop of the dates of Native occupancy and the dates during which Alaska's acceptance of the grant was in effect. The section line easements could only attach to lands not occupied by Natives between the dates of April 6, 1923, and January 18, 1949, and from March 21, 1953, forward.

Additionally, by the terms of the State statute, the acceptance is dependent on the existence of a "section line." In the Opinion previously noted, the State Attorney General also concluded that for the R.S. 2477 grant to attach under the statute, the "public lands must be surveyed and section lines ascertained," id. at 7. We agree with this conclusion; therefore, you must also determine whether

the lands in question were subject to individual Native use and occupancy on the date the section line was actually surveyed.[5]

(B) Other Official Acts of Acceptance. As noted earlier, other official actions (i.e., construction, repair, dedications, etc.) can constitute official acceptance of the R.S. 2477 grant. Whether such official action has created an R.S. 2477 right of way will have to be determined on a case-by-case basis.

(C) Public User. Rights of way claimed to have been created by public use must also be determined on a case-by-case basis. On the one extreme, an obvious public road established prior to Native use and occupancy would certainly be sufficient to constitute acceptance of the R.S. 2477 grant; see State v. Fowler, 1 Alas. L.J. 7, supra. On the other extreme, it is equally clear that desultory or occasional use of a road or trail by individuals having no interest in the land to which they obtain access is not sufficient to create an R.S. 2477 right of way, Hamerly v. Denton, supra. Whether a given use is sufficient to constitute acceptance of the R.S. 2477 grant, may have to be determined judicially in all but the most obvious cases.

4. Widths

By State statute, section line easements on "public lands" are four rods (66 feet) wide with the section line as a center of the dedicated right of way.[6] Other official

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[5] The Attorney General also concluded that the R.S. 2477 grant attaches on the date the "protracted surveys" were published in the Federal Register. We do not agree with this position; as a practical matter, the protraction diagrams are not a reliable means of ascertaining the correct position of the surveyed section line.

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[6] A right of way 100 feet wide is granted between sections of land owned by or acquired from the State. Since Native occupied lands could not fall within this category, section line easements on Native allotments will be confined to the 66 foot width.

acts could conceivably establish larger rights of way. Rights of way established by public user appear to be confined to the width actually used, State v. Fowler, supra.

B. Other Access Questions

1. Obligations To Provide Access

We do not believe either the allottee or the United States is obligated to provide a warranty of access to the purchaser of an allotment. By statute (AS 34.15.030) Alaska has incorporated the common law covenants for title into any deed which by its terms "conveys and warrants" real property to another. Thus, a deed substantially in the statutory form includes implied warranties that at the time of the conveyance the grantor: (1) is lawfully seized of the estate in fee simple and has the right and power to convey the premises; (2) that the premises are free from encumbrances and (3) that he warrants quiet enjoyment of the premises and to defend the title against all persons claiming the premises.

You have advised that you use a special warranty deed to convey restricted Indian lands. As you know, a special warranty deed limits the grantor's obligation to defend only against claims arising through him. It does not require the grantor to defend against claims arising through other persons, 21 CJS "Covenants" § 49. Except as so limited, we believe the deed form you used includes all of the statutory covenants implied by AS 34.15.030. None of these, however, include a covenant of access to the land granted. See generally, Powell on Real Property, ¶ 904, et seq. (1968 edition). Furthermore, AS 34.15.030 specifically provides: "No covenant is implied in a conveyance of real estate, whether the conveyance contains special covenants or not." We interpret this to mean that unless there is a specific covenant of access, the grantor is not obligated to provide it.

2. Easements By Conveyance Or Covenant

In spite of the protection this doctrine affords both the United States and the allottee, we recommend that as a prudent land manager you advise the allottee to provide whatever access it is within his power to provide incident to the sale of an allotment. That is especially true if, as in one case you described to us, the allottee is selling a

portion of the allotment which would be landlocked by the remaining lands of the allottee or others. In these circumstances, we advise you to insure that appropriate access is guaranteed through the allottee's other lands either by convenant or specific grant of easement. See generally, Powell on Real Property, ¶ 407 and 408. See also, 28 CJS Easements, § 23, et seq. Conversely, if the allottee's other lands will be landlocked by conveyance of a portion of the allotment to a third party, the allottee should insure that he is reserved an easement in the lands granted. See 28 CJS Easements, § 29. Under these circumstances, failure to provide or obtain access at the time of conveyance could result in later litigation to establish an easement by necessity.

3. Easements By Necessity

Easements by necessity are implied easements across otherwise unencumbered tracts where necessary to afford access to an otherwise landlocked parcel. See generally, Powell on Real Property, supra, ¶ 410. This doctrine comes into play only where there is a unity of ownership between the dominant and servient parcels at the time the landlocked (i.e., dominant) parcel was severed from the rest of the estate. The doctrine would apply to both examples discussed above where the grantor conveys a portion of the allotment thereby isolating either the land conveyed or the grantor's retained lands. In these circumstances, the courts have construed the intention of the parties to create an easement of necessity across the servient estate to provide access to the landlocked (i.e., dominant) estate.

As applied in this jurisdiction, the doctrine only requires proof of reasonable (as opposed to absolute) necessity in order to imply an easement. U.S. v. Dunn, 478 F.2d 443, 446 (9th Cir. 1973). Although the easement must be something more than a mere "convenience," it is not necessary to show that it is the only means of access to the property. In any event, the determination of whether the easement is a "reasonable necessity" is a fact question which involves considerations of public policy as well as the intent of the parties and the reasonable utilization to be made of the landlocked parcel. See generally, Powell on Real Property, supra, ¶ 410.

The doctrine has also been applied to Indian lands in this jurisdiction, cf. Superior Oil Co. v. United States, 353 F.2d 34 (9th Cir. 1965). The oil company in this case

sought to obtain an easement to move heavy oil drilling equipment across Indian reservation lands in order to drill on lands owned by a mission society and leased to the oil company. The mission society had previously been granted the land by the United States under a statute permitting such grants to religious organizations engaged in mission or school work on Indian reservations. The court concluded that although the mission society had an easement by necessity for mission purposes, the scope of that easement could not be expanded to accommodate the purposes of the oil company. We know of no principle which would preclude an easement of necessity from attaching to lands merely because they are Indian trust or restricted lands where the easement of necessity doctrine is otherwise applicable. See also, U.S. v. Clarke, 529 F.2d 984 (9th Cir. 1976), aff'd _____U.S._____, (No. 78-1693, March 18, 1980).

IV. SUMMARY

This, of necessity, has been a rather wide-ranging opinion dealing with the several general concerns you raised regarding easements across Indian allotments. We will summarize some of our conclusions below for ease of referenc

A. R.S. 2477 Easements

R.S. 2477 easements can be created either by the positive acts of authorized authorities or public user of a right of way across the "public lands." Native used and occupied lands, however, are not "public lands." Therefore, a right of way under R.S. 2477 can only be obtained if, at the time the R.S. 2477 grant is accepted, the lands were not subject to the individual use and occupancy rights of an Alaska Native who has applied for an allotment.

B. Section Line Easements

Whether a section line easement supersedes Native use and occupancy depends on whether the Native use and occupancy preceded either the statutory acceptance or actual survey of the section line easement. If Native use and occupancy began prior to April 6, 1923, or between January 18, 1949, and March 21, 1953, then the easement could not be imposed on those lands by subsequent survey of a section line. If unoccupied lands were surveyed either between April 6, 1923,

and January 18, 1949, or after March 21, 1953, then the section line easement supersedes Native occupancy rights.

C. Guarantees of Access

Although there is no legal requirement to guarantee access to otherwise landlocked allotments, you would be well advised to counsel the allottees to provide access if it is within their power to do so. It is especially important to provide access where there is an initial unity of title in the allottee. Under these circumstances an easement of necessity can be imposed to benefit a landlocked parcel. Providing access at the time of the grant will avoid later confusion and possible litigation.

D. Public or Private Access

You should also be aware that any R.S. 2477 right of access (whether by section line easement or otherwise) predating Native use and occupancy is a right of public access. While it may also permit private individuals to have access to otherwise landlocked parcels, it also permits the public at large to use the right of way. Of course, that does not permit the public to trespass on the allottee's or anybody else's private property.

David S. Case
Attorney/Advisor

Enclosure

cc: Scott Keep, Div. of Indian Affairs, Washington, D.C.
Area Realty Officer, Bureau of Indian Affairs, Juneau

IN REPLY REFER TO

2800 (932)

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Alaska State Office
701 C Street, Box 13
Anchorage, Alaska 99513

September 7, 1984

Memorandum

To: Member of ALUC

From: State Director, Alaska

Subject: R.S. 2477 Issue Paper

Transmitted herewith is an issue paper which sets forth BLM's policy on R.S. 2477 rights-of-way. The policy has been altered enough in recent years to allow us to note these claims on our records provided the State takes the initiative and files an application for notation which meets the criteria set out in the issue paper.

In the absence of the State formally asserting its rights under the Statute, BLM has no choice but to consider the lands involved to be vacant public lands without established public access. BLM has had numerous discussions with the State concerning R.S. 2477 and the State is well aware of our policy and procedures.

Enclosed is a draft MOU between our Fairbanks District Office and the State of Alaska which is intended to facilitate the policy set out in the issue paper. Also enclosed is a copy of our BLM Manual section on R.S. 2477 and a copy of a Regional Solicitor's Office memorandum to the Bureau of Indian Affairs dated May 21, 1980.

The Fairbanks District Office and the State of Alaska, Department of Transportation and Public Facilities, Northern Region have been working on this Draft MOU for sometime now and have established a good working document which fits well within the constraints of our regulations.

Our first preference would be to have the cooperative State Federal work on R.S. 2477 started in Fairbanks proceed. However, we would not object to the Council taking this matter under its wing if this is what the State wishes. Under any circumstance, the State must clearly take the leadership role.

Michael J. Penfold
State Director

Enclosure (1) w/Exhibits I, II, and III

BLM POSITION

Issue Paper - R.S. 2477 Roads and Trails

Under DOI existing authority and policy, it is the responsibility of the State of Alaska to officially assert its claimed rights by filing applications for notation of such rights-of-way on our records. Such applications in addition to providing the information required to show the highway meets the four criteria set out below must provide a plottable description of the facility so that BLM's records can be properly noted.

The Act of July 26, 1866, R.S. 2477 (43 U.S.C. 932) provided:

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

This statute, which was repealed by the Federal Land Policy and Management Act (FLPMA) of October 21, 1976, 90 stat. 2743, has been interpreted as granting a right-of-way for public use over public land without limiting the method of establishment of that right-of-way. The grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located.

The Act (R.S. 2477) did not specify the extent of the grant, the width of the right-of-way, or the nature of the right conveyed. Since the Department does not grant such rights-of-way, it has consistently held that it has no authority to adjudicate claims made under this Act. Therefore, acknowledgements of such claims have not been inserted in Federal Land Patents. The courts have held that reservation of an R.S. 2477 right in our patents is not necessary to validate or protect rights-of-way created under the statute.

In order to facilitate proper management of the public land, the Department has to have sound transportation plans. It is, therefore, necessary to identify all public roads in a given area. To facilitate such identification the Bureau of Land Management has recently been given authority to note claimed R.S. 2477 highways (roads, trails, etc.) on its official status plats, provided that requests for notation meet the following criteria:

1. In order for a valid right-of-way to exist, there must have been actual construction of a highway. Mere use, planning, or survey is not considered construction. However, construction of the highway need not have occured all at once. Road maintenance often equals improvement and even construction. When the history of a road is questionable, it's existence in a condition adequate for public use may constitute evidence that construction has taken place.

2. The highway is free and open to the public at large.

3. The construction of the highway on unreserved public land must have occurred prior to repeal of R.S. 2477 on October 21, 1976.

4. The State must have a procedure to confirm the R.S. 2477 public highway right-of-way grant.

Once the State application is received, BLM has the responsibility to assure that the lands covered by the claimed right-of-way were, on the date of establishment of the highway, unreserved public lands. If the information submitted by the State meets the four criteria above, BLM assumes (it does not adjudicate the claim) that the road is a bona fide R.S. 2477 highway. The BLM then acknowledges the State's claim and plots the right-of-way on its records.

Any uses other than for highway purposes within the boundaries of an R.S. 2477 right-of-way must be permitted by BLM by a separate right-of-way grant. It should also be noted that the R.S. 2477 grant extends only to the right-of-way itself, it does not include ancillary facilities such as material sources and stockpile areas.

The Fairbanks District of BLM is currently working on a Memorandum of Understanding with the State of Alaska, Department of Transportation and Public Facilities. This MOU is intended to facilitate notation of the State's claimed R.S. 2477 rights on BLM's official records.

BLM has no objection to elevating this MOU to State level if the Council so desires. However, even if the MOU is elevated to State level, BLM cannot by law or regulation note the State's R.S. 2477 claims to its records until the State DOT/PF files a formal request for notation accompanied by a plottable description and a date of appropriation. The initiative to begin the record notation process rests with the State.

Further, until the State officially identifies its claimed R.S. 2477 rights, so they can be noted on the records, Federal agencies have no recourse but to treat the lands involved as if they were free and clear of encumbrances. As an example, numerous contacts were made with the State of Alaska during the planning process on the Steese NCA and the White Mountains NRA. At no time has the State of Alaska identified any R.S. 2477 claims within these planning areas.

COPY

MEMORANDUM OF UNDERSTANDING
BETWEEN ALASKA DEPARTMENT OF NATURAL RESOURCES AND
ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
AND
BUREAU OF LAND MANAGEMENT

PURPOSE

1. The purpose of this agreement is to establish the procedures for the assertion of RS 2477 rights-of-way by the Alaska Department of Natural Resources (DNR) and the Alaska Department of Transportation and Public Facilities (DOT&PF) to the Bureau of Land Management (BLM). Federal, state, and local officials need to know locations of RS 2477 public right-of-way assertions in order to assist such officials in their land and resource management decisions. The public needs to know the location of RS 2477 public right of way assertions to avoid unauthorized uses on private lands. This Memorandum of Understanding (MOU) will establish procedures that will enable RS 2477 rights-of-way assertions to be placed on land status plats.

BACKGROUND

2. RS 2477, formally codified as 43 U.S.C 932 (repealed by P.L. 94-579, Federal Land Policy and Management Act of October 21, 1976), provides:

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

3. By regulation found in 43 C.F.R. 2802.5 (b), the Bureau of Land Management has provided:

> In order to facilitate management of the public lands, any person or state or local government which has constructed public highways under the authority of RS 2477 (43 U.S.C. 932, repealed October 21, 1976) may file a map showing the location of such public highways with the authorized officer.

4. In Hamerly v. Denton, 359 P. 2d 121, 123 (Alaska 1961), the Alaska Supreme Court stated that the general rule regarding acceptance of the RS 2477 federal grant:

> Before a highway may be created, there must be either positive act on the part of appropriate public authorities of the state, clearly manifesting an intention to accept the grant, or there must be public use for such a period of time and under such conditions as to prove that the grant has been accepted.

DOT-DNR/BLM M.O.U.

5. The United States Department of the Interior, Office of the Solicitor, stated in a memorandum dated July 7, 1983:

> "[(T)he Department of the] Interior has long recognized that State law controls what constitutes a (R.S. 2477) highway within each state;" and

6. Alaska Statute 19.45.001(8) states:

> "Highways includes a highway (whether included in the 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 solely inside the state or to connect with a Canadian highway, and any such related facility;" and

7. WHEREAS by statute, AS 19 SLA 1923; 123 SLA 1951; 35 SLA 1953; AS 19.10.010, the State of Alaska has accepted the RS 2477 grant.

8. The RS 2477 grant has also been accepted in many cases by actual public use or expenditure of public monies on unreserved public lands for highway purposes.

POLICIES AND PROCEDURES

9. DOT&PF shall have responsiblity for asserting and for identifying and submitting maps to BLM of all RS 2477 rights-of-way established before October 21, 1976, identified on the list of state maintained highways. DOT&PF's responsibility under this paragraph includes both state and non state lands.

10. DNR or DOT&PF may identify, assert, and submit maps and evidence of use to BLM for all other RS 2477 rights-of-way established before October 21, 1976, situated upon any land within the State of Alaska.

11. DNR or DOT&PF shall accept evidence of use on any right-of-way established before October 21, 1976, from other state agencies, local governments, and members of the public. For all claims of RS 2477 rights-of-way which involve state land or provide access to state land or public water an ADL/LAS case file will be established.

12. DNR or DOT&PF may maintain duplicate sets of all files regarding RS 2477 rights-of-way. All newly created RS 2477 files, or any documents to be added to an existing file, will be duplicated and forwarded from one agency to the other.

13. All maps showing the location of RS 2477 rights-of-way established before October 21, 1976, submitted to BLM shall be the best maps possible but not of lesser detail than standard USGS maps at a scale 1:63,360. Maps and supporting documentation shall be submitted by both agencies concurrently. The submission of such maps showing the location of RS 2477 rights-of-way on public lands shall not be conclusive evidence as to their existence. Similarly, a failure to show the location of RS 2477 rights-of-way on any map shall not preclude a later finding as to their existence.

14. There shall be established an RS 2477 coordinating committee in the Northern Region of Alaska composed of DNR, DOT&PF and BLM. The purposes for this committee are as follows:

(a) coordination of agency priorities for identifying, locating, and asserting RS 2477 rights-of-way;

(b) coordination of RS 2477 processing procedures for identifying, locating, establishing case files, making assertions, and platting claims on both federal and state land status plats; and

(c) coordination of requests made to and by the agencies.

15. Each assertion of the existence of an RS 2477 right-of-way made pursuant to this agreement and the submissions to BLM will be reviewed by BLM to ensure the land was unreserved public land as of the date claimed and was established prior to the repeal of the law on October 21, 1976. BLM will not adjudicate the validity of RS 2477 assertions.

16. BLM, DNR, and DOT&PF shall each issue a serial number and establish a case file for each claim made pursuant to this agreement. All correspondence shall reference all agencies' file numbers.

17. BLM shall plot each RS 2477 right-of-way asserted on their Master Title Plats when the following criteria are met (BLM Manual 2801.24 B.1, Rel. 2-152, 9/10/82):

1. Criteria for identification of R.S. 2477 Public Highways, include four elements:

a. In order for a valid right-of-way to come into existence, there must have been the actual building (construction) of a highway. Mere use, planning, or surveying, does not equal construction. However, construction may not have occurred all at once. Road maintenance often equals improvement, or even construction.

Increments of maintenance over several years may equal construction. When public funds have been spent on the road it may be a public road. When the history of a road is unknown or questionable, its mere existence in a condition adequate for public use may be evidence that construction has taken place.

b. A highway is freely open to everyone. Roads that have had access restricted to the public by locked gates or other means may not be public highways.

c. The construction of a public highway on unreserved public land must have occurred prior to October 21, 1976.

d. A State has to have a procedure to confirm the R.S. 2477 public highway right-of-way permit.

18. This MOU establishes the state's procedure to confirm the RS 2477 and thereby fulfills item d in paragraph 17 above.

19. DNR shall plot each RS 2477 right-of-way asserted on their land status plats.

20. Nothing in this Memorandum of Understanding shall obligate any party in the expenditure of funds, or for future payments of money, in excess of appropriations authorized by law.

21. Each party agrees that it will be responsible for its own acts and the results thereof and each party shall not be responsible for the acts of the other parties; and each party agrees it will assume to itself risk and liability resulting in any manner under this agreement.

22. Nothing in this MOU is intended to limit agency or individual rights to normal administrative or judicial appeal processes.

23. Nothing herein is intended to conflict with Federal, State or local laws or regulations. If there are conflicts, this agreement will be amended as soon as practical to bring it into conformance with conflicting laws or regulations.

24. It is understood by all parties that individual citizens may be entitled to assert rights-of-way under RS 2477 notwithstanding this agreement. Nothing in this Agreement shall affect the right of private citizens to assert rights-of-way under RS 2477 in conformance with applicable law.

25. The effective date of this agreement shall be from the date of final signature. The agreement shall remain in effect until the parties jointly agree otherwise.

Jerry L. Brossia Date 9-28, 1984
Jerry L. Brossia, District Manager,
Northcentral District Office, Alaska Department of Natural Resources

Carl Johnson Date 9/28, 1984
Carl Johnson, District Manager,
Fairbanks District Office, Bureau of Land Management

H. Glenzer Date 28 Sept, 1984
H. Glenzer, Deputy Commissioner,
Northern Region, Alaska Department of Transportation & Public Facilities