MEMORANDUM

State of Alaska
Department of Law

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

DATE: July 17, 2002

FILE NO: 665-01-0201

TEL. NO.: 451-2811

FROM: Paul R. Lyle
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SUBJECT: Scope of Klutina Lake Road right-of-way.

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Question

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

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

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 In addition, Ahtna asserts that the state's R.S. 2477 right-of-way for the Klutina Lake road is superceded by an overlapping ANCSA § 17(b) easement reserved for the road in the interim conveyances conveying the lands traversed by the road from BLM to Ahtna and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

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

Summary of Advice

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the uses made of the road from its establishment circa 1898 through October 21, 1976 (the date R.S. 2477 was repealed) and may take reasonable steps to render the road convenient for those public uses.

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 The state's R.S. 2477 right-of-way is not superceded by the overlapping ANCSA § 17(b) easement contained in Ahtna's conveyances.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

Legal Analysis

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

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

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

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

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

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

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

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

There is controversy over whether state or federal law controls the perfection of R.S. 2477 rights-of-way. The controversy centers on whether R.S. 2477 required actual road construction in order to perfect a right-of-way, as opposed to establishment by user or an act of a public authority. *See North Dakota Op. Att'y Gen. No. 2000-05*, 2000 WL 146636 (N.D.A.G. Jan. 26, 2000)(containing a general summary of this controversy and of state and federal cases addressing this issue).

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

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

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

No ninth circuit decision directly holds that the scope of an R.S. 2477 is a matter to be determined under state law where federal law is otherwise silent on the issue of which law controls. However, several ninth circuit decisions imply that state law would be applied to determine the uses to which an R.S. 2477 may be put where, as here, the perfection of the R.S. 2477 right-of-way by actual construction is not in doubt. *See Shultz v. Dep't of Army*, 10 F.3d 649, 655 n. 8 (9th Cir. 1993)(holding that both the establishment and scope of an R.S. 2477 right-of-way is a question of state law, citing *Standage Ventures, infra.* and *Hodel,*

supra.), *withdrawn*, 96 F.3d 1222 (1996)[3]; *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974); *Adams v. U.S.*, 687 F.Supp. 1479, 1490 (D.Nev. 1988), *affirmed in part, reversed in part on other grounds*, 3 F.3d 1254 (9th Cir. 1993)("[A] right of way could be established by public use under terms provided by state law."); *U.S. v. Rogge*, 10 Alaska 130 (D. Alaska Terr. 1941), *affirmed*, 128 F.2d 800 (9th Cir. 1942); *see also* lower court decisions within the ninth circuit, *e.g.*, *U.S. v. 9,947.71 Acres of Land*, 220 F.Supp. 328, 332, 335-36 (D.Nev. 1963); *Berger v. Ohlson*, 9 Alaska 389, 395 (D. Alaska Terr. 1938), *vacated on other grounds*, 9 Alaska 605 (D.Alaska Terr. 1939); *Clark v. Taylor*, 9 Alaska 298, 305 (D. Alaska Terr. 1938).

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

> State law determines what is a 'public highway legally established' for the purposes of federal land grant statutes . . . .

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

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

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

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

Furthermore, in a case that arose out of the Supreme Court of California, the U.S. Supreme Court recognized that R.S. 2477 authorized the creation of highways over the federal public domain in any manner consistent with state law. *Central Pacific Railway Co. v. Alameda* County, 52 S.Ct. 225, 226-27, 229 (1932). The right-of-way at issue in *Central Pacific* was a road first established by public use and subsequently laid out and improved by the county before R.S. 2477 was enacted.[5] The Court held that R.S. 2477 applied retroactively to validate pre-existing roads crossing public domain lands. *Id.* at 227. The Court also held that R.S. 2477 rights-of-way are "controlled by the same general principles" applicable to cases concerning appropriation of water from the public domain under section 9 of the Act of July 26, 1866.[6] *Id.* at 228. Section 9, in turn, provided that water appropriation issues would be determined under local customs and laws. The Court twice noted that the road was established under state law. *Central Pacific*, 52 S.Ct. at 226, 229. *Central Pacific* thus lends support to the argument that state law controls the scope of an R.S. 2477 right-of-way.

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

Hodel distinguished the holding of *Gates of the Mountains*, reasoning that it was limited to the issue of placing utilities within R.S. 2477s.[7] *Hodel*, 848 F.2d at

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

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

[7] In *Fisher v. Golden Valley Electric Ass'n.*, 658 P.2d 127, 130 (Alaska 1983), the Alaska Supreme Court held that electric utilities may be placed within R.S.

1081. Unlike the situation in *Gates of the Mountains*, we can find nothing in federal law that controls **other uses** to which an R.S. 2477 may be put or that specifies a width for R.S. 2477 rights-of-way. Federal law is silent on both of these "scope" issues. Thus, because there is no federal law to apply with respect to the scope issues related to the Klutina Lake road, we believe there is a good chance that the ninth circuit would apply state law to resolve these issues.

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

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

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

(ii) Cases from Alaska and other state courts.

The Alaska Supreme Court has long held that R.S. 2477 grants are to be interpreted in accordance with Alaska law. *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975); *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961). Other

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2477 rights-of-way. Therefore, there is a direct conflict between the Alaska Supreme Court and the ninth circuit on this point. This conflict is not an issue in the present case.

states also hold that state law controls the scope of an R.S. 2477 right-of-way. *See, e.g.* cases cited in *Hodel*, 848 F.2d at 1082 & n. 13 ("We are not aware of any state that even considered the possibility of a federal rule."); *North Dakota Op. Att'y Gen. 2000-05* at 10 ("All state court decisions look to state law.")

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

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

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

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

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

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

The historical uses of the Klutina Lake road include vehicular and pedestrian travel, rest stops, parking for recreational uses of the Klutina River and

overnight camping. The law authorizes the reasonable use of the right-of-way for these purposes.

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

> The holder of a right-of-way, private or public, 'cannot lawfully take dominant possession and deal with the land upon which the easement exists as if he were the owner of the land,' because he is not the owner of the land:
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> > Easements do not carry any title to the land over which the easement is exercised, and work no dispossession of the owner. Since the interest itself is nonpossessory, the holder of the easement does not have the degree of control over the burdened property that is enjoyed by the owner of the servient estate; complete dominion is inconsistent with a claim of easement.
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> 28A C.J.S. *Easements* § 144, at 347 (footnotes omitted). At the same time, the owner of the servient estate must abstain from acts that impermissibly interfere or are inconsistent with the proper use or enjoyment of the easement. *Id.* at § 143.

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

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

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

Andersen held that clearing the full width of a 100-foot wide easement reserved in state patents was a trespass on the privately-owned servient estate because clearing the full width was not reasonably necessary for access. The court held that an award of treble trespass damages would be appropriate for cutting the trees outside of a 25-foot wide area, the area considered reasonably necessary for access under the circumstances of that case. *Andersen*, 625 P.2d at 289. Therefore, we recommend that DOT&PF limit improvements in the right-of-way to those that are reasonably necessary to support the historic public uses of the Klutina Lake road.

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

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

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

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

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

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

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

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

(emphasis added).

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

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

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

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

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

Alaska Dep't of Transp., 88 IBLA 106, 107, 110 (1985), quoting *State of Alaska (On Reconsideration)*, 7 ANCAB 188, 198, 89 I.D. 346, 350 (1982)(emphasis added)[8]; accord, *City of Tanana, Tozitna, Ltd.*, 98 IBLA 378, 383 (1987).

Fourth, highways are not subject to revocation by the federal government once established under R.S. 2477. *Alaska Land Title*, 667 P.2d at 727 n. 21. The Klutina Lake road was established well before ANCSA and FLPMA were enacted. Both ANCSA and FLPMA preserved prior valid existing access, as we explained above.

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

Sixth, the ANCSA § 17(b) easements included in Ahtna's conveyances are expressly made "subject to applicable Federal, State, or Municipal corporation regulation." *See* Patent No. 50-80-0108 (July 18, 1980), Interim Conveyance 346 (July 18, 1980). Thus, the state, not Ahtna, has legal authority to regulate § 17(b)

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

easements. Ahtna was not granted regulatory authority over the § 17(b) easements included in its conveyances.[9] Where § 17(b) road easements overlap with R.S. 2477 rights-of-way, the state may reasonably regulate the road consistent with the scope of the greater of the two easements. *Alaska Land Title*, 667 P.2d at 720 (easement implied by law in patent controls over express patent easement of lesser width).

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

Conclusion

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

It is not certain that the ninth circuit would apply state law to determine whether an R.S. 2477 crossing private lands was perfected. However, where, as here, perfection is not an issue and no contrary federal statute dictates otherwise, we believe ninth circuit precedent supports the application of state law to determine the scope of an R.S. 2477.

Given the ongoing controversy concerning this road, we recommend that litigation be initiated in state court to confirm the extent of DOT&PF's authority before construction begins on any DOT&PF-proposed improvements to the road.

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

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