
Ahtna, Inc. v. SOA, DOT&PF et. al.

Klutina Lake Road – RS2477 Report

December 19, 2016

Introduction

The purpose of this report is to assess the validity, width and scope of a public right-of-way for the Klutina Lake road¹ and a portion of the Klutina Lake Trail that extends beyond the road terminus based on the authority of federal Revised Statute 2477².

My knowledge of the Klutina Lake Road RS-2477 issue commenced in mid-summer of 1999, a month before I was appointed as the Department of Transportation & Public Facilities (DOT&PF) Northern Region Right of Way Chief. Prior to that appointment, I served as the Regional Right of Way Engineer, a position that required a license as a professional land surveyor and involved analysis of land boundaries and titles. As a result, I was often first in line to respond to questions regarding the status of a public right-of-way.

The question arose in July of 1999 because of user complaints to Fish & Game that Ahtna was requiring fees for travel and fishing access along the Klutina Lake road. Ahtna asserted that according to their patents, the existing right-of-way was based solely on a 60-foot wide ANCSA 17(b)³ easement that is subject to joint management between Ahtna and the Bureau of Land Management. Their intent was to control camping and trespass on their lands as well as fishing access to the Klutina River. While recognizing Ahtna's right to manage and prevent trespass on their lands beyond the right-of-way, Northern Region Right of Way issued a letter dated July 30, 1999 asserting the Department's jurisdiction over the Klutina Lake road under the authority of RS-2477. As Klutina Lake road is listed as a part of the official Alaska Highway System, management jurisdiction of this public right of way lies with DOT&PF. The

¹ The Klutina Lake Road is also known as the Brenwick-Craig Road (See [Alaska DOT&PF Roadway Data](#) for CDS Route 195200 at <http://akdot.maps.argo.com>) and the Copper Center – Valdez Trail (See Article 05. Rights-of-way Acquired Under Former 43 U.S.C. 932 - A.S. 19.30.400 Identification and acceptance of rights-of-way (d) Name: Copper Center – Valdez – RST Number: 0633)

² The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) The above referenced Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932) RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976.

³ "Pursuant to Sec. 17(b) of the Alaska Native Claims Settlement act of December 18, 1971, 43 U.S.C. 1601, 1616(b), public easements...are reserved to the United States. These easements are subject to applicable Federal, State, or Municipal corporation regulation. The following is a listing of uses allowed for each type of easement. Any uses which are not specifically listed are prohibited." – "[60 Foot Road](#) – The uses allowed on a sixty (60) foot wide road easement are: travel by foot, dogsleds, animals, snowmobiles, two – and three-wheel vehicles, small and large all-terrain vehicles (ATVs), track vehicles, four-wheel drive vehicles, automobiles, and trucks."



letter to Ahtna noted that a toll/information booth they had constructed was encroaching within the Klutina Lake road right-of-way and that would have to be removed.

Location

The asserted portion of the Klutina Lake road/trail runs in a southwesterly direction from its intersection with the New Richardson Highway at approximate milepost 101.7 near Copper Center to the easterly end of Klutina Lake, then continuing westerly along the north shore of the lake to the westerly line of Section 30, Township 1 South, Range 3 West. At this point, the road/trail exits Ahtna owned lands and enters State owned lands. The road passes through the following Townships and Ranges: 2 North, 1 West; 2 North, 2 West; 1 North, 2 West; 1 South, 2 West; and 1 South, 3 West; all referenced to the Copper River Meridian.

The relationship between the Klutina River and Klutina Lake road in this vicinity is graphically depicted on the U.S. Geological Survey Quadrangle Maps Valdez D-4, Valdez D-5 and Valdez C-5.

General Land Status

The land ownership straddling the subject portion of the Klutina Lake Road/trail is a mix of ANCSA⁴ Corporation lands, Native Allotments⁵ and other private property.

The majority of the lands straddling the road were conveyed by Interim Conveyance No. 346 to Kluti-Kaah Corporation (surface estate) and Interim Conveyance No. 347 to Ahtna, Inc. (sub-surface estate) both dated July 18, 1980.

Other lands straddling the road were conveyed to Kluti-Kaah Corporation and Ahtna, Inc. in patents No. 50-80-0108 and 50-80-0109 respectively, both dated July 18, 1980.

A small section of the road passes through the southeast corner of Section 36, Township 2 North, Range 2 West, C.R.M. Within this section, both the surface and sub-surface estate was conveyed to Ahtna, Inc. by Patent 50-2001-0492 dated September 28, 2001.

Ahtna, Inc. is the ANCSA regional corporation and Kluti-Kaah is recognized as a village corporation. In 1980, Kluti-Kaah along with other village corporations in the Ahtna region merged with Ahtna, Inc. In this merger, Ahtna Inc. gained rights to the surface estate of land formerly held by the village corporation.

ICs 346/347 and patents 50-80-0108/50-80-0109 are both subject to a 60-foot wide ANCSA 17(b) easement designated as EIN 11 C3, C5, D1, D9, L for an existing road extending

⁴ Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(a), 1621(j)

⁵ Act of May 17, 1906, as amended, 43 U.S.C. 270-1 to 270-3 (1970)



from the Copper Center area to a site easement designated as EIN 10a C5 on the left bank of the Klutina River near Klutina lake. At this point, the 17(b) easement transitions to 17(b) easement 21E, a 25-foot wide easement for an existing access continuing southwesterly to public lands. The ICs and patents are also subject to “Valid existing rights...including but not limited to ...right-of-way, easement,...” Patent 50-2001-0492 which conveyed both surface and subsurface rights to Ahtna, Inc. is subject to a 60-foot wide ANCSA 17(b) easement designated as EIN 38 C3, C5, D1, D9, L for an existing road in Section 36, T.2N., R.2W., Copper River Meridian. This patent is also subject to valid existing rights such as a right-of-way or easement for an existing road.

By map observation, the designated 17(b) road easements apparently are intended to align with the existing Klutina Lake road/trail as shown on the official BLM ANCSA 17(b) maps Valdez D-4 dated 5/2/2012, Valdez D-5 dated 3/11/2010 and Valdez C-5 dated 7/14/2009.⁶ The existing Klutina Lake road/trail shown on the 17(b) maps is based on 1948-1950 aerial photography⁷. The designated 17(b) easement deviates from the existing road/trail along an approximately 3 mile section where 17(b) easement 11,C3,C5,D1,D9,L transitions to 21E through sections 26/25/24 of Township 1 South, Range 3 West and sections 19/20/17 of Township 1 South, Range 2 West. In this area, the 17(b) easement is offset approximately 1/3 of a mile to the southeast of the Klutina Lake trail.

The existing road/trail also passes through four parcels that were initially patented as restricted native allotments.

- U.S. Survey No. 5112 located within Section 11 of T.1N., R.2W., C.R.M. This parcel was patented to Stewart Nicolai in Certificate No. 50-77-0004 on October 13, 1976.
- U.S. Survey No. 6785, Lot 3 located on the north side of Klutina Lake and at the headwaters of the Klutina River within Section 26 of T.1S., R3W., C.R.M. This parcel was patented to Mildred E. McKee (Truitt) as a restricted native allotment in patent No. 50-85-0088 on December 21, 1984. The parcel was eventually released of restrictions by the Bureau of Indian Affairs, subdivided and sold to individual private owners.
- U.S. Survey No. 6979, Lot 1 located within Sections 29 & 32 of T.1S., R.3W., C.R.M. This parcel was patented to the heirs of Fannie Sthienfield in Certificate No. 50-92-0186 on February 5, 1992.

⁶ The BLM ANCSA 17(b) maps can be found at http://sdms.ak.blm.gov/scanned_images/esmtindex.html

⁷ United States Geological Survey Quadrangle (USGS Quad) Valdez D-4 dated 1949 (Minor Revisions 1974) is based on aerial photographs taken in 1948. USGS Quad Valdez D-5 dated 1948 (Minor Revisions 1983) is based on aerial photographs taken in 1948. USGS Quad Valdez C-5 is dated 1951 (Minor Revisions 1965) is based on aerial photographs taken in 1950.



- U.S. Survey No. 6979, Lot 1 located within Section 32 of T.1S., R.3W., C.R.M. This parcel was patented to Lucille Brenwick in Certificate No. 50-77-0004 on August 9, 1985.

ANCSA 17(b) Easements

The previously referenced ANCSA 17(b) easements were established as a part of the conveyances to Ahtna and Kluti-Kaah. The intent was to protect existing roads, trails and sites with public easements and to provide future access through the conveyed lands to other public lands. Generally, BLM is responsible for easement management unless and until administration is transferred.⁸ Management is performed in coordination with the ANCSA landowner.

In the Klutina case, BLM established a 17(b) easement along an existing road where the State asserted that a valid RS-2477 right-of-way already existed. This was not an unusual practice by BLM as their policy prevented them from adjudicating a claimed RS-2477, many of which were in their view, questionable. To ensure that a gap in public access was not created by assuming the validity of all asserted existing public access easements, BLM imposed a secondary layer of 17(b) easements. The federal position is that “The reservation of an overlapping § 17(b) public easement, and the conveyance of the underlying fee, are each subject to, and do not affect, a previously-existing R. S. 2477 right-of-way.”⁹

While a 17(b) easement and an RS-2477 are both public rights-of-way, the 17(b) easement width, scope and management jurisdiction are in conflict with those of an RS-2477 as asserted by the State of Alaska. ANCSA 17(b) easements may only be imposed upon ANCSA lands. They have no effect where the road/trail crosses native allotments, private (non-ANCSA) property or state lands. A public easement for highway purposes as established under RS-2477 has no such limitations where the evidence of public use and construction supports the acceptance of the federal grant.

As stated in the section regarding general land status, the subject road/trail crosses four native allotments from the Richardson Highway to the State owned public lands at Klutina Lake. As the 17(b) easement cannot be imposed over a native allotment, the 17(b) easement cannot by itself provide access to the State owned public lands.

⁸ See ANCSA 17(b) Easement Management Handbook at https://www.blm.gov/style/medialib/blm/ak/aktest/ims.Par.26550.File.dat/im_ak_2007_037_17bhandbook.pdf

⁹ See State of Alaska, Dept. of Transportation and Public Facilities (On Reconsideration) ANCAB VLS 80-51, June 24, 1982.





Figure 1 - DNR Land Estate Map Showing Copper Center to Valdez Trail (RST 633)

RS-2477 Authority & Validity

Revised Statute 2477 provided a federal offer for road easements over public lands. The intent of the grant was to protect the access rights of miners in the early 1800's where there was a virtually complete absence of a federal presence on the public domain lands. In Alaska, highways that were constructed prior to the Public Land Orders establishing rights-of-way may have been created across unreserved public lands by virtue of the RS-2477 grant¹⁰. The Federal offer for road easements over public lands was concisely stated:

¹⁰ A footnote to the Alaska Supreme Court case *State v. Alaska Land Title Ass'n*, cited a memo from the Chief Counsel of BLM dated 2/7/51 noted that "Prior to the issuance of Public Land Order No. 601..., nearly all public roads

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

Alaska case law supports the acceptance of an RS-2477 grant offer by an act of the public authorities showing intent to accept it or by “public user for such a period of time and under such conditions as to prove that the grant has been accepted.”¹¹ With regard to an RS-2477 grant for a trail, the required evidence to show acceptance would be documented public use.

For the RS-2477 grant to be effective, the trail/highway had to have been established over “...public lands, not reserved for public uses...”, prior to the repeal of the RS-2477 offer by the Federal Land Policy and Management Act in October of 1976. Often the research required to determine the periods when the public lands were in unreserved status could be complex as they may involve many types of federal land entries that could prevent application of an RS-2477 ROW. With respect to Klutina Lake Road, the required research was fairly straight forward due to the wealth of documentation of historic public use prior to 1976 and prior to any conflicting entries or claims that would have placed the public lands in a reserved status.

Between 1992 and 1993, the Alaska Legislature appropriated funds for a task force to create an RS-2477 trail inventory. The Department of Natural Resources (DNR) researched approximately 1,950 trails and determined that almost 600 trails may qualify as valid RS-2477 rights-of-way.¹² Included in this research was RST-633, the Copper Center-Valdez Trail. Historic USGS Quadrangle maps indicate that the subject Klutina Lake Road alignment is coincident with the Copper Center-Valdez Trail from Klutina Lake east towards Copper Center.

The research materials for RST-633 documents construction or use of this 103 (approximate) mile trail by prospectors and explorers dating as far back as 1898. The research concluded that the RS-2477 offer for the Copper Center-Valdez trail had been accepted by construction and public use when the land was not reserved for public purposes. In 1998, the Legislature amended Title 19 of the Alaska Statutes by adding Article 05 identifying rights-of-way accepted under 43 U.S.C. 932 (RS-2477). The Legislative acceptance included RST-633, “Copper Center – Valdez”. The State’s intent in amending A.S. 19 is stated in A.S. 19.30.400(a):

in Alaska were protected only by easements. Right-of-way easements were acquired under section 2477 of the Revised Statutes (43 U.S.C. sec. 932) by the construction of roads.”

¹¹ Hamerly v. Denton, 359 P.2d 121, Alaska January 27, 1961 and Dillingham Commercial Company, Inc., v. City of Dillingham, 705 P.2d 410, Alaska August 16, 1985.

¹² See <http://dnr.alaska.gov/mlw/trails/rs2477/> for DNR RS-2477 Project background and case file summaries.



The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities, in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities.

Paragraph (c) of A.S. 19.30.400 noted that the listing of RST's in paragraph (d) have been accepted by public users and that the failure to list a trail in this section does not relinquish any right, title or interest the public may have in an RS-2477 trail.

In the absence of the compelling historic public use documentation recovered by the DNR RS-2477 project, an acceptance of the RS-2477 offer for Klutina Lake road would still be conclusively supported in the records of the DOT&PF Pioneer Access Road program. The 1960's Pioneer Access Road program provided state funds to construct or repair roads into areas that would facilitate resource development.

The Klutina Lake Pioneer Access Road, project X-5119, commenced on September 21, 1964 and was completed on October 13, 1964. The contractors were Leonard Brenwick and Oscar Craig, for whom the road was named. The contract with the State described the project scope:

A rudimentary truck haul road from the present terminus of the Klutina Lake road approximately 12 ½ miles southwesterly from the Richardson Highway in the vicinity of Copper Center southwesterly to Klutina Lake. The length of road to be constructed is approximately ten miles. The exact location of the route will be determined by the contractor but will generally follow the old Klutina Lake trail along the Klutina River. The road shall have a minimum width of twelve (12) feet and be sufficient to support a four-wheel drive truck during the portion of the year when the ground is thawed.

The project file recognized that the road crossed federal public domain lands and includes a December 23, 1964 letter from the Bureau of Land Management to Leonard Brenwick discussing the scope and authority for the road construction.

This office has no objection to your improving the Klutina Lake trail in cooperation with the State of Alaska for a public road. It appears that this would come under the regulations R.S. 2477, which provides for pioneer access roads.



The acknowledgement by BLM that the right-of-way authority was based on RS-2477 is somewhat unique in my experience. In my years of researching the DOT&PF Northern Region Right of Way archives, I have only found one other similar letter from BLM citing the RS-2477 authority. This is not completely unexpected as the majority of the DOT&PF highway system rights-of-way in the pre-statehood years were based on federal public land orders. New rights-of-way crossing BLM managed lands after statehood would most often be issued as a BLM Grant or through the Federal Highway Administration as a Title 23 Grant.

The combined documentation of public construction and use for Klutina Lake road and the supporting Alaska case law provides a clear basis to support the establishment of a valid RS-2477 right-of-way.

RS-2477 Width

RS-2477 trail rights-of-way have been asserted at widths ranging from the physical footprint or “*ditch to ditch*”¹³, 60-feet based on the Territorial Road Act of May 3, 1917 or 66-feet based on the 1923 Territorial acceptance of the R.S. 2477 grant for section line easements. Since the 1963 enactment of A.S. 19.10.015¹⁴, an RS-2477 right-of-way may be 100-feet wide if the public lands it crossed were unreserved as of that time.

Had the lands crossed by the Klutina Lake road been “...reserved for public uses” as envisioned in the RS-2477 offer prior to the effective date of A.S. 19.10.015, it could be argued that the width could be limited to the physical footprint or “*ditch to ditch*” width. However, these lands remained unreserved as of April 7, 1963 and so were subject to the full effect of A.S. 19.10.015.

The application of a 100-foot width based on A.S. 19.10.015 is supported in the Memorandum Opinion and Judgment¹⁵ (MOJ) issued by the Alaska Supreme Court on August

¹³ In the 1963 Superior Court case State v. Fowler regarding Farmer’s Loop road in Fairbanks, the Highway Department claimed that 43 U.S.C. 932 (RS-2477) provided for a 66 foot wide right-of-way where a claim of RS-2477 was appropriate. The Superior Court sustained defendant’s position that the state “*only has a right-of-way for the width of the road utilized in the past and now by the Highway Department*”.

¹⁴ In order to establish a 100-foot width for an RS-2477 right of way, the State legislature enacted Sec. 1, Ch. 35, SLA 1963 (Effective April 7, 1963): Establishment of Highway Widths. (a) It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet. AS 19.10.015.

¹⁵ Memorandum Opinion and Judgment, Alaska Supreme Court No. 0930, August 25, 1999



25, 1999 relating to the 1996 case, Puddicombe v. Fitzgerald¹⁶. Although unpublished, the MOJ stated:

The superior court did not err in holding that the right-of-way should be 100 feet wide. The scope of an RS 2477 grant is subject to state law. The superior court's reliance on AS 19.10.015 to determine the scope was not erroneous. The statutory definition of "highway" includes "trail(s)."

The Superior Court's Order¹⁷ referenced in the MOJ held that A.S. 19.10.015 conclusively establishes the width for an RS-2477 highway right-of-way at 100 feet and that the statutory definition for a "highway" includes roads, streets and trails.

There has been discussion that the Federal Land Management and Policy Act (FLPMA) of 1976 served to "freeze" the width of an RS-2477 right-of-way to the width under actual use as of the FLPMA repeal of the RS-2477 grant. To the extent that the "freeze" had any effect on the width of an RS-2477 right-of-way, the construction and use activities and the effective date of A.S. 19.10.015 both preceded the repeal of the RS-2477 offer and have no effect on the width of the Klutina Lake road right-of-way.

A width of 100-feet for the subject portion of the Klutina Lake road is reasonable and supported in both Alaska case law and statutes.

RS-2477 Scope

The State takes a fairly liberal view towards the scope of use of a highway easement. An RS-2477 grant is clearly an easement for highway purposes. Most of Alaska's highway right-of-way are based on federal public land orders (PLO) issued from the mid-1940's to the mid-1950's. The PLOs were initially withdrawals from the public domain but prior to conveyance of the highway system from the federal government to the State of Alaska in 1959, the PLO based highway rights-of-way had been converted to easement¹⁸ interests. As a result, the scope of use of a highway easement constitutes a significant statewide policy issue.

The Dillingham case, which considered the scope of an RS-2477 right-of-way, the Alaska Supreme Court ruled "...it may be used for any purpose consistent with public travel." In Fisher v. Golden Valley¹⁹, the issue was whether a utility could construct a power line within a section

¹⁶ Fitzgerald v. Puddicombe, 918 P.2d 1017, Alaska April 26, 1996.

¹⁷ Puddicombe v. Fitzgerald, Order, Case No. 3PA-91-00391CI, November 22, 1996

¹⁸ Secretarial Order No. 2665, October 16, 1951 established "A right-of-way or easement for highway purposes..." for roads classified as "Feeder" or "Local". PLO 1613, April 7, 1958 established "An easement for highway purposes..." for the roads classified as "Through".

¹⁹ Fisher v. Golden Valley Elec. Ass'n, Inc., 658 P.2d 127, Alaska 1983



line easement established under the RS-2477 authority. The court held that the use of an easement reserved for highway purposes is not limited to the movement of vehicles but

...includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities which the advance of civilization may render suitable for a highway.

The Fisher case in part considered construction of a power line to be an incidental and subordinate use of the highway easement that did not increase the burden upon the underlying fee estate.

The reasoning underlying this position is that electric, and telephone, lines supply communications and power which were in an earlier age provided through messengers and freight wagons traveling on public highways. So long as the lines are compatible with road traffic they are viewed simply as adaptations of traditional highway uses made because of changing technology.

In the same sense that power and telephone line placement represent modern versions of a traditional highway use, other traditional uses that were compatible with highway travel would also be considered allowable. Such traditional uses include camping alongside of the highway easement at the end of a long day of travel or launching a boat into an adjoining body of water to change modes of transportation. Parking, camping and access to rivers or lakes from within the highway easement may be formalized by the construction of a rest area/wayside or boat launch by DOT&PF. However, they would also be allowable where a traveler could pull off the highway in a manner that did not adversely affect the safety of the travelling public and was allowable under the DOT&PF management regulations.²⁰ A DOT&PF sanctioned rest area/wayside represents an integral component of highway safety in that they provide opportunities for travelers to recover from an extended period of driving. A boat launch can also be considered an integral feature of a highway in that it provides a connection to an alternate mode of transportation.

Other highway features that some might view as recreational include bike, pedestrian or multi-purpose paths, trailhead parking and scenic viewing areas. As they are also conventional components of a highway facility, they would not be considered incidental, subordinate uses of a highway easement but necessary elements. Informal parking, camping and boat launching by the public may not be considered as critical elements of highway use but under Fisher they would meet the and allowable incidental and subordinate uses of a highway easement that did not increase the burden on the underlying fee estate.

²⁰ 17 AAC 05.045 Rest stops and pullouts, "(a) A person may not park a vehicle or camp for longer than the posted limits in a highway rest stop or pullout located on the state highway system."



There has been much discussion in this case regarding recreation and whether it can reasonably fall within the scope of an easement for highway purposes. Recreation and transportation by highway are integrally linked concepts and more so in Alaska than many other places. Tourism is the second largest employer in the state serving nearly two million visitors a year. Many of these tourists travel the state highway system.

Travelers use truck campers, 5th wheels and motor homes on the highway system all of which are commonly referred to as recreational vehicles. It is also common for these recreational vehicles to park and spend the night at a wayside or wide spot in the road. In addition, all-terrain vehicles, bicycles, hikers and horse riders can be found participating in the traditional recreation use of the highway easements. Highways are often enhanced to facilitate tourism and recreation. These enhancements include turnouts, rest areas, scenic viewing sites, trailhead parking, water access, outhouses and waste receptacles. These are common elements of highways, particularly on rural highways in a state where you may travel great distances between commercial services.

It has been suggested that the Klutina Lake road is merely a dirt track and can in no way be compared to roads along the main highway system. History shows that this is an inappropriate limitation. In 1925 Governor George Parks responded to a request from Colonel James Steese to abandon the Richardson Highway due to high maintenance costs²¹. Governor Parks responded:

Only those who have followed it through all of its stages of development, from the days when it was a pack trail and it required twelve or fifteen days to make the trip from the Coast to Fairbanks to the present time when one can get in an automobile in Fairbanks and in two days easy driving, reach the Coast, can appreciate its worth.

I am advised that the statistics compiled by the transportation company now operating cars on the Richardson Highway, show that the tourist travel for 1925 increased approximately twenty-five per cent over that of 1924, and each year this business will prove to be a growing asset to the Territory.

Until 1949, the basis of the right-of-way for the Richardson Highway was RS-2477. In 1949, a federal Public Land Order²² withdrew a 300-wide corridor for the highway that was later converted to an easement for highway purposes. Nearly a century ago, Alaska's leaders

²¹ George A. Parks, Governor, Territory of Alaska to Colonel James G. Steese, President, Alaska Road Commission, October 10, 1925. – Copy attached.

²² Public Land Order No. 601, August 10, 1949. The PLO 601 withdrawal was replaced with an easement for highway purposes by PLO 1613 dated April 7, 1958.



recognized the recreational and economic value of tourism along the State’s highway system and in fact, this recreational activity is within an RS-2477 based highway right-of-way, in part resulted in the continuing maintenance and operation of the Richardson Highway.

On May of 2016, the Court issued an Order²³ concluding that an RS-2477 grant can only be used for ingress and egress and that boat launches, camping, and other recreational uses are not included within the scope of the highway easement. The order noted that the State’s position lacks any meaningful limit on the scope of an RS-2477 right-of-way and could include “gas stations, lodges, hotels, automotive repair shops, and retail establishments.” As The Klutina Lake road (Brenwick-Craig road) is under DOT&PF management jurisdiction, it is subject to the property management provisions in A.S. 19 and 17 AAC. The commercial uses that the Court has suggested would be considered as encroachments that under A.S. 19.25.200 would require permitting by DOT&PF. Encroachment permits compliant with 17 AAC 10.011 may not be issued for permanent structures, fueling facilities or uses not in the best interest of the state. As most of the state highway system consists of easements, an encroachment permit for a low impact use such as extension of business parking into an unused portion of the highway right-of-way can only be issued to the owner of the underlying fee estate. Encroachment permits are generally intended to authorize non-highway uses and as a non-highway use by definition would fall outside the scope of a highway easement, they could not be issued to a private third party.

However, when viewed in the context of non-commercial use of a highway easement by a traveler, the prohibition of a commercial lodge or hotel would not be a limitation on a traveler from spending the night in the right-of-way in a tent or motor home. Neither would the prohibitions against fueling stations or auto repair shops preclude a motorist from changing a tire or filling their tank from a 5-gallon jerry can in the highway easement.

RS-2477 Management Jurisdiction

The Klutina Lake Road (Brenwick-Craig) from Copper Center to Klutina Lake is one of the few highway rights-of-way within DOT&PF Northern Region that is based primarily upon the RS-2477 authority. While DOT&PF and DNR can both have management jurisdiction over an RS-2477 ROW, DNR defers jurisdiction to DOT&PF if the RS-2477 is listed as a route on the official State Highway System.

²³ Order Granting Ahtna, Inc.’s Motion for Partial Summary Judgment, Case No. 3AN-08-06337 CI, May 11, 2016.



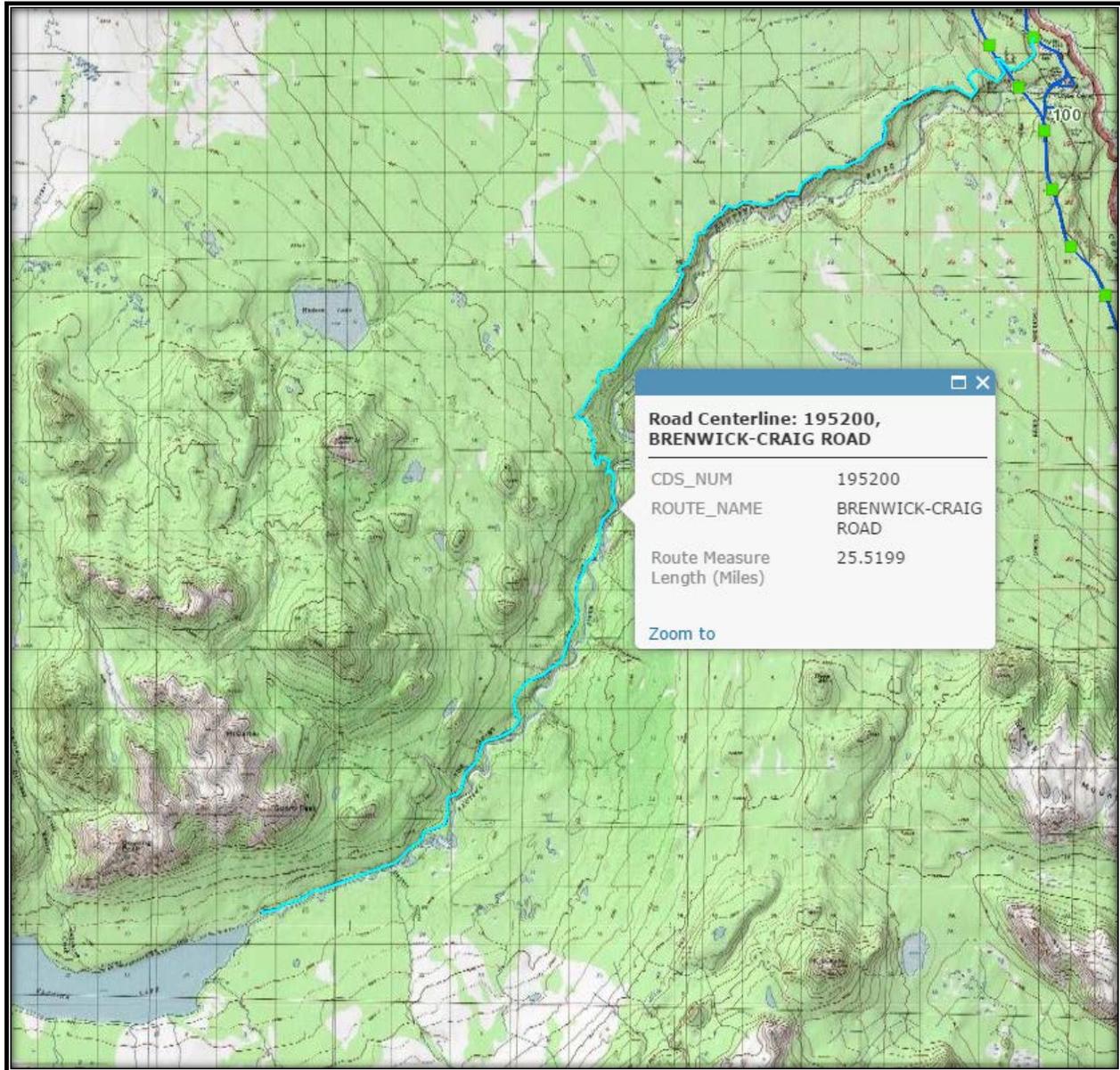


Figure 2 - DOT&PF Brenwick-Craig Route Map²⁴

Figure 2 is a DOT&PF map identifying the Brenwick-Craig (Klutina Lake) road as CDS²⁵ route number 195200 with a length of 25.5 miles from Copper Center to its terminus at Klutina Lake. Essentially, if a road is listed on the State Highway System and the right-of-way is based

²⁴ From Alaska DOT&PF Roadway Data website:

<http://akdot.maps.arcgis.com/home/webmap/viewer.html?webmap=0642c35270ba418e95dd61756ccf1b7b>

²⁵ CDS means “Coordinated Data System”, a DOT&PF road log database.

on an RS-2477 grant, DOT&PF has jurisdiction. The RS-2477 right-of-way continuing westerly from the Brenwick-Craig terminus is under the management of DNR.

BLM jurisdiction of an ANCSA 17(b) easement that coincides with the DOT&PF jurisdiction of the RS-2477 right-of-way creates significant conflicts due to differences in the scope of each authority and their respective management regulations. The Federal Land Policy and Management Act of 1976 § 509(a), 701(a) and 701(h) along with the Alaska Native Claims Settlement Act § 14(g) & 17(b)(2) specifically protect valid existing rights. With the substantial documentation of historic construction and use of the Klutina Lake road validating the RS-2477 grant as pre-existing both ANCSA and FLPMA, the Bureau of Land Management should defer its management of Klutina Lake road right-of-way to the State of Alaska, DOT&PF. A continuing management role by BLM would be redundant and has been superseded by the valid existing right of the RS-2477 right-of-way.

The DOT/DNR joint jurisdictional authority for R.S. 2477 is defined by the following regulation and statute:

11 AAC 51.100. Management of public easements, including R.S. 2477 rights-of-way “(a) The commissioner has management authority over the use of any R.S. 2477 right-of-way that is not on the Alaska highway system.”

A.S. 19.30.400. Identification and acceptance of rights-of-way. “The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities.”

While the management of an RS-2477 trail that is listed on the State Highway System falls under DOT&PF regulations, the agencies take joint responsibility for disposal of an RS-2477 right-of-way should it be warranted. Under 11 AAC 51.065 a person may petition the Department of Natural Resources to vacate an RS-2477 based trail or section line easement. Due to the joint agency responsibility, the final plat vacating an RS-2477 trail must be signed by both the Commissioners of DOT&PF and DNR or their designees. The legislature tightly constrained the ability to vacate an RS-2477 right-of-way in A.S. 19.30.410. The process to vacate an RS-2477 is required to release this encumbrance over the land it crosses, as a public



right-of-way cannot be lost by an apparent abandonment. An affirmative act by the appropriate authority is required to dispose of the public's interest. The formal vacation process is necessary to release the RS-2477 interest as A.S. 38.95.010 prohibits the State's interest being terminated by adverse possession or prescription.

Conclusion

In summary, a review of the asserted RS-2477 road right-of-way results in a finding that:

- The right-of-way for Klutina Lake road/trail constitutes a valid easement for highway purposes from the Richardson Highway westerly to state owned lands based on an RS-2477 grant accepted by construction and use;
- The right-of-way is 100-feet in width, 50-feet on each side of the physical centerline;
- The asserted RS-2477 right-of-way that is a part of the Alaska Highway System is under DOT&PF management jurisdiction. The remaining asserted RS-2477 right-of-way is under DNR management jurisdiction.
- The scope of use within an easement for highway purposes may include reasonable traditional uses such as overnight camping, access to adjoining bodies of water (boat launching), parking, non-commercial day use, sight-seeing, and fishing.

Prepared by:



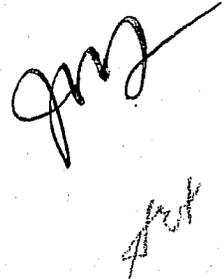
John F. Bennett, PLS, SR/WA



GEO. A. PARKS
GOVERNOR

TERRITORY OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

October 10th, 1925.



Colonel James G. Steese,
President, Alaska Road Commission,
2802 Munitions Bldg.,
WASHINGTON, D. C.

Dear Friend Steese:

The following letter is submitted in compliance with your request for my opinion on the advisability of abandoning the Richardson Highway.

I have been familiar with the construction of the road from Fairbanks to the Coast since the inception of the project, and in the course of my official work in the Territory I have traveled over the route nearly every year. Prior to the completion of the Alaska Railroad, the wagon road furnished the only overland route to the interior of Alaska and materially assisted in the development of the Tanana Valley and other interior districts. For many years all winter traffic destined for the interior of Alaska, passed over this road. It is impossible to overestimate the value that the road has been to Alaska.

13/90-34

Only those who have followed it through all of its stages of development, from the days when it was a pack trail and it required twelve or fifteen days to make the trip from the Coast to Fairbanks to the present time when one can get in an automobile in Fairbanks and in two days easy driving, reach the Coast, can appreciate its worth.

I am sure that the costs of construction and maintenance over a period of twenty-one years, as shown by your report, are reasonable and are seldom equalled in a similar country.

I am advised that the statistics compiled by the transportation company now operating cars on the Richardson Highway, show that the tourist travel for 1925 increased approximately twenty-five per cent over that of 1924, and each year this business will prove to be a growing asset to the Territory.

The development of any new country naturally follows the roads and this is true along the wagon road in question. Since the road has been improved so as to be suitable

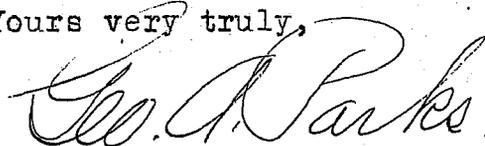
for travel at all times during the year, many new homesteads and fox farms have been improved in the region adjacent to the right of way. The public land surveys have been extended over a large part of the region traversed by the road in the Tanana and Copper River valleys, and it is reasonable to assume that normal development of these lands will follow the only available transportation route.

I feel that it would be a very serious mistake to abandon the project at this time.

In order to reduce the maintenance charges to the minimum, it is essential that the project be completed as soon as possible. Recently I made a trip from Fairbanks to Chitina during one of the heaviest rainfalls of the season, and the only places where we encountered trouble were on the uncompleted sections of the road. A few impassable places impairs the value of the entire project.

I hope that you will be successful in obtaining funds to complete this project according to your program.

Yours very truly,



Governor