1981 WL 38763 (Alaska A.G.)

Office of the Attorney General
State of Alaska

*1 File No. A66-404-81
September 14, 1981

Management of R.S. 2477 Rights-of-Way

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By memorandum to this office you have requested an opinion concerning the State's **management authority** over section line and public-user **highways** created pursuant to 43 U.S.C. § 932, Revised Statutes 2477.

The short answer to your question is that the Alaska Department of Transportation and Public Facilities has **management authority over R.S. 2477 highways** where they occur on non-state land. Where such **highways** occur on state land, the Alaska Department of Transportation and the state agency having **management authority over** the state land in question have concurrent **authority over** the **highway**.

Congress by act of July 26, 1866 granted the right-of-way for construction of **highways over** unreserved public lands:

> The right-of-way for the construction of **highways** over public lands not reserved for public uses is hereby granted. 43 U.S.S. § 932, R.S. 2477.

In Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961), the Supreme Court of Alaska stated the general rule regarding acceptance of this federal grant:

> . . . before a **highway** may be created there must be either some positive act on the part of the appropriate public **authorities** of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Our territorial legislature accepted the federal grant by designating public highways of a specified width on all section lines within the Territory. See Ch. 19, SLA 1923; Ch. 123, SLA 1961; Ch. 35, SLA 1953; 1969 Opinion of the Attorney General No. 7. The state statute accepting the federal grant is presently codified in AS 19.10.010, which states as follows:

> A tract 100 feet wide between each section of land owned by the state, or

acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to this strip inurs to the owner of the tract of which it formed a part of the original survey.

In addition to section line highways created by legislative designation there are numerous highways, not necessarily conforming to section lines, which have been created by public use alone throughout the State of Alaska.

Our Supreme Court, along with a majority of courts which have considered the issue, has stated that roads created pursuant to R.S. 2477, whether by public authority, such as section line rights-of-way, or by public user alone, are public highways. Hamerly, supra at p. 123.

The term 'highways', which is used in R.S. 2477, 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 of the highway to the public. Prillman 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. The term 'public' highway therefore is tautological. Detroit International Bridge Co. v. American Seed Co., 229 N.W. 791, 793 (Mich. 1930). There is an old line of cases which holds that the R.S. 2477 right-of-way grant is available to privately owned and operated railroads. See Flint & P.M. Railroad Co. v. Gordon, 2 N.W. 648 (Mich. 1879). Most of these cases are very old, and the principle has not been extended beyond railroads to include essentially 'private' public utilities or conveyances. See Opinion of the Attorney General of September 7, 1976 at 18.

*2 The State has broad police power to manage its public highways. United States v. Rogge, 10 Alaska 130, 153 (1941); see discussion of state's police power to regulate public highways in Opinion of the Attorney General of September 7, 1976 at 21-29. The Alaska Legislature has conferred broad powers upon the Department of Transportation and Public Facilities to regulate the use of public highways, including the control of highways under AS 19.05.030, power to control access to highways under AS 19.05.040, the power to vacate highways under 19.05.070, and the power to close highways under AS 19.10.100.

When an R.S. 2477 highway crosses state land, the Department of Transportation and the state agency having management responsibility for the underlying fee, usually the Department of Natural Resources, have concurrent responsibility for management of the highway.

You have also inquired whether the State has authority to enforce AS 19.40.210 with regard to R.S. 2477 rights-of-way which may exist adjacent to or radiating from the Dalton Highway from the Yukon River to the Arctic Ocean. AS 19.40.210

1981 WL 38763 (Alaska A.G.)

states,

Off-road vehicles are prohibited on land within five miles of the right-of-way of the highway. However, this prohibition does not apply to a person who holds a mining claim in the vicinity of the highway and who must use land within five miles of the right-of-way of the highway to gain access to his mining claim. The term 'land' is not defined in the legislation, and must be presumed in this context to include both state and federal public land. (The Legislature could not, of course, authorize or prohibit vehicular use of private lands without consent of the landowner unless the public health, safety and welfare clearly required it.) The term does not appear to be limited to 'state land', since, in the preceeding section, the Legislature specifically addressed the concept of 'state land' with regard to its prohibition against land disposals. AS 19.40.200. There is no inherent ambiguity in state regulation of means of access over both state and federal lands, so long as the United States has not, by statute or regulation, adopted inconsistent provisions with regard to its own land. The federal lands in question were not included within the areas of exclusive federal jurisdiction listed in Sections 10 and 11 of the Alaska Statehood Act. However, if the United States were to adopt inconsistent statutes and regulations which permitted, or further restricted, the use of off-road vehicles on federal land adjacent to the Dalton Highway, those statutes or regulations would supercede inconsistent provisions of state law pursuant to the Supremacy Clause of the United States Constitution (Article VI, Section 2) and the property clause of that Constitution (Article IV, Section 3). Kleppe v. New Mexico, 426 U.S. 529 (1976).

The authority of the State of enforce AS 19.40.210 with regard to public use of acknowledged R.S. 2477 rights-of-way should not be in question. The original offer of the United States to the public to create rights-of-way for public highways over public lands (which was made by R.S. 2477 in 1866) did not specify or contemplate any particular means of travel in order to validly establish such a right-of-way; nor did it guarantee that such a right-of-way, once established by public use, could forever remain available for use by any specific means of conveyance. So long as the right-of-way has been validly established by public use and is thereby acknowledged to exist, it remains free for public use, though the means of conveyance of the public over that right-of-way is subject to reasonable regulation to achieve other public purposes, such as minimization of terrain damage, avoidance of wildlife harassment, and other reasonable restrictions to achieve such goals. Notwithstanding the fact that a person may have, in the past, have a certain means of conveyance on an R.S. 2477 right-of-way, subsequent state enactments (including the statute in question) are valid as against that person, so long as the right-of-way continues to be available for public use by whatever reasonable means which are authorized by law or regulation.

*3 The proviso in AS 19.40.210 which permits mining claim holders 'in the vicinity of the highway' to in essence ignore the off-road vehicle prohibition contained in the remainder of the statute presents particular enforcement problems, as I am sure you are aware. First, the statute gives no guidance as to what is to be considered in the 'vicinity' of the highway. Second, it does not

1981 WL 38763 (Alaska A.G.)

require that the mining claim supporting the exception pre-date the enactment of the statute, or that the claim be a valid one; this could obviously lead to the location of spurious mining claims simply to circumvent the off-road vehicle prohibition. Third, the statute by its terms does not require that the use of land to gain access to the mining claim be reasonable, so as to avoid a proliferation of parallel or duplicate access routes to the same general area, or to otherwise avoid significant terrain damage or wildlife impact. Because the intention of the Legislature in enacting the exception appears to be clear (i.e., that the mining claim is presumed to be bona fide and that the need for access to the claim is to be met by means which are reasonable), this appears to be a subject for appropriate regulations which implement the exception to the off-road vehicle prohibition in a manner which protects the general public interest in the area.

If you have further questions regarding this subject, please contact us at your convenience.

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1981 WL 38763 (Alaska A.G.)

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