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MEMORANDUM

State of Alaska

TO Files

DATE: May 27, 1981

FILE NO: F-66-140-81

TELEPHONE NO:

FROM: Mary E. Greene *MEG*
Assistant Attorney General

SUBJECT: Haul Road (Dalton Highway)
Right-of-Way

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During the crisis over the Ice Cut Hill DOT/PF encroachment permit, several issues arose over the Haul Road Right-of-Way. This memo is to memorialize the research done at that time and the professional assessments made.

I. Nature of Right-of-Way

There is an important question as to the creation of the right-of-way. The right-of-way for the Haul Road could have come about in either of two ways--as an R.S. 2477 (43 U.S.C. §932) right-of-way or as the Grant of Right-of-Way issued May 2, 1974, by the Department of Interior. DOT/PF files show that Commissioner Campbell returned this Grant to DOI stating the State already had a valid existing right-of-way. Differing rights and duties flow to the holder of the right-of-way depending on the authority of the grant.

A. R.S. 2477 Right-of-Way?

By Act of July 26, 1866 [R.S. 2477, 43 U.S.C. §923 (1964)], Congress granted the right-of-way for construction of highways over unreserved public lands. Until its repeal in the Federal Land Policy and Management Act of 1976, this grant of 1866 was a standing offer of a free right-of-way over the public domain. To be effective some act of acceptance was required.

An opinion of the Solicitor of DOI, issued April 28, 1980, states that actual construction of a highway is a condition precedent to the creation of a valid R.S. 2477 right-of-way. Contra Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975). The Haul Road was actually constructed and was completed before the passage of FLPMA in October of 1976.

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| OTHER | DOI | AGO | DCI/IF | DEC | FWS | LR | LS | RS | LAC | SO | AD | FC |
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State of Alaska
Office of
Pipeline Coordinator

There is one problem with the creation of an R.S. 2477 right-of-way which relates to the Haul Road. The grant was valid only across lands not reserved for public use. The Alaska Legislature accepted the grant for a "highway from the Yukon River to the Arctic Ocean" in 1970; the statute is codified as AS 19.40.010-.080, especially noting AS 19.40.050. Had the lands not been reserved for public use, a valid R.S. 2477 right-of-way would have been created. Where lands had been reserved, an application under 43 C.F.R. § 2822.1-2 (1972) was required, requesting that the reservation be revoked or modified so as to permit construction of the highway.

Public Land Order No. 4582, signed January 17, 1969, withdrew

...all public lands in Alaska which are unreserved or which would otherwise become unreserved prior to the expiration of this order, ...from all forms of appropriation and disposition under the public land laws (except locations for metalliferous minerals), including selection by the State of Alaska pursuant to the Alaska Statehood Act (72 Stat. 339), and from leasing under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. 181, et seq.), as amended, and reserved under the jurisdiction of the Secretary of the Interior for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska.

The withdrawal was to terminate on December 31, 1970. There were two modifications of P.L.O. No. 4582 which are possibly germane to the issue. First, on April 14, 1969, P.L.O. No. 4582 was modified by P.L.O. No. 4589 to permit

...appropriations of the lands for rights-of-way for highways, or materials sites, under section 317 of the Federal-Aid Highway Act of August 27, 1958 (72 Stat. 317; 23 U.S.C. 317).

Second, on January 7, 1970, P.L.O. No. 4582 was modified by P.L.O. No. 4760 to permit:

1. The granting of rights-of-way under the Mineral Leasing Act of February 25, 1920 (41 Stat. 449, as amended; 30 U.S.C. secs. 181 et seq.), for an oil pipeline system,

including but not limited to, pumping plant-sites, access facilities, terminal facilities, catch basins, and any other structures reasonably necessary or convenient for transportation of oil by pipeline from fields in Northern Alaska to a deep water port in the Gulf of Alaska.

2. 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 described in paragraph 1 above.

3. The sale of forest products and mineral materials as may be reasonably necessary or convenient for the construction, operation or maintenance of the oil pipeline system described in paragraph 1 above.

The other possibly relevant Public Land Order is P.L.O. No. 5150, issued December 28, 1971, which reserved a "utility and transportation corridor" from the North Slope to Valdez.

Given the withdrawal of lands in P.L.O. No. 4582, it is doubtful that a valid R.S. 2477 right-of-way for the Haul Road was created. Accord, 1976 Opinion of the Attorney General No. 38, "North Slope Haul Road" at 7-9 (Sept. 7, 1976). P.L.O. 4589 does not appear to assist because 23 U.S.C. §317 provides that a map of the lands to be appropriated for the public highway must be filed before the grant; additionally, such rights-of-way are created by grant as opposed to acceptance. P.L.O. 4760 does not assist the creation of an R.S. 2477 right-of-way because of the language requiring "issuance" of a right-of-way. Nevertheless, Wilderness Society v. Morton, 479 F.2d 842, 882-884 (D.C. Cir. 1973), cert. denied 411 U.S. 917, 36 L.Ed.2d 309, at least implies that a valid R.S. 2477 right-of-way for the Haul Road was created.

Even if a valid R.S. 2477 right-of-way was created, there is a question as to the width of the right-of-way. The legislature declared the width to be 200 feet. AS 19.40.040. However, there is authority in the superior court that R.S. 2477 rights-of-way are ditch-to-ditch. Pinkerton v. Yates, No. 62-237 (4th Judicial District, 1963); State v. Fowler, 1 Alas. L.J. No. 4 at 7 (April 1963). It is my opinion that these superior court holdings are incorrect.

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What the courts did not examine are the P.L.O.'s determining the width of R.S. 2477 highway rights-of-way in Alaska. By examining the following P.L.O.'s, one can conclude that the width of the Haul Road right-of-way, if it exists as an R.S. 2477 right-of-way, is 100 feet either side of center line as a feeder road or 50 feet either side of center line as a local road: P.L.O. No. 601 (Aug. 10, 1949); P.L.O. No. 1613 (April 7, 1958); P.L.O. No. 757 (Oct. 16, 1951); Office of the Secretary Order 2665 (October 16, 1951) with amendment No. 1 (July 17, 1952) and amendment no. 2 (September 15, 1956).

In summary, the creation of R.S. 2477 right-of-way does not seem to be a winning argument.

B. Mineral Leasing Act Right-of-Way?

The grant of right-of-way issued by the Department of Interior on May 2, 1974, was issued "[p]ursuant to the Trans-Alaska Pipeline Authorization Act" of 1973 and "in accordance with the applicable provisions of an agreement, dated January 8, 1974, entitled 'Cooperative Agreement between the United States Department of the Interior and State of Alaska regarding the Proposed Trans-Alaska Pipeline.'" The authorization for the grant of right-of-way is found in 43 U.S.C. §1655, which provides:

A right-of-way, permit, lease, or other authorization granted under section 1652(b) of this title for a road or airstrip as a related facility of the trans-Alaska pipeline may provide for the construction of a public road or airstrip.

Section 1652(b) authorized and directed the Secretary of the Interior to issue all authorizations necessary for or related to the construction, operation, and maintenance of TAPS. The kicker is found in 43 U.S.C. §1652(c) which directs that rights-of-way, permits, leases, and other authorizations issued "pursuant to this chapter by the Secretary" shall be subject to the provisions of section 28 of the Mineral Leasing Act of 1920, as amended, (30 U.S.C. §185) with certain excepted provisions. Thus, the 1974 grant is a very strange creature, unlike other highway rights-of-way in this state.

Several important principles flow from making a right-of-way subject to section 28 of the Mineral Leasing Act. The most important fact is that, pursuant to subsection (p) of section 28, 30 U.S.C. §185(p), the federal government reserves the right

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to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way or permit area [sic] granted pursuant to this section.

See also 43 C.F.R. 2881.1-3. The regulations set out other restrictions on the holder's rights; 43 C.F.R. §2881.1-1(a) expressly provides that a holder may not allow the use of a right-of-way any any others. Subsection (b) of that regulation expressly provides the holder cannot use the right-of-way for any purpose other than that authorized in the grant. Subsection (e) of that regulation sets a maximum term of 30 years for a grant (although it can be renewed). The federal government argues that the right to grant rights-of-way for "compatible uses" carries with it the right to determine what constitutes a compatible use. Presumably, the State would retain a cause of action for interference with the full use and enjoyment of the easement, if the authorized use was not in fact compatible. See generally Energy Transportation Systems, Inc. v. Union Pacific Railroad Co., 606 F.2d 934 (10th Cir. 1979); Tenneco, Inc. v. May, 377 F.Supp. 941 (E.D.Ky. 1974); United States v. Sea Gate, Inc., 297 F.Supp. 1351 (D.N.C. 1975); County of Santa Barbara v. United States, 269 F.Supp. 855 (C.D. Cal. 1967).

II. Miscellaneous Facts

As the May 2, 1974, grant required, the State of Alaska has filed as built surveys of the road on April 25, 1980 (letter Evelyn Melville--signed received by Victor O. Ross). However, at the present time, the right-of-way has not been located on the ground (it is not necessarily 100 feet either side of centerline). On December 13, 1979, Commissioner Ward wrote a letter to Charles Behlke advising him that DOT/PF would support an offset right-of-way north of the Yukon, provided written concurrence of DOT/PF was obtained on a segment-by-segment basis. Thus, the physical location of the 200 foot right-of-way is not actually determined, and it may not be until after NWA's alignment is finally established.

MEG:bsb

cc: Charles Behlke, SPC
Lynn Harnisch, DOT/PF