United States Department of the Interior
OFFICE OF THE SOLICITOR
ALASKA REGION

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Anchorage, Alaska 99513

IN REPLY REFER TO:

BIA.AK.0062

June 25, 1984

MEMORANDUM

TO Area Director, Juneau Area Office, BIA

FROM: Attorney, Office of the Regional Solicitor
Alaska Region

SUBJECT: Additional Uses Of A State Right-of-Way Where It Passes Through An Approved Native Allotment

This is in response to your March 12, 1984 request for an opinion regarding the uses allowable in the State of Alaska's 300-foot Parks Highway right-of-way where it passes through the approved Native Allotment of Evelyn Foster. You have specifically inquired whether departmental approval, in the form of a BIA right-of-way grant, is necessary before an access road can be constructed and maintained in the right-of-way.

The short answer to the question is that departmental approval is necessary before additional uses can be made of a right-of-way. Construction and maintenance of the access road in question without BIA approval is trespass.

On October 3, 1961, the State of Alaska was granted a right-of-way for the construction and maintenance of a highway in what has become the Parks Highway. The right-of-way grant included the portion of the highway from Talkeetna to Cantwell. The authority for the grant was the Act of August 27, 1958, 23 U.S.C. § 317.

By application dated June 17, 1971, Evelyn C. Foster applied for a Native Allotment. The application notes that Mrs. Foster commenced use and occupancy in 1964. By a decision dated December 9, 1979, BLM approved the Native Allotment application. On August 18, 1980, the Division of Cadastral Survey was requested to survey the allotment.

Rec'd 7/6/84

Sometime after the portion of the Parks Highway passing through the allotment was built, Mrs. Foster allowed Charles Landesman to cross her pending allotment to provide access to his land. The Landesmans are successors in interest to a homesite patent of Willard J. Shannon, U.S. Survey No. 1930. At some point the Landesmans subdivided the land and sold lots, thereby increasing the use of the access road through the pending allotment. The additional use caused Mrs. Foster to close the access road. Apparently a second access road was designed and built pursuant to a State of Alaska Department of Transportation permit. The current access road, to the extent it conflicts with the Native Allotment, passes through the Parks Highway right-of-way.

The case file also contains a right-of-way permit dated July 19, 1982, wherein the State of Alaska, Department of Natural Resources, Division of Lands granted a right-of-way to the South-central District, Division of Land and Water Management. This right-of-way also apparently passes through the Native Allotment. Although it is less than clear, I am going to assume that the right-of-way permit granted in 1982 encompasses the same road built in 1979 and that it is the road that accesses the Landesman property.

My conclusion that a departmental right-of-way is required for construction and maintenance of the access road is based primarily upon a recently decided Ninth Circuit Court of Appeals decision entitled United States of America v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411 (9th Cir. 1984). In Gates of the Mountains, the court found that the scope of an RS 2477 right-of-way through government land was to be determined by Federal, not State law. The court went on to find that Congress had adopted a federal rule that power transmission lines is not within the scope of an RS 2477 right-of-way. United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943), which is often cited for the proposition that State law controls, is distinguished by the court because the statute under which the right-of-way was granted in that case, 25 U.S.C. § 311, specifically incorporates State law.

While the Parks Highway is a Federal-aid highway rather than an RS 2477 right-of-way, the language of the two statutes is sufficiently similar to justify similar treatment. A more fundamental distinction is that in Gates of the Mountains Congress has specifically found that power transmission is not within the scope of an RS 2477. Congress has not made a pronouncement regarding the addition of access roads to rights-of-way within either Federal Aid Highway Act rights-of-way or RS 2477 rights-of

way. The access road is not an incidental use of the right-of-way which was for a highway from Talkeetna to Cantwell. An access road for the convenience of another landowner is less of a highway use than the powerlines in Gates of the Mountains.

Departmental regulations in effect at the time of the right-of-way grant waived the requirement of an application for a right-of-way for all facilities usual to a highway along a highway right-of-way granted pursuant to the Federal Aid Highway Act. If my conclusion that the access road was not "usual to a highway" was wrong, then the regulation would have arguably allowed the construction of the access route with the State's permission because a Federal law did not exist specifically requiring a permit for the additional access road. However, a contrary conclusion is required because the Interior Board of Land Appeals determined that a regulation change subsequent to the right-of-way grant properly limited that highway grant to require anyone seeking a right-of-way within the State's right-of-way to apply for authorization with the Department. Penasco Valley Telephone Cooperative, Inc., 55 IBLA 360 (1981). Therefore, because departmental regulations in effect at the time the access road was built required departmental approval, the access road is in trespass. The Bureau of Land Management regulations in effect at the time the access road was built was 43 CFR 2821.6 which remained unchanged until July 1, 1980 when CFR Part 2800 was completely revised. The current prohibition against a right-of-way holder such as the State from granting additional rights-of-way is found at 43 CFR 2801.1-1.

The operation of the 1979 Memorandum of Understanding between BLM and BIA regarding division of responsibilities does not change the result in this particular instance. Pursuant to the MOU upon BLM approval of the allotment application, BIA assumed responsibility for the granting of rights-of-way on the Native Allotment. The authority of BIA to approve a right-of-way grant is contained at 25 CFR 169.3. That regulation has been in effect since before the construction of the access road through the right-of-way. Therefore, under the rationale of Penasco Valley Telephone Cooperative, Inc., supra, a right-of-way applicant is required to obtain BIA approval prior to using the land of the allottee.

The State of Alaska may well take a different view regarding the necessity of Department of Interior approval prior to an additional use of its right-of-way. In Fisher v. Golden Valley Electric Association, Inc., 658 P.2d 127 (1983), the Alaska Supreme Court found that powerline construction was an incidental and subordinate use of a highway easement and that acquisition of

an additional right-of-way from the fee owner was not necessary. Simply because the State of Alaska has adopted a more liberal interpretation of what constitutes a highway use does not relieve a subsequent applicant for an additional use of a right-of-way from compliance with Federal law. Any litigation resulting from trespass regarding the right to possession would, of course, be in Federal District Court. 28 U.S.C. § 1360(b).

In light of my conclusion that departmental approval was necessary prior to the construction and maintenance of the access road, Mrs. Foster is entitled to recover trespass damages. In light of her expressed interest in not resorting to court action, she might condition her consent pursuant to 25 CFR 169.3(b) upon payment of her out-of-pocket expenses regarding the trespasses.

P. Christopher Bockmon

cc: Carlene Faithful, Realty Specialist,
Anchorage Agency, BIA (w/original case file)