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INTRODUCTION

purpose of this paper is to present, from the perspective of U.S. Fish and Wildlife Service, a discussion of R.S. 2477

Access to Federal lands is an important matter in Alaska where the Federal government is by far the largest single landholder. The extent to which access can be obtained and the conditions under which it can be used are often vitally important to those seeking to develop and utilize Alaska's resources. The questions are equally important to federal land managers who may have to follow different requirements and responsibilities in administering the lands in their charge.

Questions relating to access are some of the most difficult issues facing Federal land managers. In dealing with them, we must carefully consider the laws and regulations governing our activities, agency missions, and the needs of people. These matters must be approached with an open mind, and decisions made after full consideration of all factors. We intend to follow approach and will work with all interests to reach fair and reasonable decisions

In order to fully understand the application and implications of 2477 in Alaska, it is essential that the reader have some appreciation of the extent of the refuge system in Alaska and the various statutes which govern the management of refuge lands.

There are 444 refuges in a national system totalling about 91 million acres in the United States. They are in every state except West Virginia. Sixteen of the refuges, totalling 77 million acres, are in Alaska. Refuges cover about twenty-one percent of the State and represent a third of the total Federal land holdings in Alaska. Near the Canadian border, the boundaries of two refuges run from the south edge of the Yukon Flats to the Arctic Ocean. On the Bering Sea, the refuges reach from Cape Constantine in Bristol Bay to Cape Stephens in Norton Sound. Refuges stretch almost unbroken from the base of the Alaska Peninsula to Attu Island at the end of the Aleutian Chain. Eight more, totalling about 17 million acres are scattered across Alaska. Within the boundaries of these refuges are about 24 million acres of selections, private and State lands

There are many laws that govern to some degree our management of the refuges. They include the Clean Water Act, the Refuge Recreation Act, and the Migratory Bird Treaty Act. Most directly, however, refuge management, and access to refuges, is governed by the National Wildlife Refuge System Administration Act of 1966, as amended (16 U.S.C. 668dd), and the Alaska National Interest Lands Conservation Act of 1980. Both the Refuge Administration Act and the Alaska Lands Act require that non-refuge uses, such as rights of way for roads, pipelines, and power lines, be permitted only if they are compatible with the purposes of the refuge. To be

compatible with the purposes of the refuge, an activity cannot significantly interfere with or detract from the purposes for which the refuge was established. It is possible that an activity may adversely affect refuge values to a limited extent and still be compatible. A proposed activity that is not initially compatible can be made to be compatible by mitigating measures, such as by adding other habitat to the refuge system to replace that which the project will impact.

R.S. 2477

R.S. 2477 is the common name for Section eight of a law dated July 26, 1866. It was codified as 43 U.S.C. 932. It was repealed on October 21, 1976, by the Federal Land Policy and Management Act, and no new R.S. 2477's are possible. Section eight reads: "A right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." R.S. 2477 was an actual grant of the rights of way, and it was only for public highways.

This is a difficult subject compounded by differences of opinion as to what actions are necessary to constitute acceptance and what is the scope of the grant. The Department of the Interior position on the issue is set forth in the policy memorandum signed by the Secretary on December 7, 1988. The policy clearly recognizes that R.S. 2477 grants do exist. It reiterates the

requirements of the Act that the grant must have been accepted during a time when the lands were public lands that were not reserved for public use. The highway so accepted must be considered to be a public highway, freely open for all to use. Restrictions may be imposed, such as types of vehicles, or payment of a toll, but they must generally apply to all users. Under the policy, space is included in the grant for highway related facilities such as drainage ditches, slopes, and turnouts. Other facilities such as telephone lines, electric lines, and so forth, do not facilitate use of the highway and are not part of grant. A separate right of way under other authorities may be obtained for those utilities. The Departmental interpretation clearly restricts the grants to highways

However, we do not restrict the R.S. 2477 rights of way to "highways" only in the modern sense. "Highways" in earlier days were constructed for foot travel, dog sleds, pack trains, and so forth. In Alaska as well as in many of the other Western states, the highways may be maintained and open all year, or they may be very seasonal - winter "highways" and summer "highways." Iditarod Trail and the Taylor Highway are some good examples of these "highways."

Although the Act itself granted the rights of way, they must have been validated by an act of acceptance. The Department's position is that the acceptance must be by actual construction. The

construction may be considered to include planning, survey, and design, if that was followed within a reasonable time by construction. Since R.S. 2477 was repealed in 1976, on the ground construction would have had to follow within a reasonable time after that date. Because actual construction is required for acceptance of an R.S. 2477 right of way, the Department does not accept the concept of R.S. 2477 "section line rights of way."

The grant was for construction of highways on public lands that were not reserved. Most of our refuges in Alaska were reserved on December 2, 1980, but some go back as far as 1909. Much of our refuge lands were reserved for other purposes at various times before the refuges were established. Six of the larger Aleutian islands had been included in the Refuge system in 1913, were later removed, and then again included in 1980. A very large Yukon Delta Reservation was reserved from February 27, 1909, when it was withdrawn by Executive Order 1041, until February 27, 1922, when it was revoked by Executive Order 3642. Beginning in December of 1968, most of Alaska was withdrawn for the purpose of consideration of the Native land claims, and since December of 1971 for implementation of the Alaska Native Claims Settlement Act, including Section 17(d)(2) of that Act. In our view, R.S. 2477 rights of way could not have been established during any of those times.

A highway that has been constructed during an appropriate period and for which the grant is so validated, is only a right of way. It is not a transfer of fee title. Federal Courts have been clear that management of the R.S. 2477 right of way within a Conservation System Unit must be within the regulations affecting that unit. Types of use and time of year of use may be regulated by federal permit. We may impose reasonable restrictions on maintenance methods. Upgrading may be only for the uses for which the grant was accepted; in other words, a "highway" for a pack train trail cannot, under the authority of R.S. 2477, be upgraded to a standard gauge railroad track. Of course, we could authorize additional uses, or widening or upgrading, under our basic authority for granting rights of way, 16 U.S.C. 668dd, and the regulations in 50 CFR 29.21

The Fish and Wildlife Service will develop internal procedures similar to those of the National Park Service for the filing of a notice that a grant under the authority of RS 2477 has been accepted and construction has occurred. The notice must contain a legal description sufficient for locating the highway on the ground, accompanying maps, as built, etc., and evidence that the acceptance and construction of the grant predate the withdrawal of the lands

The Fish and Wildlife Service plans to display the location of these public highways on its land status maps of the refuge system

in Alaska. We are currently involved in the collection of land status into a Geographic Information System to be used as base maps for Alaska Refuges. The maps will define selected, private and refuge lands, and have attributes to identify ownership. Upon completion of this feature, we will add hydrography for meanderable waterbodies, those lakes 50 acres or greater and rivers equal to or greater than 3 chains. Upon completion of this feature we will be ready to digitize the location of rights of issued by the Service, and other rights, such as 2477 trails and roads

SUMMARY

Historically, considerable public access has been allowed across the National Wildlife Refuge System in Alaska. Even before Title XI, and without regard to R.S. 2477, we have granted rights of for roads, power lines, pipelines for oil and gas, and for other economic activities. We have granted rights of way for electric transmission lines, gas pipelines, and oil pipelines on the Kenai Refuge, all before enactment of Title XI. We continue to look favorably on allowing access, provided that we can still assure protection of fish and wildlife, their habitats, and other refuge resources as Congress has charged us to do.

Our first responsibility is to fulfill the laws of the land and to follow the regulations implementing those laws. We must also

carefully consider the intent of the Congress and the needs of the people whether it be for access to inholdings, opportunities to recreate, or economic development. We intend to approach access issues with an open mind and to make decisions only after full consideration of all factors and viewpoints. Access issues are some of the most difficult facing Federal land managers, and, unfortunately, because of the broad spectrum of interests represented in Alaska, we anticipate continuing controversy and disagreement among the parties. My hope is that we can continue to communicate openly with the various interest groups and have the opportunity to explain our rationale for decisions no matter how popular or unpopular they may be.