File: III .22

United States Department of the Interior
OFFICE OF THE SOLICITOR
ANCHORAGE REGION
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IN REPLY REFER TO

May 21, 1980

MEMORANDUM

To: Acting Area Director
Bureau of Indian Affairs
Juneau

From: David S. Case
Attorney/Advisor

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

I. INTRODUCTION

A. Your Requests

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

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

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

B <u>R.S. 2477 in Brief</u>

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

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

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 It was repealed by Section 706(a) of the Federal Land Policy and Management Act (FLPMA) of October 21, 1976, PL 94-576, 90 Stat. 2743, 43 U.S.C. 1701, 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

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

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

II. SHORT ANSWERS

A May 22, 1979 Request

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

B. July 6, 1979 Request

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

C April 4, 1980 Request

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

III DISCUSSION

A R.S. 2477

1 History and Purpose of R.S. 2477

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

7

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

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

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

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

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

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

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

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

2. Allotments As "Public Lands"

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

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

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

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

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

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

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

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

3. Acts Accepting the R.S. 2477 Grant

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

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

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

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

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

4 Widths

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

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

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

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

B Other Access Questions

1 Obligations To Provide Access

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

You have advised that you use a special warranty deed to convey restricted Indian lands. As you know, a special warranty deed limits the grantor's obligation to defend only against claims arising through him. It does not require the grantor to defend against claims arising through other persons, 21 CJS "Covenants" § 49. Except as so limited, we believe the deed form you used includes all of the statutory covenants implied by AS 34.15.030. None of these, however, include a covenant of access to the land granted. See generally, Powell on Real Property, ¶ 904, et seq. (1968 edition). Furthermore, AS 34.15.080 specifically provides: "No covenant is implied in a conveyance of real estate, whether the conveyance contains special covenants or not." We interpret this to mean that unless there is a specific covenant of access, the grantor is not obligated to provide it.

2 Easements By Conveyance Or Covenant

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

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

3 Easements By Necessity

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

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

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

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

IV. SUMMARY

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

A. R.S. 2477 Easements

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

B. Section Line Easements

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

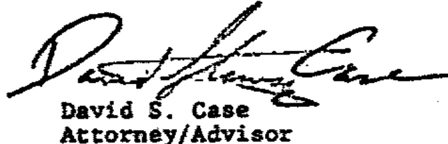
and January 18, 1949, or after March 21, 1953, then the section line easement supersedes Native occupancy rights

C. Guarantees of Access

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

D. Public or Private Access

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



David S. Case
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Enclosure

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