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STATE OF ALASKA
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JUNEAU

January 11, 1993

Mr. Ted D. Stephenson
Bureau of Land Management
United States Department of the Interior
Utah State Office
324 South State, Suite 301
Salt Lake City, UT 84111-2302

Dear Mr. Stephenson:

The State of Alaska appreciates the opportunity to provide comments and materials to the Bureau of Land Management (BLM) for use in the report to Congress pertaining to RS 2477, rights-of-way.

RS 2477 is extremely important to Alaska. Unlike other states, Alaska is relatively young and undeveloped, without a highly sophisticated and well-developed transportation system. Its communities are widely scattered over vast, unpopulated areas of land and access is vital to those communities and to the development of the state's resources. Many RS 2477 trails and roads were originally pioneered by dog mushers, miners, teamsters, traders, and trappers, and some have evolved into Alaska's existing transportation network. It is significant that the impact to the environment has been minimal. Verification of rights-of-way established by RS 2477 is of profound importance to Alaska and its people. A history of RS 2477 rights-of-way and other alternative access statutes in Alaska is enclosed as Appendix A.

Recognition of RS 2477 is a matter of state law, and administrative decisions of the Department of the Interior have consistently held that the existence of an RS 2477 right-of-way is a question of state law. Therefore, the State of Alaska adopted an extensive regulatory program designed to conclusively identify and classify existing, valid rights-of-way established under RS 2477. A copy of these regulations is enclosed as Appendix B. This regulatory process provides a fair method for determining whether RS 2477 rights-of-way claims are valid and do not permit the creation of new rights-of-way. The State of Alaska will only confirm irrevocable, pre-existing property rights established under RS 2477, based on documented historical use. The evaluation process established in 11 AAC 51 is an appropriate vehicle to

evaluate those rights-of-way claims and affords all interested and affected parties--state agencies, private property owners, federal agencies and members of the public--input into the determination.

Consequently, Congress need not adopt a comprehensive statutory process to determine the validity of RS 2477 claims. In addition to being more appropriately decided under state law and procedure, RS 2477 validity claims will almost certainly be time consuming and expensive. In an era of budget deficits, the federal government should avoid an expensive encroachment on a task traditionally reserved to the states.

The State of Alaska has a long history of asserting RS 2477 rights-of-ways through administrative processes and legislative action. Nearly 2000 irrevocable rights-of-way grants in Alaska were established under RS 2477. This documentation has been presented to the BLM on two previous occasions. A copy of one such summary is enclosed as Appendix C for your reference.

Other than grants created by RS 2477, there are only three other principle methods for obtaining rights-of-way and access in Alaska to or through lands managed or previously controlled by the Department of the Interior in Alaska:

1. *Alaska National Interest Lands Conservation Act (ANILCA);*

2. *Alaska Native Claims Settlement Act (ANCSA); and*

3. *Federal Land Policy Management Act (FLPMA).*

During recent exhaustive efforts to complete the state's final land selections under the Alaska Statehood Act, it became obvious that the access provisions in the statutes referenced above, including the repealed RS 2477, do not fully meet the complete access needs of the public, individuals, or agencies seeking to use or manage the vast land and resource base in Alaska. Taken together, the four laws contain distinctly different access provisions which, in conjunction with the Statehood Act land selections, provide a barely acceptable means of ensuring that future generations will have access to Alaska lands. Therefore, it is important to preserve the RS 2477 process.

Unfortunately, some of the significant access provisions in these statutes, particularly Title XI of ANILCA, are cumbersome and difficult to use, causing these access promises to remain largely unfulfilled. For example, rather than relying on ANILCA's Title XI provisions to establish access to a major zinc deposit in northwest Alaska, the NANA Corporation (a corporation created by ANCSA) instead requested Congress to enact a bill directly providing access. While the eventual success of the NANA Corporation in developing the Red Dog Mine and the Delong Mountain Road is a source of pride in Alaska, NANA's difficulties only serve to underscore the problems associated with obtaining access to Alaska's vast country. These statutes are, to date, largely empty promises. Likewise, due in part to rapid conveyances and narrow interpretations, the easements authorized in section 17(b) of ANCSA have proved an unreliable means of providing access across Native land.

There are other effects of RS 2477 in Alaska. Multiple-use activities in Alaska during the later part of this century have been affected by boat and airplane access due to the size and ruggedness of much of the terrain. Although the advent of aviation in the twentieth century was a blessing in many respects, it probably arrested a significant portion of trail, road and highway development in Alaska. As a result, fewer roads and trails were established than in other states.

In addition, the checkerboard land ownership patterns created by ANCSA and ANILCA and the statutory restrictions in those statutes are unique to Alaska, directly affecting access options and associated multiple-use activities. Therefore, where roads and trails were established, the RS 2477 grants are critical to the ability of residents to continue multiple-use activities.

Limitations on access are also detrimental to federal and state agencies whose ability to continue management activities associated with fisheries, wildlife, water quality, mining, logging, and tourism is directly related to access. In some instances, access restrictions would deny public use of federal public lands even where the activities are permitted or where those activities further the express purposes of the conservation unit.

In closing, access issues are extremely important to the State of Alaska. Because Alaska is a young and sparsely populated state and is only now experiencing the kinds of growth and development pressure most states experienced long ago, Alaska's

access rights, of which RS 2477 is a key element, must be protected. By creating a procedure for identifying and confirming the existence of previously established RS 2477 rights-of-way which protects all affected interests, Alaska has acted responsibly to protect those rights previously granted to, and vested in, the inhabitants of Alaska.

With best regards.

Sincerely,

Walter J. Hickel
Governor

Enclosures

State of Alaska Department of Natural Resources

This appendix briefly outlines a history of RS 2477 in Alaska and briefly identifies the other principle statutes available to provide access within Alaska and their respective advantages and disadvantages.

I. RS 2477 - HISTORY AND INTERPRETATION

Revised Statute 2477 ("RS 2477"), formerly codified as 43 U.S.C. 932, was section 8 of the Mining Law of 1866.[1] RS 2477 provided:

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

RS 2477 was repealed by the Federal Land Policy and Management Act ("FLPMA") of Oct. 21, 1976, Pub.L.No.94-579, Title VII, Sec. 706(a), 90 Stat. 2793. However, all rights of way existing on the date of repeal were expressly preserved. 43 U.S.C. § 1769(a) and § 701 of FLPMA. Similarly all RS 2477 rights of way are preserved as "valid and existing rights" under the Alaska Native Claims Settlement Act and under the Alaska National Interest Lands Conservation Act. See Aleknagik Natives, Inc. v. United States, 806 F.2d 924, 926-7 (9th Cir. 1986) and Northern Environmental Center v. Lujan, 872 F.2d 901, 903 (9th Cir. 1989).

RS 2477 was an open ended and self-executing grant by the federal government that could be accepted by public use. Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988). The statute was enacted at a time when the national government encouraged expansion and development of public lands. Luchetti v. Bandler, 777 P.2d 1326, 1328 (N.M. App. 1989) citing Wilkenson v. Department of Interior of United States, 634 F.Supp 1265 (D. Colo. 1986). "This suggests that the concept of acceptance by public usage is to be applied liberally." Id.

Although RS 2477 access was characterized as a "right-of-way for the construction of highways," in its proper historical context, the "highway" language did not mean a modern public street. The word "highway" was used generically at the time to include any public way, such as a path, wagon road, pack trail, street, alley and other transportation routes common and customary in an area.

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

A. Legal History of RS 2477 in Alaska

1. Legal Framework

The earliest cases construing RS 2477 were state cases. The first significant decision directly concerning RS 2477 was McRose v. Bottyer. This case is significant because it clearly held that the act was self-executing and subject to state law:

> The act of congress of 1866 granted the right-of-way for the construction of highways over public land not reserved for public uses. By the acceptance of the dedication thus made, the public acquired an easement subject to the laws of this state[2] . . .

The administrative decisions of the Department of the Interior have consistently held that the existence of an RS 2477 right-of-way is a question of state law. See Leo Titus, Sr., 89 IBLA 323, 337, (1985) (existence of RS 2477 to be determined by law of the state in which the public land is located); Edward A. Nickoli, 90 IBLA 273, 275 (1986) (BLM has no jurisdiction to determine validity of RS 2477); Courtney Ayers, 122 IBLA 275, 278 1992) (adjudication of RS 2477 right-of-way involves questions of state law).

State courts have continued to recognize "acceptance" of the RS 2477 right-of-way "grant" in numerous ways:

1. use (various states, including Alaska);
2. user plus some mode of formal dedication and acceptance (e.g., Nebraska);
3. mere statutory dedication, such as of section lines, without more (e.g., Kansas, North Dakota, South Dakota, Alaska);
4. construction plus formal dedication (e.g., Arizona).

In Alaska, the Alaska Supreme Court outlined the operation of the statute and the procedure for acceptance of a RS 2477 right-of-way, as follows:

> The operation of this statute in Alaska has been recognized. The territorial District Court and the highest courts of several states

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[2] Later state court cases, most notably from North Dakota, South Dakota, and Kansas, have suggested that once a RS 2477 right-of-way grant is accepted, the state or territorial government becomes the trustee of the right-of-way for the public, and thereafter could not limit or otherwise affect the public's use of the right-of-way. This is the extreme view of the effect of a "dedication" of a RS 2477 right-of-way for public use. Were it the correct view, the sovereign government would always be permanently deprived of the power to make land use decisions as future conditions might warrant.

> have construed the act as constituting a federal 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, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

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

In 1975, the Alaska Supreme Court applied these principles and ruled in Girves v. Kenai Peninsula Borough that the Territorial Legislature's 1923 adoption of a statute created a right-of-way along a section line and operated as an acceptance. The most recent amendment was in 1953. It read

> [A] tract 100 feet wide between each section of land owned by the state, or acquired from the state and a tract four rods (66 ft.) between all other sections in the state, is dedicated for use as public highways. AS 19.10.010.

Therefore, an RS 2477 grant can be accepted in Alaska in two independent ways.[3] It can be accepted by an action of the appropriate public authorities or by public use.

Acceptance of the RS 2477 grant by public use is a factual question determined on a case by case basis. In order to establish an orderly and fair process for verifying the existence of a RS 2477 right-of-way, the State of Alaska adopted a regulatory evaluation process in 1992. 11 AAC 51. This regulatory process is the vehicle used to gather the relevant factual information on each route asserted. Factors tending to prove or disprove the acceptance of a proposed RS 2477 route by public use include the purpose of the use, the amount of the use, the duration of the use, and the "construction" of the route. A road may be a RS 2477 highway though it reaches but one property owner. "[The property owner] has a right to access other roads and the public has a right to access him." There are no specific number of users necessary to establish public use.

Upon acceptance of the grant, RS 2477 operates to irrevocably convey a right of way to the public across the federal lands. Wilderness Society v. Morton, 479 P.2d 842, 882 (D.C. Cir. 1973).

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[3] Hammerly also stands for the principle that the grant under RS 2477 is only for right-of-ways crossing unreserved and unappropriated public lands.

Case law and the Department of Interior's own regulations[4] have made it clear that RS 2477 was an offer to dedicate unreserved public lands for the construction of highways.[5] Dillingham Comm. Co. v. City of Dillingham, 705 P.2d 410 (Alaska 1985). With respect to public lands that were open and unreserved, no federal application for such a right-of-way was required and no notation appeared in land office records.

2. Detailed Listing of Relevant Alaskan cases

a) Clark v. Taylor, 9 Alaska 928 (4th Div. Fairbanks 1938). The public may, by user, accept the RS 2477 grant, and 20 years of "adverse" public use was sufficient in this case. However, the case also intimates that there is no such thing as an unsurveyed "section line" acceptance of the RS 2477 grant.

b) Berger v. Ohlson, 9 Alaska 389 (3rd Div. Anchorage 1938). The RS 2477 grant may be accepted by the general public, through user, even absent acceptance by governmental authorities, although there must be sufficient continuous use to indicate an intention by the public to accept the grant.

c) U.S. v. Rogge, 10 Alaska 130 (4th Div. Fairbanks 1941). Same as b.

d) Hamerly v. Denton, 359 P. 2d 121 (Alaska 1961). Same as b. In addition, this case held that AS 19.10.010 (the section line dedication) was equivalent to a legislative acceptance of the RS 2477 grant.

e) Mercer v. Yutan Construction Co., 420 P.2d 323 (Alaska 1966). Trial court was correct in finding that the issuance of a grazing lease, expressly subject to later rights-of-way, did not reserve the leased land such that the government could not accept the RS 2477 grant and build a right-of-way.

f) Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.) (enbanc), cert. denied 411 U.S. 917 1973). AS 19.40.010 (concerning the trans-Alaska pipeline haul road) it probably acceptance of the RS 2477 grant, the court citing Hamerly v. Denton favorably. This is the only reported federal court

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[4] For years the CFR's contained a section reading in part: "[R.S. 2477] grants become effective upon the construction or establishment of highways, in accordance with state laws, over public lands, not reserved for public uses." E.g., 43 CFR 244.53 (1962); 43 CFR 2234.2-5(b) (1970); 43 CFR 2822.2-1 (1974). This regulation has since been repealed.

[5] The meaning of the term "highway" in the historical context of RS 2477 is broad and in present day includes common and customary transportation routes used by automobiles, off-road vehicles, equipment, snow machines, dog sleds, and any other mode of transportation, including on foot. See, e.g., Cincinnati v. White, 33 U.S. 431, 432 (1831)

case dealing with an Alaska RS 2477 issue, at least as of October 1, 1987.

g) Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975). Same as Hammerly v. Denton, above.

h) Anderson v. Edwards, 625 P.2d 282 (Alaska 1981). Where the state has not stepped in to regulate a section line right-of-way created via AS 19.10.010, a private citizen may use it, but only up to a width that is reasonable under the circumstances. Consequently, a citizen using a right-of-way who had cut too many trees to widen it must compensate the fee owner.

i) Fisher v. Golden Valley Electric Association, 658 P.2d (Alaska 1983). Utility use of an otherwise unused (i.e., it was not otherwise regulated or used by the State) RS 2477 section line right-of-way for a powerline was permitted not-withstanding the underlying fee owners' objections.

j) Alaska v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983). RS 2477 did not establish the width of rights-of-way created under it. The Department of the Interior's Order No. 2665 for ceratin RS 2477 roadways did, however, establishing a width.

k) Brice v. State, 669 P.2d 1311 (Alaska 1983). Pre-existing section line highway easements created under AS 19.10.010 remained valid even when the law was temporarily repealed between 1949 and 1953.

l) Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 4110 (Alaska 1985). This case reaffirmed the holding of Hamerly v. Denton, and then found that relatively slim evidence of user was sufficient to prove the acceptance of an RS 2477 grant. In Hamerly the court had found inadequate evidence of user. The different results of the two cases probably rest on the fact that in Hamerly the evidence of use was disputed, but in Dillingham no rebuttal evidence showing lack of use was submitted. The Dillingham court also held that once the RS 2477 road was created, it could be used for any purpose consistent with public travel.

B. History of RS 2477 in Alaska

In 1971, Commissioner of Transportation, Bruce Campbell, submitted a set of USGS maps and listing of possible RS 2477 rights-of-ways to the Bureau of Land Management. This listing had approximately 1500 routes identified. The majority of these routes were already noted on the USGS quadrangle maps. Although received by BLM, there was no indication that they were accepted existing RS 2477 rights-of-way by the federal government.

a higher road classification then their specific use requires. By providing for a low-volume management regime, the state hopes to keep any road development on an RS 2477 commensurate with the activity it supports and, therefore, less intrusive on adjacent lands.

Many RS 2477s provide unique access opportunities for the public which could not be otherwise realized. The state intends to actively assert those RS 2477s which meet the statutory criteria and provide public use benefits.

II. ALASKA INTEREST LANDS CONSERVATION ACT (ANILCA), TITLE XI (16 USC 3116 et seq)

Title XI, ANILCA, has been suggested as an alternative method for ensuring access in Alaska. However, Title XI is of only limited application because it applies only to conservation system units, i.e., national parks, monuments and preserves, national wildlife refuges, wild and scenic river corridors, National Forest Monuments, wilderness areas, national conservation areas and national recreation areas. Therefore, the process contained in Title XI is not applicable on millions of acres of BLM, National Forest or military lands in Alaska.

In addition, it only supplements existing methods, such as RS 2477, for providing access and/or rights-of-way across conservation system units. 16 USC §3169. Likewise, §1110(b) (16 USC §3170(b)), also guarantees the owners of "inholdings" the right of adequate and feasible access for economic and other purposes and specifically recognizes that other rights of access may exist.

> The Committee understands that the common law guarantees owners of inholdings access to their land, and that rights of access might also be derived from other statutory provisions, including other provisions of this title, or from constitutional grants. This provision is intended to be an independent grant supplementary to all other rights of access, and shall not be construed to limit or be limited by any other right of access granted by the common law, other statutory provisions, or the Constitution. (House Report 96-97, Part I, p.240. emphasis added)

"Inholdings" for the purposes of Title XI are not simply non-federal property interests which lie within the external boundary of a conservation system unit. The term is specifically defined by §1110(b) as

> [S]tate owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy [which] is

> within or is effectively surrounded by one or more conservation system unit - . . .

Accordingly, private property or property interests are also considered inholdings for the purpose of Title XI, even if they are located outside the external boundaries of a conservation system unit, but where the only "adequate and feasible" access is across the unit.

Given Congress' clear recognition of other access rights, as referenced above, Title XI is only complements RS 2477 right-of-ways and other means for providing access. It is of only limited application. It provides access to inholdings located within the external boundaries of a conservation system unit or access to private property or property interests that are inholdings by virtue of being "effectively surrounded" by a conservation system unit. Where an RS 2477 right-of-way or another appropriate statutory authority does not exist, Title XI would have to be used.

Because it is not a particularly effective means for establishing access and is especially cumbersome, in the 12 years since the passage of ANILCA, not a single right-of-way has been authorized under Title XI. Therefore, it remains to be seen whether Title XI is a truly viable tool for providing access within Alaska's conservation units.

III. SECTION 17(B), ALASKA NATIVE CLAIMS SETTLEMENT ACT

In enacting the Alaska Native Claims Settlement Act (ANCSA), Congress created a means for providing public access which has been suggested as an alternative to RS 2477 rights-of-way in Alaska. It is the so-called 17(b) easement. Like the Title XI access procedure, these easements complement, rather than a replace, the RS 2477 grant. These easements only establish access across specific private lands and are subject to significant limitations.

Authorized by Section 17(b) of ANCSA, these easements are designed to provide the public with access across private lands (in this instance - Native owned lands) to State and other public lands and waters. There are, however, some significant differences between rights-of-way granted under RS 2477 and 17(b) easements.

The most significant difference between a 17(b) easement and a RS 2477 right-of-way is that a 17(b) easement can only be identified and reserved at the time the lands are conveyed. Experience in recent years has shown that due to the rate at which lands are being conveyed, it is not always possible for the State and the public to identify these easements. To further complicate the issue, in many instances where a easement is identified and reserved in the conveyance documents, funding shortages have prevented actual location of the easement on the ground. When they are located on the ground, the BLM has found that they are not always useable as reserved.

Additionally, while an RS 2477 right-of-way is irrevocable, a 17(b) easement can be extinguished if it is not used for the purpose for which it was reserved by the date specified in the conveyance, if any, or by December 18, 2001. Finally, a 17(b) easement may be reserved for the future construction of a road only if construction of the road will occur within 5 years of the date of conveyance. This precludes reservation of 17(b easements as a long range transportation planning tool.

IV. FEDERAL LAND POLICY AND MANAGEMENT ACT

The Federal Land Policy and Management Act (FLPMA) also provides authority for granting rights-of-way across certain federal public lands. However, just as Title XI is of limited application and utility by only applying to lands within conservation system units, the authorities in FLPMA apply only to BLM managed lands and, therefore, provide no alternative to RS 2477 on other federal lands in Alaska.

In addition, although FLPMA repealed RS 2477, it clearly preserved all RS 2477 rights-of-way created prior to the effective date of FLPMA. This is clearly stated in Sections 509 and 701:

> Section 509 EXISTING RIGHTS-OF-WAY
>
> (a) Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted.
>
> Section 701 EFFECT ON EXISTING RIGHTS
>
> (a) 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.

Further, unlike an RS 2477 right-of-way, a right-of-way grant under FLPMA is made for only a specified period of time and only for those purposes specified in the authorization. A FLPMA right-of-way may also be extinguished by the agency if the holder fails to meet certain conditions. The applicant for a FLPMA right-of-way must also post bond, pay rental fees and meet numerous other criteria before authorization is made. Clearly, because of its inherent limits, a FLPMA right-of-way can only be used as an alternative to an RS 2477 right-of-way in certain circumstances.