12/12/91

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

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AT ANCHORAGE

AHTNA, INCORPORATED, an Alaska corporation, and CHITINA NATIVE CORPORATION, an Alaska corporation, and the CHITINA TRADITIONAL COUNCIL, an Alaska Native village,	)
Plaintiffs,	)
vs.	)
STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,	)
Defendant.	) Case No. 3AN-91-6957 Civ.

PLAINTIFFS' SUPPLEMENTARY BRIEF

I. INTRODUCTION.

In its Motion for Summary Judgment, the State of Alaska contended that it possessed a right-of-way for the Copper River Highway under either of two theories: (a) that it had inherited the railroad right-of-way because the federal act of July 15, 1941 preserved this right-of-way despite its relinquishment by the Railroad; or (b) that it had acquired a valid right-of-way by reason of D.O. 2665 (as amended). In their opposition to the summary judgment, plaintiffs responded to the State's assertion that either of these two grounds gave it a right-of-way.

In its reply brief, and for the first time, the State raises yet a third ground upon which it claims a right-of-way: R.S. 2477. The first portion of this brief will respond to the

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State's contentions that it has a right-of-way under this statute.

In addition, since this case is of considerable public importance, since it is complicated, since the initial briefs were written early on in the case, before additional authorities came to light, and since there are no reasons why a decision need be made immediately on the right-of-way issues, the plaintiffs believe that the court would benefit from further briefing on the issues which were discussed in the earlier summary judgment briefs. For this reason, the latter portion of this brief revisits the State's claim that it has inherited the railroad right-of-way.

II. THE STATE DOES NOT HAVE A RIGHT-OF-WAY BY VIRTUE OF R.S. 2477.

The briefing to date has already contained an extensive discussion of D.O. 2665. However, D.O. 2665 was not promulgated in a vacuum. It has important and significant relationships to R.S. 2477, which predates it. For this reason, any investigation of the State's right-of-way claims under R.S. 2477 must begin with an inquiry into the relationship between this statute and D.O. 2665.

A. The relationship between R.S. 2477 and D.O. 2665.

R.S. 2477, which was enacted on July 26, 1866, provided:

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

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This statute had been on the books for over eighty (80) years at the time that D.O. 2665 was promulgated in October of 1951. D.O. 2665 was promulgated in the context of existing laws governing right-of-ways across federal lands, and R.S. 2477 was a very important part of that existing legal framework.

The clearest indication of this relationship is to be found in a memorandum that was written to the Director of the Bureau of Land Management from the Chief Counsel of the Bureau on February 7, 1951. A copy of this memorandum is attached hereto as Exhibit "A." This memorandum is the document that proposed the issuance of D.O. 2665, and as such, it provides valuable insight as to why D.O. 2665 was passed, and as to the intent behind D.O. 2665.

The memorandum makes it clear that R.S. 2477 was a major ingredient in prompting the promulgation of D.O. 2665. As is indicated in its second paragraph, rights-of-way for nearly all of the public roads in Alaska (prior to the issuance of P.L.O. 601 in 1949) were acquired under R.S. 2477. The existence of this large number of R.S. 2477 rights-of-way created three problems. First, as is pointed out in the second page of Exhibit "A," R.S. 2477 "does not fix the widths of the rights-of-way granted by it."

A second problem was caused by the fact that R.S. 2477 created an easement for rights-of-way established pursuant to it, while P.L.O. 601 spoke of "withdrawing" lands for highway rights-of-way. A new order was needed in order to clarify which

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highway rights-of-way were easements, and which rights-of-way were withdrawals.

A third problem was caused by the fact that although R.S. 2477 would apply to new or proposed roads within the territory, it does not specify exactly when, in the course of planning a new road, the right-of-way for that road would come into existence. Accordingly, the memorandum addresses the fact that the new order must provide specific guidance as to when a right-of-way comes into existence on a newly-constructed road.

In short, the three reasons why D.O. 2665 was promulgated all directly spring from a need to clarify certain ambiguities that resulted from the many R.S. 2477 rights-of-way in Alaska. As such, it is clear that D.O. 2665 was intended to complement and supplement R.S. 2477. It was intended to delineate the width of rights-of-way acquired under R.S. 2477, and it was intended to clarify the procedures by which rights-of-way for new construction were acquired under R.S. 2477. It was not intended to replace R.S. 2477, nor it was intended to create an entirely new and different means by which rights-of-way could be created.

The discussion on p. 2 of Exhibit "A" supports this conclusion, for the thrust of this discussion is that a new administrative order was needed in order to clarify the width and location of rights-of-way obtained under R.S. 2477. Thus, when Exhibit "A" at p. 2 recommends issuance of D.O. 2665, it states that this order should "fix the width for existing roads

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and the width for new construction." Moreover, to the extent that it was contemplated that D.O. 2665 would set forth the mechanisms under which new rights-of-way were created, it involves an administrative determination of the activities which were required to perfect a right-of-way under R.S. 2477. As noted in the second paragraph of Exhibit "A," "Right-of-way easements were acquired under Section 2477 of the Revised Statutes (43 U.S.C. sec. 932) by the construction of the roads" (emphasis supplied). Thus, when Exhibit "A" states that "in the case of new construction the order can only be effective when the survey stakes have been set in the ground," it was setting forth the Interior Department's understanding of when a new right-of-way came into existence under R.S. 2477.

In short, a proper understanding of the relationship of R.S. 2477 and D.O. 2665 shows that the latter was intended to supplement and clarify the former; moreover, to the extent it requires the setting of survey stakes before a right-of-way could come into existence for new construction, it was intending to codify the procedure by which rights-of-way could come into existence under R.S. 2477.

To construe D.O. 2665 to imply that it created a wholly new method of establishing rights-of-way is to assume that the Department of Interior acted in complete ignorance of the statutory and regulatory context which existed at the time that D.O. 2665 was promulgated. As Exhibit "A" hereto demonstrates, that was most emphatically not the case. Finally,

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the symbiotic relationship between R.S. 2477 and D.O. 2665 shows that at least as early as 1951 the federal government was firmly of the opinion that rights-of-way for new roads could not be created under R.S. 2477 without actual construction taking place -- or at least without the setting of survey stakes preparatory to the actual construction.

Exhibit "A" also sheds light upon what is to be considered to be "new construction" within the meaning of D.O. 2665. The paragraph numbered (1) at the bottom of page 2 recommends that an order be issued which will govern the creation of rights-of-way "for new construction, <u>including</u> changes in the location of existing roads and <u>extensions of such roads</u>" (emphasis supplied). Thus, it is clear that D.O. 2665's requirements relating to new construction were meant to apply to extensions of existing roads.

B. <u>No right-of-way for the Copper River Highway has been perfected under R.S. 2477</u>.

(1) <u>R.S. 2477 applies by its terms only to public lands which are "not reserved for public use."</u>

The "land freeze" which was implemented by means of P.L.O. 4582 withdrew all of the federal lands in Alaska from unreserved status on January 17, 1969. Thus, if an R.S. 2477 right-of-way exists, it must have been perfected before January 1969.

Still further, portions of the disputed right-of-way were removed from unreserved status by earlier federal land

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classifications. Power Site Classification 403 was issued on March 29, 1950, and covered the following lands:

> All lands within 1/4 mile of Copper River for a distance of 1/2 mile upstream and 1/2 mile downstream from a point in Wood Canyon at latitude 61°27'N longitude 144°27'W.

This land description covers all lands which are one-half mile in either direction from a point that is approximately one-third of a mile south of the mouth of Eskilida Creek. Thus, for this mile of railroad bed, an R.S. 2477 right-of-way would have had to be perfected before March 29, 1950.

In addition, powersite withdrawal 2138, which was promulgated on February 5, 1954, covered T4SR5E and T5SR5E, CRM. Powersite withdrawal number 2215 was promulgated on June 1, 1957, and also covered T4SR5E, CRM. These two townships encompass the northern end of the railroad bed, from Chitina to approximately half way between the Uranatina River and Haley Creek. Thus, they cover approximately the northerly two-thirds of the right-of-way which is in dispute in this case. For this portion of the right-of-way, an R.S. 2477 right-of-way must have been perfected before February 5, 1954.

Plaintiffs contend that, for an R.S. 2477 right-of-way to be perfected, a road must actually be constructed, or it must be in the type of planning activities which immediately precede construction. Thus, in order to claim a valid R.S. 2477 right-of-way to the abandoned railroad bed, the State must prove that it had constructed a road across the northern two-thirds of the disputed right-of-way before February 5, 1954, and must prove

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that it had constructed a road over the remainder of the disputed right-of-way by January 17, 1969. It is undisputed, however, that neither the State, nor the Alaska Road Commission, nor the Bureau of Public Roads performed the type of activities which would perfect an R.S. 2477 right-of-way before January 17, 1969, and they certainly did not perform the requisite activities for the northern two-thirds of the disputed right-of-way before February 5, 1954.

Plaintiffs will now explain in detail the legal authorities which support their contention that actual construction, or its immediate precursor activities, are needed to perfect an R.S. 2477 right-of-way.

(2) Federal law controls and it requires actual construction or its equivalent.

The State of Alaska maintains that the existence of an R.S. 2477 right-of-way is a matter of state law, citing Sierra Club v. Hodel, 848 F.2d 1068, 1080 (1988) (State Reply Brief at p. 11). The State is incorrect in this contention.[1] The Hodel

[1]The scope and existence of an R.S. 2477 right-of-way is a matter of federal law, not state law. However, the interplay between federal and state law in this area is complex. R.S. 2477 has been construed as a federal offer of rights-of-way which may be accepted by the states. Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). The scope of the federal offer is a question of federal law. U.S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 (9th Cir. 1984); Frank A. Hubbels Co. v. Gutierrez, 22 P.2d 225, 37 N.M. 309 (1953). However, within the scope of that offer, the federal government may consent to the use of state law in determining whether a right-of-way has been validly accepted as a public highway. See, U.S. v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 (9 Cir. 1984) ("the scope of a grant of federal land is, of course, a question of federal law. But in some instances it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances.") (citation omitted). Put another way, states may, through state law, accept less

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case did not involve the existence of an R.S. 2477 right-of-way. At issue in Hodel was the width of the right-of-way. Since R.S. 2477 does not specify the width of any right-of-way it might bestow, one could conclude that the federal government has offered rights-of-way of indeterminate width under R.S. 2477, and that it has consented to the use of state law to determine the width of an R.S. 2477 right-of-way. This understanding of the situation is consistent with the analysis in Exhibit "A," attached hereto, for in Exhibit "A" there is specific mention of the fact that R.S. 2477 does not specify the width of the right-of-way, and further specific mention of the fact that courts have looked to state or territorial law for guidance on this issue. Accordingly, the Hodel case resorted to state law in order to determine the width of an R.S. 2477 right-of-way. Reference was made to state law in the Hodel case, not because state law was controlling on the issue, but simply because the applicable federal law allowed for reliance upon state laws.[2]

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than the federal government has offered, but the states may not accept more than the federal government has offered.

[2]The Hodel court also relied upon a 1938 federal regulation which stated that an R.S. 2477 right-of-way became effective "upon the construction or establishing of highways, in accordance with state laws." The minimum requirements of the federal offer in R.S. 2477 are, by this regulation, stated to be the "construction" or "establishment" of a highway. This is so as a matter of federal law. However, by this regulation, the federal government has consented to the use of state law in determining when a state has performed sufficient "construction" or "establishment" of a highway to accept the federal offer. In Alaska, the effect of this regulation was greatly restricted by the promulgation of D.O. 2665 in 1951. In promulgating D.O. 2665 the federal government acted to pre-empt the use of state law in Alaska. Since D.O. 2665 applied only to Alaska, the Hodel court was not faced with its pre-emption of the use of state law.

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This is the only possible reading of Hodel that can square this case with the holding in Gates of the Mountains Lakeshore Homes, supra.

To recapitulate then, the offer of rights-of-way to be found in R.S. 2477 is a federal offer and is a matter of federal law. However, if as matter of federal law, it is concluded that the federal government has consented to the application of, or reference to, state law in order to define a particular aspect of an R.S. 2477 right-of-way acceptance by a state, then state law may be utilized for that purpose. We also know from Exhibit "A" hereto and from the Hodel case that one purpose for which state law has been used on many occasions is to determine the width of an R.S. 2477 right-of-way.[3]

The present case, however, raises more than the question of width of an R.S. 2477 right-of-way, for the plaintiffs challenge the existence of the right-of-way, as well as its width. The question before the court, then, is two-fold. First, the court must determine the scope of the federal offer contained in R.S. 2477. This inquiry is a question of federal law, and it will establish the minimum requirements that must be

[3]A further refinement of this principle as applied to the width and creation of an R.S. 2477 right-of-way in Alaska is in order, however, for the promulgation of D.O. 2665 meant that the federal government had acted to occupy the field with respect to the width and creation of R.S. 2477 rights-of-way in Alaska. Accordingly, while state (or, rather, territorial) law may be used to determine the width of an R.S. 2477 right-of-way that was accepted in Alaska before D.O. 2665's promulgation, federal law in the form of D.O. 2665, would control for all rights-of-way accepted under R.S. 2477 in Alaska after D.O. 2665's promulgation in October of 1951.

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met before a state can accept an R.S. 2477 grant. Second, the court must determine whether the federal government, as a matter of federal law, has consented to the use of state law in determining which activities on the part of the State will constitute an acceptance of an R.S. 2477 grant. In order to answer these two questions, we must examine the federal record to determine whether the federal government has ever attempted to define the scope of an R.S. 2477 offer, and whether it has ever taken a position as to what is necessary to accept a right-of-way under R.S. 2477. If so, federal law controls and state law is irrelevant. If, on the other hand, it can be said that the federal government has consented to the use of state law in defining an acceptance of an R.S. 2477 grant, then, if the minimum requirements of the federal offer have been met, we must examine the applicable state law.

If we look at the federal government's actions with regard to the creation of rights-of-way under R.S. 2477, we find that there is a long history of federal authority to the effect that the federal offer in R.S. 2477 is contingent upon actual construction, or something virtually tantamount thereto. Moreover, to the extent that the federal government has consented to the use of state laws in determining an acceptance of an R.S. 2477 grant, this consent has been of a limited nature. There has always been a requirement that, no matter what the state law might be, certain minimum requirements must

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be met in order to trigger the federal offer contained in R.S. 2477.

The starting point, for statutory construction, is the plain meaning of the words of the statute. Alaska v. Lyng, 797 F.2d 1479 (9th Cir. 1986).

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

R.S. 2477.

It is significant that the statute uses the word "Construction." The ordinary dictionary meaning of the word construct is "to form, make, or create by combining parts or elements; build, fabricate." The statute must be construed, if possible, to give this word its ordinary dictionary meaning (see, Powell v. Tucson Air Museum Foundation of Pima, 771 F.2d 1309, 1311 (9th Cir. 1985)). If this is done, it is clear that the statute's language makes the federal grant contingent upon at least some actual building of a highway. To construe the statute otherwise would render the word "construction" surplusage. This, of course, violates the canon of construction that a statute must be interpreted to avoid surplusage. United States v. Menasche, 348 U.S. 528, 538-39 (1955).

The proposition that the statute contains a requirement of actual construction is reinforced when one examines other federal easement statutes from the mid-nineteenth century. These statutes must be read in pari materia with R.S. 2477. See Sands, Sutherland Statutory Construction § 64.07.

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Most notable is 30 U.S.C. 51 which is the section immediately following R.S. 2477 in the Act of July 26, 1866,[4] C. 262 § 9, 14 Stat. 253 (repealed 1976)

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: Provided, however, that whenever after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Despite the strong reference to state and local law and customs, the Supreme Court has interpreted this section to include an actual construction requirement.

> Under this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests as against the government, in the party entering upon possession from the mere fact of possession unaccompanied by the performance of any labor thereon.
>
> * * *
>
> It is the doing of the work, the completion of the well or the digging of the ditch, within a reasonable time from the taking of

[4]Of course, a provision of a statute must be read in the context of the whole statute. Richards v. United States, 369 U.S. 1 (1962).

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> possession, that gives the right to use the water in the well or the right of way for the ditches or the canal upon or through the public land. Until the completion of this work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the person taking possession has no title, legal or equitable, as against the government.

Bear Lake Irrigation v. Garland, 164 U.S. 1, 18-19 (1896).

Similarly, Section 2 of the Act of July 6, 1866 allows the patenting of mining claims to those who have "occupied and improved the same . . . having expended in actual labor and improvements thereon an amount not less than one thousand dollars." § 2, 14 Stat. 251.

The contemporary federal statutes relating to railroads are similar in that they, too, require construction. In 1875, Congress granted a right-of-way across the public lands for railroad purposes. Act of March 3, 1875, 18 Stat. 483, 43 U.S.C. 934 et seq. The right-of-way may be accepted either by actual construction, Great Northern R.R. v. United States, 315 U.S. 262 (1942), or by filing a profile of the route with the Secretary of the Interior. 43 U.S.C. § 937. If acceptance is by filing, the railway must be actually constructed within five years or the right-of-way is forfeited. Id.

The conclusion is inescapable. Congress was generous with those who actually placed improvements on the public lands but never consented to the cluttering of the public domain with paper rights-of-way by those who had not constructed, nor were about to construct, such improvements.

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If we turn next to the federal government's actions in interpreting R.S. 2477, the conclusions that we have reached from an examination of its language are further buttressed. The earliest indication of the federal government's position on this matter is found at 26 L.D. 446, an 1898 decision of the Department of Interior. A copy of this decision is attached hereto as Appendix "B." As can be seen in this decision, Douglas County, in the state of Washington, claimed that it could accept an R.S. 2477 right-of-way by passing an ordinance which purported to accept an R.S. 2477 right-of-way grant along all of the section lines in the county. The Department of Interior gave short shrift to this contention, stating as follows:

> There is no showing of either a present or a future necessity for these roads or that any of them have been actually constructed or that their construction and maintenance is practicable. Whatever may be the scope of the statute under consideration it certainly was not intended to grant a right-of-way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed.

While this decision does not go so far as to require actual construction in every case before an R.S. 2477 right-of-way will arise, it does indicate that, at the very least, there must be a substantial showing of the necessity for, and practicability of, construction.

The next federal authority which bears upon this point is a Department of the Interior regulation which was promulgated

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in 1938. It stated that an R.S. 2477 grant "becomes effective upon the construction or establishment of highways, in accordance with the state laws, over public lands not reserved for public uses." Although this regulation does consent to the use of state law, it also speaks of the "construction or establishment of highways." Thus, although the regulation says that state law may be used to define exactly when a state has accepted an R.S. 2477 grant by "constructing" or "establishing" a highway, it also requires that, at a bare minimum, a highway must be in some fashion "constructed" or "established" before the federal offer is triggered.

Later federal authorities are even more rigorous in requiring actual construction or its equivalent. As we have seen from Exhibit "A," attached hereto, at the time that D.O. 2665 was under consideration, the federal government was of the view that actual construction was required in order to perfect an R.S. 2477 right-of-way. D.O. 2665, which followed upon the heels of Exhibit "A," clarified what was meant by construction when it stated that the setting of survey stakes immediately prior to construction created the right-of-way.

The federal government has reinforced this interpretation of R.S. 2477 in more recent times. Attached hereto as Exhibit "C" is an opinion of the Solicitor's Office of the United States Department of Interior dated April 28, 1980.[5]

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[5]That this first comprehensive analysis by the Department of the Interior of R.S. 2477 followed the enactment of the statute by more than a century is not at all surprising.

As can be seen from a reading of the Solicitor's opinion, there is a long line of authority for the proposition that determining the existence and scope of an R.S. 2477 right-of-way is a matter of federal law. See, Solicitor's Opinion at head III, pp. 4-5. Secondly, and more importantly, the government once again indicates in no uncertain terms that the proper interpretation of R.S. 2477 is that no rights-of-way are created until there is actual construction. See, Solicitor's memorandum at pp. 5-8.[6]

Although the statute had been the subject of numerous state court cases and a few federal court cases, the United States was almost never a party. It was only after the repeal of R.S. 2477 and the passage of the Federal Land Policy and Management Act of 1976 [FLPMA] that it became necessary for the Solicitor's Office to take a comprehensive look at R.S. 2477.

[6]The State cites the case of Wilderness Society v. Morton, 479 F.2d 842 (1973) for the contrary proposition. The State's reliance on Morton is misplaced, however. In Morton the court relied upon state law, in the form of the Alaska case of Hamerly v. Denton, 359 P.2d 121, 123 (1961), but this reliance is questionable for several reasons. First, Morton's use of state law is not directly related to the issue before the court in this case, because the issue of actual construction was not before the court in Morton. The issue there was whether an R.S. 2477 road right-of-way could be perfected when the purpose of the road was to serve as an adjunct for the construction of a pipeline. Second, as pointed out above, state law is not relevant unless the federal government has consented to its use. It does not appear that the court focused on the issue of whether the federal government had consented to the use of state law, nor does it appear that the court was aware of either 26 L.D. 446, or D.O. 2665. Third, the Department of the Interior, the agency which is responsible for administering R.S. 2477 has concluded that "analysis in the various federal cases involving R.S. 2477 also are not only inconsistent with each other, but none of them definitively come to grips with the precise issue we now face: Exactly what was offered and to whom by Congress in its enactment of R.S. 2477, and how were such rights-of-way to be perfected?" Exhibit "C" at 2. The Solicitor included Morton as being among the "inconsistent" cases which did not come to grips with the problem, for he was well aware of this decision, citing it several times in his opinion. The Solicitor saw nothing in the tangled case law to prevent the agency from maintaining that its interpretation of R.S. 2477 would require actual construction.

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Still more recently, the Bureau of Land Management Manual, for the State of Alaska, establishes very clearly that federal governmental policy is that rights-of-way do not come into existence under R.S. 2477 until there is actual construction. See, Exhibit "D" attached hereto, which is a copy of the pertinent portions of the Bureau of Land Management Manual for Alaska. On p. .48A2 the Manual specifically states that "some form of construction of the highway must have occurred" for an R.S. 2477 highway to come into existence. Subsequent portions of the manual indicate that planning preparatory to construction may be sufficient to initiate the creation of an R.S. 2477 right-of-way, but only if the planning is so clearly related to the construction effort that it can be deemed the first step in construction. Moreover, actual construction must occur within a reasonable time thereafter.

It is well to remember at this juncture that there is a long standing and well-established principle of law to the effect that an agency's interpretation of a statute which it administers is entitled to great deference by the courts. Udall v. Tallman, 380 U.S. 1, 16 (1965). If a statute is silent or ambiguous with respect to the specific issue, the court may not substitute its own construction for a reasonable interpretation by the agency. Chevron USA v. Natural Resource Defense Council, 467 U.S. 837 (1984). Indeed, deference requires affirmance of any agency interpretation "within the range of reasonable meanings the words permit, comporting with the statute's clear

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purpose." Alaska v. Lyng, 797 F.2d 1479 (9th Cir. 1986). In this case, it is clear that R.S. 2477, a federal statute which governs the granting of rights-of-way over federal lands, is a statute which the federal Department of the Interior is entrusted with administering. Moreover, the brevity of the statute leaves quite a few "gaps" for the agency to fill, and as stated in Chevron at 467 U.S. 843:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.

The court went on to declare, at 467 U.S. 845, that agency interpretations of a statute "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

Here, we have a line of agency interpretations which begin in 1898 with 26 L.D. 446, and which culminate with the Solicitor's Opinion, and the BLM Manual for Alaska. All of these agency interpretations state that actual construction, or activities which are tantamount thereto, are required in order to trigger the offer of a right-of-way under R.S. 2477. These administrative interpretations are controlling unless they are arbitrary and capricious or manifestly contrary to the statute. There is absolutely nothing before the court from which it can be concluded that the Interior Department's interpretation is arbitrary, capricious, or manifestly contrary to the statute. To the contrary, the Solicitor's opinion fully comports with the

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clear purpose of the 1866 act, which was to secure and reward those who actually placed improvements on public lands.

The State contends in its reply brief that no highway construction was needed to perfect an R.S. 2477 right-of-way, because the construction of the railroad, which was performed in 1906-1910, sufficed. The argument flies in the face of the fact that R.S. 2477, by its own words, applies only to the "construction of highways." If one could obtain a right-of-way under R.S. 2477 by constructing a railroad, there would have been absolutely no reason for Congress to pass the Act of May 14, 1898, which granted a right-of-way for the construction of railroads in Alaska. Congress obviously thought that R.S. 2477 could not be stretched to cover the construction of railroads when it passed this law, and the Copper River and Northwestern Railroad obviously thought that it needed to proceed under the Act of May 14, 1898, rather than R.S. 2477. In short, therefore, the "actual construction" which is needed to perfect a highway right-of-way under R.S. 2477 is actual construction of a highway. Anything else would make a mockery of the wording of the statute.

Moreover, as a practical matter, the railroad right-of-way that was constructed in 1910 would not necessarily be located in the same place as a highway to be constructed after statehood. For one thing, every place that the railroad route utilized trestles, the road would likely be built in a different place. Secondly, the road right-of-way would be a different

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width than the railroad right-of-way; thirdly, the Copper River's constant changing of its course would have made significant portions of the railroad right-of-way unusable for road purposes in the roughly 50 years that elapsed between the construction of the railroad and statehood (See, Affidavit of Breivogel, attached hereto as Exhibit "E"); and fourth, and most importantly, the pertinent highway agencies -- the Alaska Road Commission, the Bureau of Public Roads, and the State Department of Transportation -- all entertained the idea of not following the railroad route, and of building the road up the Tasnuna or Tiekel valleys instead.[7]

The fact of the matter is that an abandoned railroad is not a highway, and construction of a highway, even if on the site of an old railroad bed, is new highway construction in every sense of the word. This is the kind of actual construction that must occur in order to perfect a highway right-of-way under R.S. 2477, and this is the kind of construction that never happened at the north end of the railroad bed.

It should be noted at this juncture that the quitclaim deed by which the State received whatever rights were possessed by the Department of Commerce to various highway rights-of-way describes the Copper River Highway "system mileage" as being 170 miles, and the "constructed mileage" as being only 88 miles.

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[7]For details, see note 11, infra.

The reason for this is that, at the time of Statehood, the Copper River Highway was in the process of being built northward from Cordova, and had reached the Million Dollar bridge (see Exhibit "J" attached hereto).[8] Plaintiffs concede that the State acquired an R.S. 2477 right-of-way from Cordova to the Million Dollar bridge. Any extensions of the highway beyond the Million Dollar bridge would be "new construction" within the meaning of D.O. 2665 however, because Exhibit "A" specifically states that "new construction" includes "extensions of existing roads." Thus, an R.S. 2477 right-of-way could have come into existence to the north of the Million Dollar bridge only if, as, and when, the survey stakes were placed prior to construction.

In this regard, it is significant that the federal government, by its actions, has indicated that it does not regard the state to have acquired any right-of-way over those portions of the abandoned railroad bed where a road has not actually been constructed. For example, in 1963, the U.S. government issued a patent to Harley Bain King for U.S. Survey 3574, which covered 118 acres of land near the junction of the Tiekel and Copper Rivers. This parcel is bisected by the abandoned railroad bed. (See, copy of U.S. Survey 3574, attached to Exhibit "N.") Yet, the patent reserves no right-of-way along the railroad bed (Exhibit "N" attached).

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[8]The other portion of the "constructed mileage" was the Edgerton Highway between Chitina and the Richardson Highway.

In a similar vein the State argues that the railroad construction satisfied the surveying and staking requirements of D.O. 2665. This assertion is contrary to the State's previous position on this matter. Attached hereto as Exhibit "F" is a memorandum prepared by Jack McGee of the Attorney General's office, which concludes that surveying and staking would be necessary before the State could claim a 300-foot right-of-way under D.O. 2665. The State's argument on this point is also contrary to the understanding of the Bureau of Public Roads. See, Bureau of Public Roads letter attached hereto as Exhibit "X" in which the Bureau discusses its progress in surveying and staking the Copper River Highway in the course of analyzing a right-of-way issue. If surveying and staking were not needed for a 300' right-of-way, this discussion would have been superfluous. Also see Exhibit "N" attached, in which the government granted a patent to lands which were bisected by the abandoned railroad, but reserved no right-of-way because of the railroad construction. Finally, this contention flies in the face of the fact that Exhibit "A" defines new construction to include extensions of existing roads. It is beyond doubt that the existing road went only so far as the Million Dollar bridge at the time of Statehood. Since further highway construction was clearly an extension of this road it was also clearly new construction for the purpose of D.O. 2665.

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(3) Assuming arguendo that State law can be applied, there has not been sufficient activity by the State or the Alaska Road Commission to perfect an R.S. 2477 right-of-way under court decisions applying state law.

Plaintiffs have demonstrated above that the existence and scope of an R.S. 2477 right-of-way is a matter of federal law. State law enters the picture only if it can be determined, as a matter of federal law, that the federal government has consented to the use of state law in determining whether a state has accepted an R.S. 2477 grant. Plaintiffs have also demonstrated that while, at least prior to 1951, there is some evidence for the proposition that the federal government consented to the use of state law to define certain aspects of the acceptance of an R.S. 2477 right-of-way, there has never been a federal consent to the use of state law for determining the scope of the federal offer under R.S. 2477. That is so because a long line of federal authority, going back to 1898, requires actual construction, or pre-construction activities which are so closely related to the construction that they can be said to amount to the first step of the construction, before an R.S. 2477 right-of-way is even offered.

Even if it is assumed, arguendo, however, that state law decisions on acceptance of a right-of-way will control the result here, the State and its predecessors in interest have not performed the kinds of activities that will support an acceptance of an R.S. 2477 right-of-way.

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The State cites the case of Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) for the proposition that activities other than construction can create an R.S. 2477 right-of-way if they evidence a clear acceptance of the grant which is implicit in R.S. 2477. The State correctly notes that Hamerly does not provide much detail about the kinds of activities which will suffice to create an R.S. 2477 right-of-way. The general language in Hamerly does state, however, that there must be (1) "some positive act" (2) on the part of the "appropriate public authorities" which (3) "clearly manifest[s] an intention to accept a grant."

Plaintiffs are aware of two cases involving rights-of-way in Alaska in which a court has applied state law and has determined the existence of an R.S. 2477 right-of-way in the absence of actual construction. They are Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975) and Wilderness Society v. Morton, 429 F.2d 842 (D.C. Cir. 1973). In both of these cases, the activities by the State were in excess of anything that the public authorities have done with regard to the proposed Copper River Highway, and in both cases the "appropriate" public authority who took action was the legislature.

The first case, Girves v. Kenai Peninsula Borough, supra, involved a statute passed by the territorial legislature in 1953. This statute, Ch. 35 SLA 1953, dedicated a 100-foot right-of-way along the section lines within the state. The

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court held this statute to be sufficient to create a right-of-way under R.S. 2477. It will be noted, however, that the "positive act" required by Hamerly was the passage of this statute. This statute "clearly manifested" a desire to create an R.S. 2477 right-of-way because it specifically stated that it was dedicating lands for use as public highways. Moreover, the statute served to specify the exact location of the right-of-way on the ground, because it dedicated the land on either side of the section lines. Finally, the "appropriate public authority" was the territorial legislature.[9]

If standards enunciated in Girves are applied to the facts of the present case, it is clear that the State cannot prevail. In the first place, the appropriate public body which acted in Girves was the legislature.[10] No similar action was ever taken by the legislature with regard to the proposed Copper

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[9]The Girves decision is directly contrary to the decision of the Interior Department at 26 L.D. 446 (1898) and it is therefore of no vitality if federal law controls. Moreover, it does not appear that the court in Girves was aware of the Interior Department decision at 26 L.D. 446 when it rendered its opinion. For purposes of this argument, however, the plaintiffs will assume the validity of Girves.

[10]The only other case involving acceptance of R.S. 2477 rights-of-way in Alaska without the actual construction of a road or public use as a highway which is known to plaintiffs, Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), also involved a situation where the state legislature had acted. Although decided by a federal court, this case applied state law to determine the existence of an R.S. 2477 right-of-way. As pointed out supra, Morton never addressed the issue of whether federal or state law should be applied because this issue was never raised in that case. The crux of the argument in Morton was the wholly unrelated issue of whether the State could claim an R.S. 2477 right-of-way for a highway where the highway was intended to service a pipeline, and where the pipeline had further right-of-way requirements.

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River Highway. Instead of legislative action, all that the State can point to is the fact that administrative officials in the Alaska Road Commission or the State Department of Transportation may have planned to build a road along the abandoned railroad bed.

There are good reasons why state law has heretofore failed to allow any public body other than the legislature to create an R.S. 2477 right-of-way in the absence of actual construction. Accordingly, as a matter of public policy, this court should not expand upon the existing state law and should hold that administrative officials are not deemed to be an "appropriate public body."

The decision of whether to accept an R.S. 2477 right-of-way is an important policy decision which involves balancing the benefits and burdens of a proposed road. On the benefit side of the scale are the advantages that a road would bring. There are corresponding detriments, however. For example, in this case, the idea of building a road to Cordova has been a controversial matter, with strong opinions held by people on both sides of the issue. Those who oppose the road believe that it could jeopardize the fisheries which are Cordova's economic livelihood or that it would not be the best way to provide access to the scenic beauties of the Copper River Valley. In addition, creation of a right-of-way involves the responsibility to maintain it, and it also carries with it the burden of potential liability. Once the right-of-way comes into

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existence, persons who are injured because of dangerous conditions along the right-of-way become potential claimants against the State. In the case of the abandoned Copper River Railroad right-of-way, there are numerous crumbling trestles and other railroad improvements which could prove dangerous.

In deciding whether to accept an R.S. 2477 right-of-way (or any right-of-way, for that matter), the public authorities must weigh the benefits and burdens of the right-of-way. This weighing process is a procedure which involves considerations which are almost entirely matters of public policy. Clearly, the legislature is an appropriate public body to weigh these sorts of considerations and to make a policy decision as to whether, on balance, a right-of-way is desirable. Highway engineers who are working for the Alaska Road Commission or the Bureau of Public Roads, however, are not the appropriate officials to make such discretionary decisions. Their function is to carry out the policy decisions which are made by the legislature.

Secondly, in both Girves and Morton the public action which was sufficiently "positive" to create the right-of-way and which was a sufficiently "clear manifestation" of an intent to create the right-of-way served to define exactly where the right-of-way would be. The Girves rights-of-way ran along the section lines, so their location was fixed upon the ground. The Morton case involved not only a state statute authorizing construction of a road, but other public actions, including an

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application to the federal government for a right-of-way, which served to fix the exact location of the right-of-way on the ground. Morton, moreover, involved a situation in which it was clear that road construction was imminent.

In this case, there is no fixing of the right-of-way upon the ground. As mentioned earlier, any highway will have to depart from the course of the abandoned railroad bed in places where trestles were used by the railroad, and in places where changes in the topography since the railroad was abandoned have made use of the railroad route impractical. More importantly, to the extent that the Alaska Road Commission, the Bureau of Public Roads, or the State Department of Transportation planned to build a road, it is not clear where they planned to build it. The record bristles with references to the fact that ever since 1950, the road authorities have vacillated between building the road along the abandoned railroad bed, building it along the Tasnuna Valley, or building it along the Tiekel valley.[11] If

[11]See Exhibits "G," "H," "I," "J," "K," and "L" attached. Exhibit "G" is excerpts from the Alaska Road Commission report from 1950 and 1951. As can be seen from this exhibit, the Road Commission was undecided as to whether to build the road through Chitina or up the Tiekel River valley during these years. Exhibit "H" is an excerpt from the 1953 Alaska Road Commission report. At this time the Commission was speaking of building the road through Chitina. Exhibit "I" is an excerpt from the 1954 Alaska Road Commission report. It shows that in 1954, the Road Commission was once again undecided about where to build the road, because of possible hydroelectric developments that would rule out a route through Chitina. Exhibit "J" is a letter written by the Bureau of Public Roads in 1959. It demonstrates that, as of 1959, the Bureau was undecided as to whether the road would go through Chitina or elsewhere. Exhibit "K" is excerpts from a Copper River Highway Feasibility Study that was prepared by the State after the 1964 earthquake. It recommends against a road through Chitina, and in favor of a road up the Tiekel River valley. Exhibit "L" is a copy of excerpts from Southern Interior Regional Transportation Study of the State

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the Road Commission's planning efforts were enough to create a right-of-way along the abandoned railroad bed, those same efforts were also enough to create rights-of-way along the Tiekel and Tasnuna valleys. Or alternatively, the right-of-way switched back and forth among these three alternatives every time a different one was favored by the planners. The absurdity of either proposition is clear. Hamerly's requirement of a clear intent to create a right-of-way must be interpreted to mean that public action accepting a right-of-way is not clear unless and until a final decision as to routing is made, and until the route is described with sufficient specificity that its position can be located on the ground. In this vein, Girves and Morton both involve situations where the location of the right-of-way was finally and definitively fixed. Here, the facts are far different for although a road may have been planned, it is unclear exactly where the proposed road would be built.

III. THE STATE DOES NOT HAVE THE RAILROAD RIGHT-OF-WAY BY VIRTUE OF THE ACT OF JULY 15, 1941.

The following discussion refutes the state's argument that the 1941 federal statute dedicated the railroad right-of-way to public use as a highway.

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of Alaska. It shows that as of 1986, the Alaska Department of Transportation was favoring the Tasnuna River valley route over the route through Chitina.

A. Facts.

Historical Background:

In 1938, with the profitable Kennecott ores exhausted and the mines closed, the Copper River and Northwestern Railway Co. requested the federal Interstate Commerce Commission to allow it to cease operation of the railroad from Cordova to Kennecott, at which time it would relinquish its right-of-way.[12] See Interstate Commerce Commission Report, Exh. "N," at 1. In 1939, after review and hearings, the ICC granted the railway company's request. Id., at 6

Relinquishment presented a practical problem. There were still people living east of Chitina near McCarthy who depended upon the railway for access to Chitina, the terminus of the state highway system; in his testimony before the Commission, the Chitina superintendent of highways recommended for their benefit that the rail line between Chitina and McCarthy be maintained as a railroad and operated by light equipment. Id., at 3. At the time, however, federal law required that the sections of a railroad right-of-way passing through private patented lands, such as homesteads and mining claims, would upon relinquishment become the property of the

[12]The original railroad right-of-way was authorized by Congress in 1898, with a width of 200 feet (100 feet to either side of the centerline). 30 Stat. 409, May 14, 1898. The railroad operated between Cordova and Kennecott from 1911 through 1939; the total line was over 195 miles long. Interstate Commerce Commission Report, Exhibit "M" at 1; see also, Memo from Jack B. McGee, Assistant Attorney General, to Commissioner Hickey, Alaska Department of Transportation and Public Facilities, Apr. 18, 1989 (hereinafter "McGee Memo"), Exhibit "F," at 1.

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patentees. Act of March 8, 1922.[13] In other words, the effect of relinquishment under the 1922 statute would be to sever the right-of-way between McCarthy and Chitina wherever it crossed private land.

Congress provided a solution in a 1941 statute authorizing the Secretary of Interior to accept the relinquishment of the right-of-way free from the effects of the 1922 statute. Act of July 15, 1941.[14] The formal relinquishment by the railway company and acceptance by the federal government took place in 1945, at which time the railroad right-of-way was canceled. Exhibits "O" and "P;" compare McGee Memo, Exhibit "F," at 2-3. As a result, the United States once again held clear title to the former right-of-way lands, and the Chitina to McCarthy line continued to be used as a transportation route for the local residents.

There was far less concern that the rail line south of Chitina be kept open. The ICC hearing report describes McCarthy as "the only other community of importance in the tributary territory . . . ." Exhibit "M," at 3. More to the point, as the Secretary of Interior reported to Congress during consideration of the 1941 act, there were no plans to maintain the Chitina to Cordova section as a transportation route. Exhibit "Q" at 2.

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[13]Pub. L. 163, ch. 94; 42 Stat. 414; codified at 43 U.S.C. § 912 (1976); see also Note, Reversion of Railroad Rights in South Dakota after Haack v. Burlington Northern, Inc., 28 S.Dak.L.Rev. 196, 202 (Winter 1982).

[14]Pub.L. 176, ch. 300; 55 Stat. 594., attached as Exhibit "R." The text and legislative history of the 1941 statute are discussed below.

Consistent with that intention by the Secretary, the statute authorized him to accept conveyance of the railroad right-of-way free from the claims of the adjoining landowners under the 1922 statute, and to maintain the rail line "as far as may be necessary or practicable" as a public highway or tramway.[15] Act of July 15, 1941, Exhibit "R," supra.

From 1941 through 1956, the year that Amendment No. 2 to Departmental Order 2665 added the "Copper River Highway" to the list of through roads in D.O. 2665, the Alaska Road Commission talked about, but never constructed, a highway connecting Cordova to the greater highway system. In fact, at no time did the Road Commission, under the auspices of the Department of the Interior, ever definitely establish a preference between the three alternate routes: Tasnuna Valley; Tiekel Valley; or Wood Canyon/Chitina. See, note 11, supra, and references therein.

In 1956, Congress decided to transfer jurisdiction over roads in Alaska from the Department of the Interior to the Department of Commerce, § 107(b), Federal-Aid Highway Act of 1956, 70 Stat. 374, Exhibit "S." Roadbuilding by the Commerce Department on the public lands in Alaska, however, would have required compliance with 18 U.S.C. § 317, which required the roadbuilding agency to file certain maps for approval with the

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[15]A tramway is defined as "a way for trams," while the most pertinent definition of a tram herein is "a boxlike wagon running on rails." Webster's Ninth New Collegiate Dictionary (Springfield, Mass: Merriam-Webster, Inc., 1988), at 1252 and 1251.

landholding agency before a right-of-way would be granted. There is no indication in the record to date that the Commerce Department ever filed any such maps for a route from the terminus of construction north of Cordova, at about mile 75, to mile 131 at Chitina.

In 1959, as a benefit of Alaska statehood, the U.S. Department of Commerce quitclaimed to the State of Alaska its interest in the Alaska road system. See Exhibit "T." That deed, however, as with all quitclaims, transferred only what the grantor possessed.[16] The State of Alaska, therefore, received through the 1959 quitclaim only the interest of the Department of Commerce, and not any interest held by any other federal agency, such as the United States Bureau of Land Management.

In 1962 the government issued a patent to a homesteader covering lands which were bisected by the abandoned railroad bed (Exhibit "N"). This patent contained no right-of-way reservation on account of the abandoned railroad bed.

Through the 1960s, the State of Alaska and the Bureau of Public Roads occasionally discussed a road that would connect Cordova to the state highway system and some planning was

[16]Black's Law Dictionary (Abridged 5th Ed.) defines a quitclaim deed as:
A deed of conveyance operating by way of release; that is, intended to pass any title, interest, or claim which the grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title. Under the law of some states the grantor warrants in such deed that neither he nor anyone claiming under him has encumbered the property and that he will defend the title against defects arising under and through him, but as to no others.

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initiated. Actual roadway was constructed north from Cordova for approximately 70 miles, but no major construction was attempted north of this point, and the contemporaneous evidence shows that neither the state nor federal government could decide which of the three likely routes to take.

In 1969, federal land transfers in Alaska were frozen by the Secretary of Interior pending passage of ANCSA in 1971. PLO 4582. ANCSA maintained the withdrawal of federal lands from entry and allowed Alaska Native Village and Regional Corporations to select certain federal lands for conveyance in settlement of aboriginal land claims. 43 U.S.C. §§ 1601 et. seq. In 1981, 1984 and 1985, Ahtna and Chitina received conveyance of land interests along the old railroad bed for a distance of eighteen miles south of Chitina. Each of the relevant conveyance documents contains an exception for "[a]ny right-of-way interest in the Copper River Highway (FAS 851), . . . executed by the Secretary of Commerce . . .."[17]

B. The State's Claim to a Dedicated Right-of-Way is Invalid.

The main focus of this action is to determine whether or not the State of Alaska has any right-of-way interest for the Copper River Highway across the lands conveyed to plaintiffs under the Alaska Native Claims Settlement Act. The specific

[17]Note that the reservation does not mention a 200-foot right-of-way where there was no surveying and staking, as McGee's memo claims. The use of the word "any" implies that the conveyance documents do not establish or affirm the validity of the right-of-way, but merely put the grantee on notice that third-party rights may exist, and leaves the existence of such rights to be determined by reference to other law.

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issue addressed here is whether or not the 1941 federal statute dedicated the old railroad right-of-way to public use as a highway.

1. The Opposing Arguments.

The State argues that the 1941 statute, 55 Stat. 594, authorizing the Secretary of the Interior to accept the Railway Company's relinquishment of the right-of-way was a "dedication"[18] of the land for public highway purposes. See, e.g., State's Reply to Opposition to Partial Summary Judgment, at 2.[19]

Plaintiffs' position was succinctly stated in Roger DuBrock's letter of April 28, 1989, to Assistant Attorney General McGee, at 2-3:

> CNC's interpretation of the 1945 Act is different: the Act is directive in that it

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[18]Black's Law Dictionary (abridged 5th ed.) defines a dedication as:

> The appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public. Such dedication may be express where the appropriation is formally declared, or by implication arising by operation of law from the owner's conduct and the facts and circumstances of the case. . . .

[19]See also, McGee Memo, Exhibit "F," at 3, n. 1, citing 23 Am.Jur.2d Dedication (1983). According to the State, the interest of the federal government conveyed by the quitclaim to the State of Alaska was this:

> a) a 200-foot right-of-way along the original route of the Copper River Railroad stemming from the Act of 1988 and the 1945 acceptance, and b) a 300-foot right-of-way along those segments of the Copper River Highway that were constructed prior to the date of Amendment No. 2 to D.O. 2665 and that, as of the date of Amendment No. 2, crossed federal lands. The 300-foot easement of Amendment No. 2 also attached to any new construction by the federal government of the Copper River Highway that took place across federal lands and that occurred after the date of Amendment No. 2.

McGee Memo, at 5. It is the claim under paragraph (a) that is specifically addressed here.

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requires the Secretary to use the railroad lands so far as is practicable for highway or tramway purposes. However, it does not state that the land must be used for highway or tramway purposes. Its purpose is therefore merely elective. If the Secretary believes that the lands can be used for highway or railway purposes he is authorized to use them for those purposes. On the other hand, the Act clearly contemplates that the Secretary may decide not to use some or all of the property for railroad or tramway purposes. Since the Secretary must elect what to do, the statute obviously contemplates some sort of executive action in order to withdraw or perfect the right-of-way. In order to perfect a right-of-way, the Secretary should have exercised his authority to use the lands for highway purposes by withdrawing those lands from the public domain as a right-of-way. In actual fact, no such withdrawal ever took place.

Exhibit "U."[20]

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[20]McGee's reply, in a letter to DuBrock dated May 9, 1989, Exhibit "V" at 1, was: "From our perspective, 55 Stat. 594 (1941) would have little meaning if its only function was to authorize the Secretary of Interior to create a highway right-of-way across federal lands – a power the Secretary already had under 47 Stat. 46 (1932). It seems that 55 Stat. 594 (1941) if it is not to be viewed as merely duplicating an already existing power, must be understood to do something more."

DuBrock's answer followed in a letter of June 7, 1989:

"In the first place, prior to the relinquishment by the Railroad of its right-of-way, the Secretary of the Interior could not have withdrawn those lands, for the very simple reason that the federal government had previously granted a right-of-way to the Railroad company . . .. Moreover, existing federal law provided that if a right-of-way was relinquished by a Railroad, adjoining private property owners would acquire those portions of the right-of-way that passed through their lands. Thus, absent the 1941 Act, if the Railroad had relinquished its right-of-way, every homesteader, Native allotee, and holder of a trade and manufacturing site along the route of the Copper River and Northwestern Railroad would have acquired title to those adjacent lands within the right-of-way.

In short, the 1941 Act did not dispense with the need for a withdrawal by the Secretary. Instead, it created a federal ownership of the right-of-way

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2. The Law of Dedication.

Dedication is a mechanism for transfer of real property which need not comply with the Statute of Frauds. There are, however, well-defined requirements for a valid dedication.

"Dedication is the intentional appropriation of land by the owner to some public use." Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952), quoting 16 Am.Jur. § 2, at 348.[21]

In Alaska, there are two basic elements of common law dedication: an intent to dedicate on the part of the landowner, and an acceptance by the public. Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska), reh. denied, 1985; State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1380 (Alaska 1981); Seltenreich v. Town of Fairbanks, 103 F.Supp.

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after relinquishment, which would be a necessary precondition to the Secretary's exercise of his authority to withdraw the lands for a right-of-way."

Letter from Roger DuBrock to Asst. A.G. McGee, June 7, 1989, Exhibit "W," at 3-4.

[21]See also Nature Conservancy v. Machipongo Club, Inc., 419 F.Supp. 390, 396 (E.D.Va. 1976). "A common law dedication occurs `when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose.' Hamerly v. Denton, 359 P.2d 121 [, 125] (Alaska 1961); see also State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378 (Alaska 1981); Olson v. McRae, 389 P.2d 576 (Alaska 1964)." A grant of a private right-of-way is not a dedication. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).

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319, 323 (D.Ak. 1952), quoting McQuillin on Municipal Corporations, 3d ed., § 33.02, at 579-80.[22]

"It is a question of fact whether there has been a dedication." Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961). The burden of proof to show dedication is on the party asserting it. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).[23]

The evidence to establish a dedication must be clear and convincing. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).[24]

First, the proponent of a dedication must show that the landowner intended to dedicate his property to the public,

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[22]"[D]edication involves not only an offer to dedicate, but an acceptance thereof, either express or implied, by a public authority having power to pass upon the matter." Anderson v. Town of Hemingway, 237 S.E.2d 489, 490 (S.Car. 1977); Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska), reh. denied, 1985; Nature Conservancy v. Machipongo Club, Inc., 419 F.Supp. 390, 396 (E.D.Va. 1976).

[23]Quoting McQuillin on Municipal Corporations, 3d ed., at 671-72, and quoting 16 Am.Jur. § 75, at 417; see also Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961) ("It is a question of fact whether there has been a dedication. This fact will not be presumed against the owner of the land; the burden rests of the party relying on a dedication to establish it by proof that is clear and unequivocal." (at 125.) "Since we know that individual owners of property are not apt to transfer it to the community or subject it to public servitude without compensation, the burden of proof to establish dedication is upon the party claiming it." Anderson v. Town of Hemingway, 237 S.E.2d 489, 490 (S.Car. 1977) (citations omitted).

[24]Quoting McQuillin on Municipal Corporations, 3d ed., at 674; see also Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961). "'Dedication being an exceptional and a peculiar mode of passing title to interest in land, the proof must usually be strict, cogent, and convincing and the acts proved must be inconsistent with any construction other than that of dedication.' Seaboard Air Line Ry. Co. v. Town of Fairfax, 80 S.C. 414, 430, 61 S.E. 950, 956 (1908)." Anderson v. Town of Hemingway, 237 S.E.2d 489, 490 (S.Car. 1977).

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and that he manifested that intent in such a way as to create, as a matter of law, an offer to dedicate. "The crux of the offer requirement is that the owner must somehow objectively manifest his intent to set aside property for the public use." Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska), reh. denied, 1985 (footnote omitted, emphasis in original).

"The existence of an intent to dedicate is a factual issue which the claimant must clearly prove." Swift v. Kniffen, 706 P.2d 296, 300 (Alaska), reh. denied, 1985. Intent to dedicate must be clearly and unequivocally manifested. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).[25] Recordation of a plat showing streets does not by itself dedicate the lands shown as streets on the plat. State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378 (Alaska 1981).

An intent to dedicate on the part of the landowner only sets the stage for creation of a valid dedication. A

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[25]Quoting McQuillin on Municipal Corporations, 3d ed. § 33.36, at 669; see also Nature Conservancy v. Machipongo Club, Inc., 419 F.Supp. 390, 396 (E.D.Va. 1976). "Intention must be clearly and unequivocally manifested by acts that are decisive in character." Hamerly v. Denton, 359 P.2d 121, 125 (Alaska 1961); accord, Swift v. Kniffen, 706 P.2d 296, 300-01 (Alaska, reh. denied, 1985. "[S]uch intention must be manifested in a positive and unmistakable manner." Anderson v. Town of Hemingway, 237 S.E.2d 489, 490 (S.Car. 1977).
"A court can, however, find an intention to dedicate land based on objective facts in spite of testimony as to a subjective intent to the contrary. See e.g., Tinaglia v. Ittzes, 257 N.W.2d 724 (S.D. 1977); 6 R. Powell, The Law of Real Property § 935 at 368-69 (Rohan rev.cd. 1977)." State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1380 n. 3 (Alaska 1981).

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dedication, to be effective, must be accepted by or on behalf of the public.[26]

> Acceptance, in this context may occur through a formal official action or by public use consistent with the offer of dedication or by substantial reliance on the offer of dedication that would create an estoppel.

State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1380 (Alaska 1981) (citations omitted).

The issue of whether, in a particular case, there were acts constituting acceptance is a question of fact, but what constitutes acceptance under a particular state of facts is a question of law. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966).

As with the proof of an offer to dedicate, the burden to prove acceptance is on the party asserting dedication. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966).. Proof of acceptance must be unequivocal, clear and satisfactory, and inconsistent with any other construction. Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952).[27]

Where an implied offer to dedicate is found to be accepted, the acceptance, too, is usually implied. "A landowner's implied dedication may be and usually is impliedly

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[26]"Common law dedication takes place when an offer to dedicate is accepted." State v. Fairbanks Lodge No. 1392, Loyal Order of Moose, 633 P.2d 1378, 1380 (Alaska 1981) (citations omitted); Seltenreich v. Town of Fairbanks, 103 F.Supp. 319, 323 (D.Ak. 1952), quoting McQuillin on Municipal Corporations, 3d ed., § 33.43, at 682–85.

[27]Quoting McQuillin on Municipal Corporations, 3d ed., § 33.54, at 727 and 728. See also, Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966).

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accepted by public use of the property in question. Acceptance may also be implied from acts of maintenance by public authorities." Bruce & Ely, Law of Easements and Licenses, ¶ 4.06[3], at 4-75 (footnotes omitted).

Irregular plowing or repair by city does not establish acceptance. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966). Use of right-of-way for garbage collection does not establish acceptance. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966). Giving permission to utility company to erect poles in the right-of-way does not establish acceptance. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966). Failure to assess right-of-way for taxes does not establish acceptance. Watson v. City of Albuquerque, 76 N.M. 566, 417 P.2d 54 (1966).

3. The 1941 Statute Was Not an Offer to Dedicate the Chitina to Cordova Section of the Abandoned Railroad Bed.

The legislative history, including the Senate Report on the 1941 statute and the previous report of the Interstate Commerce Commission, illustrates that the federal government was concerned that abandonment of the railroad line would isolate the individual landowners near McCarthy and Kennecott. The effect of the 1922 statute would be to split the ownership of the former right-of-way lands between the federal government and the other landowners adjacent to the railroad. It is clear from the legislative history that the main intent of the 1941 statute

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was to hold on to the entire right-of-way between Chitina and McCarthy so that the rail line could be used for public access to the private lands, especially the remaining small mines.

The legislative history also shows that, as of 1941, no highway was contemplated for the Chitina to Cordova route. The Secretary of the Interior (who, incidentally, was the drafter of the 1941 act) reported to Congress that no highway was contemplated between Chitina and Cordova. Exhibit "Q" at 2. When the 1941 Act is read in this context, it is clear that the most that can be argued is that there was a need for a right-of-way from Chitina to McCarthy. There is no evidence that would suport an intent to dedicate the railroad right-of-way from Cordova to Chitina. Indeed, it is precisely because Congress saw differing levels of need for a right-of-way in regards to various portions of the railroad bed that it left the matter to the discretion of the Secretary. Instead of saying that all of the railroad right-of-way was dedicated, Congress left it to the Secretary to determine those portions of the railroad for which a right-of-way was "necessary and practicable."

This is the only logical explanation for Congress' instruction to the Secretary that he was to use the relinquished right-of-way as a public highway or tramway "as far as may be necessary or practicable". Exhibit "R." In this regard, it is highly significant that the Secretary saw no present need for a highway from Chitina to Cordova and that he drafted the bill in

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such a way as to allow himself the discretion to create or not create a highway. Exhibit "Q" at 2.

A comparison of the meaning of the text with and without the phrase "as far as may be necessary and practicable" provides immediate verification that the phrase is a significant limitation upon the mandate to turn the railroad into a public highway. With the phrase in place, the Secretary has discretion to establish some sections of the railroad as highway, and to refrain from establishing a highway elsewhere. Without the phrase, the Secretary would be mandated to establish a highway along the entire route from Cordova to McCarthy. Although the State of Alaska would now prefer the latter text, Congress in 1941 chose the former.

The State advocates an interpretation of the statute that would deny any significance to Congress' choice of terms. It is well-settled in both federal law and Alaska law, however, that the courts will apply statutes so as to give effect to the entire text, considering no word or phrase to be mere surplus. U.S. Menasche, supra; Alaska Transportation Commission v. AIRPAC, Inc., 685 P.2d 1248 (Alaska 1984); Alascom, Inc. v. North Slope Boorugh Board of Equalization, 659 P.2d 1175 (Alaska 1983).

The subsequent conduct of the Department of the Interior lends support to the proposition that the 1941 statute was not a dedication of the railroad as a public highway, particularly between Chitina and Cordova. As discussed above,

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the Department outlined a structure for the creation of highway easements in Alaska through Departmental Order 2665 in 1951. In 1956, the Department expressly applied the provisions of D.O. 2665 to the "Copper River Highway", providing for a 300 foot right-of-way for existing construction (from Cordova to Mile 75, approximately), and imposing certain requirements for the attachment of an easement to subsequent construction. In addition, Exhibit "A, which was the precursor of D.O. 2665 shows that "new construction" under 2665 included extensions of existing roads. Since roadbuilding had commenced from Cordova in 1956, there was, at the time that the "Copper River Highway" was added to D.O. 2665's list of through roads a portion of the road (the southern 75 miles) in existence. Extensions of the constructed portion of this road to the north towards Chitina clearly would be extensions of the road that existed in 1956, and as such, would clearly be "new construction" within the meaning of D.O. 2665. Rights-of-way for northerly extensions of the road accordingly would not come into existence until the right-of-way was surveyed and staked, and notices were posted. This procedure is inconsistent with the State's theory that a 200-foot right-of-way was dedicated in 1941.

The State will probably argue that the effect of the 1956 addition of the "Copper River Highway" to the list of through roads was to increase the width of the right-of-way from 200 to 300 feet where construction was completed, but the idea that additional easements for northerly extensions of the road

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would attach only upon surveying, staking and posting runs contrary to the idea of an existing right-of-way.

Furthermore, the grant of a patent to lands which were bisected by the abandoned railroad bed by the federal government in 1962 shows that the federal government regarded the Copper River Highway right-of-way to exist by virtue of D.O. 2665 or not at all. This patent (Exhibit "N") encompassed lands which were in an area where surveying and staking had not been performed, and it reserved no right-of-way, despite the fact that the abandoned railroad bed traversed the lands embraced within the patent.

All of the above indicates that the 1941 statute was not the sort of clear and unequivocal manifestation of intent on the part of the grantor required to show an offer to dedicate.

4. The State Did Not Fulfill the Requirements for Acceptance of an Offer to Dedicate.

Even if an offer to dedicate could be squeezed from these facts, an acceptance of that dedication could not. There was no construction of a "public" road south from Chitina until the early 1970s, after PLO 4582 withdrew all federal lands in the area from entry. There was not a fixed route for the northern half of the "Copper River Highway as late as 1976, and arguably not even today. There was no survey and staking of the route between Mile 75 and Chitina from 1941 to the present. And there was no public user of any of the road prior to the 1970s, and subsequently no more than a casual use of a limited stretch

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of road from Chitina south approximately 2.5 miles to the mouth of O'Brien Creek.

C. Conclusion.

The United States intended for there to be a public highway along a portion of the old railroad right-of-way, but only "as far as may be practicable or necessary". Specifically, it appears that Congress was primarily concerned with the Chitina to McCarthy route rather than the road south from Chitina to Cordova. Because Congress felt that the need for a right-of-way varied from place to place along the abandoned railroad bed, it left to the Secretary's discretion the decision as to whether a right-of-way would be proper for any given portion of the railroad bed. Thus, the purpose of the 1941 act was to maintain federal ownership of the railroad bed so that a right-of-way could be created if one were ever needed -- in short, to provide the Secretary with the flexibility to respond to varied and changing circumstances. For the State to prevail, it would need to show by clear and convincing evidence that the statute's purpose was otherwise -- that it was to mandate a highway right-of-way for the entire length of the railroad. Such a contention conflicts with the legislative history and given the heavy burden of proof which the State must carry, it must be rejected by the court. Later federal references to a "Copper River Highway" subject the existence of the right-of-way to an Interior Department requirement that the highway easements must be surveyed and staked, and appropriate notice posted,

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before attachment. Finally, powersite withdrawals in 1954 and the 1969 land freeze cut off the ability of the State to cause new easements to attach on lands eventually conveyed to Native corporations.

DATED this 12th day of December, 1991.

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By _____
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CNC\Brief

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INDEX TO EXHIBITS

Exhibit	Document
A	Memorandum to Director of the Bureau of Land Management from the Chief Counsel of the Bureau of Land Management dated February 7, 1951
B	Decision: 26 L.D. 446 (1898)
C	U.S. Department of Interior, Solicitor's Opinion dated April 28, 1980
D	Portions of B.L.M. Manual
E	Affidavit of Jon Breivogel
F	Memorandum from Jack McGee, Attorney General's office
G	Excerpts, Alaska Road Commission Report (1950-1951)
H	Excerpts, Alaska Road Commission Report (1953)
I	Excerpts, Alaska Road Commission Report (1954)
J	Letter by Bureau of Public Roads (1959)
K	Excerpts, Copper River Highway Feasibility Study (prepared after 1964 earthquake)
L	Excerpts, Southern Interior Regional Transportation Study, State of Alaska
M	Interstate Commerce Commission Report
N	Patent/Survey
O	Relinquishment
P	Department of Interior decision canceling railroad right-of-way
Q	Report - Committee on Territories and Insular Affairs
R	Pub. L. 176, Ch. 300; 55 Stat. 594

S	70 Stat. 374
T	Quitclaim deed
U	DuBrock letter to McGee dated April 28, 1989
V	McGee letter to DuBrock dated May 9, 1989
W	DuBrock letter to McGee dated June 7, 1989
X	Letter by Bureau of Public Roads (1957)