RS 2477s - Building on Experience

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ABSTRACT

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

This deceptively simple phrase became law in 1866, ten months before Alaska was purchased from Russia. Interpretations of the congressional intent of this law have varied over the past 120 years. Land ownership or management changes created under the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act have further complicated the interpretation and implementation of the law in Alaska. Confusion and disagreement also remain over the respective roles and responsibilities of affected state and federal agencies and private landowners.

Numerous decisions have been issued on these rights-of-way, mainly from western state courts. This paper will discuss the history of the law, its interpretation by various state courts, its interpretation by federal courts, and its present implementation in Alaska.

INTRODUCTION

Revised Statute 2477 (RS 2477) was a federal law, codified as 43 USC 932, and repealed in 1976 by the Federal Land Policy and Management Act (FLPMA). Since this repeal, no new rights can be established under this authority; however, previously existing valid rights-of-way are not affected. The statute constitutes a grant by the federal government that becomes effective upon acceptance by the public or proper public authority. RS 2477 are rights-of-way established on unreserved federal land, including section line easements.

HISTORY

1866 Mining Law

Although RS 2477 refers to rights-of-way without limitation as to purpose, the statute of which it was a part addressed only mining and homesteading claims. It was the first comprehensive mining law for land owned by the United States. Before 1866 miners had entered, settled on, and used public domain land without benefit of federal statutory protection. Sometimes miners' dealings with each

other were handled by gunfire, only gradually coming to be ruled by local customs, later confirmed in territorial and state laws.

Eventually, the United States Supreme Court held that the federal government had, by its conduct, recognized, encouraged, and was bound to protect the rights of miners who had created and improved mines without federal statutory protection. This result would be somewhat startling today, in that it legitimized adverse possession and use of public domain lands against the federal government.

This explanation was given in Jennison v. Kirk, the first case construing the 1866 act in a controversy involving the validation of a mining water ditch built well before 1866. The case occurred so close in time to 1866 that it provides the best contemporary judicial history for the 1866 act.

> The object of this section (9) was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration to the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined ... Nothing but such equality

would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claim taken up; and all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced.

For eighteen years -- from 1848 to 1866 -- the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States.

And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached.

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the

> State and molded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right-of-way of the owners of the ditches and canals across the claims, although then recognized by the local customs, laws, and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights-of-way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights-of-way where they were not previously recognized by the customary law of miners.

Without the right to access their mining claims across public lands, the legitimacy that the 1866 act granted pre-existing claims would have left miners unprotected. Section 8 of the act, RS 2477, insured that miners, and homesteaders protected under Section 10 of the act, would have access rights across otherwise unreserved public lands to reach their claims and improvements. While RS 2477 may seem crude today, it was then an appropriate solution for miners and homesteaders faced with the problem of an absentee landlord, the federal government.

Highways

Although RS 2477 access was characterized as a "right-of-way for the construction of highways", in its proper historical context, the "highway" language did not mean a modern public street. The word "highway" was used generically at the time to include any public way, such as a path, wagon road, pack trail, street, alley and other transportation routes common and customary in an area.

Railroad Land Laws

Closely tied to the opening of the western United States to settlement were the railroad land grants. These grants were created by statutes whose case law interpretations figured prominently in the first state and federal court cases discussing RS 2477.

In the interpretation of these railroad land laws, the United States Supreme Court quickly construed the language of the acts as providing for "present" grant. Among the first of the railroad cases, and typical of them, was Schulenberg v. Harriman, 88 U.S. 551 (1874), construing an act granting lands to the State of Wisconsin in trust for construction of a railroad.

> It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such

> designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed, their location became certain and the title, which was previously imperfect, acquired and became attached to the land.

This and similar railroad cases figured prominently in the early RS 2477 court cases because the "present grant" language was adapted to the RS 2477 context.

INTERPRETATION BY STATE COURTS

The earliest cases construing RS 2477 were from state, not federal, courts. The first significant decision directly concerning RS 2477 came from California. In McRose v. Bottyer, the overseer of roads sought to enjoin the owner of a brick store who had, after acquisition of a title from the United States, fenced off a strip of land which had been used by the public as a public way since at least 1858. In answer to the defendant's contention that public user could not secure rights in public lands in the United States, the California Supreme Court said:

> The fact that the land was public land of the United States at the time the right to use it as a public way was acquired, and also at the time the use of it ceased, makes no difference. The act of congress of 1866 granted the right-of-way for the construction of highways over public land not reserved for public uses. By the acceptance of the dedication thus made, the public acquired an easement subject to the laws of this state . . .

The qualifier, "subject to the laws of the state", is noteworthy. Later state court cases, most notably from North Dakota, South Dakota, and Kansas imply that once a RS 2477 right-of-way grant was accepted, the state or territorial government became the trustee of the right-of-way for the public, and thereafter could not limit or otherwise affect the public's use of the right-of-way. This is the extreme view of the effect of a "dedication" of a RS 2477 right-of-way for public use. Were it the correct view, the sovereign government would always be permanently deprived of the power to make land use decisions as future conditions might warrant.

The next decision interpreting RS 2477, and the first to rely heavily on the railroad "present grant" analogy, was Wells v. Pennington County. This case is often cited in RS 2477 state court decisions. In 1877 South Dakota's Territorial Legislature passed a law providing "that all sections lines shall be and are hereby

declared public highways as far as practicable." The court in Wells held that this law represented an acceptance of the congressional RS 2477 grant, and:

> That the right acquired by the territory or the public was necessarily imperfect until the land accepted for highways was surveyed, and capable of identification; but when the land was surveyed and the various section lines were designated to be public highways as far as practicable, the right of the territory attached to them for that purpose, and took effect as of the date of the territorial law.

In so holding, the court emphasized that the railroad land grant cases were in many respects analogous to RS 2477, which law it claimed was a grant in present that takes effect as of the date of the act. The court's conclusion, however, missed a distinction in analogizing to the railroad and other congressional land grant cases. In those cases, the private grantee, whether a railroad or other entity, typically took some action in reliance on the grant. Railroad corporations, for example, might have sold bonds to secure funds for financing construction of the rail line with the land-holders no doubt assuming that subsequent land patents from the United States of alternate sections along the right-of-way would provide asset value for their investment. The corporations might gain no right to the lands, despite the "in present" judicial interpretation of the grant, if they did not comply with each condition of the legislation making the grant.

In contrast, the mere passage of a law dedicating public highways, such as on surveyed section lies, may not provoke the same judicial concern for the reliance interest of the "grantee" of the RS 2477 "grant". The actual survey of a section line, construction of a highway, or customary use following the statutory "acceptance" might be seen as sufficient reliance and change of position. However, a final federal court decision on this issue has not occurred.

State courts have recognized "acceptance" of the RS 2477 right-of-way "grant" by:

1. use (various states, including Alaska);
2. user plus some mode of formal dedication and acceptance (e.g., Nebraska);
3. mere statutory dedication, such as of section lines, without more (e.g., Kansas, North Dakota, South Dakota, Alaska);
4. construction plus formal dedication (e.g., Arizona).

The Wells holding gained favor in neighboring North Dakota when in Faxon v. Lallie Civil Tp., the North Dakota Supreme Court held that

a RS 2477 right-of-way, once accepted by a statutory enactment, was effective without regard to the fact the land was then unsurveyed. Later survey of a section line retroactively "perfected" the right-of-way to take priority over any interim conveyances. In contrast, Oregon rejected this position in Wallowa County v. Wade, when the Oregon Supreme Court said "the right is necessarily indefinite, and in a sense, floating and liable to be extinguished by a sale or disposition of the land until the highway is surveyed and marked on the ground, or in some other way identified or designated."

Since Wells, North and South Dakota as well as Kansas have held under their statutes that "section line highways" are open to the public without any official action, at least in certain rural areas. The respective courts reached their conclusions after reviewing state legislation to ascertain whether their legislatures had, after RS 2477 acceptances, thereafter enacted comprehensive road construction statutes that delegated the authority to public agencies to actually "open" section line highways.

State courts have also been divided on whether RS 2477 rights-of-way can be perfected by user without government funding or maintenance, or other action by a public agency. Alaska, Colorado, Oregon, Idaho, Wyoming, New Mexico, Nevada, and Utah, among others have clearly acknowledged user as a form of RS 2477 right-of-way perfection.

In contrast, in Arizona a formal resolution by a local government body after construction is needed to perfect the right-of-way, and mere user is not enough.

Recognition of user seems a logical outgrowth of the pre-1866 history of RS 2477, given that Congress clearly sought in the 1866 act to validate at least existing, if not also future, uses across public lands associated with mining activity.

In Alaska, two notable Supreme Court cases have set the standard for establishing RS 2477 rights-of-way. In 1961 in Hamerly v. Denton the court ruled that ". . . 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 a public user for such a period of time and under such conditions as to prove that the grant has been accepted." In 1975 the court ruled in Girves v. Kenai Peninsula Borough that the legislature's adoption of a statute was held to create a right-of-way along a section line. This was first done by a territorial law passed in 1923. The law has been amended several times, most recently in 1953. It is codified as AS 19.10.010 and reads, "a tract 100 feet wide between each section of land owned by the state, or acquired from the state and a tract four rods (66 ft.) between all other sections in the state, is dedicated for use as public highways."

INTERPRETATION BY FEDERAL COURTS

The first major federal court interpretation of RS 2477 was Colorado v. Toll. In that case, the superintendent of the Rocky Mountain National Park asserted full authority over all highways in the park, including the regulation of automobiles for hire and the extraction of license fees from privately owned vehicles. The roads had been built by Colorado and its counties "under the grant of right in Revised Statues, 2477 . . . before the park was laid out." The park was created in 1915, and its authorizing statute stated that creation of the park did not "affect any valid . . . entry under the land laws of the United States . . . for right(s)-of-way" and further indicated that "no land located within the park boundaries now held in private, municipal, or state ownership shall be affected by or subject to the provisions" of the act creating the park. Colorado, objecting to the highway controls, sued. Colorado claimed that Congress did not have power to "curtail its jurisdiction or rights without an act of cession from it and an acceptance by the general government."

The United States Supreme Court perfunctorily held that "the state has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly decided." If this holding had any substance, it was diminished in Kleppe v. New Mexico, which reaffirmed unlimited congressional power over federally owned public lands under the U.S. Constitution, Article IV, by saying:

> In Colorado v. Toll, the court found that Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause.

The court thus appears to have reaffirmed federal legislative authority over federal public land, forcing inconsistent state laws to accede in the face of congressional enactment.

The Ninth Circuit Court of Appeals, confronted with similar issues, has recently said the same about Congressional power over federal land. In Ventura County v. Gulf Oil Corp. the court held that "a different rule would place the public domain of the United States completely at the mercy of state legislation . . ." While FLPMA contains a savings clause in 701(a) for valid rights-of-way, we should also note that 509(a) of FLPMA also gives the Department of the Interior authority to cancel the right-of-way and replace it with an alternative access.

Federal Court of Appeals and District Court decisions concerning RS 2477s are surprisingly few in number and neither particularly helpful nor consistent. The two most significant federal court cases are Wilderness Society v. Morton , U.S. v. Gates of the

Mountains Lakeshore Homes, and Sierra Club v. Hodel.

In Wilderness Society an attempt was made to prevent the Secretary of the Interior from granting rights-of-way for the trans-Alaska oil pipeline and haul road. The court interpreted the effect of AS 19.40.010(a), a statute passed to create the haul road:

> Ordinarily this expression of intent would constitute valid acceptance of the right-of-way granted in Section 932. That section acts as a present grant which takes effect as soon as it is accepted by the State. All that is needed for acceptance is some "positive act on the part of the appropriate public authorities of the state clearly manifesting an intention to accept."

Wilderness Society seems to stand for three propositions with respect to RS 2477. First, apparently some level of statutory acceptance of an RS 2477 right-of-way on unreserved federal public land was possible prior to RS 2477's repeal in 1976. Unfortunately, the minimum for an adequate statutory expression is not defined, and the trans-Alaska pipeline haul road received such extraordinary federal and state statutory attention as to leave Wilderness Society a weak beacon. It remains unclear, therefore, whether under federal law a generalized statutory acceptance is sufficient for an RS 2477 acceptance if it nonetheless amounts to a "positive act on the part of appropriate public authorities of the state clearly manifesting an intention to accept . . ." In Wilderness Society, the Alaska Department of Highways had made application to BLM for the right-of-way, studies of the road had been made in 1951 and 1965, state money had been appropriated for further study and mapping, and the State and Alyeska Pipeline Service Company had entered into contract for design and construction of the road. Whether these actions were sufficient alone without the passage of AS 10.40.010 is unclear. Third, use of RS 2477 for rights-of-way to facilitate oil drilling was consonant with Congress' intent in 1866 to facilitate mineral development. Presumably utility uses connected with mineral development would pass muster, but ones unconnected with mineral development, or homesteading, might not. Federal case law is not clear on the issue. The state believes all utility uses are permissible.

More important than Wilderness Society for the future application and interpretation of RS 2477 for Alaska is U.S. v. Gates of the Mountains Lakeshore Homes. In 1901, American Bar Road was declared a public road under RS 2477 by Montana's Lewis and Clark County. In 1905 the Helena National Forest was created, through which the road passed. In 1973 the Gates of the Mountains Lakeshore Homes Subdivision was developed, with a primary access to it being the American Bar Road. The Montana Power Company unsuccessfully sought

a Forest Service permit to bury a powerline to the subdivision along the road. The county, however, granted the company a permit, so the company went ahead and installed the powerline. The Forest Service sued to have the powerline removed. The District Court held that "state law controls the interpretation of the scope of pre-existing RS 2477 roadways, whereas federal law controls the establishment of new RS 2477 roadways," and consequently a Forest Service permit was not needed.

The Ninth Circuit Court of Appeals then reversed the District Court ruling. After noting that any doubt as to the scope of an RS 2477 grant must be resolved in favor of the federal government, the Court of Appeals rejected the argument that Congress intended the RS 2477 grant to be construed according to the law of the state. It therefore reversed the District Court's decision insofar as it decided that the Montana Power Company did not "trespass upon the rights of the United States in the American Bar Road." This result appears inconsistent with a 1983 Alaska Supreme Court decision, Fisher v. Golden Valley Electric Assn., Inc. In that decision, the court ruled that a utility could, without a permit, properly construct power line on a section line easement reserved but not used for highway purposes, under AS 19.25.010 and 17 ACC 15.031(a). The court also concluded that "state law governs this issue."

The Court of Appeals in Gates of the Mountains Lakeshore Subdivision relied heavily on Utah Power & Light Co., v. U.S., in which the United States Supreme Court held that legislation enacted in 1896 concerning rights-of-way across public land for power transmission superseded an act governing the grant of rights-of-way for ditches, canals and reservoirs. The court remarked that later legislation "dealt specifically with that subject (utility rights-of-way), covered it fully, embodied some new provisions, and evidently was designed to be complete in itself." The same argument might be made, of course, with respect to RS 2477 and the later plethora of highway, land management, environmental, and land reservation laws which have been enacted since 1866 and which deal with federal and state land.

In any event, the current Ninth Circuit Court of Appeals' view of RS 2477, as announced in Gates of the Mountain Lakeshore Subdivision, is that the question of the scope of an RS 2477 right-of-way over federal public land is a question of federal, not state, law. This view sharply contrasts with the view of state court decisions and past federal court decisions, which have determined on their own what constituted "acceptance" of the RS 2477 "grant" pursuant to state law. As a practical matter, what this means today is that state courts clearly may continue with assurance to apply state law in determining the establishment and scope of rights-of-way, at least as long as state land is involved and the rights of the private property owner contesting the existence of the right-of-way or its scope do not derive from a federal source. However, where federal land is involved or the

private property owner's rights originate from the federal government without intervening state ownership, such that Congressional or Executive Branch power over federal land becomes an issue, the question might end up being one of federal, not state, law. In addition, when the subject private property is held in trust by the United States, jurisdiction to decide the RS 2477 issue will reside exclusively in the federal courts.

This opinion was contradicted in 1988 by the Tenth Circuit Court of Appeals' in Sierra Club v. Hodel. This case involved the establishment and management of the Burr Trail that winds through BLM managed land of southern Utah's Garfield County. In this case the court upheld a lower court finding that the scope of an RS 2477 highway is governed by state law. The court went on to find that state law provides that the scope of a right-of-way is what is reasonable and necessary for its purpose and that the proposal by Garfield County to improve the road was within the scope of the right-of-way.

These findings were based on Wilson v. Omaha Indian Tribe. The court made two principal findings based on this case. The first Wilson factor was that "state law has defined RS 2477 grants since the statutes's inception. A new federal standard would necessitate the remeasurement and redemarcation of thousands of RS 2477 rights-of-way across the country, an administrative duststorm that would choke BLM's ability to manage the public lands."

The second Wilson factor "strongly supports the use of state law, as imposing a federal definition of RS 2477 rights-of-way would undermine the local management of roads across the western United States."

Over the past 125 years, each western state has developed its own state-based definition on the perfection and local management of RS 2477 rights-of-ways. They are components of the transportation system of each state and are subject to the principles that govern the scope of all easements. Although we have two conflicting Circuit Court Decisions, the Tenth Circuit Court decision follows the trend adopted by the western states in establishing ownership and controlling their use.

IMPLEMENTATION IN ALASKA

With the passage of three major pieces of legislation within a ten year period - The Alaska Native Claims Settlement Act (ANCSA), the Federal Land Policy and Management Act (FLPMA) and the Alaska National Interest Lands Conservation Act (ANILCA) - the federal and state governments are being asked to become more involved in RS 2477 issues.

Task Force for Northern Alaska

In the fall of 1985, the Department of Natural Resources, the Department of Transportation and Public Facilities and the Bureau of Land Management signed a Memorandum of Agreement that created a task force for Northern Alaska with the assignment to identify and review possible RS 2477s to determine if sufficient information was available to administratively find whether a valid right-of-way may exist. If the task force felt that adequate information existed, then the appropriate state and federal land records were to be noted. The task force dissolved when state and federal representatives found that the identification of RS 2477s was more difficult than anticipated because of a variety of legal and policy questions.

Consequently, the state and federal agencies developed separate RS 2477 policies. After months of negotiation between state and federal agencies, a federal RS 2477 policy was adopted on December 7, 1988. A state policy has been drafted by the Departments of Natural Resources and Transportation and Public Facilities but has not yet been formally adopted.

State/Federal Differences

Although case law makes it clear that the federal agencies have no authority to finally adjudicate the validity of an RS 2477, they have developed policies that are different from the state's. Most federal policies, however, are purely land management policy considerations that conflict with over 110 years of established state law and past management practices. There are at least five significant state/federal policy differences.

Do federal or state courts have jurisdiction? Federal agencies believe that only federal courts have jurisdiction over federal land and should apply only federal law when it comes to determining the scope and establishment of RS 2477s; the state believes that state courts have primary jurisdiction and can apply state law in determining the scope and establishment of RS 2477 ROWs. Most of the case law on RS 2477s is from the state courts, where local customs and conditions can be considered.

2. Does passage of a state law constitute acceptance? Federal agencies believe passage of a state law does not constitute acceptance of a grant of an RS 2477. The state holds that passage of a state law constitutes acceptance (i.e., surveyed section line easements).

3. Can auxiliary uses be allowed within the right-of-way? Federal agencies believe that RS 2477s are for vehicular, animal, or pedestrian travel, but not for pipelines, powerlines, telephone or other communication facilities. The state believes that these auxiliary uses are

permissible. The state's position is consistent with numerous western state court decisions.

4. What is the width of the right-of-way? Federal agencies believe the width of the right-of-way is only that necessary to accommodate the area actually used (ditch to ditch) or the construed area. The state believes that the width of roads and trails is usually set as the distance from the farthest limit of backslope to the farthest limit of backslope on the opposite side for RS 2477s established by public use. Secretarial Order 2665 established a width of 50 feet either side of center line for RS 2477s established by public or government construction. In addition, AS 19.10.010 establishes a width of 100 feet either side of center line for any right-of-way created on state land and 66 feet on federal land.

5. Who manages RS 2477 rights-of-way? Federal agencies feel they have full authority to regulate uses on rights-of-way that cross federal land. The state believes federal management authority is limited to the regulation of adverse impacts on adjacent federal lands and that those limits should be specified.

The State's Approach

The state believes that many RS 2477s provide unique access opportunities for the public which could not be otherwise realized. The state intends to actively assert those RS 2477s which meet the statutory criteria and provide public use benefits.

RS 2477s will not provide a magic cure-all for access problems encountered by the public on federal, state and private land. It may take years to defend the assertion of a single trail or road through the judicial system. Also, many issues relating to the rights and management of RS 2477s remain unclear. In many cases, the state will have to enter into time consuming and expensive litigation to fully know what an RS 2477 really means to the landowner and public user. There are many Alaskan land owners, such as Native corporations, who want and desire assurance that their rights and interests will not be adversely affected in the process of RS 2477 identification and platting. It is the obligation of federal, state and local governments to consider these concerns.

State policies and actions related to RS 2477 will involve cooperation whenever possible. It is intended that RS 2477 assertions cover those roads and trails that qualify as off-system roads under proposed state regulations (17 AAC 05.030).

CONCLUSION

In summary, RS 2477 was part of the 1866 mining law, but was not restricted in application to mining or homestead claims. The law referred to rights-of-way "for the construction of highways", but at that time highways included paths, trails, streets, alleys and other common and customary routes. Early courts relied heavily on railroad land laws to interpret and apply its meaning. State courts have recognized acceptance of the grant by user (Alaska), plus some mode of formal dedication and acceptance, statutory dedication (Alaska) and construction plus formal dedication. Federal courts have just recently become involved in interpreting RS 2477s and with views that contrast with over 100 years of state court decisions. As a practical matter, state courts may interpret the law on federal land and on private land where title was received directly from the federal government. These varying court decisions also lead the state and federal governments to disagree on: whether state law constitutes acceptance; can auxiliary uses be allowed within the right-of-way; what is the width of the right-of-way;, and who manages the right-of-way and, to what extent.

APPENDIX
SUMMARY OF PERTINENT CASES ON RS 2477

1) Clark v. Taylor, 9 Alaska 928 (4th Div. Fairbanks 1938). The public may, by user, accept the RS 2477 grant, and 20 years of "adverse" public use was sufficient in this case. However, the case also intimates that there is no such thing as an unsurveyed "section line" acceptance of the RS 2477 grant.

2) Berger v. Ohlson, 9 Alaska 389 (3rd Div. Anchorage 1938). The RS 2477 grant may be accepted by the general public, through user, even absent acceptance by governmental authorities, although there must be sufficient continuous use to indicate an intention by the public to accept the grant.

3) U.S. v. Rogge, 10 Alaska 130 (4th Div. Fairbanks 1941). Same as 2.

4) Hamerly v. Denton, 359 P. 2d 121 (Alaska 1961). Same as 2. In addition, this case held that AS 19.10.010 (the section line dedication) was equivalent to a legislative acceptance of the RS 2477 grant.

5) Mercer v. Yutan Construction Co., 420 P.2d 323 (Alaska 1966). Trial court was correct in finding that the issuance of a grazing lease, expressly subject to later rights-of-way, did not reserve the leased land such that the government could not accept the RS 2477 grant and build a right-of-way.

6) Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.) (enbanc), cert. denied 411 U.S. 917 1973). AS 19.40.010 (concerning the trans-Alaska pipeline haul road) it probably acceptance of the RS 2477 grant, the court citing Hamerly v. Denton favorably. This is the only reported federal court case dealing with an Alaska RS 2477 issue, at least as of October 1, 1987.

7) Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975). Same as Hamerly v. Denton, above.

8) Anderson v. Edwards, 625 P.2d 282 (Alaska 1981). Where the state has not stepped in to regulate a section line right-of-way created via AS 19.10.010, a private citizen may use it, but only up to a width that is reasonable under the circumstances. Consequently, a citizen using a right-of-way who had cut too many trees to widen it must compensate the fee owner.

9) Fisher v. Golden Valley Electric Association, 658 P.2d (Alaska 1983). Utility use of an otherwise unused (i.e., it was not otherwise regulated or used by the State) RS 2477 section line right-of-way for a powerline was permitted not-withstanding the underlying fee owners' objections.

Alaska v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983). RS 2477 did not establish the width of rights-of-way created under it. The Department of the Interior's Order No. 2665 for ceratin RS 2477 roadways did, however, establishing a width.

Brice v. State, 669 P.2d 1311 (Alaska 1983). Pre-existing section line highway easements created under AS 19.10.010 remained valid even when the law was temporarily repealed between 1949 and 1953.

Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 4110 (Alaska 1985). This case reaffirmed the holding of Hamerly v. Denton, and then found that relatively slim evidence of user was sufficient to prove the acceptance of an RS 2477 grant. In Hamerly the court had found inadequate evidence of user. The different results of the two cases probably rest on the fact that in Hamerly the evidence of use was disputed, but in Dillingham no rebuttal evidence showing lack of use was submitted. The Dillingham court also held that once the RS 2477 road was created, it could be used for any purpose consistent with public travel.