

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

NORTHERN REGION, REGIONAL DIRECTOR

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March 13, 2008

Re: Brenwick-Craig Road
RS-2477 Right-of-way Status

J. Michael Robbins, Esq., General Counsel
Ahtna, Incorporated
406 W. Fireweed Lane, Suite 103
Anchorage, AK 99503

Dear Mr. Robbins:

Thank you for your correspondence of March 3, 2008 expressing an interest in resolving Ahtna's concerns over the Brenwick-Craig Road along the Klutina River. You have questioned the State's ownership of the ROW pursuant to R.S. 2477. Your letter suggests that expenditure of State funds are necessary to assert a valid R.S. 2477 claim, and that to the extent the State had spent funds on the road, it was not on the disputed portion of the Brenwick-Craig road (between the current Richardson Highway and Klutina Lake.) You have also suggested that the State should limit the width of its ROW, and should abstain from the management of the road until Ahtna and the State have agreed on the description and status of the ROW.

The State of Alaska will not of waive or release its R.S. 2477 rights to the Brenwick-Craig road because the title is firmly vested in the State and its relinquishment would not be in the public interest. I am sure that you understand that the State must takes its defense of valid public access seriously. Our assertion of the public's R.S. 2477 rights in the subject road is soundly based in historic research, statute and case law. The State's ownership was formalized in the Alaska Statutes and was listed under A.S. 19.30.400(d) as "Copper Center - Valdez 0633." I have included an excerpted portion of that statute below for your reference.

Sec. 19.30.400. Identification and acceptance of rights-of-way.

(a) 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...

....

"Providing for the safe movement of people and goods and the delivery of State services."

(c) The rights-of-way listed in (d) of this section have been accepted by public users and have been identified to provide effective notice to the public of these rights-of-way. The failure to include or identify a right-of-way under (d) of this section does not relinquish any right, title, or interest the public has in a right-of-way.

(d)...Copper Center - Valdez 0633...

More details of the evidence supporting the public's claim to the subject road under R.S. 2477 can be found at the Department of Natural Resources R.S. 2477 Project website, <http://www.dnr.state.ak.us/mlw/trails/rs2477/>

Among other items, the DNR website notes the listing of the "RST #633 Copper Center – Valdez Trail" in "Alaska Statute (AS 19.30.400(d)) as a qualified RS2477 Right-of-Way" and further notes that:

The Valdez-Copper Center trail was used by prospectors and explorers at the turn of the century and early 1900's to access the interior of Alaska from Valdez.

....

Documentation in the file shows construction or use of the route occurred by 1898. The grant of the RS 2477 right-of-way for the trail was accepted by construction and use, subject to valid, existing rights, when the land was not reserved for public purposes.

http://www.dnr.state.ak.us/mlw/trails/rs2477/rst_legal.cfm

The acceptance of an R.S. 2477 grant by public user was confirmed in *Hamerly v. Denton*, 359 P.2d 121 (1961).

Section 932, Title 43 U.S.C.A., which provides: 'The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.' The operation of this statute in Alaska has been recognized. The territorial District Court and the highest courts of several states have construed the act as constituting a congressional grant of right-of-way for public highways across public lands. But 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.

While it is unnecessary to prove public expenditure as well as user to establish an R.S. 2477 ROW, we can also provide evidence of State expenditures on the Brenwick-Craig road between Copper Center and Klutina Lake prior to Ahtna's land selections and prior to 1971. The following documents are attached:

1. November 18, 1964 Final Estimate and Certification for Project X-5119, Lake Klutina pioneer access road – 4 pages
2. September 14, 1964 – Agreement for the Construction of a Pioneer Access Road to Klutina Lake in the Vicinity of Copper Center – 2 pages
3. July 20, 1964 Proposed Pioneer Road from Copper Center to Klutina Lake – 1 page
4. December 23, 1964 Letter from BLM noting R.S. 2477 as the regulation that provides for pioneer access roads
5. December 30, 1964 internal transmittal memo regarding the BLM letter

Within the portion of the Valdez-Copper Center Trail known as the Brenwick-Craig road or Klutina Lake road, it would appear that the public has met the requirements of acceptance of the R.S. 2477 grant as noted in *Hamerly v. Denton* both by a positive act of a public authority and by public user.

You have also noted that BLM has identified an ANCSA 17(b) easement that follows the Brenwick-Craig road and suggest that the State's claim should be consistent with that of the federal government, and limited to the scope of a 17(b) easement. ANCSA 17(b) easements are subject to prior existing rights. (see Public Law 92-203 Section 17(b)(2)) We do not find it appropriate to disclaim the public's rights in the R.S. 2477 right-of-way in favor of a lesser interest.

You then recommended that we review the 1938 Territorial District Court decision of *Clark v. Taylor*, in support of the proposition that a right-of-way established by public user is limited to the width of actual use. *Clark v. Taylor* was superseded in 1963, however, when AS 19.10.015 was adopted. This statute sets the width of an R.S. 2477 right-of-way that encumbered unreserved public lands after the 1963 at 100 feet. The Brenwick-Craig Road falls into this category. In the unreported August 25, 1999 Memorandum Opinion and Judgment, the Alaska Supreme Court in *Puddicombe v. Fitzgerald* appropriately observed:

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.

In response to your request for a \$1000 reimbursement for the reinstallation of a fee station located within the right-of-way and removed by DOT&PF staff, we must remind you that the station was an encroachment. A.S. 19.25.220. The cost for the removal of an encroachment is required by statute to be born by the owner of the encroachment, not by the State. AS 19.25.250. Your assertion that Ahtna, Inc. had no notice of DOT's intention to remove it is incorrect. As early at July of 1999, DOT had notified Ahtna that the fee station was an unauthorized encroachment and must be removed. (See attached letter July 30, 1999, DOT to Joseph Hart, Ahtna, Inc.)

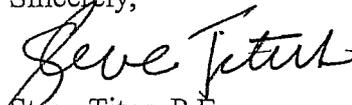
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Ahtna suggests that that Alaska Statehood Act and the Alaska Constitution forbid R.S. 2477 rights of way over Ahtna's land. You have requested that DOT&PF refrain from entering Ahtna lands (Brenwick-Craig road right-of-way) until the R.S. 2477 claim has been resolved.

DOT&PF has a responsibility and an obligation to the people of Alaska to defend rights of public access. We have reviewed your recent and prior correspondence but are not convinced that our conclusion that the ROW described as Copper Center - Valdez 0633 in AS 19.30.400(d) is secured to the public by a valid 100 foot R.S. 2477 right-of-way is incorrect. DOT's maintenance and management of the Brenwick-Craig road is a public service that falls within DOT's responsibilities. DOT will continue management of the road as it would any other road on the Alaska Highway system and in the manner appropriate for a road of its class.

Little of the information in this current response should be new to Ahtna, Inc. The Department has been persistent in its efforts to communicate and work with Ahtna in the interest of the greater good. Prior to this letter, our most recent correspondence relating to the Brenwick-Craig road was the response to the Ahtna letter dated August 9, 2007 issued by the Commissioner's Office on August 22, 2007. We hope that we have clearly provided our position to you, and have communicated our commitment to fulfill our responsibilities to the public. We hope to do so with your cooperation as a local land owner who also takes the public interest seriously.

Sincerely,



Steve Titus, P.E.
Regional Director

cc: Leo von Scheben, P.E., P.L.S., M.B.A., Commissioner
John Bennett, P.L.S., SR/WA, Right-of-way Chief
Dave Bloom, P.E., Preconstruction Engineer

NR DOT & PF - ROW

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