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ISSUE PAPER
REVISED STATUTE 2477 RIGHTS-OF-WAY IN ALASKA

This paper sets forth the issues related to Revised Statute 2477 (RS2477) rights-of-way which cross Federally managed lands in Alaska. Policy options are presented for each issue. The intent of this paper is to present these issues and options for discussion leading to development of an Interior Department policy for RS2477 claims in Alaska.

Revised Statute 2477

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. (Sec. 8 of the Act of July 26, 1866; R.S. 2477, 43 U.S.C. 932; repealed October 31, 1976, 90 Stat. 2793.)

The RS2477 right-of-way grant became of interest to Federal land managers in Alaska during their effort to determine prior existing rights for planning purposes. The State of Alaska and many private individuals came forward during the planning process to make these rights-of-way known and acknowledged in the plans. This level of interest in RS2477 rights-of-way is due in part to the lack of a developed road network connecting most communities and future economic development areas in the State and the lack of any other provisions addressing these needs for access in the land management plans.

A basic understanding of how a right may come into being is needed prior to delving into the specific issues. RS2477 is a legislative grant of a "right-of-way for the construction of highways." For a right to exist there has to be an acceptance of this grant. Whether or not there is an acceptance is a matter of fact. Various state courts have said acceptance may occur through construction, use or legislative action. There is no requirement for the governmental unit or individual claiming the acceptance to notify any party of this acceptance, i.e. no notification of an executive branch agency. This direct relationship between the legislative body (grantor) and the claimant (grantee) does not allow for participation by Federal agencies and, consequently, no adjudication of the claim. Therefore, the validity of a claim to the acceptance of the legislative grant can only be determined by the judiciary.

RS2477 issues related to Federally managed lands can be grouped under the following headings:

1. When is there an existing RS2477 right?
2. What is the nature of that right?
3. Who has regulatory and management authority over the right-of-way?
4. Federal procedures for recognizing RS2477 rights.

ISSUE GROUP 1: When is there an existing RS2477 right?

The law itself provides the basic tests as to the validity of claimed acceptance of the legislative grant. The problems arise from interpretation of the words which compose this one sentence law.

ISSUE 1-1: The offer of the grant must have been accepted for a right-of-way over public lands, not reserved for public purposes."

This is generally a non-issue as most everyone agrees with the meaning of "public lands, not reserved for public uses." The law was repealed by FLPMA on October 31, 1976, so there is a absolute date when no more grants could be accepted. When analyzing a specific claim, the first step is to determine when the affected lands became reserved.

BLM regulations relating to segregation (reservation) of public lands governs the date when a specific parcel became reserved. Generally, all lands in Alaska were reserved when Public Land Order 4582 was posted to the Miscellaneous Documents Index of the Master Title Plat system on December 14, 1968. Some lands were later returned to an unreserved status prior to the repeal of RS2477.

ISSUE 1-2: What is meant by "highway?"

This is the first major area of divergent interpretation. The various viewpoints are listed as options:

Option 1: Legal requirement. The legal requirement as expressed in a number of judicial opinions is a route of travel open to the general public and used by the public for more than incidental use.

Option 2: Historical view. This view states the intent of the law was to accommodate uses of a highway at the passage of the law, i.e. a highway was a public route of travel which would accommodate travel by foot, horse and wagon. Any travel route which can be used by these modes of travel would qualify as an RS2477.

Option 3 State government definition. Historically, the Federal government has let State government laws and regulations determine the definition of highway, as long as the legal definition was also met, i.e. in Arizonia, a highway must be a county dedicated road. Alaska provides a very broad definition

> Highways includes a highway (whether included in the primary or secondary systems), road, street, trail, walk bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof, and further includes a ferry system, whether operated solely inside the state or to connect with a Canadian highway, and any such related facility. (Alaska Statute 19.45.001 (8)).

Option 4: Local criteria view. A highway is the transportation route common to that locale at the time the grant was accepted or the lands became reserved, whichever came first.

NOTE: There may have been incremental acceptance of increased widths over a period of time. The acceptance of the greatest legal interest prior to the lands becoming reserved is the controlling acceptance.

DISCUSSION:

From the Federal viewpoint, at least the leagl minimums of open to general public use and that it be an established route of travel must be met. But what is the breakpoint between "incidental use" and an "established route of travel?" Generally, continuous use over a period of time by a number of individuals, usually for more than one purpose, in a manner consistent with local transportation styles would constitute an established route of travel. An example might be the Seventymile Trail which has been used many years for purposes of mining, hunting, timber, berry picking and trapping acess.

The judicial record shows a melding of Options 1, 3 and 4. The legal test must be met. The courts then look at what is appropriate under the State's laws and what is locally considered the prevalent type of surface transportation route. Therefore, in the Anchorage and Fairbanks area wagon roads might be the standard, while in the Steese Mining District trails used for resupplying mining operations might meet the test, and in the less populated areas intervillage dog sled or snowmachine trails might meet the test.

ISSUE 1-3: Define construction.

The term construction is tied directly to ISSUE 1-2. There must be sufficient construction so that a "highway" comes into being. This is often further broken into who can perform the construction and what constitutes construction.

1-3a: Who can legally construct the highway for there to be an acceptance?

Option 1: Construction must be performed by an authorized entity, i.e. the Alaska Road Commission, Alaska Department of Transportation and Public Facilities, or other road building authority.

Option 2: Construction can be performed by any agency, individual, group of individuals or company.

1-3b: What constitutes construction of a highway?

Option 1: Construction must meet or exceed the State's standards for addition to the "highway system."

Option 2: Construction must be sufficient to allow the passage of persons, animals or vehicles for which the highway was established, i.e. brushing of a snow machine trail or minimal grading by a CAT on its way to a mining operation.

Option 3: Construction can occur over time through use of the route by removal of a tree here and a rock there by the users. This may be incidental improvement or intended upgrading of the route.

Option 4: Use even when no intentional improvement is made, i.e. winter roads on the north slope.

DISCUSSION:

No Federal Court guidance has been found on this matter. Planning and survey do not equate to construction (BLM Manual 2801.24B.1a).

Alaska law (AS 19.30.241) defines construction as including "...the necessary preliminary engineering, construction engineering and utility relocation." Preliminary engineering includes location reconnaissance and centerline survey.

ISSUE 1-4: Can a right be created without construction and use?

The State of Alaska argues that there can be legislative acceptance of the grant (Ch. 19, SLA 1923; Ch. 123, SLA 1951; Ch. 35, SLA 1953). Other state courts have either supported or rejected this viewpoint based on their state's law. But what is the Federal position? No Federal case law has been found that addresses this issue.

Option 1: Accept the State of Alaska's view as set forth in their laws pertaining to section line easements.

Option 2: Reject the State's view as the intent of Congress was to grant a "right-of-way for the construction of highways" and unless the highway was actually constructed prior to the lands becoming reserved, the grant was not accepted.

DISCUSSION:

Section line easements are a complicated topic unto themselves. Many legal principles are involved as well as a series of laws by the Territorial Legislature. A current legal issue deals with the relationship of the Territorial Legislature and Federal government lands. Of primary importance to Federal agencies is that the Territorial Legislature was an instrument of the Federal government. Therefore, when the Territorial Legislature passed laws relating to section line easements, those easements were reserved on lands being conveyed to a second party, i.e. homestead, home site, etc.. Section line easements could not affix to Federal lands based on merger-of-title principles. There was only a small window of opportunity for section line easements to affix to unreserved Federal lands. This period was from the date Territorial Legislature laws took full force and effect as State Laws with the passage of the Act of July 7, 1958, until all lands in Alaska were reserved on or about December 14, 1968.

Another major point to remember is the courts have held a section line easement could not affix until the section line has been surveyed.

ISSUE GROUP 2: What is the nature of the right? Fed Court assumes this is restricted.

ISSUE 2-1: What rights transfer to the claimant?

This issue has been addressed many times by the courts and IBLA. The Federa position is:

1. This is a right of passage over the land, not fee title;
2. The right-of-way is for vehicular, animal or pedestrian travel, not for pipelines, powerlines, telephone or other communication facilities.
3. The right-of-way is a specific width, not a transportation corridor. historical precedent

There is no "issue" from the Federal viewpoint. Many outside the Federal government continue to argue for additional rights.

ISSUE 2-2: What is the width of an RS2477 right-of-way?

Option 1: The Federal government has generally held that the width of the right-of-way is from ditch to ditch; the constructed area.

→ Option 2: In Alaska, if the lands crossed were unreserved public lands on April 6, 1963 or later, then the width is 100 feet based on State law (AS 19.10.015). Section line easement widths vary depending on the laws referenced under ISSUE 1-4 and the date the lands became reserved.

DISCUSSION:

On April 6, 1963 the State of Alaska passed the following law:

> It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet.

Option 2 is based on this law. The question is: Does the Federal government recognize this law or does it still adhere to the ditch-to-ditch standard?

The ditch-to-ditch standard is a problem in Alaska due to the nature of the "highways", i.e. snow machine and other ATV trails, many with sections which have multiple routes. Generally, when the ditch-to-ditch standard is applied, it is either the constructed width, if easily defined, or that width necessary to accommodate the uses which are common to that "highway." Under the ditch-to-ditch principle, the width cannot be further increased after the lands became reserved. Therefore, a snow machine trail could not be expanded in width to accommodate large ATVs once the lands have become reserved.

ISSUE 2-3: Can the right-of-way be upgraded to accommodate use by newer technologies or larger vehicles?

Option 1: Uses are restricted to those in use as of the date the lands became reserved, i.e. a snow machine trail could not now be used for all season use or for larger ATVs, even if they would fit within the right-of-way. New technologies could be used only if they were for the same purpose, used the same width right-of-way, and had similar impacts on the servient estate.

Option 2: Vehicle type could change over time so long as the newer or upgraded use stayed within the right-of-way that existed when the lands became reserved. This makes ISSUE 2-2 critical, as upgrading for larger vehicles can more easily be accommodated within a 100 foot right-of-way than on a ditch to ditch trail.

DISCUSSION:
No guidance has been found on this issue

ISSUE 2-4: Abandonment

What would constitute an abandonment under RS2477? Is it treated differently than other right-of-way grants?

Probably this one - Option 1: Only a formal action of abandonment would cause the right-of-way to be abandoned, the same as other rights-of-way granted in perpetuity.

Option 2: A Disclaimer of Interest by the governmental unit having road authority for the local area may:

a. change the status from a public highway to a private trail and the Federal agency would then work with the claimants of this private access,
b. retain the status of a public highway, but the Federal agency would then work with other non-governmental claimants, or
c. if there are no other claimants, there is no right-of-way.

Option 3: A possible right-of-way would be determined abandoned if it has become unusable for the purposes for which it originally came into being, i.e. heavy tall brush growing on a snow machine trail.

Option 4: The State's adverse possession laws would apply to a private landholding crossed by the right-of-way.

Option 5: Agencies could pursue a "quiet title" action to insure there are no claims to the highway.

DISCUSSION:

Some legal research is needed on this topic. There are two (2) types of easements (read right-of-way): "easements in gross" and "easement in appurtenance." An "easement in gross" reverts to the fee title holder when the easement is no longer used. An example might be the Fairbanks to Circle trail which has not been used since the construction of the Steese Highway. Also, somewhere in the Federal statutes there may be a general reversionary law based on non-use. There is no Alaska law concerning non-use.

ISSUE GROUP 3: Who has regulatory and management authority over the right-of-way?

ISSUE 3-1: Claimant

a. What are the State laws governing a private individual, group of individuals, association, corporation or others having management of a public highway?

b. Under State and Federal law, what are the responsibilities of the claimant (private or governmental) to maintain and control use of the right-of-way so as not to infringe upon the rights of the servient land owner?

Option 1: It is the responsibility of the claimant (private and/or State to ensure the servient estate is not encumbered to a greater degree than the rights granted.

Option 2: All public rights-of-way fall under the jurisdiction of the State government, and therefore, the State government bears full responsibility for managing and regulating the uses on these rights-of-way.

Option 3: The owner of the servient estate is responsible for protecting their own interests and could take action against the user or claimant of the right-of-way for infringing on their rights through misuse or degradation of the right-of-way.

ISSUE 3-2: Federal control over State or private managed public highways

Do any of the Interior agencies have regulatory authority over State public highways when they cross lands managed by the Federal agency?

Option 1: Yes. (At this time there are no uniform regulations delineating the extent of the authority.)

Option 2: No

If the public highway is managed by a claimant other than the State and the State does not bring it under State management, do any Interior agencies have regulatory authority over the highway?

Option 1: Yes. (At this time there are no uniform regulations delineating the extent of the authority.)

Option 2: No

ISSUE 3-4: Right of the fee title holder.

What are the rights of the servient land owner to control impacts on their land?

Option 1: Standard rights. The servient land owner has the ability to prevent impacts from the right-of-way encroaching on their land and to stop uses not authorized by the grant.

Option 2: Dependent upon the claimant. The ability to control actions on the right-of-way is dependent on whether the grant holder is the State or a private individual.

DISCUSSION:

This issue involves the authority available to control the use of the right-of-way. Some people question the current authority of the State to place weight, seasonal, or vehicle type limits on highways. If the State's authority is in question, how can a private individual who has claimed public highway right-of-way be expected to control the uses thereon? Where does this leave the servient land owner in protecting their rights? This issue needs additional research to more fully develop the available options.

ISSUE GROUP 4: Federal procedure for recognizing RS2477 rights.

ISSUE 4-1: Federal recognition - effect on adjacent land managers/owners.

Is it possible for Federal agencies to give administrative recognition of an RS2477 right-of-way to avoid taking each right-of-way to court for a validity determination? Current BLM regulations allow recognition. Adjacent land owners have complained that if this recognition is granted and they wish to challenge the claim, then they are placed in a weaker legal position.

Option 1: Federal agencies administratively recognize the existence of a right.

Option 2: Federal agencies will not recognize any RS2477 right until proven in a court of competent jurisdiction.

DISCUSSION:

Over the years, a few RS2477 claims have been recognized in Alaska and placed on the Master Title Plats. There are currently four claims before BLM with requests to have them placed on the plats.

ISSUE 4-2:
Placement of RS2477 rights-of-way in Federal land management plans.

Option 1: Only those RS2477 rights-of-way which have been determined to be valid in a court of competent jurisdiction will be placed on the planning maps.

Option 2: Those rights-of-way which have been determined valid by a court of competent jurisdiction or which the agency is willing to administratively recognize will be placed on the planning maps.

Option 3: All known claimed RS2477 rights-of-way will be placed on the planning maps.

ISSUE 4-3: Placement of RS2477 rights-of-way on Federal Master Title Plats.

Option 1: Only those RS2477 rights-of-way which have been determined to be valid in a court of competent jurisdiction will be placed on the Master Title Plats.

Option 2: Those rights-of-way which have been determined valid by a court of competent jurisdiction or which the agency is willing to administratively recognize will be placed on the Master Title Plats.

DISCUSSION:

Option 3 from ISSUE 4-2 was not carried forward to this issue as a claim without some form of judicial or administrative review is not appropriate for placement on the Master Title Plats. A spaghetti pattern of unsubstained claims would serve no purpose for the Federal land manager and may confuse the general public concerning legal access to an area. Whether or not an RS2477 claim is shown on a Master Title Plat has no legal bearing on the claim. The State's Road and Trails Inventory and USGS maps depict most travel routes in the State, without giving them an "air of legality" imparted by placement on the plats.

ISSUE 4-4: The State of Alaska Roads and Trails Inventory of 1974

Option 1: Accept the State's letter(s) of April 8, 1974 and/or December 26, 1984 as notification that the State is claiming the roads and trails under the authority of RS2477.

Option 2: Do not accept the State's letter(s) of April 8, 1974 and/or December 26, 1984 as notification of claims under RS2477. This is the current position.

DISCUSSION:

When the first letter was received, there was no requirement to notify BLM of these claims or procedures to process the claims. The second letter claiming these rights-of-way has been rejected as the information provided is not sufficient for administratively processing the claims to recognition or non-recognition, i.e. the map scale is too small and there are no dates of construction. There is still no requirement to notify any Federal agency of a claim and there is no sunset date for coming forth to make a claim known.

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IN REPLY REFER TO

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PLO 4582 - said all lands in AK are hereby withdrawn 12-14-68, [illegible] North [illegible] AK. Some lands were excluded.

Supplement Number 1

ISSUE PAPER
REVISED STATUTE 2477 RIGHTS-OF-WAY IN ALASKA
(Dated March 17, 1986)

Additional information has been received which bears on future RS 2477 discussions. This information is formatted to match to the Issue Paper of March 17, 1986.

ISSUE 1-1:

DISCUSSION: ~~The State~~ of Alaska has recently surfaced an argument against the use of PLO 4582 as the date when all lands became reserved in the State and no new RS 2477 rights could be created. Their argument runs that PLO 4582 did not "reserve the lands for public purposes" (RS 2477), but rather are withdrawn "for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians in Alaska" (PLO 4582, para. 1).

ISSUE 1-4:

DISCUSSION: The State argues the phrase "right-of-way for construction" implies the right to construct in the future without any apparent deadline to complete the construction. Through the section line easement laws, the State intends to reserve the implied right to construct in the future.

ISSUE 2-2:

DISCUSSION: A position held by many is the Federal intent was that the width of all rights-of-way in Alaska, including RS 2477s, are at least 100 feet. Public Land Order (PLO) 601, 757 and Secretarial Order (S.O.) 2665 are cited as demonstrating this intent.

PLO 601 (August 10, 1949), as amended by PLO 757, and S.O. 2665 (October 16, 1951) define widths for highways in Alaska which were ". . . established or maintained under the jurisdiction of the Secretary of Interior." RS 2477 rights-of-way were not established or maintained under the jurisdiction of the Secretary of Interior. Therefore, these orders cannot be directly applied to the RS 2477 rights-of-way.

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ISSUE 4-2:

Option 4: All known possible RS 2477 rights-of-way will be placed on the planning maps.

ISSUE 4-3:

Option 3: All known claimed RS 2477 rights-of-way will be placed on the Master Title Plats.

Option 4: All known possible RS 2477 rights-of-way will be placed on the planning maps.

DISCUSSION: Some reviewers felt all options should be discussed and that early deletion of options was inappropriate.

ISSUE 4-4:

DISCUSSION: Another view is the requirement for additional information is based on the Code of Federal Regulations (CFR) and BLM's Manual. The absence of the information requested is a "curable defect" of the claim and, therefore, the claim cannot be rejected or ignored until the agency takes a formal action requesting the additional information and the information is not received.

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