File: 111 .22

United States Department of the Interior

OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

IN REPLY REFER TO

May 21, 1980

MEMORANDUM

To Acting Area Director
Bureau of Indian Affairs
Juneau

From: David S. Case
Attorney/Advisor

Subject: Rights of Way on Allotments --
R.S. 2477 and Other Access Questions

## I. INTRODUCTION

### A. Your Requests

Over the last twelve months you have directed three opinion requests to this office regarding access to and across Native allotments. Your first request (dated May 22, 1979) asked about the effect of Native occupancy on the establishment of section line road easements under R.S. 2477.[1/] Your second request (dated July 6, 1979) was for general guidance about the method for assuring access to landlocked Native allotments you had advertised for sale. You also asked if you have to disclose any access problems in your sale advertisement. With respect to R.S. 2477 easements, you asked whether a section line easement for public access would suffice for private access to an otherwise landlocked

1/ The request was entitled "Effect of Statutory Reservations on Native Allotments" and was answered in a memorandum by Dennis Hopewell of this office, dated September 4, 1979. The section line easement question was specifically excluded from that response pending this reply.

allotment. Your final request (dated April 4, 1980) reduced to its essentials, asked whether the Indian right of way laws and regulations apply when the right of way on or through a certified allotment coincides with a surveyed section line easement arguably granted under R.S. 2477.

B R.S. 2477 in Brief

R.S. 2477 is an 1866 Act "granting" highway rights of way over public lands in the following deceptively simple terms:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. Act of July 26, 1866, c. 262, sec. 8, 14 Stat. 253.

This act was initially codified as Revised Statute (R.S.) 2477 and later as 43 U.S.C. 932. It was repealed by Section 706(a) of the Federal Land Policy and Management Act (FLPMA) of October 21, 1976, PL 94-576, 90 Stat. 2743, 43 U.S.C. 1701, et seq.

Your questions focus on the section line easements appropriated by the Territory and State of Alaska under this federal authorizing legislation. The State statute appropriating the section line easements is codified as Alaska Statute (AS) 19.10.010. However, the the R.S. 2477 grant includes other kinds of rights of way other than those appropriated under this statute. On the other hand, you should note that the R.S. 2477 grant is specifically limited to rights of way over "public lands." The latter point is significant, because it is our opinion that Alaska Native use and occupancy sufficient to qualify for a certificate of allotment is also sufficient to withdraw the land occupied from "public land" status.

Finally, the State's acceptance of the R.S. 2477 grant along section lines has had an on-again, off-again history that must be taken into account when determining whether the easements granted under R.S. 2477 have ever been accepted by the State. Thus, the answers to your questions require some background in the meaning of the term "public lands" and in the history of the application of R.S. 2477 in Alaska. In order to give some direction to that discussion, however, we have provided short answers to each of the questions posed in your opinion requests.

## II. SHORT ANSWERS

### A May 22, 1979 Request

We agree with the conclusion expressed at page 2 of your opinion request about the effect of Native use and occupancy on the establishment of a section line easement. However, we would state your conclusion more definitely: If use and occupancy were initiated after survey of the section line, then the section line easement is superior to the allottee's rights and a right of way across the allotment does not require the consent of the allottee or a grant from the United States. If use and occupancy began any time before the survey, then the easement can only be granted with the consent of the allottee and according to the applicable Indian right of way laws.

### B. July 6, 1979 Request

We know of no principle requiring you to disclose whether or not there is access to advertised parcels; furthermore, otherwise valid section line easements can be used to provide private access, but they are also open to the public. Under some circumstances, however, easements by necessity can be implied across otherwise unencumbered lands to afford private access to landlocked parcels.

### C April 4, 1980 Request

Whether the Indian right of way laws apply to a Native allotment depends on whether the allottee commenced use and occupancy before or after a section line right of way was appropriated by survey.

## III DISCUSSION

### A R.S. 2477

#### 1 History and Purpose of R.S. 2477

U.S. Supreme Court and Ninth Circuit cases have cast some doubt on whether R.S. 2477 applies in Alaska. A narrow reading of the U.S. Supreme Court's opinion in Central Pacific Railway Co. v. Alameda County, 284 U.S. 463 (1932) and the Ninth Circuit's later decision in U.S. v. Dunn, 478 F.2d 433, 445 (9th Cir. 1973) would indicate that R.S. 2477

was only a recognition of pre-existing rights rather than a grant of new rights. Strictly construed, this interpretation could mean that R.S. 2477 was never applicable to Alaska, since it was enacted in 1866, one year prior to the purchase of the Territory.

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The Territorial and State cases, on the other hand, consistently characterize R.S. 2477 as "in effect, a standing offer from the federal government" for the grant of a right of way, Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1226 (Alaska 1975). Under this interpretation, the right of way has been held to come into existence upon the "acceptance" of the standing offer. See Berger v. Ohlson, 9 Alaska 389 (D. Alaska 1938); Clark v. Taylor, 9 Alaska 298 (D. Alaska 1938); United States v. Rogge, 10 Alaska 130 (D. Alaska 1941); State v. Fowler, 1 Alas. L.J. 7 (April 1963); Hammerly v. Denton, 359 P.2d 121 (Alas. 1961). Given the weight of authority in this jurisdiction and the historical reliance placed upon R.S. 2477 in Alaska as a source of rights of way across the public domain, we are unwilling to conclude that the statute has no applicability to Alaska. We suspect that if the question were squarely presented to the Ninth Circuit Court of Appeals it would agree.

It has been held that R.S. 2477 first became applicable in Alaska by the Organic Act of May 17, 1884, 23 Stat. 24, whereby Alaska first became an organized territory. Section 9 of that Act, among other things, provided that the laws of the United States be extended to the Territory of Alaska, U.S. v. Rogge, 10 Alaska, supra at 147. As noted previously, R.S. 2477 is construed as a standing offer from the federal government for the creation of a right of way, Girves v. Kenai Peninsula Borough, 536 P.2d, supra at 1226. Under this construction, it has been held that the offer can be accepted (and the right of way created) either (1) by a positive act of the state or territory clearly manifesting an intent to accept the offer, Hammerly v. Denton, 359 P.2d, supra at 123.[2/]

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2/ Accord: Wilderness Society v. Morton, 479 F.2d 842, (D.C. Cir. 1973), cert. den'd. 411 U.S. 917

or (2) by public use of the right of way for such a period of time and under such conditions as to prove that the offer has been accepted, id.

Statutory acceptance of the grant, formal expression on the part of public officials of an intention to construct a highway or actual public construction of a highway may all constitute acceptance of the R.S. 2477 grant by the "positive act" of the appropriate public authorities. Thus, in Girves, supra, the Alaska Supreme Court held that AS 19.10.010 (establishing a highway easement along all section lines in the State) was sufficient to establish a right of way along the boundary of plaintiff's homestead coinciding with a surveyed section line. In Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), it was held that the State's application to the Bureau of Land Management to construct a "public highway" from the Yukon River to Prudhoe Bay, along with enabling State legislation, was sufficient to establish an acceptance of the federal grant. In addition, the actual construction or public maintenance of a highway may constitute acceptance. See Moulton v. Irish, 218 P.2d 1053 (Montana 1923), construction of highways; Streter v. Stalnaker, 85 NW 47 (Nebraska 1901), public maintenance and improvement of highways.

Public use (sometimes called "public user") may also constitute acceptance of the grant in the absence of any positive official act. Whether any claimed use constitutes acceptance of the grant, however, is a question of fact to be decided by the court. It appears that continued and consistent use of a right of way across the public lands by even one person with an interest in the lands to which the road gives access may be sufficient to establish public user, State v. Fowler, 1 Alas. L.J., supra at 8 (April 1963). See also Hamerly v. Denton, supra at 125. However, the Alaska Supreme Court has held that mere desultory or occasional use of a road or trail does not create a public highway, id.[3]

[3] Of course, it is no longer possible to accept the R.S 2477 grant by any of these methods, because R.S. 2477 was repealed by FLPMA, supra, in 1976.

2. Allotments As "Public Lands"

By its terms, R.S. 2477 is only an offer for a right of way across "public lands." In discussing this term in the context of R.S. 2477, the Alaska Supreme Court has noted:

> The term "public lands" means lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler. Hammerly v. Denton, supra at 123.

Beginning with the 1884 Organic Act, previously discussed, Congress has specifically provided for the protection of lands used or occupied by Alaska Natives. Section 8 of the Organic Act provided in part:

> That the Indians or other persons in [Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.[4/]

Federal decisions have long recognized the statutory protection afforded Alaska Native use and occupancy. See, e.g., U.S. v. Berrigan, 2 Alaska 442 (D. Alas. 1904); U.S. v. Cadzow, 5 Alaska 125 (D. Alas. 1914). Departmental regulations and policy reinforce the statutes. See, e.g., 43 CFR §§ 2091.1(e), 2091.2-1, 2091.5, 2091.6-3; see also Government Appropriation of Rights-of-Way in Alaska, Opinion of the Associate Solicitor, Public Lands (M-36595, March 15, 1960, copy attached).

In analogous circumstances, the U.S. Supreme Court has consistently recognized that railroad land grants are not to be construed in derogation of Native use and occupancy

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4/ Similar provisions appear in the following acts: Act of March 3, 1891, c. 561, 26 Stat. 1095, § 14; Homestead Act of May 14, 1898, c. 299, 30 Stat. 412, § 7; Act of June 6, 1900, c. 786, 31 Stat. 330, § 27.

rights. That is particularly true where those rights have been protected by treaty, Leavenworth L & GR Co. v. United States, 92 U.S. 733 (1875), or specific statutory exceptions, Buttz v. Northern Pacific Railway Co., 119 U.S. 55 (1886). See generally, Bardon v. Northern Pacific Railway Co., 145 U.S. 535, 540-543 (1892). Most significantly, the U.S. Supreme Court has specifically protected rights of individual Native occupancy against competing federal grants even in the absence of any statutory or treaty protections where those rights flow "from a settled government policy." Cramer v. United States, 261 U.S. 219, 229 (1923). Whether from the statutory protection afforded in the 1884 Organic Act and the other legislation specifically noted or from the settled government policy of protecting Alaska Native use and occupancy, we think it is clear that lands used and occupied by individual Alaska Natives are not "public lands" within the meaning of R.S. 2477 and that the R.S. 2477 grant cannot attach during any period of such occupancy.

3. Acts Accepting the R.S. 2477 Grant

(A) Section Line Easements. You have noted that AS 19.10.010 establishes rights of way of varying widths along the section lines in the State. As noted earlier, the Alaska Supreme Court has concluded this statute is a positive official act constituting acceptance of the R.S. 2477 grant, Girves, supra. The Territorial statute accepting the grant was originally enacted on April 6, 1923 (19 SLA 1923), but was subsequently repealed (perhaps inadvertently) on January 18, 1949. Op. Ak. Atty. Gen. No. 7 at 3 (December 18, 1969). The statute was subsequently reenacted in substantially its present form by the 1953 Territorial legislature (Act of March 21, 1953, 35 SLA 1953). Id. Thus, whether a section line easement has attached to Native occupied land must be viewed against the backdrop of the dates of Native occupancy and the dates during which Alaska's acceptance of the grant was in effect. The section line easements could only attach to lands not occupied by Natives between the dates of April 6, 1923, and January 18, 1949, and from March 21, 1953, forward.

Additionally, by the terms of the State statute, the acceptance is dependent on the existence of a "section line." In the Opinion previously noted, the State Attorney General also concluded that for the R.S. 2477 grant to attach under the statute, the "public lands must be surveyed and section lines ascertained," id. at 7. We agree with this conclusion; therefore, you must also determine whether

the lands in question were subject to individual Native use and occupancy on the date the section line was actually surveyed.[5]

(B) Other Official Acts of Acceptance. As noted earlier, other official actions (i.e., construction, repair, dedications, etc.) can constitute official acceptance of the R.S. 2477 grant. Whether such official action has created an R.S. 2477 right of way will have to be determined on a case-by-case basis.

(C) Public User. Rights of way claimed to have been created by public use must also be determined on a case-by-case basis. On the one extreme, an obvious public road established prior to Native use and occupancy would certainly be sufficient to constitute acceptance of the R.S. 2477 grant; see State v. Fowler, 1 Alas. L.J. 7, supra. On the other extreme, it is equally clear that desultory or occasional use of a road or trail by individuals having no interest in the land to which they obtain access is not sufficient to create an R.S. 2477 right of way, Hamerly v. Denton, supra. Whether a given use is sufficient to constitute acceptance of the R.S. 2477 grant, may have to be determined judicially in all but the most obvious cases.

4 Widths

By State statute, section line easements on "public lands" are four rods (66 feet) wide with the section line as a center of the dedicated right of way.[6] Other official

[5] The Attorney General also concluded that the R.S. 2477 grant attaches on the date the "protracted surveys" were published in the Federal Register. We do not agree with this position; as a practical matter, the protraction diagrams are not a reliable means of ascertaining the correct position of the surveyed section line.

[6] A right of way 100 feet wide is granted between sections of land owned by or acquired from the State. Since Native occupied lands could not fall within this category, section line easements on Native allotments will be confined to the 66 foot width.

acts could conceivably establish larger rights of way. Rights of way established by public user appear to be confined to the width actually used, State v. Fowler, supra.

B Other Access Questions

1 Obligations To Provide Access

We do not believe either the allottee or the United States is obligated to provide a warranty of access to the purchaser of an allotment. By statute (AS 34.15.030) Alaska has incorporated the common law covenants for title into any deed which by its terms "conveys and warrants" real property to another. Thus, a deed substantially in the statutory form includes implied warranties that at the time of the conveyance the grantor: (1) is lawfully seized of the estate in fee simple and has the right and power to convey the premises; (2) that the premises are free from encumbrances and (3) that he warrants quiet enjoyment of the premises and to defend the title against all persons claiming the premises.

You have advised that you use a special warranty deed to convey restricted Indian lands. As you know, a special warranty deed limits the grantor's obligation to defend only against claims arising through him. It does not require the grantor to defend against claims arising through other persons, 21 CJS "Covenants" § 49. Except as so limited, we believe the deed form you used includes all of the statutory covenants implied by AS 34.15.030. None of these, however, include a covenant of access to the land granted. See generally, Powell on Real Property, ¶ 904, et seq. (1968 edition). Furthermore, AS 34.15.080 specifically provides: "No covenant is implied in a conveyance of real estate, whether the conveyance contains special covenants or not." We interpret this to mean that unless there is a specific covenant of access, the grantor is not obligated to provide it.

2 Easements By Conveyance Or Covenant

In spite of the protection this doctrine affords both the United States and the allottee, we recommend that as a prudent land manager you advise the allottee to provide whatever access it is within his power to provide incident to the sale of an allotment. That is especially true if, as in one case you described to us, the allottee is selling a

portion of the allotment which would be landlocked by the remaining lands of the allottee or others. In these circumstances, we advise you to insure that appropriate access is guaranteed through the allottee's other lands either by convenant or specific grant of easement. See generally, Powell on Real Property, ¶ 407 and 408. See also, 28 CJS Easements, § 23, et seq. Conversely, if the allottee's other lands will be landlocked by conveyance of a portion of the allotment to a third party, the allottee should insure that he is reserved an easement in the lands granted. See 28 CJS Easements, § 29. Under these circumstances, failure to provide or obtain access at the time of conveyance could result in later litigation to establish an easement by necessity.

3 Easements By Necessity

Easements by necessity are implied easements across otherwise unencumbered tracts where necessary to afford access to an otherwise landlocked parcel. See generally, Powell on Real Property, supra, ¶ 410. This doctrine comes into play only where there is a unity of ownership between the dominant and servient parcels at the time the landlocked (i.e., dominant) parcel was severed from the rest of the estate. The doctrine would apply to both examples discussed above where the grantor conveys a portion of the allotment thereby isolating either the land conveyed or the grantor's retained lands. In these circumstances, the courts have construed the intention of the parties to create an easement of necessity across the servient estate to provide access to the landlocked (i.e., dominant) estate.

As applied in this jurisdiction, the doctrine only requires proof of reasonable (as opposed to absolute) necessity in order to imply an easement. U.S. v. Dunn, 478 F.2d 443, 446 (9th Cir. 1973). Although the easement must be something more than a mere "convenience," it is not necessary to show that it is the only means of access to the property. In any event, the determination of whether the easement is a "reasonable necessity" is a fact question which involves considerations of public policy as well as the intent of the parties and the reasonable utilization to be made of the landlocked parcel. See generally, Powell on Real Property, supra, ¶ 410..

The doctrine has also been applied to Indian lands in this jurisdiction, cf. Superior Oil Co. v. United States, 353 F.2d 34 (9th Cir. 1965). The oil company in this case

sought to obtain an easement to move heavy oil drilling equipment across Indian reservation lands in order to drill on lands owned by a mission society and leased to the oil company. The mission society had previously been granted the land by the United States under a statute permitting such grants to religious organizations engaged in mission or school work on Indian reservations. The court concluded that although the mission society had an easement by necessity for mission purposes, the scope of that easement could not be expanded to accommodate the purposes of the oil company. We know of no principle which would preclude an easement of necessity from attaching to lands merely because they are Indian trust or restricted lands where the easement of necessity doctrine is otherwise applicable. See also, U.S. v. Clarke, 529 F.2d 984 (9th Cir. 1976), aff'd U.S , (No. 78-1693, March 18, 1980).

## IV. SUMMARY

This, of necessity, has been a rather wide-ranging opinion dealing with the several general concerns you raised regarding easements across Indian allotments. We will summarize some of our conclusions below for ease of reference

### A. R.S. 2477 Easements

R.S. 2477 easements can be created either by the positive acts of authorized authorities or public user of a right of way across the "public lands." Native used and occupied lands, however, are not "public lands." Therefore, a right of way under R.S. 2477 can only be obtained if, at the time the R.S. 2477 grant is accepted, the lands were not subject to the individual use and occupancy rights of an Alaska Native who has applied for an allotment.

### B. Section Line Easements

Whether a section line easement supersedes Native use and occupancy depends on whether the Native use and occupancy preceded either the statutory acceptance or actual survey of the section line easement. If Native use and occupancy began prior to April 6, 1923, or between January 18, 1949, and March 21, 1953, then the easement could not be imposed on those lands by subsequent survey of a section line. If unoccupied lands were surveyed either between April 6, 1923,

and January 18, 1949, or after March 21, 1953, then the section line easement supersedes Native occupancy rights

C. Guarantees of Access

Although there is no legal requirement to guarantee access to otherwise landlocked allotments, you would be well advised to counsel the allottees to provide access if it is within their power to do so. It is especially important to provide access where there is an initial unity of title in the allottee. Under these circumstances an easement of necessity can be imposed to benefit a landlocked parcel. Providing access at the time of the grant will avoid later confusion and possible litigation.

D. Public or Private Access

You should also be aware that any R.S. 2477 right of access (whether by section line easement or otherwise) predating Native use and occupancy is a right of public access. While it may also permit private individuals to have access to otherwise landlocked parcels, it also permits the public at large to use the right of way. Of course, that does not permit the public to trespass on the allottee's or anybody else's private property.

David S. Case
Attorney/Advisor

Enclosure

cc: Scott Keep, Div. of Indian Affairs, Washington, D.C.
Area Realty Officer, Bureau of Indian Affairs, Juneau

# MUNICIPALITY OF ANCHORAGE

## MUNICIPAL ATTORNEY'S OFFICE

## MEMORANDUM



DATE: November 9, 1995

TO: Tom Knox, Municipal Survey/Property Acquisition
Public Works Department

THRU: Mary K. Hughes, Municipal Attorney

THRU: Ann Waller Resch, Deputy Municipal Attorney

FROM: G. Peter Hallgrimson, Assistant Municipal Attorney

SUBJECT: Section Line Easements

**ISSUE:**

Was the section line easement extinguished when the property was transferred to Eklutna, Inc. pursuant to 43 U.S.C. § 1613(a) of the Alaska Native Claims Settlement Act?

**SHORT ANSWER:**

Yes, since the patent failed to reference or specifically identify the section line easement, the section line easement was extinguished.

**DISCUSSION:**

In 1866, Congress enacted 14 Stat. 253, 43 U.S.C. 932, which was a very broad grant of rights-of-way across federal lands. This grant, or "dedication," is only valid when accepted by some positive act of a local entity or by continuous public use for a period of years.

Your research has concluded that, pursuant to a Proclamation by Theodore Roosevelt in 1908, Section 4, T15N, R1W was placed in a reserved status beginning in 1909, and designated as part of the Chugach National Forest lands.

In 1917, the township was surveyed and monumented. Included in the survey was Section 4, T15N, R1W.

In 1923, the Territorial Legislature enacted Chapter 19, SLA 1923, Section 1, which "dedicated" a tract of land four rods wide (66 feet) along each section line in the state. The Alaska Supreme Court has previously ruled that this action on the part of the Legislature was in fact an acceptance of the federal offer to dedicate. *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975).

In 1949, the Alaska laws were recompiled, but the pertinent dedication section was excluded, causing it to be repealed on January 18, 1949. CH 1 SLA 1949 provides in part that:

> All acts or parts of acts heretofore enacted by the Alaska Legislature which have not been incorporated in said compilation because of previously enacted general repeal clauses or by virtue of repeals by implication or otherwise are hereby repealed.

In 1951, the territorial legislature enacted Chapter 123 SLA 1951, which provided as follows:

> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired by the Territory, is hereby dedicated for use as public highways, a section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.

This was a reenactment of the 1923 statute; however, in its amended form, it applied only to lands "owned by" or "acquired from" the territory, and the width of the right-of-way was increased to 100 feet.

In 1953, the territorial legislature enacted Chapter 35 SLA 1953, which provided as follows:

> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract 4 rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, the section line being the center of said right-of-way. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.

Based on a 1969 Opinion of the Attorney General, No. 7, the foregoing legislative acts clearly establish a section line right-of-way on all land owned by or acquired from the State or Territory while the legislation was in force. Further, it stated that the 1923 and 1953 acts also express the legislature's intent to accept the standing federal rights-of-way offer contained in the Act of July 26, 1866.

Since dedication of section line rights-of-way across federal lands was not re-enacted until 1953, many people have assumed that any federal land entered or patented between January 18, 1949 and March 21, 1953 is not subject to the section line easement. This is erroneous - the action of entering or patenting the land is not the controlling factor in determining whether a section line easement exists, but rather it is the action of establishing the section line itself. Once the section line is officially surveyed and platted during a period of time when the dedication statute was in effect, the easement automatically comes into existence. The repeal of the dedication statute in 1949 did not destroy or vacate easements which were then in existence. *See Brice v. State of Alaska*, 669 P.2d 1311 (Alaska 1983).

On April 22, 1953, Section 9 was identified as a Power Site Classification and was restored to an "unreserved" status, eligible for public entry according to the homestead and homesite regulations.

In 1952/53, a dependent resurvey was conducted by BLM on Section 4 which subdivided the W1/2SW1/4 and SE1/4SW1/4 into 2.5 acre tracts. The plat was accepted by BLM in 1955 creating Government Lot 9.

On December 7, 1977, a patent was issued to Eklutna, Inc. for Lot 9 pursuant to 43 U.S.C. 1613(a) of the Alaska Native Claims Settlement Act. Since that patent was issued to Eklutna, Inc., the property has been sold to private parties several times.

43 U.S.C. § 1613(g) of the Alaska Native Claims Settlement Act provides in part:

> All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement . . . has been issued for the surface minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Accordingly, Native-selected lands subject to rights-of-way were included in conveyances under ANCSA, but the conveyances were subject to the valid existing rights-of-way.

In this case, the section line easement was established on April 22, 1953 when the property was restored to an unreserved status and eligible for public entry. The property had already been surveyed and monumented in 1917. However, the section line easement was extinguished when the property was transferred to Eklutna, Inc. under 11 U.S.C. § 1613(a) of ANCSA since the patent failed to contain any reference or language to the section line easement. In a decision dated June 26, 1981 by the Department of the Interior, 88 Interior Dec. 629, the Board stated in a footnote that:

> Since rights-of-way granted by the United States are, if valid, protected under §14(g) of ANCSA [43 U.S.C. § 1613(g)] as valid existing rights, they must be specifically identified in both the BLM's decision to convey lands and the subsequent conveyance document.

A copy of this decision is attached hereto.

Our review of the conveyance documents at your office failed to uncover any reference to the section line easement. Thus it was extinguished upon the transfer to Ekutna, Inc.

**CONCLUSION:**

Since the patent failed to reference or specifically identify the section line easement, it was extinguished when the property was transferred to Eklutna, Inc. pursuant to 11 U.S.C. § 1613(a) of the Alaska Native Claims Settlement Act.

Attachment

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88 Interior Dec. 629 (D.O.I.), 5 ANCAB 307 (D.O.I.), 1981 WL 143200 (D.O.I.)

Department of the Interior (D.O.I.)

# STATE OF ALASKA, DEPT. OF TRANSPORTATION AND PUBLIC FACILITIES [a1]

Decided June 26, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14866-A, F-14866-A2 and AA-9368.

**Affirmed in part; modified in part.**

**1. Rights-of-way: Revised Statutes Sec. 2477--Rights-of-way: Nature of Interest Granted**
A right-of-way granted by Revised Statutes Sec. 2477 is a less-than-fee interest in the nature of an easement. Following the acceptance of a Revised Statutes Sec. 2477 grant of right-of-way, the Federal Government retains its fee interest in the land, subject to the right-of-way, and may dispose of it pursuant to law.

**2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests--Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Public Easements**
The existence of a Revised Statutes Sec. 2477 right-of-way precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. Such reservation or conveyance does not affect the previously existing right-of-way.

**3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests--Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Public Easements**
The continued existence of a Revised Statutes Sec. 2477 right-of-way following conveyance of the underlying fee interest is entirely independent of any reservation, pursuant to § 17(b), of a public easement.

**4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance--Alaska Native Claims Settlement Act: Administrative Procedure: Conveyances--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests**
Rights-of-way granted by Revised Statutes Sec. 2477 shall be identified in the decision to issue conveyance and in the conveyance document in the same manner as other third-party interests which the Bureau of Land Management need not adjudicate.

***1** APPEARANCES: Susan Urig, Esq., on behalf of the State of Alaska, Dept. of Transportation and Public Facilities; M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

## *OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD*

### *Summary of Appeal*

This appeal involves the question of whether the Bureau of Land Management erred in deciding to convey land pursuant to the Alaska *630 Native Claims Settlement Act (ANCSA) without expressly declaring the conveyance to be subject to an alleged R.S. 2477 right-of-way located thereon. The issues raised are whether the land subject to an R.S. 2477 right-of-way can be conveyed, and whether the Bureau of Land Management may reserve, pursuant to § 17(b) of ANCSA, a public easement along the entire length of the right-of-way.

The Board holds that the existence of an alleged R.S. 2477 right-of-way neither precludes conveyance of the subject land nor the reservation of a coincident public easement, but that where the Bureau of Land Management is informed of the existence of the right-of-way, the decision to issue conveyance and the subsequent conveyance document must expressly declare that the conveyance and the public easement are each subject to the right-of-way.

*Jurisdiction*

***2** The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

*Procedural Background*

In 1959 and 1960, the State of Alaska constructed, on public lands, a road from the south end of the Hooper Bay Airport easterly to the village of Hooper Bay. In so doing, the State purported to accept the grant, pursuant to Revised Statutes Sec. 2477, 14 Stat. 253 (1866) (repealed 1976) (R.S. 2477), of a 100# right-of-way (r/w) along the entire length of the road.

On Sept. 30, 1980, the Bureau of Land Management (BLM) issued its decision numbered F-14866-A, F-14866-A2, and AA-9368. The decision approved for conveyance to Sea Lion Corp. (Sea Lion) lands surrounding the village of Hooper Bay, including the lands covered by the Hooper Bay Airport Road.

On Oct. 30, 1980, the State of Alaska, Dept. of Transportation and Public Facilities (hereinafter State), appealed the above-designated decision. The State alleged that R.S. 2477, prior to its repeal in Oct. 1976, was a standing offer of a free r/w, which r/w was created upon acceptance of the offer by the State. The State argued that acceptance was complete when the road was finished (in 1960), if not previously.

The State declared that all subsequent entries are subject to the State's r/w, thus BLM may reserve a public easement pursuant to § 17(b)(3) of ANCSA only subject to the State's 100# r/w. In fact, the State argued, there is no r/w interest remaining for the BLM to reserve to itself. By the reservation of an easement to itself, BLM in effect seeks to repeal the State's r/w. The State asserted that the road itself is a preexisting (pre-ANCSA) 100# ***631** r/w, and that the BLM's failure to object 20 years ago to the State's acceptance of a 100# r/w should now estop BLM from seeking to limit that r/w by almost half its present width.

The BLM filed its Answer on Jan. 9, 1981. BLM asserted that the State's alleged r/w "does not preclude the reservation of a § 17(b) casement for the road and the conveyance of the underlying fee to Sea Lion Corp. Neither the § 17(b) easement nor the conveyance to the village corporation will affect the State's interest, if any, under [R.S. 2477]."

The BLM pointed out that the State devoted a significant portion of its brief to arguments that it has a valid interest pursuant to R.S. 2477. BLM asserted that the Department is not the proper forum for such arguments, and that questions involving the validity of rights-of-way under R.S. 2477 should be resolved in State court. The BLM further asserted that, pursuant to the Nov. 20, 1979, amendment to Secretary's Order No. 3029, 43 FR 55287 (1978) (S.O. 3029), the BLM has neither the authority nor the obligation to adjudicate R.S. 2477 r/w interests, thus the existence of the State's claimed r/w cannot be a factor in deciding whether a § 17(b) easement should be reserved.

***3** The BLM disagreed with the State's apparent assumption that the State's claimed r/w would somehow be diminished by the proposed conveyance of lands and reservation of a § 17(b) easement for the airport road. The BLM declared that, as the appealed decision expressly states, all ANCSA conveyances are subject, pursuant to § 14(g) of ANCSA, to valid existing rights. The BLM further asserted that the appealed decision, in compliance with the Nov. 20, 1979, amendment to S.O. 3029, did not and could not recognize the State's claimed r/w.

The BLM argued further that an R.S. 2477 r/w is a less-than-fee interest in the nature of an easement. BLM declared that the Federal Government may dispose of its remaining fee interest in spite of an R.S. 2477 claim and regardless of the absence of a reservation or exception in the patent for the alleged r/w, and that conveyance is not inconsistent with an R.S. 2477 claim.

BLM also asserted that reservation of a § 17(b) easement is not inconsistent with a claimed R.S. 2477 r/w, and that the State's argument is based upon a mistaken view of the nature of an R.S. 2477 r/w interest.

The State, on Feb. 9, 1981, replied that the true effect of the BLM's reservation of a 60# wide § 17(b) easement is to dedicate 40 feet of the State's r/w to a third party while appropriating the remainder of the State's property interest for itself. The State

declared that the only dispute before the Board concerns the effects rather than the validity of the State's r/w, and that this **632* Board is the proper forum before which the State may seek protection of its r/w interest.

The State declared that its acceptance of the R.S. 2477 grant severed the resulting r/w from the public domain, and thus there is nothing for BLM to adjudicate. The State argued that if the BLM has a duty to make certain that public rights-of-way are preserved, then § 17(b) of ANCSA requires only that BLM recognize the State's valid existing r/w at Hooper Bay, and that such recognition is merely an acknowledgment, and not an adjudication, of the r/w. The State also argued that should the BLM believe further action is necessary to fulfill its § 17(b) obligations, the BLM could reserve a 100# public r/w and expressly state that such r/w is subject to the State's R.S. 2477 r/w.

The State asserted that the BLM's failure to reserve to itself the full 100# width of the State's r/w causes the State to lose its r/w interest in the portion not reserved, and that the State's ability to exercise its property rights within the 60# reserved to the United States is greatly diminished. For an example of the latter concern, the State declared that if the BLM's reservation were recognized, the State would no longer be authorized to independently, without Federal approval, locate and relocate utilities within its r/w. Further, the Federal Government would become responsible along with the State for maintenance of the Hooper Bay Airport Road, resulting in considerable management problems.

***4* The State argued that acceptance of the R.S. 2477 grant severed the *land* underlying the r/w from the public domain, and that BLM cannot now reserve an interest in property which it relinquished to the State.

Finally, the State asserted that there is no authority for the proposition that the State's r/w can exist concurrently with the public easement reserved to the United States. The State distinguished *Berger* v. *Ohlson,* 9 Alaska 389 (D.C. Alaska 1938), on the basis that the court ruled therein with regard to a specific intersection, and not a lengthwise concurrence, of two rights-of-way.

*Decision*

The State has brought this appeal asking:

(1) cancellation of the proposed reservation of a public easement coincident with a portion of the State's R.S. 2477 r/w for the Hooper Bay Airport Road;

(2) alternatively to item 1, reservation of a 100# wide public easement entirely coincident with, and expressly subject to, the State's R.S. 2477 r/w;

(3) exclusion of the State's 100# R.S. 2477 r/w from conveyance to Sea Lion Corporation;

The State also, without explanation, asserts that BLM's reservation of only a 60# wide § 17(b) public easement causes the State to lose that 40# wide portion of its R.S. 2477 r/w not overlapped by the § 17(b) easement.

The BLM has responded that the State's alleged R.S. 2477 r/w precludes **633* neither reservation of a § 17(b) public easement for the Hooper Bay Airport Road nor conveyance of the underlying fee to Sea Lion Corp. BLM asserted that it has neither the authority nor the obligation to adjudicate the validity of the asserted r/w, and that the existence of the alleged r/w cannot be a factor in deciding whether a § 17(b) easement should be reserved. The BLM also asserted without explanation, except by allusion to the Nov. 20, 1979, amendment to S.O. 3029, that it cannot recognize the r/w claimed by the State.

Sec. 14(g) of ANCSA provides in part:

> All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Departmental regulations found in 43 CFR 2650.3-1(a) provide further that:

> Pursuant to sections 14(g) and 22(b) of [ANCSA], all conveyances issued under the act shall exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as * * * rights-of-way * * *.

***5** Accordingly, ?? Native-selected lands subject to rights-of-way are to be included in conveyances pursuant to ANCSA, but the conveyances are subject to the rights-of-way. Further, the Board has previously ruled that both the decision to convey lands and the subsequent conveyance document must specifically identify interests in the lands being conveyed which are protected under ANCSA as valid existing rights. [1] Since rights-of-way granted by the United States are, if valid, protected under § 14(g) of ANCSA as valid existing rights, they must be specifically identified in both the BLM's decision to convey lands and the subsequent conveyance document.

Prior to its repeal in 1976, R.S. 2477 provided simply: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The State asserts that its acceptance of the R.S. 2477 r/w grant severed from the public domain the land underlying the r/w. Such assertion is incorrect.

"A right-of-way is most typically defined as the right of passage over another person's land." *Wilderness Society* v. *Morton,* 479 F. 2d 842, 853 (D.C. Cir. 1973). It would be unusual to apply the term to absolute ownership of the fee simple of lands to be used for a railway or **634* any other kind of a way. *Williams* v. *Western Union Ry. Co.,* 5 N.W. 482, 484 (Wis. 1880); BLACK'S LAW DICTIONARY 1489 (4th ed. rev. 1968). Furthermore, "grants by the sovereign for which no compensation is made will be strictly construed against the grantee and pass nothing but what is conveyed in clear and explicit language." *Oregon Short Line R.R. Co.* v. *Murray City,* 277 P. 2d 798, 802 (Utah 1954). "[A] ny ambiguity in a grant is to be resolved favorably to a sovereign grantor-- 'nothing passes but what is conveyed in clear and explicit language' * * * ." *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, 272, 62 S.Ct. 529, 533, 86 L.Ed. 836 (1942).
[1] Accordingly, a r/w granted by R.S. 2477 is a less-than-fee interest in the nature of an easement. *Berger* v. *Ohlson,* supra at 395; *Oregon Short Line R.R. Co.* v. *Murray City, supra* at 802. Following the acceptance of an R.S. 2477 grant of r/w, the Federal Government retains its fee interest in the land, subject to the r/w, and may dispose of it pursuant to law. *Alfred E. Koenig,* A-30139 (Nov. 25, 1964); *Herb Penrose,* A-29507 (July 26, 1963).

The Federal Government's retention and control of the fee interest in the land affected by an R.S. 2477 r/w, which control includes the Government's authority to issue additional rights-of-way affecting the same land, is manifest in Departmental regulations in 43 CFR 2822. 2-2, which state:

> A right-of-way granted pursuant to R.S. 2477 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. Grants under R.S. 2477 are made subject to the provisions of § 2801.1-5(b), (c), (d), (e), (i), and (k) of this chapter.

***6** The decision of the District Court in *Berger* v. *Ohlson, supra,* is not contrary. The Court, in discussing an earlier Colorado case, specified that the grant of a r/w under R.S. 2477 "severs the land" from the public domain, and that following appropriation and proper designation, the "way" ceased to be a portion of the public domain. 9 Alaska at 395. But the Court immediately went on to find that the right granted under R.S. 2477 was in the nature of an easement which could exist concurrently with a r/w subsequently granted to the Alaska Railroad. 9 Alaska at 395. The Court manifestly was not declaring that the grantee of

an R.S. 2477 r/w received fee simple title to the affected ground. The specification that such a grant severs the "land" seems to be an unfortunate choice of words rendered in a context in which the emphasis was on the severance, *635 and the point being made was that an R.S. 2477 r/w is not a right obtained merely by prescription.

[2, 3] Thus, the existence of an R.S. 2477 r/w for the Hooper Bay Airport Road precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. In either case, the owner of the R.S. 2477 r/w retains the r/w interest, and the reservation and/or conveyance is subject to that r/w interest. [2] Such reservation and/or conveyance does not affect the previously existing r/w. [3] Accordingly, the continued existence of the R.S. 2477 r/w following conveyance of the underlying fee interest is entirely independent of any reservation, pursuant to § 17(b), of a public easement coincident with that r/w interest.

Overlapping § 17(b) public easement and R.S. 2477 r/w interests may cause some administrative concern regarding future maintenance and other responsibility within the affected area. Such concerns, however, do not preclude the existence of both interests concurrently.

[4] The BLM has asserted that it has neither the authority nor the obligation to adjudicate the validity of the State's asserted r/w. In deed, the Secretary's Nov. 20, 1979, amendment to S.O. 3029 declared that BLM should not adjudicate rights-of-way claimed under R.S. 2477. Nonetheless, said amendment does not preclude identification of claimed R.S. 2477 rights-of-way. Such rights-of-way shall be identified in the decision to issue conveyance and the conveyance document in the same manner as other third-party interests which the BLM need not adjudicate. Such identification does not recognize or declare the validity of the alleged interest.

*Order*

The above-designated decision of the Bureau of Land Management is hereby amended so as to conform to this decision of the Board. Publication of an amended decision to issue conveyance is not required. The conveyance document issued pursuant to the above-designated decision of the Bureau of Land Management shall expressly state that the conveyance of land and the reservation of a public easement for the Hooper Bay Airport Road are each subject to the State's R.S. 2477 right-of-way, if valid, for the Hooper Bay Airport Road.

**7 This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge
ABIGAIL F. DUNNING
Administrative Judge
JOSEPH A. BALDWIN
Administrative Judge

Footnotes

a1 Not in chronological order.

FN1. *Appeals of the State of Alaska/Seldovia Native Association, Inc.,* 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15]. Secretarial policy expressed in S.O. 3029 and not changed by the Nov. 20, 1979 amendment thereto essentially affirmed the Board's ruling on this matter.

2 43 U.S.C. § 1613(g); *State* v. *Crawford,* 441 P. 2d 586, 590, (Ariz. 1968).

3 The rights acquired by the public pursuant to R.S. 2477 are not affected by the passing into private ownership of land over which a public highway has been thus established. *Lovelace* v. *Hightower,* 168 P. 2d 864 (N.M. 1946).

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