

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

BILL SHEFFIELD, GOVERNOR

POUCH Z
JUNEAU, ALASKA 99811
PHONE: (907) 465-3900

April 8, 1985

Mr. Richard J. Verniman
Acting District Manager
United States Department of the Interior
Alaska State Office
701 "C" Street, Box 13
Anchorage, AK 99513

RECEIVED
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BUREAU OF LAND MGMT.
ANCHORAGE DIST. OFFICE

Dear Mr. Verniman:

This is in response to your recent letter suggesting a meeting of legal counsels to discuss fee title pertaining to Alaska's roads and highways.

I agree there are different interpretations of statutes, and agency documents which our respective legal counsels need to resolve. Please contact Milton H. Lentz, Chief of Right-of-Way and Land Acquisition to set up a meeting. His telephone number in Juneau is 465-2985.

We look forward to hearing from you.

Sincerely,



R. J. Knapp
Commissioner

cc: John Simpson, Director, Standards and Technical Services
Milton H. Lentz, Chief, Right of Way Section, Standards and
Technical Services

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

POUCH Z
JUNEAU, ALASKA 99811
PHONE: (907) 465-3900

OFFICE OF THE COMMISSIONER

August 20, 1985

Mr. Michael Penfold
State Director
Alaska State Office
Bureau of Land Management
United States Department
of the Interior
701 C Street, Box 13
Anchorage, AK 99513

NORTHERN REGION	
<input checked="" type="checkbox"/>	Deputy Commissioner
	D & C Director <i>ea</i>
	Planning Director <i>ea</i>
	Admin. Serv. Director
	Interior M & O Director
	Western District Director
	So. Central Dist. Director
	Paks. Intern'l Airport Dir.
	RETURN _____

Dear Mr. Penfold:

I have researched the factual background that prompted a letter from Mr. Richard Vernimen of your office, dated March 6, and I think a short description of these facts may be helpful in discussing the issues raised in that letter. I am writing to you regarding this matter because I feel you should be involved in any further discussions.

On September 24, 1984, Mr. and Mrs. Wayne Powers were granted an encroachment permit from the State of Alaska for their cabin and two sheds that are located within the 150 foot right-of-way of the Richardson Highway. The Federal Highway Administration approved this permit on October 1, 1984. The Bureau of Land Management, however, is of the view that it has jurisdiction over the Richardson Highway and, subsequent to the issuance of the state encroachment permit, has apparently informed the Powers that they are trespassing against the United States.

Given this set of facts, the issue raised in the letter of March 6, really goes to the question of whether the State of Alaska or the Bureau of Land Management has management authority over a public road that was transferred to the State of Alaska in 1959. Because BLM's assertion of authority over state highways will have a far reaching effect on future federal/state relations as they relate to Alaska's highway system, I have asked our Attorney General's office to look into this matter. The Attorney General's office has since issued a legal opinion that concludes that BLM does not have jurisdiction over the validity of the Powers' encroachment permit.

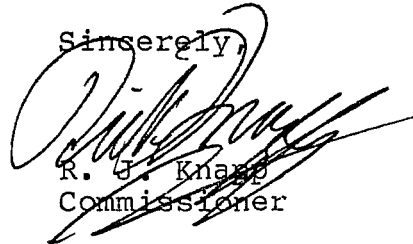
Mr. Michael Penfold

-2-

August 20, 1985

I am enclosing a copy of this opinion. I would urge you to review this opinion along with BLM's decision to get into the business of regulating the use of state highway rights-of-way. If you have any questions, please give me a call at 465-3900.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. G. Knapp", is written over the typed name and title.

R. G. Knapp
Commissioner

Enclosure

cc: Hal Brown, Attorney General, Department of Law
H. Glenzer, Jr., Deputy Commissioner,
Northern Region
Mark S. Hickey, Special Assistant for External Affairs,
Commissioner's Office
John Simpson, Director, Standards and Technical Services,
Headquarters
Richard Vernimen, Acting District Manager, Bureau of
Land Management

United States Department of the Interior

2800 (01.7)

BUREAU OF LAND MANAGEMENT

cler 3-22-85

Alaska State Office
701 C Street, Box 13
Anchorage, Alaska 99513

RECEIVED

March 6, 1985

MAR 11

Mr. Richard J. Knapp
Commissioner
Alaska Department of Transportation
and Public Facilities
Pouch Z
Juneau, Alaska 99811

DOT/PF
COMMISSIONER'S OFFICE

Dear Mr. Knapp:

In the years since Statehood, the question of who holds fee title to Alaska's roads and highways has remained unresolved. The State of Alaska, in its interpretation of the Omnibus Act - 73 Stat. 141, 48 U.S.C. 21 (1976) and the Quitclaim Deed from the Secretary of Commerce which followed, has held that fee title was passed to the State on those roads and highways listed in the deed. This interpretation is currently reflected in your administrative code.

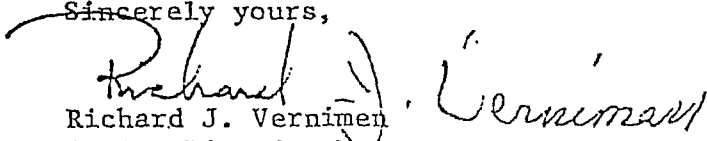
The Bureau of Land Management, on the other hand, has always referenced the issue back to the Act of August 1, 1956, entitled Disposal of Public Lands Within Highway, Telephone, and Pipeline Withdrawals in Alaska - 70 Stat. 898, 43 U.S.C. 971a (1982) which authorized the Secretary of the Interior to dispose of public lands within these types of withdrawals. As a result of this Act, those linear withdrawals, established for what were then Federal installations, were revoked and otherwise modified to reserve only easements. This process culminated in Public Land Order 1613 which allows entrymen to gain title to the centerline of the highways, feeder roads, and local roads in Alaska. Under the terms of PLO 1613, millions of acres of public land have been patented and interim conveyed to both private individuals and Native Corporations subject to a reservation for highway easements for those roads and highways included in the Omnibus Act Quitclaim Deed.

To cloud the issue even further, the State has continued to assert its position, based on its interpretation of the Omnibus Act Quitclaim Deed, on subsequent grants and amendments to its rights-of-way under the Federal Aid Highway Act, 23 U.S.C. 317. The net result has been a great deal of confusion for private land owners in Alaska and for the public at large. An excellent example is the unauthorized use at Mile 57.4 on the Richardson Highway being pursued by our Glennallen Resource Area Office. This unauthorized use was recently the subject of a letter from this office to State Senator Kerttula, a copy of which was sent to your office. The memorandum from our Regional Solicitor's staff, copy enclosed, which went with that letter is the most definitive statement of the Bureau's position available.

The confusion over this issue, which has remained internal between BLM and your Department for years, is spreading as more land holders become involved. As our conveyance process continues, we anticipate the problem will continue to cause difficulties until some instance(s) of conflict result in legal action in Federal Court to resolve it. I would like to suggest as an alternative that our respective legal counsels consider some format in which to discuss and resolve the issue short of formal legal action.

Your assistance, together with that of the Federal Highway Administration, will be appreciated.

Sincerely yours,


Richard J. Vernimmen
Acting District Manager

5 Enclosures

- Encl. 1 - Kerttula Letter (2 pp)
- Encl. 2 - Kerttula Response (2 pp)
- Encl. 3 - Solicitor's Memorandum (9 pp)
- Encl. 4 - Encroachment Permit (1 p)
- Encl. 5 - Glennallen Memorandum (1 p)

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

POUCH Z
JUNEAU, ALASKA 99811
PHONE: (907) 465-3900

OFFICE OF THE COMMISSIONER

May 1, 1985

Mr. Richard J. Vernimen
Acting District Manager
Alaska State Office
Bureau of Land Management
United States Department of the Interior
701 C Street, Box 13
Anchorage, AK 99513

Dear Mr. Verniman:

This is in response to your letter of March 6 regarding the nature of the State's interests in our roads and highways. I have requested the Department of Law to review your correspondence and recommend a response to your proposal.

I will contact you again following that review with a more detailed response. Thank you for your correspondence on this matter.

Sincerely,



R. J. Knapp
Commissioner

cc: Ben F. Harding, Special Staff Assistant, Office of the Governor
John Simpson, Director, Standards and Technical Services
Mark S. Hickey, Special Assistant for External Affairs, Office of the Commissioner
Jack McGee, Assistant Attorney General, Department of Law

14-256B
(R 5/82)

Project No. F-RF-071-1(22)
Route FAP-071
Section 180000
EPN 71-1-003-1

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES
ENCROACHMENT PERMIT

The STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, (hereinafter called the "STATE"), pursuant to 17 Alaska Administrative Code 10, hereby grants permission to Wayne & Leanna Powers, (hereinafter called the "PERMITTEE"), for an encroachment within right of way limits 110 feet to the right of of Station 1157+50 to Station 1157+75 on Alaska Highway Project No. F-RF-071-1(22), Route FAP-071, Control Section 180000, MP 57.5, per Construction Plans sheet thereof, hereto attached and made a part hereof.

1. The PERMITTEE shall adjust or relocate the encroachment without cost or liability to the STATE if, at any time, or from time to time, the use or safety of the highway within which the encroachment exists requires that the encroachment be adjusted or relocated.
2. If the encroachment is a driveway or road approach, it shall be the property of the STATE, but all cost and liability which relate to it or its maintenance shall be at the sole expense of the PERMITTEE.
3. The encroachment shall be maintained by the PERMITTEE in such a manner that the highway and all its appurtenances or facilities including, but not limited to, all drainage facilities, pipes, culverts and ditches, and their safety shall not be impaired or endangered in any way by the construction or maintenance.
4. The PERMITTEE shall hold and save the STATE, its officers, agents and employees, harmless from liability of any nature or kind, including costs and expenses, for or on account of any or all suits or damages of any character whatsoever resulting from injuries or damages sustained by any person or persons or property by virtue of the encroachment permitted herein.
5. The PERMITTEE shall not place additional improvements within the rights of way and, if, at any time in the future, the existing encroachment is destroyed, removed or rebuilt for any reason whatsoever, it shall not again be placed within the rights of way unless authorized by another permit.
6. The STATE, by sixty days written notice, may terminate this permit, when it is in the best interest of the STATE.
7. This permit is subject to any applicable federal law, regulation, or policy and procedure memorandum of the Federal Highway Administration.

RECOMMENDED FOR APPROVAL:

Shirley A. Williams 9/21/84
Regional Chief R/W Agent Date
Northern Region

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES

By: William C. Cook 9/21/84
Director Date
Design & Construction
Northern Region

CONSENT OF FEDERAL
HIGHWAY ADMINISTRATION
MAP LETTER DATED: 10/1/84

PERMITTEE:
Wayne & Leanna Powers 10-1-84
Date

INDIVIDUAL ACKNOWLEDGEMENT

STATE OF ALASKA)
)ss.
 3rd JUDICIAL DISTRICT)

BE IT REMEMBERED THAT on this 15th day of October, 1987, before me the undersigned, a Notary Public of the State of Alaska, personally appeared Walter F. Fournier known to me to be the identical person who executed the foregoing Agreement and he acknowledged to me that he signed the same as free and voluntary act and deed with full knowledge of its contents, for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of my Office the day and year first above written.

John R. Walker
A NOTARY PUBLIC OF ALASKA
My commission expires: June 24, 1988

CORPORATE ACKNOWLEDGEMENT

STATE OF ALASKA)
)ss.
 JUDICIAL DISTRICT)

BE IT REMEMBERED that on this _____ day of _____, 19____, before me, the undersigned, a Notary Public of the State of Alaska, personally appeared _____ and _____, both to me personally known and known to me to be the identical individuals named in and who executed the foregoing Agreement, and acknowledged the said instrument to be the free and voluntary act and deed of the above named corporation for the uses and purposes therein expressed, and on oath stated that they were authorized to execute said instrument and that the seal affixed hereto is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of my Office the day and year first above written.

A NOTARY PUBLIC OF ALASKA
My commission expires: _____

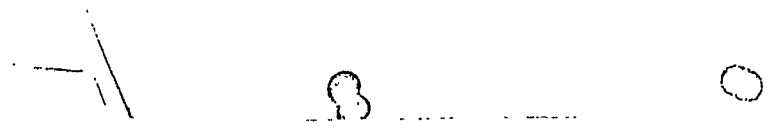
ACKNOWLEDGEMENT OF DIRECTOR

STATE OF ALASKA)
)ss.
 JUDICIAL DISTRICT)

BE IT REMEMBERED that on this _____ day of _____, 19____, before me, the undersigned, a Notary Public of the State of Alaska, personally appeared _____, Director of Design and Construction, Northern Region, known to me to be the identical person who executed the foregoing Agreement and he acknowledged to me that he executed the same for and on behalf of the State of Alaska, Department of Transportation and Public Facilities, with full authority so to do, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of my Office the day and year first above written.

A NOTARY PUBLIC OF ALASKA
My commission expires: _____





US Department
of Transportation
Federal Highway
Administration

October 1, 1984

Alaska Division

P.O. Box 1048
Juneau, Alaska 99802

HRW-AK
416.3

William B. McMullen, Director
Design and Construction
Northern Region Alaska DOT&PF
Fairbanks, Alaska

Dear Mr. McMullen:

Project F-RF-071-1(22) - Richardson Highway

We concur with Mr. Cameron's request to issue an encroachment permit for a cabin located at Milepost 57.5 of the Richardson Highway.

Sincerely yours,

Barry F. Morehead
Division Administrator

By: Gary E. Wilson
Division Right-of-Way Officer

CIR CUL A T E	C O P Y	D & G DIRECTOR NORTHERN REGION	I N I T I A L S
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		SPECIAL PROJ.	
		PLANNING	
		QUAL. CONTROL	
		ENVIRONMENTAL	
		ENVIRONMENTAL DIST.	
		COMMISSIONER	
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Appendix #3

WRANGELL 73-480
Serial No.

BOOK 18 PAGE 1
Skagway Recording District

BOOK 90 PAGE 243
Juneau Recording Dist.

BOOK 22 PAGE 22
Haines Recording District

QUITCLAIM DEED

BOOK 391 PAGE 12
Ketchikan Recording District

BOOK 275 PAGE 113
Nome Recording District

BOOK 6 PAGE 43
Hyder Recording District

PETERSBURG

BOOK 105 PAGE 808
Hoonah Recording Dist.

BOOK VOL. 046 PAGE 08
Ketchikan Recording District

BOOK CR1 PAGE 315
Wrangell Recording District

Deed Book 18 Page 191
Petersburg Recording Dist.

KNOW ALL MEN BY THESE PRESENTS that the Secretary of Commerce, United States Department of Commerce, Grantor, under and pursuant to the authority contained in Section 21 of the Act approved by the President on June 25, 1939 (73 Stat. 141), does hereby devise, release, and quitclaim unto the State of Alaska, Grantee, its successors and assigns, subject to the condition set forth below, all rights, title, and interest of the Department of Commerce in and to all of the real properties listed in Schedules A, B, and C, attached hereto and made parts hereof, which properties are now owned, held, administered, or used by the Department of Commerce in connection with the activities of the Bureau of Public Roads in Alaska, and which said Schedules are more fully identified as follows:

Schedule A--Highways, consisting of 60 pages.

Schedule B--Improved Real Property, consisting of 5 1/2 pages.

Schedule C--Unimproved Real Property, consisting of 62 pages.

TO HAVE AND TO HOLD the premises, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining unto the said Grantee, its successors and assigns, forever, subject, however, to the condition that if the said Grantor or the head of any other Federal agency determines and publishes notice thereof in the Federal Register within 120 days next following the date of this deed that all or any part of the above premises or any interests therein are needed for continued retention in Federal ownership for purposes other than or in addition to road purposes, the Grantor may enter and terminate the estate hereby quitclaimed in those portions of the premises concerning which said determinations are made, by notifying the Governor of the State of Alaska of such termination by registered letter or letters mailed within one year next following the date of this deed. By acceptance of this deed, the Grantee agrees to the above condition without waiving any rights it may otherwise have to refer any dispute to the Claims Commission authorized by Section 46 of the Act approved by the President on June 25, 1939 (73 Stat. 141).

IN WITNESS WHEREOF the Grantor has hereunto set his hand and seal this 30th day of June 1959.

SKAGWAY
Serial No. 73-147

HAINES
Serial No. 73-447
Frederick M. Pfeiffer

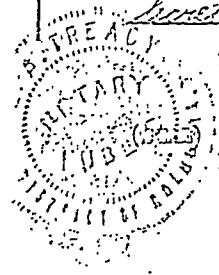
UNITED STATES OF AMERICA)
DISTRICT OF COLUMBIA

I, E. H. Greaney, a Notary Public in and for the District of Columbia, do hereby certify that on this 30th day of June, 1959, before me personally appeared Fredrick H. Muelly, being to me personally well known and known by me to be the Secretary of Commerce, and acknowledged that the foregoing instrument bearing date of June 30, 1959, was executed by him in his official capacity and by authority in him vested by law, for the purposes and intents in said instrument described and set forth, and acknowledged the same to be his free act and deed as Secretary of Commerce.

Witness my hand and seal this 30th day of June, 1959.

E. H. Greaney
Notary Public

My commission expires 1-14-61.



The foregoing property is hereby accepted by the State of Alaska, through its Governor, Honorable William A. Egan, State of Alaska

William A. Egan

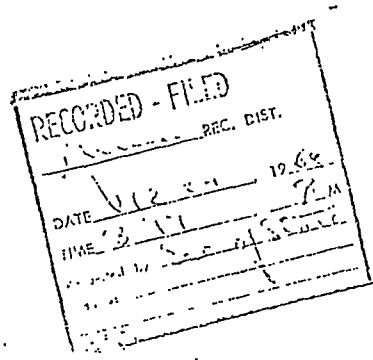
STATE OF ALASKA

I, Hugh J. Wade, a Notary Public in and for the said State, hereby certify that W. A. Egan, whose name as Governor is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he, in his capacity as such Governor of Alaska, executed the same voluntarily on this day.

Given under my hand and seal of office this 2nd day of July, 1959.

Hugh J. Wade
Notary Public

(SEAL) My commission expires 4/23/62.



Sitka Recording Dist. BOOK 11 PAGE 18
Anchorage Recording District

BOOK 105 PAGE 614
Juneau Recording Dist.

FAP Route Number Description BOOK 18 PAGE 17
Seward Recording District

- 52 From FAP Route 71 at Dixon via Cantwell through Mt. McKinley National Park to North Park Boundary.
- 61 From the junction of FAP Routes 37 and 62 at Fairbanks to Fox.
- 62 From the Alaska-Canada Border via Tok Junction and Big Delta to the junction of FAP Routes 37 and 61 at Fairbanks, with a spur to Fairbanks International Airport.
- 71 From the port of Valdez to FAP Route 62 at Big Delta Junction.
- 95 From Ketchikan via land and ferry routes through Wrangell, Petersburg, Juneau and Haines to the Alaska-Canada Border, with a spur from Haines to Lutak Inlet, a spur from Juneau to Douglas, and a spur to Juneau Airport.
- 97 From Haines to Skagway.

BOOK 12 PAGE 72
Haines Recording District

BOOK 046 PAGE 14
Ketchikan Recording District

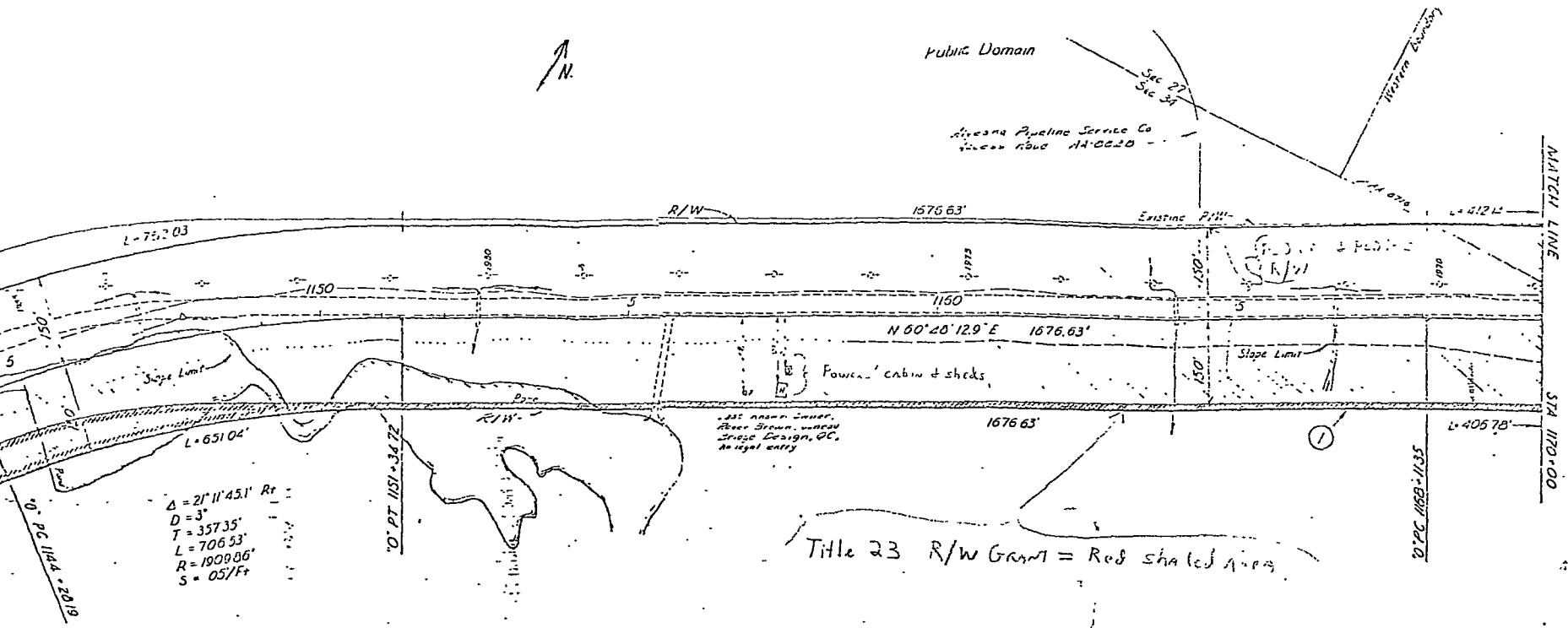
BOOK 981 PAGE 321
Wrangell Recording District

Schedule A, p. 5 of Ordinance No. 11
City of Haines
Jan 1954

BOOK 275 PAGE 119
Nome Recording District

BOOK 6 PAGE 49
Hyder Recording District

Deed Book 18 Page 197
Petersburg Recording Dist.



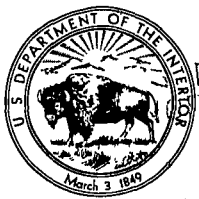
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STATE OF ALASKA
 DEPARTMENT OF HIGHWAYS
 ROAD LOG NO. 547
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United States Department of the Interior

IN REPLY REFER TO:

2800/1785 (010)

BUREAU OF LAND MANAGEMENT

ANCHORAGE DISTRICT OFFICE

4700 East 72nd Avenue
Anchorage, Alaska 99507

65 AUG 19 2:40

August 16, 1985

Mr. H. "Glen" Glenzer, Jr.
Deputy Commissioner
Alaska Dept. of Transportation
and Public Facilities
2301 Peger Road
Fairbanks, Alaska 99701

Dear Mr. Glenzer:

In preparation for our meeting on Tuesday, August 20, I have enclosed a recent Department of the Interior Solicitor's opinion (Enclosure 1) which bears on the issue of signs in the Richardson Highway right-of-way (ROW).

Your letter of March 1, 1985 (Enclosure 2), indicates reaching a solution with Mr. and Mrs. Powers on permitting uses within the ROW is a key. We feel the enclosed opinion adequately answers that question.

We and local private land owners in the Glennallen area are experiencing timber trespass problems and the signs in question should help end that problem by defining whose land is where. (Incidentally, Mr. and Mrs. Powers are now living at that site with a lease being negotiated from the Bureau of Land Management.) This is our primary concern for the meeting.

We are looking forward to our meeting and a visit to your office. Kurt Kotter, our Glennallen Area Manager, will be accompanying me. I understand Carl Johnson and Dwight Hempel will be attending from our Fairbanks District.

Sincerely yours,

Wayne A. Boden

Wayne A. Boden
District Manager

Enclosures (2)

NORTHERN REGION	
<input checked="" type="checkbox"/>	Deputy Commissioner
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<input type="checkbox"/>	Admin. Serv. Director
<input type="checkbox"/>	Interior M & O Director
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<input type="checkbox"/>	So. Central Dist. Director
<input type="checkbox"/>	Pub. Intern'l Airport Dir.
<i>Copy furnished to Sharon McLeod</i>	
<i>Jon Widdis</i>	



United States Department of the Interior

OFFICE OF THE SOLICITOR
ALASKA REGION

JAN 3 2 01 11:57 AM
707 C Street, Box 34
Anchorage, Alaska 99513

IN REPLY REFER TO:

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La Jan (HRS COPY)

January 2, 1985

MEMORANDUM

TO: Dean Crabbs, Law Enforcement, Division of Operations, Alaska State Office
Bureau of Land Management (940)

FROM: Assistant Regional Solicitor
Alaska Region

SUBJECT: Occupancy Trespass of Wayne and Leanna Powers in Richardson Highway Right-of-Way -- N 1/2 NE 1/4 Sec. 34, T. 5 S., R. 1 E., Copper River Meridian -- Glennallen Allen Area No. 9232 (017), AA-51039

Mr. and Mrs. Wayne (and Leanna) Powers (hereafter "Powers") are now maintaining and occupying a cabin, storage shed, woodshed, with associated improvements and equipment, within the Richardson Highway right-of-way at mile 34 in the captioned subdivision of the public survey. See enclosed copy of memorandum of December 21, 1984, from Land Specialist to Area Manager, Glennallen. The occupancy is located in both (a) the original highway easement established by Public Land Order 1613 (23 F.R. 2376; Apr. 11, 1958) pursuant to the Act of August 1, 1956 [70 Stat. 898, 43 U.S.C. § 971a (1982)], and (b) the realignment of such highway authorized by the federal-aid right-of-way grant of October 21, 1977 (AA-12493), pursuant to the Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. §§ 107, 317 (1982)) and implementing regulations [43 CFR Subpart 2821 (Oct. 1, 1977 rev.)]. For the reasons hereafter stated, the occupancy in question is in trespass as to both the original highway alignment (hereafter referred to as "PLO 1613 easement") and the highway realignment (hereafter referred to as "Title 23 right-of-way grant").

PLO 1613 Easement

Section 3 of the 1956 Act authorizing the easement [43 U.S.C. § 971c (1982)] provides that "lands in Alaska within an easement hereunder established by the Secretary of the Interior may not be utilized or occupied without the permission of the Secretary, or an officer or agency designated by him" (emphasis ours). Accordingly, paragraph 6 of Public Land Order 1613 provides that "the lands within the easements established by ... this order shall not be occupied or used for other than the highways, telegraph line and pipeline referred to in ... this order except with the permission of the Secretary of the Interior or his delegate as provided by section 3 of the act of August 1, 1956 [70 Stat. 898]...." Since the Powers have not obtained permission of the Secretary or his delegate to use or occupy the land in dispute for a purpose other than a highway, telegraph line or pipeline use, they did not have, nor do they now have, the requisite authority to occupy and use the land within the PLO 1613 easement for the purpose for which it has been used by them. Such unauthorized use and occupancy has been and continues to be in trespass as against the United States.

Title 23 Right-of-Way Grant

The federally assisted Title 23 right-of-way grant to the State of Alaska was made "under conditions which he (Secretary of the Interior) deems necessary for the adequate protection and utilization" of the public lands in and adjacent to the land within the right-of-way; and the State Department of Transportation took such right-of-way "subject to the conditions so specified" [23 U.S.C. § 317(b) (1982)]. Among the "conditions" in the Title 23 right-of-way grant of October 21, 1977, are the following:

- (1) Page one of the grant states that the regulations applicable to the grant are "43 CFR 2821 and 43 CFR 2801 through 2802.5.
- (2) Page two of the grant sets forth as part of the "terms and conditions" of the grant "all regulations in 43 CFR 2800 as more specifically set forth in the attached terms and conditions."

- (3) Paragraph (B)(6) of the "Standard Stipulations" attached to the grant and made a part thereof requires the grantee to "comply with all applicable Federal, State, and local laws and regulations thereunder, existing or hereafter enacted or promulgated, affecting in any manner, construction, operation or maintenance of the grant area."

In effect, the Title 23 right-of-way grant incorporated by reference the terms and conditions of the Interior regulations applicable to such a grant [Gilbert v. Levin, 64 I.D. 1, 3-4 (1957)], including the following:

- (1) 43 CFR 2821.6 (Oct. 1, 1977 rev.)

A right-of-way granted under this subpart confers upon the grantee the right to use the lands within the right-of-way for highway purposes only. Separate application must be made under pertinent statutes and regulations in order to obtain authorization to use the lands within such rights-of-way for other purposes. Additional rights-of-way will be subject to the highway right-of-way. Future relocation or change of the additional right-of-way made necessary by the highway use will be accomplished at the expense of the additional right-of-way grantee. Prior to the granting of an additional right-of-way the applicant therefor will submit to the Authorized Officer a written statement from the highway right-of-way grantee indicating any objections it may have thereto, and such stipulations as it considers desirable for the additional right-of-way. (Emphasis ours.)¹

- (2) 43 CFR 2821.6-2 (Oct. 1, 1977 rev.)

Except as modified by § 2821.6-1 of this subpart, rights-of-way within the limits of a highway right-of-way granted pursuant to Title 23, United States Code, and applications for such rights-of-way, are subject to all the regulations of this part pertaining to such rights-of-way. (Emphasis ours.)²

(3) 43 CFR 2801.1-4 (Oct. 1, 1977 rev.)

Any occupancy or use of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass. (Emphasis ours.)

Since the Powers did not make a "separate application" with BLM pursuant to proper statutory and regulatory authority [e.g., § 302(b) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1732(b)); and 43 CFR Part 2920] "in order to obtain authorization" to use the land within the Title 23 right-of-way for a non-highway purpose, they have been, and continue to be, in trespass as against the United States. Penasco Valley Telephone Cooperative, Inc., 55 IBLA 360, 365-368 (1981). Cf. Mountain Bell, 83 IBLA 67, 70-71 (1984).

While it is true that the Powers received an encroachment permit for their occupancy from the State Department of Transportation and Public Facilities pursuant to AS 19.25.200, duly approved on October 1, 1984, by the Federal Highway Administration (FHA) pursuant to 23 CFR 1.23(c) (see enclosed copy of approval),³ the permit itself is "subject to any applicable federal law, regulation ..." (par. 7), and the State regulation governing issuance of such permit provided that "encroachments may be ... permitted ... in respect to all highways acquired or constructed in whole, or in part, with federal-aid funds, in accordance with the federal regulations governing the future use and occupation of such highways" (17 AAC 10.010). One of the "governing" federal regulations is 23 CFR 1.23, which provides that "all real property ... within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes," unless "temporary or permanent occupancy or use of right-of-way ... for nonhighway purposes" is "approved by the Administrator" (of FHA) upon his determination that such occupancy or use "is in the public interest and will not impair the highway or interfere with the free flow of traffic thereon."⁴ The other "governing" federal regulations which must be complied with are those above-mentioned requiring permission of the Secretary of the Interior or his delegate for non-highway use where the right-of-way contains land administered by BLM. 43 CFR 2821.6 (Oct. 1, 1977 rev.), incorporated into the right-of-way permit of October 21, 1977; and Paragraph 6 of Public Land Order 1613. Since the Powers have not complied with the federal regulations requiring permission of the Secretary of the Interior or his delegate for non-highway use of the PLO 1613 easement

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and Title 23 right-of-way grant, they do not yet have authorization under the terms of their State encroachment permit to occupy or use the land where their cabin and sheds are presently located in the Richardson Highway easement and right-of-way. Such occupancy therefore is a technical trespass under State law as against the State of Alaska in its maintenance and regulation of the highway easement and right-of-way. Cf. Fisher v. Golden Valley Elec. Ass'n, Inc., 658 P.2d 127, 129-130 (Alaska 1983).

Finally, it is suggested that you make the following revisions of the front side of the proposed "Trespass Notice [Form 9230-1 (November 1976)], to wit:

(1) Statutory Violations

"Unlawful Enclosures and Occupancy Act [23 Stat. 321; 43 U.S.C. § 1061 (1982)]

"Section 3 of the Act of August 1, 1956 [70 Stat. 898; 43 U.S.C. § 971c (1982)]"

(2) Regulatory Violations

"Unlawful Occupancy and Enclosures (43 FR 9239.2)

"Unpermitted Highway Easement Use [(Par. 6 of Public Land Order 1613 (23 FR 2376; Apr. 11, 1958)]

"Unauthorized Right-of-Way Occupancy [43 CFR 2801.3 and 43 CFR 2821.6 (Oct. 1, 1977 rev.)]"

(3) Land Description

Change "... lying on the east edge of the right-of-way margin of the Richardson Highway...." to "... lying on and within the east edge of the right-of-way margin of the Richardson Highway...." (underscoring for emphasis only).

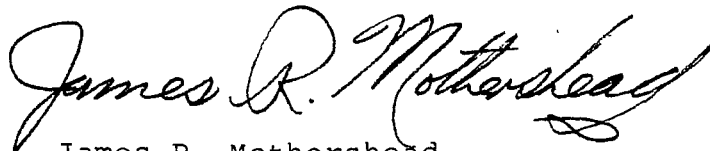
In connection with the above trespass, we should determine what specific use is being made of the trespass area by the Powers (i.e., is the use strictly for non-highway purposes, or is it used as a road maintenance station).

ENCL. 1-5

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We are returning herewith the trespass notice, etc., miscellaneous trespass materials you have furnished this office, and the Title 23 right-of-way grant case file (AA-12493) which was sent to this office for our examination.

If we can be of any further assistance in this matter, please feel free to call upon us for the same.



James R. Mothershead
Assistant Regional Solicitor
Alaska Region

Enclosures: AA-12493 (case file)

cc: Area Manager, Glennallen, BLM
District Manager, ADO, BLM

ENCL. 1-4

1/ The restriction against non-highway uses in 43 CFR 2821.6 (Oct. 1, 1977 rev.) continues to be one of the incorporated conditions in the Title 23 right-of-way grant of October 21, 1977 (AA-12493) even though this regulation was removed from 43 CFR, effective October 28, 1982 [47 F.R. 42574-5; Sept. 28, 1982 (see enclosed copy)] in favor of an interagency agreement with FHA establishing a system of imposing BLM's conditions by way of a letter of consent for a Title 23 right-of-way grant. BLM Manual Part 2805, Appendix 2 (Rel. 2-156); 9/10/82). The revocation of the regulation did not affect the conditions of such regulation incorporated into the Title 23 right-of-way grant since such incorporated conditions enjoyed an existence independent of the regulation. See Gilbert V. Levin, 64 I.D. 1, 3-4 (1957); and Henry Offe, 64 I.D. 52, 55 (1957). This situation is analogous to repeal of a statute which has previously been incorporated by reference into another statute. As stated in 1A Sutherland Statutory Construction (4th ed. 1972) § 23.32, p. 278:

Where a reference statute incorporates the terms of one statute into the provisions of another act, "the two statutes coexist as separate distinct legislative enactments, each having its appointed sphere of action." As neither statute depends upon the other's enactment for its existence, the repeal of the provision in one enactment does not affect its operation in the other statute....

"It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and 'no subsequent legislation has ever been supposed to affect it'...(citations omitted)." United States ex rel. Kessler v. Mercur Corporation, 83 F.2d 178, 180 (2nd Cir. 1936); also, United States v. Rainwater, 244 F.2d 27, 29 (8th Cir. 1957). In a detailed summary of the law on the same issue, the U.S. District Court in Professional & Business Men's L.I. Co. v. Bankers Life Co., 163 F.Supp. 274, 293 (D. Mont. 1958), approved the following statement from 50 Am. Jr., Section 39:

Effect of subsequent Amendment or Repeal of Adopted Statute. ___It is a general rule that when
(footnote continued)

(footnote continued from previous page)
a statute adopts a part or all of another statute, domestic or foreign, general or local, by a specific and descriptive reference thereto, the adoption takes the statute as it exists at that time, and does not include subsequent additions or modifications of the adopted statute, where it is not expressly so declared. The subsequent amendment or repeal of the adopted statute is not within the terms of, and has no effect upon, the adopting statute, where the latter statute is not also amended or repealed expressly or by necessary implication. This rule prevails in the case of the adoption of a specific statute, as distinguished from the adoption of the law generally relating to a particular subject.

Similarly, here, the 1982 revocation of 43 CFR 2821.6 (Oct. 1, 1977 rev.) had no effect upon the 1977 Title 23 right-of-way grant adopting the terms and conditions of such regulation. Such incorporated terms and conditions continue to exist as part of the right-of-way grant.

- 2/ The reference in 43 CFR 2821.6-2 (Oct. 1, 1977 rev.) to "all the regulations of this part pertaining to such rights-of-way" includes the regulations in Part 2800 pertaining to rights-of-way in general (e.g., 43 CFR 2800.0-1 to 43 CFR 2802.5 (Oct. 1, 1977 rev.)).
- 3/ 23 CFR 1.23 provides as follows:

(a) Interest to be acquired. The State shall acquire rights-of-way of such nature and extent as are adequate for the construction, operation and maintenance of a project.

(b) Use for highway purposes. Except as provided under paragraph (c) of this section, all real property, including air space, within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes. No project shall be accepted as complete until this requirement has been satisfied. The State highway department shall be responsible for preserving such right-of-way free of all public

(footnote continued)

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(footnote continued from previous page)
and private installations, facilities or encroachments, except (1) those approved under paragraph (c) of this section; (2) those which the Administrator approves as constituting a part of a highway or as necessary for its operation, use or maintenance for public highway purposes and (3) informational sites established and maintained in accordance with § 1.35 of the regulations in this part.

(c) Other use or occupancy. Subject to 23 U.S.C. 111, the temporary or permanent occupancy or use of right-of-way, including air space, for nonhighway purposes and the reservation of subsurface mineral rights within the boundaries of the rights-of-way of Federal-aid highways, may be approved by the Administrator, if he determines that such occupancy, use or reservation is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon.

4/ 23 CFR 1.23 was upheld as a valid regulation in Citizens Organized to Defend Environment, Inc. v. Volpe, 353 F.Supp. 520, 529 (S.D. Ohio 1972).

ENCL. 1-8

Handwritten notes and initials on a grid. Includes 'LR' and a circled '9'.

March 1, 1985

Re: Sign Installation Request
Miles 38 and 72 - Richardson Hwy.

Kurt J. Kotter
Glennallen Area Manager
Bureau of Land Management
P. O. Box 147
Glennallen, Alaska 99588

Dear Mr. Kotter:

We are responding to your January 4, 1985 request to install two signs within the Richardson Highway right of way, one at Mile 38 and the other at Mile 72.

Your request was circulated for review and comment within the Department of Transportation and Public Facilities (DOT&PF). Return comments specify that, when installed, the signs must be located at least 30 feet from the edge of the travelled way or, if closer to the travelled way, must have break-away supporting posts of approved design.

Because there also may be underground cable in the area, the local telephone company should be contacted prior to setting the sign posts.

However, your proposed sign installation appears to fall into the same category that the Bureau of Land Management (BLM) has chosen to apply to DOT&PF's encroachment permit granted to Wayne and Leanna Powers for use of the Richardson Highway right of way.

We regret to inform you that the requested BLM sign installations cannot be permitted until a resolution to the Powers' situation has been reached and there has been an acceptable determination of appropriate jurisdiction for permitting uses of highway rights of way.

If you have any questions, please call Sharon McLeod at 479-6252.

Sincerely,

Harold A. Cameron
Harold A. Cameron
Regional Chief
Right of Way Agent

SM/sg

cc: Jack Morrow, M&O Director, Valdez

Morrow

MEMORANDUM

State of Alaska

TO: Richard J. Knapp
Commissioner
Department of Transportation
and Public Facilities

DATE: May 20, 1985

FILE NO:

TELEPHONE NO: 465-3603

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: BLM's control over
state highway
rights-of-way

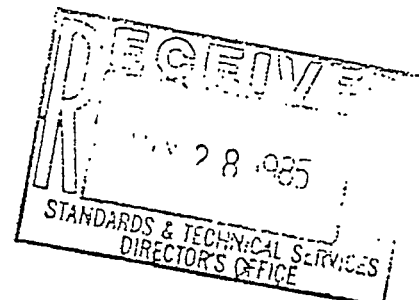
By: *JGM*
Jack B. McGee
Assistant Attorney General
Transportation Section-Juneau

The factual setting that gave rise to the BLM's letter to you dated March 6, 1985 is as follows: On September 24, 1984, Mr. and Mrs. Wayne Powers were granted an encroachment permit from the State of Alaska for their cabin and two sheds that are located within the 150 foot right-of-way of the Richardson Highway. The Federal Highway Administration approved this permit on October 1, 1984. The Bureau of Land Management, however, apparently feels that it has jurisdiction over the Richardson Highway right-of-way and, subsequent to the issuance of the state encroachment permit, has informed the Powers that they are trespassing against the United States.

BLM's claim here is a bold one, it is asserting jurisdiction over matters concerning the use of the right-of-way of a state highway. You have asked for our legal opinion on this question and our conclusion is that BLM does not have any such jurisdiction. Attached is a copy of our legal opinion together with a draft response to the BLM's letter of March 6.

JBM:ebc

Attachments



D R A F T

Richard Vernimen
Acting District Manager
Alaska State Office
Bureau of Land Management
United States Department
of the Interior
701 C Street, Box 13
Anchorage, AK 99513

Dear Mr. Vernimen:

I have researched the factual background that prompted your letter of March 6, 1985 and I think a short description of these facts may be helpful in discussing the issue you raised in your letter.

On September 24, 1984, Mr. and Mrs. Wayne Powers were granted an encroachment permit from the State of Alaska for their cabin and two sheds that are located within the 150 foot right-of-way of the Richardson Highway. The Federal Highway Administration approved this permit on October 1, 1984. The Bureau of Land Management, however, is of the view that it has jurisdiction over the Richardson Highway and, subsequent to the issuance of the state encroachment permit, has apparently informed the Powers that they are trespassing against the United States.

Given this set of facts, the issue raised in your letter of March 6, 1985 really goes to the question of whether the State of Alaska or the Bureau of Land Management has management

authority over a public road that was transferred to the State of Alaska in 1959. Because BLM's assertion of authority over state highways will have a far reaching effect on future federal/state relations as they relate to Alaska's highway system, I have asked our Attorney General's office to look into this matter. The Attorney General's office has since issued a legal opinion that concludes that BLM does not have jurisdiction over the validity of the Powers encroachment permit. I am enclosing a copy of this opinion.

I would urge you to review this opinion along with BLM's decision to get into the business of regulating the use of state highway rights-of-way.

Sincerely,

Richard J. Knapp
Commissioner