During the 16-month interval between issuance of the preliminary injunction and the hearing on the permanent injunction, there were several significant developments affecting the Mineral Leasing Act issues. In March 1971 Alyeska filed an application for rights-of-way for 26 communications sites.[6] In June 1971 the State of Alaska, intervenor-appellee in these cases, entered into a contract with Alyeska[7] whereunder Alyeska agreed to build a public highway to run from Livengood to Prudhoe Bay, along a route almost identical with the route of the 200-foot-wide haul road proposed in TAPS' SLUP application of December 1971. In this contract Alaska agreed to be responsible for securing all rights-of-way across federal land necessary for the highway, and on July 28, 1971 the State of Alaska applied to the Bureau of Land Management for a highway right-of-way across public lands for this road.[8] Following this application, on August 18, 1971 Alyeska withdrew its SLUP application for the 200-foot haul road.[9]

RIGHTS-OF-WAY ISSUED TO THE STATE OF ALASKA

The State of Alaska has applied for and the Secretary of the Interior has stated his intention to grant a permanent right-of-way for a public highway from the Yukon River to Prudhoe Bay along the pipeline route, a 20-year lease of lands on which to locate three public airports, and permits for the free use of gravel with which to construct these facilities. Appellants draw our attention to the facts that construction of these facilities is indispensable to the proposed pipeline, that the State probably would not have constructed these facilities (at least not at the present time) were it not for the pipeline, and that the facilities are not actually going to be constructed by the State, but rather by Alyeska who by contract with the State has agreed to construct the facilities at its own expense. Based on these allegations, appellants charge that the rights-of-way are nothing but "another device to tack together separate rights-of-way in order to achieve that which is explicitly proscribed by the Mineral Leasing Act." Putting it another way, appellants maintain that these too are "rights-of-way" "for the transportation of oil" which exceed the width limitations of Section 28 and are therefore barred by the provision in Section 28 "[t]hat no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section."

Appellees respond by pointing to specific statutory authority for each right-of-way, and argue that we should not read Section 28 so as to forbid resort to other statutory grants of rights-of-way. The highway right-of-way, they argue, is authorized by 43 U.S.C. § 932 (1970) which provides very simply: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The airport leases are alleged to be authorized under 49 U.S.C. § 211 (1970) which authorizes the Secretary of the Interior, "in his discretion and under such regulations as he may prescribe, to lease for use as a public airport any contiguous public lands, unreserved and unappropriated, not to exceed two thousand five hundred and sixty acres in area * * *." Finally, the application for a free use permit for gravel rests upon 30 U.S.C. § 601 (1970) which authorizes the Secretary of the Interior to dispose of mineral materials including gravel. That section provides that the Secretary must charge a price for such materials except that he "is authorized in his discretion to permit any * * * State * * * to take and remove, without charge, materials and resources subject to this subchapter for use other than for commercial or industrial purposes or resale."

In rebuttal appellants contend that the statutes are inapplicable to the rights-of-way at issue in

this lawsuit. In their view, the road to be constructed by Alaska will not qualify as a "highway" within the meaning of Section 932 because it will not be open to the public; similarly, they charge that the airports to be constructed under the lease will not be "public" within the meaning of Section 211. Finally, since the ultimate purposes of these facilities are allegedly to facilitate construction of the pipeline, they argue, gravel with which the facilities will be constructed will be used for "commercial or industrial purposes" within the meaning of Section 601, thus making the free use exception inapplicable.

These competing contentions of the parties raise two separate questions for this court. First, does Section 28 of the Mineral Leasing Act preclude resort to other statutory grants of rights-of-way in cases where Section 28 and the other statutes appear in conflict? Second, if the answer to the first question is "no," do the rights-of-way at issue in this case meet the requirements of the specific statutes cited by appellees?

A.

The only theory upon which we might conclude that Section 28 forbids resort to other statutory rights-of-way is that Conress, in enacting Section 28, intended it to repeal or supersede these other statutes in situations where they conflict. Although Section 28 was passed after one of the other statutes cited by appellees, Section 932,[87] we hesitate to conclude that its enactment was intended to operate as a repeal of that statute to the extent that Section 932 permits rights-of-way which incidentally, or even primarily, are used to facilitate construction of an oil pipeline. It is an axiom of statutory construction that repeals by implication are not favored.[88] Thus when interpreting statutes inconsistencies are to be avoided and repeal by implication found only where there is a "positive repugnancy" between the two or where the intention to repeal is "clear and manifest." *Rosenberg* v. *United States,* 346 U.S. 273, 295 (1953) (Mr. Justice Clark, concurring); *United States* v. *Borden Co.,* 308 U.S. 188, 199 (1939). In the case of Section 28, we cannot find any such positive repugnancy or any such manifest intent to repeal. Section 932 is nowhere mentioned in the legislative history of Section 28. It should also be noted that Congress' intent in enacting the Mineral Leasing Act was to grant rights-of-way where none existed previously, not to take away rights-of-way already authorized by statute.

A differently phrased yet similar principle of statutory construction is that where are two acts on the same subject -- here rights-of-way in federal lands -- effect should be given to both if possible. *United States* v. *Borden Co., supra,* 308 U.S. at 198; *Rawls* v. *United States,* 8 Cir., 331 F.2d 21, 28 (1964); *A.P.W. Paper Co.* v. *F.T.C.,* 2 Cir., 149 F.2d 424, 427 (1945), *affirmed,* 328 U.S. 193 (1946). Courts should make every effort to reconcile allegedly conflicting statutes and to give effect to the language and intent of both, so long as doing so does not deprive one or the other of its essential meaning. *Myers* v. *Hollister,* 96 U.S. App. D.C. 388, 390, 226 F.2d 346, 348 (1955), *cert. denied,* 350 U.S. 987 (1956).

This doctrine should be of special significance when we deal with allegedly conflicting public land laws. As a cursory glance at those sections of the United States Code which deal with public lands will indicate, these laws are hardly a model of neat organization and uniform planning. Congress recently noted in creating the Public Land Law Review Commission:

"Because the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because

those laws, or some of them, may be inadequate to meet the current and future needs of the American people * * * it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary."

43 U.S.C. § 1392 (1970). This is an area of the law where it truly can be said that most statutes are *sui generis.* It is an area where it is extremely doubtful that Congress, when passing certain legislation, was aware of, let alone intended, inconsistencies with prior legislation. Indeed, the history of Section 28 of the Mineral Leasing Act is a good example of the lack of organization and coordination in this area of our nation's statutory framework. As noted in Part I *supra,* when Congress passed the Mineral Leasing Act it thought the only prior law dealing with oil pipelines was an 1896 statute, now codified at 43 U.S.C. § 962 (1970), which granted rights-of-way for pipelines in Colorado and Wyoming. Congress was evidently unaware of a 1910 statute dealing with rights-of-way for pipelines through public lands in the State of Arkansas, *see* 43 U.S.C. § 966 (1970), an unawareness caused, no doubt, by the fact that in 1920 the first edition of the United States Code had not yet been prepared. However understandable this ignorance may be, it indicates that in this area of the law we should be especially hesitant to arrive at inferences with respect to congressional intent to have one statute supplant, modify or supersede another. Absent specific indication to the contrary, the only reasonable inference is that Congress intended all of its statutes to have effect, and it is this inference we follow in holding that nothing in Section 28 precludes resort to other specific statutory grants of rights-of-way, even in cases where the purposes for which said rights-of-way are to be used seem to fall within the purposes intended to be covered by Section 28.

B.

Having concluded that if the rights-of-way at issue qualify under the specific statutory provisions cited by appellees they will be valid notwithstanding Section 28 of the Mineral Leasing Act, we can now analyze whether in fact they so qualify.

1. *Highway from Yukon River to Prudhoe Bay.*

Appellants contend that the road to be built does not qualify as a "highway" under 43 U.S.C. § 932 (1970). They argue first that, even though Alaska has formally indicated its intention to construct a public highway along the right-of-way, its real "motive" is not benefit to the public but assistance to those constructing the pipeline, and that this motive takes the road outside Section 932. Second, they charge that the State in fact has no intention of making the road public, at least not until construction of the pipeline has been completed, pointing to the fact that the construction contract between Alaska and Alyeska gives Alyeska a preference over the public to use the road.

There is no question that the State, at least formally, has indicated its intention to construct a public highway along the right-of-way requested. The application from the State Department of Highways to the Bureau of Land Management specifically states that "[t]he primary purpose for which the right of way is to be used is a public highway."[89] In addition, in 1970 the legislature of the State passed a statute enabling the Department of Highways to contract with Alyeska for construction of the highway. In that statute "[t]he legislature finds and declares that there is an immediate need for a public highway from the Yukon River to the Arctic Ocean and that this

public highway should be constructed by the State of Alaska at this time * * *." Alaska Stat. § 19.40.010(a). Ordinarily this expression of intent would constitute valid acceptance of the right-of-way granted in Section 932. That section acts as a present grant which takes effect as soon as it is accepted by the State.[90] *Tholl* v. *Koles,* 65 Kan. 802, , 70 P.881, 882, (1902); *cf. Railroad Co.* v. *Baldwin,* 103 U.S. 426, 429 (1880). All that is needed for acceptance is some "positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept * * *." *Hamerly* v. *Denton,* Alas., 359 P.2d 121, 123 (1961).[91]

Appellants charge that this is not the ordinary case because the State's real intentions and real motives are not to construct a public highway but to permit Alyeska to build a haul road for construction of the trans-Alaska pipeline. It is a well known precept of our jurisprudence that we shun attempts to look behind a stated legislative purpose to find a hidden intention or motive, and that we may not "restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States,* 195 U.S. 27, 56 (1904). *See United States* v. *O'Brien, supra,* 391 U.S. at 383; *Arizona* v. *California,* 283 U.S. 423, 455 (1931). While this doctrine typically has force in a context different from that present here, namely review of the constitutionality of legislative enactments, we think it thoroughly applicable to the instant case. The doctrine is based on the theory that ascertaining motive is a difficult and hazardous task, *see United States* v. *O'Brien, supra,* a factor present when reviewing administrative as well as legislative action, in a constitutional context or otherwise. In addition, any rule requiring us to look behind the face of Alaska's action in this case and analyze its "real motive" is inconsistent with the sound federal-state relationship that the judiciary has carefully protected in other contexts.

Even were we to pierce the alleged facade of Alaska's intentions, we would be constrained to approve the highway right-of-way. The State has been interested in providing some form of ground transportation to the North Slope area for many years. Studies of a proposed road were made in both 1951 and 1965, and in 1966 the State Legislature authorized the expenditure of up to $20,000 for another study, involving aerial photography and visual investigation of principal alternative routes and the drafting of maps and preliminary cost estimates for the various alternatives.[92] The State's intentions to have a public highway, rather than a mere pipeline construction road, are further evidenced by the fact that the State required Alyeska to make certain changes in the design features of the road to better accommodate public use.[93] These changes included realigning segments of the road to tie it in with an existing network of roads, reducing grades in certain segments, changing standards for bridges and culverts to ensure their continued maintenance after construction of the pipeline is completed, and enlarging bridge spans to better accommodate public traffic.

Appellants charge that even though Alaska might intend eventually to open the road to the public, the contract between the State and Alyeska envisions granting Alyeska preferential use during the pipeline construction period -- that is, it may be read to allow public use to be barred when hazards posed by pipeline construction use endanger the public. Even were we to conclude that Alaska intends to grant Alyeska this preference,[94] we would affirm the validity of the right-of-way.

87. *See* Act of July 26, 1866, c. 262, § 8, 14 STAT. 253, 43 U.S.C. § 932 (1970).

88. *See Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968); *Amell* v. *United States*, 384 U.S. 158, 165-166 (1966); *Millard* v. *Harris*, 132 U.S. App. D.C. 146, 151, 406 F.2d 964, 969 (1968); *District of Columbia National Bank* v. *District of Columbia*, 121 U.S. App. D.C. 196, 200, 348 F.2d 808, 812 (1965).

89. Supplemental Documents, *supra* note 2, Tab E-2.

90. Since the section acts as a present grant, it is normally not even necessary for the builder of the highway to apply for a right-of-way. *See* 43 C.F.R. § 2822.1-1 (1972): "No application should be filed under [43 U.S.C. § 932], as no action on the part of the Government is necessary." However. since § 932 applies only to land "not reserved for public use," and the lands sought to be used for highway purposes were considered reserved for public use under Public Land Order No. 4582, Jan. 17, 1969, 34 FED. REG. 1025, application was necessary under 43 C.F.R. § 2822.1-2 (1972) to request that the reservation be revoked or modified so as to permit construction of the highway. By Public Land Order No. 4760, Jan. 7, 1970, 35 FED. REG. 424, Public Land Order No. 4582 was modified to permit granting of rights-of-way necessary for construction of the trans-Alaska pipeline. In addition, by Public Land Order No. 5150, Dec. 28, 1971, 36 FED. REG. 25410, a contiguous series of tracts of public lands from the North Slope to Valdez was set aside for a "utility and transportation corridor."

91. *See also Kirk* v. *Schultz*, 63 Idaho 278, , 119 P.2d 266, 268 (1941); *Koloen* v. *Pilot Mound Township*, 33 N.D. 529, , 157 N.W. 672, 675 (1916); *Streeter* v. *Stalnaker*, 61 Neb. 205, , 85 N.W. 47, 48 (1901).

92. *See North Slope Road Study* in Supporting Documents, *supra* note 7, Vol. I, Tab 1, at 1.

93. *See* letter of June 19, 1972 from Alyeska to its counsel in Supporting Documents, *supra* note 7, Vol. I, Tab 11.

94. The original construction agreement between Alyeska and Alaska provided: "When the Commissioner [of the State Department of Highways] determines in writing that there is no danger to the public from hazards associated with construction, the Highway may be opened by the State for use by the public during construction of the trans Alaska pipeline." *Id.*, Vol. II, Tab 6, at 3. By later amendment, this provision was changed to read: "After completion of construction of each segment of the Highway and acceptance thereof by the State pursuant to Paragraph 10 of this Agreement, that segment will be open to use by the public under such regulations as the Commissioner may impose unless the Commissioner finds that such use will be hazardous to the public." *Id.*, Vol. II, Tab 7. While the amended version does not expressly refer to hazards caused by pipeline construction use, appellants claim that the same pipeline construction preference made express in the original agreement is implied in the amended version. Since we hold the right-of-way valid under § 932 even assuming this preference during pipeline construction, we need not reach this question of contract interpretation.