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STATE OF ALASKA

DEPARTMENT OF LAW

OPINION NO. 38

JAY S. HAMMOND, GOVERNOR

September 7, 1976

Dr. Robert LeResche
Director
Division of Policy Development
& Planning
Office of the Governor
Pouch AD - State Capitol
Juneau, Alaska 99811

Re: North Slope Haul Road

Dear Dr. LeResche:

I. Introduction

You have asked that we analyze the legal constraints on differing management options for the Trans-Alaska Pipeline Haul Road. The Haul Road (hereinafter "road") designated as Federal Aid Secondary (FAS) Route No. 681 on the Federal Aid Highway System, extends from Livengood, Alaska, across the Yukon River to Prudhoe Bay, Alaska. It includes 52.5 miles of previously constructed road between Livengood, Alaska and the Yukon River, 4.5 miles of connecting road, a newly constructed bridge over the Yukon River and 367 miles of newly constructed road between the Yukon River and Prudhoe Bay, Alaska. The road north

of the Yukon River was constructed and is being used presently by Alyeska Pipeline Service Company. It will be offered to the State as a State highway when the first oil flows through the pipeline.

The basic issue addressed by this opinion is whether the road is a "public highway" or a "development road." Different management options result depending on the answer. Our analysis of this issue has led to an examination of the relevant documents pertaining to the grants of right-of-way, the gravel permits, federal highway funding, and the agreements with Alyeska. On the basis of that examination, it is our opinion that the Haul Road is a public highway.

Certain legal obligations attach to a public highway and those obligations were examined for their bearing on management options. We have tried to cover the gamut of options available to the State, from complete and permanent closure at one end of the spectrum, to unrestricted access, at the other. In the middle of the spectrum would be the broad range of "police power" regulations which control or qualify, rather than prohibit, the use of the Haul Road. It is in this middle ground where we see the most promise for developing viable management options for the State. Opening the road without any restrictions whatsoever, we believe

would cause no legal problems. We assume, however, it would create serious problems for both the public safety and the public welfare, since there are presently no facilities for public use on the road and no plan to insure protection for the areas through which the road traverses. The option of permanent closure would result in a high level of exposure to the State: exposure to losing the right-of-way, to paying for the free gravel used in highway construction, to having additional federal highway funds withheld, and to paying Alyeska for the loss to them of the value of the road for pipeline maintenance. By way of contrast our examination of the statutes and case law leads us to conclude that properly framed regulations reasonably restricting the use of the road would withstand judicial challenge and afford a high degree of management flexibility to the State without undue exposure to liability. There are, of course, limitations on such restrictions and we will deal with them in this opinion.

For clarity we have divided our opinion into two sections. The first is a section dealing with the factual background of the legal issues--that is, the facts pertaining to the grants, permits, funds and agreements. The second section contains our analysis of the legal issues concerning use of the road.

II. Factual Background

This section of the opinion deals with the facts pertaining to:

--the rights-of-way granted by the Department of the Interior;

--the gravel permits granted by the Department of the Interior;

--the federal funds granted by the Federal Highway Administration; and

--the agreements between the State and Alyeska.

The facts disclose that it was the clear intention of the parties that the road was to be a public facility. In analyzing the facts it is important to separate the above topics because they involve transactions with and therefore obligations to, three different entities, two of which are departments of the federal government, and one of which is a private corporation.

A. The Right-Of-Way Grant. The chronology of events leading up to the grant of right-of-way for the Haul Road have an ironic twist. Following the discovery of oil at Prudhoe Bay, Alaska in 1968, several oil companies developed plans to transport

the oil to market through a pipeline extending to Valdez, Alaska. Because the proposed pipeline would cross federal lands, the oil companies had to seek rights-of-way from the Bureau of Land Management (BLM). First in June, 1969 and later in December, 1969, the Trans-Alaska Pipeline System (TAPS), agent of the oil companies, applied to BLM for a right-of-way for the pipeline under the Mineral Leasing Act, and for Special Land Use Permits for the construction of a haul road. See Wilderness Society v. Morton, 479 F.2d 842, 848-850 (D.C. Cir. 1973).

Apparently to pave the way for granting the right-of-way, on January 7, 1970, Interior published Public Land Order No. 4760, 35 Fed. Reg. 424 (1970), modifying Public Land Order No. 4582, 34 Fed. Reg. 1025 (1969) which on January 17, 1969, had imposed a "freeze" on all unreserved public lands in Alaska to protect native Alaskan land claims. The modification of the order allowed Interior to grant a pipeline right-of-way under the Mineral Leasing Act and other rights-of-way "reasonably necessary or convenient for the construction, maintenance and operation of the oil pipeline system." P.L.O. No. 4760. However, before any rights-of-way could be issued, on March 23, 1970, a group of conservation organizations filed suit against Interior to enjoin the granting of the rights-of-way as violative of the width

limitations under the Mineral Leasing Act. On April 28, 1970, an injunction issued. Wilderness Society v. Morton, 479 F.2d at 850.

Thus, up to the time of the injunction, the focus was on obtaining a right-of-way for a construction or haul road. Only when the court suit was filed did the State become involved in seeking rights-of-way for a State public highway under 43 U.S.C. §932. The latter Act provides in its entirety:

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

Apparently, former Governor Miller sent a telegram to then Secretary of Interior Hickel stating that he, the Governor, had authorized construction of the Haul Road under §932. This was followed by a letter to BLM by the Commissioner of Highways on April 7, 1970, with a location map. These were the earliest attempts to accept the grant under §932 (a §932 right-of-way is commonly referred to and will be described hereinafter as a "R.S. 2477" right-of-way). There were other attempts in 1971. See letter of former Commissioner Campbell to BLM, dated October 10, 1972.

Generally, no affirmative act was required by Interior to vest the right-of-way under R.S. 2477 in the State. The language of the Act operates as a present grant which may be accepted either (1) by positive act on the part of appropriate State authorities clearly manifesting an intention to accept the grant or (2) by public use for such time and under such conditions as to prove the grant has been accepted. Hamerly v. Denton, 359 P.2d 121, 123 (Ak. 1961). See also 43 C.F.R. §2822-1. But in this case, an affirmative act on the part of the government became necessary because P.L.O. No. 4582 withdrew all unreserved public lands in Alaska. While P.L.O. No. 4582 was modified on January 7, 1970 by P.L.O. 4760, the modification spoke of the "issuance of any other permit or right-of-way as may be reasonably necessary or convenient for the construction, maintenance or operation of the oil pipeline system. . . " The wording that the right-of-way had to be issued, and then only if it was "reasonably necessary or convenient", implies that affirmative acts on the part of the federal government were required before the R.S. 2477 right-of-way could vest. This interpretation is supported by 43 C.F.R. §2822.1-2 which is the section of the Code of Federal Regulations which pertains to the granting of R.S. 2477 rights-of-way over reserved public lands.

The regulation requires an application, a modification of the reservation, and a grant of right-of-way which may be subject to conditions. This is in direct contrast to grants over unreserved public land which require "no action on the part of the Government". Id. at 2822.1. See also Wilderness Society v. Morton, 479 F.2d at pp. 892, n. 90 and 893.

What began as an application for a Haul Road, turned in the midst of controversy, to focus on a public facility. The parties seeking to dissolve the court injunction argued that the right-of-way was for a public highway. See Wilderness Society v. Morton, 479 F.2d at 879-883. See also letter of former Commissioner Campbell to BLM, dated September 13, 1972, where the proposed highway is described as a "public facility."

No rights-of-way were issued under 43 U.S.C. §932 (R.S. 2477). The only grant of right-of-way ever issued to the State for the Haul Road was after the passage of and pursuant to the Trans-Alaska Pipeline Authorization Act (TAP Act), 43 U.S.C. §1651 et seq. Section 1652(b) authorized the Secretary of the Interior to issue rights-of-way and permits necessary for or related to the construction, operation, and maintenance of the pipeline system including roads and airstrips. Section 1655 provided that a right-of-way granted under §1652(b) for a road or airstrip as a facility related to the pipeline might

provide for the construction of a public road or airstrip. Pursuant to these sections, on May 2, 1975, the State Director of the BLM issued the State a "Grant of Right-of-Way for a Public Road." This was the only right-of-way ever issued for construction of the road. The grant was expressly made subject to the provision that "the right-of-way shall be used for only the construction, operation and maintenance of the State of a public road and related public facilities" (emphasis added).

B. Permits For Gravel. Approximately 130 Free Use Permits for gravel were granted to the State by Interior on April 15, 1974. Authorization for the permits was pursuant to §1652(b) of the TAP Act, and incorporated the provisions of the Cooperative Agreement between the United States Department of the Interior and State of Alaska dated January 8, 1974, and Exhibit A, Highway and Airport Stipulations. In Part III of the Agreement, entitled State Highway and State Airports, the Haul Road is referred to initially as "a public highway" and repeatedly thereafter as "the highway." The Stipulations, at 1.1 define the (Haul Road) highway as "the State Highway from the Yukon River to Prudhoe Bay".

The intent of the parties that the gravel would be used in a public highway would have been important from the

standpoint of obtaining the gravel free of charge. Free Use Permits were authorized by 30 U.S.C. §601 which states that the Secretary of the Interior must charge for the use of materials extracted from public land 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. (Emphasis added)

It would be difficult to argue now on the basis of the facts that it was not the intent of the parties that the gravel would be used for a public facility. Moreover, the explicit finding of the court in Wilderness Society v. Morton, (479 F.2d at 884) was that the gravel was for use in a public highway.

The total value of the gravel extracted pursuant to the approximately 130 Free Use Permits and used in construction of the Haul Road is currently between $2.8 and $5.25 million according to different estimates. More gravel still may be used.

C. Federal Highway Funds. On December 5, 1973, the route of the Haul Road from Livengood, Alaska to Prospect Creek was placed by the Federal Highway Administration ("FHWA") on the Federal Aid Highway System as a secondary highway route designated as FAS-681. This System is established and governed by Title 23, United States Code and the corresponding Title of the Code of Federal Regulations. On March 8, 1974, the route of FAS-681 was extended from Prospect Creek (the intersection of FAS-145 to Nome) to Prudhoe Bay, Alaska. The placement of the route on the Federal Aid System made it eligible for the expenditure of funds from the Federal Highway Administration.

Under a Project Agreement dated May 23, 1974, the FHWA obligated over $17 million of Federal funds for the costs of constructing the Yukon River bridge. This commitment was increased later to over $24 million of Federal funds toward an estimated overall cost of more than $40 million for the bridge, its approaches, and pump sites. The Department of Highways currently anticipates that nearly all of this authorized Federal funding will be used on the bridge.

Under another project agreement dated May 23, 1974, for the portion of the road between the Yukon River and Prudhoe Bay, Alaska, the FHWA obligated nearly $3 million of Federal

funds for construction of the Haul Road. This money was intended for and is being used for environmental surveillance of the construction of the road. The Department of Highways expects that about half of this total or approximately $1.5 million will be used.

Unlike the permits for gravel, or the grants of right-of-way, the FHWA Project Agreements make no mention of the Cooperative Agreement and Highway and Airport Stipulations. No formal documents, executed by the parties, describe the nature of the road as either a public highway or a development road. The correspondence between the State and the FHWA can support either interpretation. Under Title 23, U.S.C., Federal Highway funds are available for either public highways or, under a special Alaska provision, for development roads. 23 U.S.C. §118(d).

The various Project Agreements with the FHWA were signed on May 23, 1974. In December of 1973, Deputy Commissioner of Highways Matlock wrote to the FHWA that the road would be a State highway and "may be opened for use by the public at such time as the State determines it is safe to do so." But as late as March of 1974 Commissioner Campbell wrote the FHWA that the road was within the intent of §118(d), which is the special Alaska provision allowing development roads. To complicate matters, subsequent correspondence sent by State officials

after the Project Agreements were signed indicated that the road was deemed to be a public highway.

Notwithstanding the sometimes contradictory language of the correspondence mentioned above, the context within which the federal highway funds were sought and received must take account of (1) the passage in 1970 of AS 19.40 which authorized the contruction of a public highway running from Prudhoe Bay, Alaska and (2) the contentions raised by the State in the Wilderness Society lawsuit, supra, that the Haul Road would be a "public highway." Even if some statements by State officials might be construed to mean that funds were solicited and received for a development road, on the whole, the facts support the contrary view.

There is one additional point that bears mention here. The Project Agreements mentioned above include the following standard provision which is generally intended to "protect the investment" of the FHWA in a highway:

> 12. MAINTENANCE. The State highway department will maintain, or by formal agreement with appropriate officials of a county or municipal government cause to be maintained, the project covered by this agreement. (See also 23 U.S.C. §116)

Thus, whatever the nature of the highway - public or development - the State, by virtue of this promise, has agreed to maintain the highway for whatever its use might be.

D. Agreements With Alyeska. On June 11, 1971 the State and Alyeska agreed that Alyeska would construct a "highway" for the State from a point on the Livengood to Yukon River highway to Prudhoe Bay, Alaska (Part 1). The agreement provided that the State would secure rights-of-way and free use permits for gravel pertaining to Federal and State lands (Part 2), and that the State would maintain the highway after its acceptance (Part 10). The contract specifically provided:

> "The Highway shall be a State highway and may be used by (Alyeska) . . . for the construction and operation of the Trans-Alaska Pipeline without incurring any State-imposed tolls or costs for such use of the highway, except for applicable motor vehicle taxes, licenses and fees, such as the Alaska Motor Fuel Oil Tax, and other fees and costs imposed by law, regulations and customary conditions of its utility permits." (Part 3).

The construction of the Yukon River Bridge was covered by another agreement executed on June 11, 1971. Under this agreement the State agreed to construct the bridge while Alyeska agreed to construct the approaches and pay the State $6.5 million (later amended to $13.5 million) for the right to place the pipeline on the bridge. The State also agreed to maintain the bridge in a condition sufficient to support both traffic it would be required to bear and the pipeline as long as it should be used. On February 11, 1974 and June 17, 1975, the agreement was amended and Alyeska agreed to pay the State maximums of $2.2 million and $485,000 for direct and indirect costs of modification to Pier No. 4 of the bridge and to pay the sum of $594,000 as a bonus for early completion of the bridge. Not all of this amount has been collected from Alyeska to date and some of the amount is in litigation.

Another State-Alyeska road construction agreement was entered into in February 1974 and provided that the State would build and maintain as part of the State Highway System 4.5 miles of "highway" between the south approach of the Yukon River Bridge and the existing Livengood-Yukon River highway. Alyeska agreed to reimburse the State for the cost of such construction.

These then are the principal facts which form the background for our legal opinion. We now move to the legal analysis itself.

III. Legal Analysis

A. The Haul Road is a Public Highway. With a few exceptions, the facts previously noted indicate that the parties to the various transactions involving the Haul Road believed that the road was a "public highway", as opposed to a "development road." That intent is significant for the term "highway" has an accepted meaning. A highway is a way open to the general public at large without distinction, discrimination or restriction except that which is incident to regulations calculated to secure the best practical benefit and enjoyment to the public. Prillaman v. Commonwealth, 100 S.E. 2d 4 (Va. 1957). The primary characteristics of a highway are the right of common enjoyment on the part of the public at large (Karl v. City of Bellingham, 377 P.2d 984 (Wash. 1963)) and the duty of public maintenance. Prillaman, supra. See also 23 C.F.R. §470.2(b)(3). The term "public highway" is tautological (Detroit Int'l Bridge Co. v. American Seed Co. 229 N.W. 791, 793 (Mich. 1930)), but is used often nevertheless.

Two arguments could be raised in support of the view that the Haul Road is not a public highway, but both arguments are weak. The first involves the possibility that the Haul Road was funded under 23 U.S.C. §118(d), the special Alaska provision of law which allows the use of Federal highway funds for the construction of development roads. The evidence supporting this contention is a letter from former Commissioner Campbell to the FHWA in March, 1974 which describes the road as being within the intent of §118(d). There is no explanation for this reference. Moreover, the totality of evidence suggests that the Commissioner's reference was in error.

In analyzing whether FHWA funds were solicited and used for a "public highway" or a "development road," it is appropriate to turn to the facts surrounding the execution of the Project Agreements to ascertain the meaning of the Agreements themselves. The Project Agreements between the State and the FHWA are contracts, to be interpreted according to principles of contract law. Flynn v. State, 280 N.Y.S.2d 512, 516 (Ct. Cl. 1967). Under either Federal principles of contract interpretation (see generally Pearl Assur. Co. v. School Dist. No. 1, 212 F.2d 778 (10th Cir. 1954)) or Federal choice of law reaching Alaska contract law (National Bank of Alaska v. J.B.L. & K. of Alaska, Inc., 546 P.2d 579 (Ak. 1976)), the courts would look to

the extrinsic facts surrounding the solicitation of funds and execution of Project Agreements to determine the intention of the parties on the purpose of the Haul Road. Almost all of the facts support the conclusion that the road was intended to be a public highway. Chief among these facts earlier reviewed were the declaration of the State Legislature in AS 19.40 that the Haul Road was a public highway and the vigorous contentions made by the State that the highway was to be public in the Wilderness Society lawsuit.

The second legal argument which, if correct, would modify our conclusion that the road must be managed as a public highway would be that the right-of-way vested under 43 U.S.C. §932, instead of under the TAP Act. In the "Factual Background" section of this letter, we stated our opinion that a §932 right-of-way was never issued and did not automatically vest. But even assuming that the right-of-way vested under §932, the result concerning the nature of the road as public would probably be the same. Section 932 uses the word "highways," which as we have noted courts take to mean public highways. There is an old line of cases (see e.g. Flint & P.M. Ry. Co. v. Gordon, 2 N.W. 648 (Mich. 1879)) which hold that the R.S. 2477 right-of-way is a grant available to privately owned and operated railroads. One could argue that if the Haul Road right-of-way was granted under R.S. 2477 then its purposes would be served by a development road, citing the railroad cases; however, it is

our opinion that this argument has little merit, and would be unsuccessful. Most of these cases are old, and the principle has not been extended beyond railroads.

Our conclusion that the Haul Road is a public highway gives rise to several important consequences. Most important, the road must be managed as a public highway. If it is not, if it is managed in such a way as to defeat its basic nature (i.e. permanently closed or unreasonably restricted) the State will have breached its obligations to the FHWA and will become liable for the repayment of the federal construction funds. Since the free federal gravel would have been used for a commercial or industrial purpose, the State might well become liable for its value. The State would be vulnerable to an action by the Department of the Interior to reclaim the right-of-way for breach of the condition that it be used for a public road. Finally, if the road was not maintained by the State, the State might be liable to Alyeska for the value of the use of the road for pipeline maintenance.

If it could be maintained that the Haul Road was a development road, instead of a public highway, and if the road continued to be managed as a development road, then the State would not have to reimburse the FHWA for the federal highway funds. But such a holding would mean that while the State was relieved of liability to the FHWA, it would still be liable to

the Department of the Interior, since a promise of public highway management was independently made to that agency.

The State, of course, could relieve itself of all or some of its obligations to the FHWA for management and maintenance of the road by negotiating with the FHWA for the removal of all or part of the Haul Road from the federal-aid system. Bogart v. Westchester County, 57 N.Y.S.2d 506 (Sup. Ct. 1945) aff'd 59 N.Y.S.2d 77 (App. Div. Second Dept. 1945); see also FHWA Policy & Procedure Memorandum 10-1, May 28, 1965, in effect at the time of execution of the project agreements for the road, and 23 C.F.R. §470.6(b) July 1, 1976, now in effect. The FHWA would probably require repayment of the federal funds involved before approving such a removal. (See December 19, 1975 memo from FHWA to former Commissioner of Highways Parker stating the FHWA position that not opening the road to the public would require repayment of federal funds.)

In conclusion, since the Haul Road is a public highway, any attempt to completely close the road would involve a high degree of exposure to the State, exposure for both monetary damages and to possible loss of the right-of-way. The next section of this opinion deals with options other than closure. There are a number of management options available through reasonable regulation of the road. The limits of these regula-

tions is that they cannot be used unreasonably or in a discriminating manner. If they were so used, the purposes of the road as a public highway could be frustrated. In theory, this would trigger the same types of remedies as would be provoked by complete closure.

B. Reasonable restrictions may be placed on the use of the Haul Road. While the complete closure of the Haul Road to any form of public and/or industrial traffic would give rise to a host of legal and practical problems, the State nonetheless possesses wide latitude in the actual management of the highway. It is our opinion that this discretion is sufficiently broad to permit the State to postpone the opening of the road so as to best mitigate the adverse environmental, social and economic impacts of an immediate opening, and to afford increased protection for the public. Moreoever, the State retains an exceptionally wide range of options with regard to restrictions covering the number, type or seasonal usage of vehicles upon the Haul Road.

In delineating the legal parameters of the State's management authority over the Haul Road as a public highway, we are faced with a body of case law which, while numerically significant, is also inconsistent and uninformative. Broad and confusing phrases, used inconsistently, and often in conflict with the results of the case, make precision impossible.

The general rule, however, can be succinctly stated. While courts often speak of the public's "right" to unencumbered access over State highways (U.S. v. Barner, 195 F. Supp. 103 (N.D. Cal. 1961)) and a corresponding obligation by the State to allow access (Id.), courts likewise make it clear that this "right of usage" is subject to the State's broad power to regulate and restrict usage in order to protect the public health, safety, and welfare. This power by the State has been termed "exceptionally broad" (State v. Cotten, 516 P.2d 709, 711 (Ha. 1973)), and as constituting one of those areas of peculiar State concern "with respect to which the State has exceptional scope for the exercise of its regulatory power." Southern Pacific Company v. Arizona, 325 U.S. 761, 783 (1945). Restrictions on highway usage must "reasonably tend to correct some evil or promote some interest of the State" (Peden v. City of Seattle, 510 P.2d 1169, 1171 (Wash. 1973)) and courts will not interfere with this exercise of regulatory authority unless the regulation or restriction is "so manifestly unjust and unreasonable as to destroy the lawful use of property, and hence. . . not within the proper exercise of the police power." Dade County v. Palladino, 302 So.2d 692, 694 (Fla. 1974). It is also well settled that this broad power to regulate is in no manner compromised by the fact that the highway was built in whole or in part with federal funds. Whitney v. Fife, 109 S.W.2nd 832 (Ky. 1937); Southern Bell Tel. & Tel. Company v. Commonwealth, 266 S.W. 2nd 308 (Ky. 1954).

Of course, limits on the State's authority do exist. Even this generous standard could be contravened if, for example, the State were to restrict access to the road on the basis of arbitrary classifications (cf. South Carolina Highway Department v. Barnwell Brothers, 303 U.S. 177 (1938)), were to close or restrict the highway for patently non-public purposes (Bogart v. City of New York, 93 N.E. 937 (N.Y. 1911)) or were to indefinitely delay opening the road for such a long period of time as to evidence an intent to abandon the road as a public facility. District of Columbia v. Thompson, 281 U.S. 25 (1930).

In reviewing specific management options, the breadth of the State's power becomes clear. First, let us assume that the State wished to delay opening the road to public traffic for some reasonable period in order to permit the preparation and completion of a land-use plan for the area, and to insure that adequate facilities exist to protect the public welfare and safety--for example, trooper stations and other facilities thought necessary for public protection. It is clear that a mere temporary delay in improving, completing and opening a right-of-way to the public would not violate the State's obligations to open and maintain the right-of-way as a public thoroughfare. As one court succinctly put it:

> "To require a city to open and improve all its streets at once without reference to the need of such improvement at the peril of

forfeiting them would be absurd as a matter of public policy. . ." City of Jamestown v. Miemietz, 95 N.W. 2nd 897, 903 (N.D. 1959); in accord, Drane v. Avery, 231 P.2d 444 (Arizona 1951).

The case of District of Columbia v. Thompson, supra, is instructive in this regard. In that case, the District of Columbia acquired through condemnation a right-of-way for a public street. Special assessments were then levied against adjoining landowners to improve and maintain the public thoroughfare. After a period of 14 years from the date of the assessments, no effort at all had been made to improve the road to make it passible to the public; no policy or obstacle which would inhibit or prevent the opening of the thoroughfare existed; and the city had in fact erected physical obstructions over the right-of-way in the interim. In that case, the Supreme Court held that this combination of affirmative acts and prolonged inaction, when combined with the fact that the city had no future plans for opening the road, evidenced an intent on the part of the city to abandon the right-of-way as a public street. As a result, the court ordered the return of the special assessments previously imposed.

The extreme nature of the city's action in that case should be contrasted with the alternative under discussion here--that is, a finite delay in opening the road to accomplish certain specific legitimate state goals. It is clearly within the State's police power to protect the public from the kinds of hazards that

would result if the road was immediately opened to unrestricted travel without adequate support facilities and services. Neither the road nor the right-of-way will lose its public character simply because a delay in opening the road to the general public is necessary in order to ameliorate these vital public problems.

Turning now to a second alternative, let us consider the possibilities that the State wished to restrict in some way the use of private automobiles over all or a portion of the road. The extreme case would be that of confining public utilization of the road to forms of public transportation such as buses. The purposes of such an extreme restriction on private vehicles would be similar to those which would motivate a delay in opening--i.e., protection of the environment and the public safety. It is instructive, we feel, to analyze whether even such an extreme restriction might be valid, since if it were, obviously less restrictive measures would be equally valid. We are, of course, not meaning to recommend such a restriction - merely using it as a vehicle for analysis.

A good deal can be learned on this question from a review of the cases which have challenged the establishment of exclusive bus and carpool lanes in order to conserve fuel, and to reduce air pollution. These types of road restrictions are clearly valid. In Peden v. City of Seattle, supra, the city instituted a program whereby certain on and off ramps, and

certain lanes on a freeway were restricted to buses. A road user complained that his "right" to traverse the road in his private car was being improperly impaired by this regulation. In holding that this "impairment" of the plaintiffs' "right" to utilize his private auto on a public way was "of no constitutional consequence," the court noted:

> "The legislature had declared that separate and uncoordinated development of public highways and urban public transportation systems is wasteful of the State's natural and financial resources." 510 P.2d at 1171.

Similarly, in Dade County v. Palladino, supra, the court stated quite explicitly that it would not second guess the State's judgment that the establishment of bus and carpool lanes on public highways was necessary to promote the public welfare.

In both cases, however, certain lanes on the highway remained open to the use of private automobiles. The question then becomes: can the holding of these cases--to wit, that the State may designate what forms of public transportation are appropriate on public rights-of-way in order to protect the environment and public welfare--be extended to cover an exclusive designation of mass transportation systems on the right-of-way as a whole? As one court noted in District of Columbia v. Train, 521 F.2d 971 (C.A.D.C. 1975), highway systems often aggravate the great social, environmental and economic problems which the

private automobile has wrought. It is thus appropriate, the court suggested, that in this era of increased public responsibility, governments now utilize the highway system to ameliorate those same ills. If in a particular situation, such as the Haul Road, the problems associated with the use of private automobiles can be ameliorated not merely by their restriction, but by their prohibition, then the logic of the "bus lane" cases should apply. To rule to the contrary would require the court to hold that the "public right" of travel over public highways automatically implies the right to use a private automobile. We cannot predict with certainty what view a court will take, but there is a strong possibility that a court would hold that in providing the public with reasonable opportunity to traverse the right-of-way through use of mass transportation systems, important public values would receive protection and the public's right of passage across the corridor would be satisfied.

From the possible total prohibition of the use of private automobiles upon the road follow a host of lesser possible restrictions. Given the exceptionally broad nature of the State's regulatory power over the road, and the compelling public interests involved, we believe that it needs no prolonged discussion to conclude that restrictions such as seasonal closure or a controlled access scheme (whereby only a particular number of vehicles would be allowed on the road at one time) clearly would constitute valid

exercises of the State's police power. Similarly, the same power would support controls on the way vehicles are used, controls for instance that would allow stopping or camping only at designated places along the road.

A cautionary word might be said regarding any restrictions which would involve discrimination among users. An example of such a restriction would be the allowance of industrial traffic only during the temporary delay period which we have previously discussed, or alternatively the permanent bar or restriction of certain types of users. At the outset, it should be stressed that a discrimination in terms of users is not unlawful as such. There are two tests which courts use to review the propriety of legislative or administrative classifications. In the case of discrimination among road users, the less rigorous "rational basis" standard applies. Whitney v. Fife, supra; South Carolina Highway Department v. Barnwell Brothers, supra. Under Alaska law, a discrimination among highway users would be valid if the classification bears a fair and substantial relationship to the purpose of the State action. Isakson v. Rickey, ___P.2d___, Op. No. 1267 (Alaska S. Ct., May 21, 1976). This would involve an inquiry into the actual purpose of the regulatory scheme for the Haul Road and whether the classification of users fairly and substantially furthers that purpose. With regard to a classi-

fication which would permit only industrial users during an interim delay, we assume that the purpose of the restrictive scheme would be to prevent degradation of the Arctic environment before any reasonable plans were implemented to deal with the opening of a public right-of-way in this isolated area. By definition, these impacts would be caused by individual automobile access. It is thus neither necessary nor appropriate to apply the same restrictions to tightly controlled industrial activity. Moreover, the fairness of the classification, at least with regards to pipeline-related activity, would be enhanced by the factors of reliance on access and existing usage. Thus, under Isakson v. Rickey, supra, we believe a classification along these lines would withstand judicial review.

We have spoken to this point only of the general range of the State's police power with regards to the Haul Road. An additional word might be said with regard to the authority which the legislature has in fact conferred upon the Commissioner of Highways with regard to the Haul Road. The Commissioner of Highways is given broad authority to regulate the usage of public roads, including the power to control access (AS 19.05.-040(5)) and to close highways. AS 19.10.100; AS 28.05.010(4). See also AS 28.05.020. There seems little doubt that the Commissioner possesses sufficient authority to impose any of

the restrictions which we have discussed in this opinion. Nor do we doubt that the Commissioner has the ability to impose these restrictions for purposes which we have stated. The Commissioner is specifically given the power to "regulate roadside development" and to "preserve and maintain the scenic beauty along state highways." AS 19.05.040(6)-(7). There are many goals which the legislature sought to accomplish through the Haul Road--ranging from resource development "consistent with the public interest" (AS 19.40.010(a)(1)), to public accessibility to the Arctic area ((a)(2) and (a)(4)), to alleviating the present problem of inaccessibility ((a)(4)) and to protecting the environment. Section .010(b)-(c). Thus, the statute recognizes, rather than restricts the rather comprehensive balancing analysis which must go into responsible public management. Accordingly there is nothing in this statute which would significantly limit the broad regulatory discretion of the Commissioner.

An issue related to the management of the Haul Road is whether the costs of opening and maintaining the road, can be placed upon its users. There is no simple answer to this question. On the one hand, Title 23 of the United States Code which governs the Federal-Aid Highway System contains a prohibition against the charging of tolls on "all highways constructed under the provisions of [Title 23]." 23 U.S.C. §301. The term "highway" includes "bridges" within the meaning of the

Title. Id. §101. On the other hand, the courts have said that not all charges imposed on users of the public highways are "tolls" within the statutory proscription. Carley & Hamilton v. Snook, 281 U.S. 66 (1930).

In Carley & Hamilton, supra, the charges being challenged were graduated motor vehicle registration fees imposed upon vehicles carrying passengers or property for hire. The appellants argued that the fees were tolls prohibited by the Federal Highway Act. In rejecting appellants' argument, the court said:

> "The present registration fees cannot be said to be tolls in the commonly accepted sense of a proprietor's charge for the passage over a highway or bridge, exacted when and as the privilege of passage is exercised." Id. at 73.

The court reasoned that the fees were "exactions, made in the exercise of the state taxing power, for the privilege of operating specified classes of motor vehicles over public highways" (Id. at 71) and were not tolls. Id. at 74.

In Johnson Transfer & Freight Lines v. Perry, 47 F. 2d 900 (N.D. Ga. 1931), in finding valid a cents per mile tax imposed on private and common carriers of persons or property over public highways, the court reasoned:

> "Considering the great damage done by freight trucks continually using the same road, and the great benefits to the carrier thus provided with a track which he does not have to maintain, or pay property taxes on, it is just that such carrier should, in proportion to his use of the road, contribute to the public treasury which maintains it." (at 904)

In holding that the tax was not a toll, the court said the imposition was on the business of carriage, which is not an ordinary, but an extraodinary use of the road.

In Deppman v. Murray, 5 F. Supp. 661, 668 (W.D. Wash. 1934), a 1% tax on gross revenues was upheld as a tax, not a toll, on carriers operating on public highways and in Liberty Highway Co. v. Michigan Public Utilities Commission, 294 F. 703, 708 (E.D. Mich. 1923), the court upheld a privilege tax on common carriers using public highways. The court said that the charge was not a toll, and that it may be based upon anticipated highway repair and improvement costs. As to charges on business and industrial users of highways, see also Smallwood v. Jeter, 244 P. 149, 156 (Idaho 1926); and Sanger v. Lukens, 24 F. 2d 226, 229 (D.C. Idaho 1927), rev'd on other grounds, 26 F. 2d 855 (Ninth Cir. 1928).

The principle which emerges from the cases is that imposition of graduated registration fees, privilege taxes, or charges, on certain classes of users of public highways, to help defray the public costs of such highways is a valid exercise of a state's taxing power, and is not a toll, proscribed by the Federal Highway Act. Unfortunately, none of the cases discuss the specific question of whether a state can impose a charge on the use of only one road in its system. The problem which we see is that by singling out one road for the charge, the aura of a toll is created, which could invalidate the charge on that basis. The preferred practice would be to impose a charge on certain classes of highway users that create extraordinary impacts on highway maintenance needs on a state-wide basis and include those classes which would impact most the Haul Road. Thus, a tax could be imposed on companies which used heavy equipment, or trucks upon the highways. Such taxes could be imposed and graduated on the basis of mileage, weight, type of vehicle, or other classification as long as the classification had a rational basis.

Alternatively, the State could negotiate the removal of part or all of the Haul Road from the Federal Aid Highway System, thereby removing the prohibition against the imposition of tolls, or accomplish the same result through Congressional action. This could entail the repayment of some or all of the

Federal funds expended, but there may be ways to limit the impact of this approach. For example, the State may be able to negotiate the removal of only that portion of the road north of the Yukon River. Or, the State may be able to obtain agreement on the removal of the road immediately, while reimbursing the Federal Government over a period of years, with a payment schedule tied to expected tolls. */

Thus, there are several avenues available to the State to have the heavy commercial users of the Haul Road bear their fair share of the costs.

In conclusion, a reasonable delay in the opening of the Haul Road is a legally available option should such a delay be necessary to prepare for reasonable use of the road. Likewise, the State may restrict or close the highway to certain classes of users if that restriction bears a fair and substantial relationship to the protection of the environment and public safety. The authority of the State to establish seasonal, load or traffic volume restrictions seems clear beyond doubt. While the ability of the State to limit the use of private automobiles on the Haul

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*/ It should be noted that, at least as to Alyeska, the State-Alyeska road construction agreement of June 11, 1971 prohibits the State from imposing any tolls or costs on Alyeska for use of the Haul Road, except for "fees and costs imposed by law, regulations and customary conditions of its utility permits." This would certainly relieve Alyeska of at least direct charges on the use of the Haul Road.

Road is not settled beyond doubt, we believe that courts would uphold such restrictions as long as some reasonable access is provided to the general public, either by restricted use of private vehicles or by a means of public transportation. Finally, tolls may not be charged as long as the road remains part of the Federal Aid System although industrial or business users may be charged a reasonable fee for the privilege of using the public highways for their businesses. We should add that all of the options discussed above can be applied to a part of the road as well as to all of it.

IV. CONCLUSION

The conclusion to be drawn from this opinion is that the State has a large number of management options available to it in planning for use of the Haul Road. The most restrictive type of management, that of closure, is in our view not an option in the practical sense since it would be fraught with a great deal of exposure to liability for both monetary damages and loss of the Haul Road right-of-way. Thus, it may be in what we have termed the middle ground of reasonable regulation of access and charges on industrial users (or negotiated removal of the road from the Federal Aid System) that turn out to be the options which, as a practical matter, can be implemented. This middle ground covers a broad range of possibilities and we mean

to intimate no opinion as to the desirability of any of these possibilities. We only conclude that if such reasonable restrictions were imposed, either by legislation or regulation, they would be legally sound.

Yours very truly,

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