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United States Department of the Interior

IN REPLY REFER TO:

FISH AND WILDLIFE SERVICE
1011 E. TUDOR RD.
ANCHORAGE, ALASKA 99503

MEMORANDUM

Jan 16, 1986

TO: RS2477 Task Force

FROM: Ric Davidge, Chairman

SUBJECT: Review by Ted Bingham of RS2477 Law

Attached for your information is a very good review of the RS2477 law and various case law citations regarding definitions and other implications. I know this will find its way into the Workshop notebook and suggest you read it very closely. It has helped me understand some of the vague issues I'm sure we will be discussing at the Workshop in Fairbanks.

It looks like we need to have a Task Force meeting to move forward on the workshop and the materials for it. It would be my desire to have it here within the next two weeks. Problem - State members please call and let me know when you can make it in light of legislative activities.

Also attached are the comments of the Alaska Miners Association on the State DRAFT policy. I think they are of interest.

One of the things we need to discuss is should we have DRAFT guidelines for the workshop on the federal recognition of RS2477 ROW or should we wait until after the workshop?

I have updated the Task Force list and included it in this mailing. Please call if your name, address, phone or blood type are incorrect.

As most of you know I am now Assistant to the Director of the US Fish and Wildlife Service stationed in Alaska under the direction of the Regional Director, FWS. According to my last phone conversation with the Assistant Secretary's office I am to continue to chair the task force until the DRAFT guidelines are complete. I have not moved my office or phone but if you can not reach me at 786-3435 or 786-3374 you may contact me through the Regional Director at 786-3452.

ALASKA MINERS ASSOCIATION, INC.

509 W. Third Ave., Suite 17, Anchorage, Alaska 99501 (907) 276-0347

December 30,. 1985

Alaska Department of Natural Resources
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Pouch 7-0005
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Attn: Gary Gustafson

Dear Sirs:

The Alaska Miners Association has reviewed the Draft policy and procedures concerning RS 2477 right of ways.

We encourage the Department of Natural Resources and Department of Transportation and Public Facilities to finalize this policy and procedures and implement the review of the 1974 submission as soon as possible.

The draft does a thorough job of stating the policy and outlining procedures, and our suggestions for modification only address a few areas.

1. From a public administration, management perspective one agency should have responsibility for issuing the formal decisions. While both Departments can receive and process or originate requests one Department should have the responsibility for issuing the decisions. This will prevent the development of different language, formats or other variances which could confuse people and also make the State more susceptible to litigation.

2. We feel that action should lean in the direction of asserting a RS 2477 claim when the initial data available support such a finding. We are a little concerned that each case could result in a time consuming, lengthy research process and the public many lose because of failure to have these rights indentified. Future action can always disclaim an interest in the Right of Way if it is found to <u>not</u> serve the States best interest. The policy should articulate this intent.

3. Specifically the last sentence in the first partial paragraph on Page 24 should either be dropped or reworded. It presently states "This is not meant to imply that these roads and trails are necessarily available for public use----". Two USDI

Solicitors opinions dated 5/21/80 find 12/10/85 state that one of the criteria to qualify is that a "highway is a road freely open to everyone".

While we may be taking the draft language out of context it seems to pose some questions concerning compliance with the public use requirement. On page 24, the sentence begining "This is not meant to imply" should be dropped completly or replaced with a statment saying that the State will manage RS 2477 ROW's under appropriate authorities and policies.

4. We would encourage a very liberal interpretation of future needs. Planning processes are flawed because of the ability to predict the future. External forces, new technology, economics, social change will influence future needs for access. These variables are not always predictable. Therefore, the State should claim a RS 2477 Right of Way wherever historic data support such a claim.

5. We are very concerned about the implication that the State can vacate an RS 2477. We suggest you delete the term "vacate" as used in the document and use, instead, the words "disclaim an interest"

We believe that mining activities serve as a basis for many RS 2477 Rights of Ways and these existing access routes should be recognized and preserved as access to mineralized areas.

We look forward to receipt of DNR/DOTDF final policy and procedures document.

Sincerely,

ALASKA MINERS ASSOCIATION

Ron Sheardown
Vice President

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AMA Fairbanks Branch Office

2800 (330)
December 20, 1985

RS 2477

Section 8 of the Act of July 26, 1866, 14 Stat. 253, Revised Statutes 2477, 43 U.S.C. 932, repealed October 31, 1976, 90 Stat. 2793, (RS 2477), provided:

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

- It was an outright grant of right-of-way by the United States if and when accepted.

Determining whether an RS 2477 highway has been validly established is a question of federal law.

The common law doctrine of adverse possession does not operate against the federal government. United States v. California, 332 U.S. 19, 39-40 (1947); Texas v. Louisiana, 410 U.S. 702, 714 (1973), rehearing denied, 411 U.S. 988 (1973); Drew v. Valentine, 18 F. 712 (5th Cir. 1883). The necessary corollary of this rule is that in order for a state or individual to gain an interest in land owned by the United States, there must be compliance with a federal statute which grants such interests.

The operative rule of construction applicable to such statutes is that grants by the federal government "must be construed favorable to the government and ... nothing passes but what is conveyed in clear and explicit language — inferences being resolved not against but for the government." Caldwell v. United States, 250 U.S. 14, 20 (1918); Wisconsin Central R.R. Co. v. United States, 164 U.S. 190, 202 (1896); Great Northern Ry. Co. v. United States, 315 U.S. 262, 272 (1942); Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 617 (1978); cf. Leo Sheep v. United States, 440 U.S. 688 (1979). This doctrine applies to grants to states as well as grants to private parties. Dubuque v. Pacific Ry. Co., 64 U.S. 66, 88 (1859).

In United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411 (9th Cir. 1984), the appeals court held that RS 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal law. Citing Humboldt County v. United States, 68 F.2d 1276, 1280 (9th Cir. 1982), the court noted that any doubt as to the scope of the grant under RS 2477 must be resolved in favor of the Government.

To determine whether a valid RS 2477 highway exists, the several elements of the offer provided by the terms of the statute must be met. First, are the lands public lands? Second, were the public lands reserved for a public use? Third, was there actual construction? Fourth, was what was constructed a highway?

I. PUBLIC LANDS

These are the original lands ceded to the central Government by the original 13 States plus additional lands obtained by the United States through purchase (Louisiana purchase of 1803, Alaska purchase of 1867), by treaty with other Governments (with Great Britain in 1783, 1817, and 1846), etc. Lands 're-acquired' by the United States from patentees (Acquired Lands) are not public lands unless specific legislation so provided. The lands must not have been segregated from operation of the 'public land laws.'

Such lands must not have been settled upon, claimed, entered, etc., pursuant to appropriate public land or mineral laws of the United States. For example:

> Entered by settlement under Homestead, Trade & Manufacturing Site, or Native Allotment laws.
>
> Location of a mining claim under the 1872 Mining Laws.
>
> Selected by the State under Statehood Act or other appropriate law.

Such settlement, entry, location, or selection removes such lands from public lands status.

Such entered lands may return to public lands status upon abandonment, relinquishment, invalidation, etc. prior to obtaining title from the United States. The date of returning to public lands status will vary with the individual case circumstances and whether the official land records required notation (the 'Tract Book Notation' rule).

> The terms "public lands" and "public domain" are used in United States statutes and decisions to designate lands subject to sale or disposal under the general laws of the United States. Northern Pacific Ry. Co. v. Hirzel, 1916, 161 P. 854, 29 Idaho 438.
>
> The words "public lands," if nothing be said to the contrary, relate to lands subject to disposition under the public land laws, and not those set apart and used for some special public purpose. Stearns v. United States, Minn 1907, 152 F. 900, 82 C.C.A. 48. See also United States v. Williams, C.C. Nev. 1886, 30 F. 309, affirmed 11 S.Ct. 457, 138 U.S. 514, 34 L.Ed. 1026.
>
> "Public lands" does not include tidelands. Borax Consolidated v. City of Los Angeles, 1935, 56 S.Ct 23, 296 U.S. 10, 80 L.Ed. 9, rehearing denied, 56 S.Ct. 304, 296 U.S. 664, 80 L.Ed. 473.

> When a valid entry has been made ... that portion of the public land covered by the entry is segregated from the public domain, ... and is not included in subsequent grants made by Congress. Atchison, etc., R. Co. v. Richter, 1815, 148 P. 478, 30 N.M. 278, L.R.A.1916F, 969.

II. NOT RESERVED FOR PUBLIC USES

RS 2477 only grants rights-of-way over public lands "not reserved for public uses."

Various actions may have been taken by the Congress, Administration, or managing agency which reserves the public lands for public uses:

> Establishment of Indian Reserves, Wildlife Refuges, National Parks, National Forests, Military Reservations, and other areas not under the jurisdiction of the BLM are clearly not open to the construction of highways.
>
> Segregation from settlement, location, disposal, etc., under the public land laws by Act of Congress or by Executive or Secretarial Order (including Public Land Orders (PLO)). The extent to which withdrawals of public lands constitute "reservations for public uses" is potential complicated — see, e.g., Executive Order 6910 (54 I.D. 539) (1934); Wilderness Society v. Morton, 479 F.2d 842, 882, n.90 (D.C. Cir. 1973) — however, the BLM's position is that most, if not all, reserved for public uses. Even if not reserved for public uses, such segregation may also remove the lands from the status of "public lands;" see I above.
>
> A classification under such as the Small Tract Act (repealed), the Classification and Multiple Use Act (repealed), or the Recreation and Public Purposes Act reserves for public uses.
>
> Such lands may revert to public lands, not reserved for public uses, status upon termination of the effecting Act, Order, or Classification; the specific time of return varying with the specific circumstances.

PLO 4582 of January 17, 1969, as amended, placed all public lands in Alaska in the status of public lands reserved for public uses. PLO 4582 was repealed by the Alaska Native Claims Settlement Act of December 18, 1971, (ANCSA) which also withdrew certain lands around named and unnamed towns and villages. A

series of PLOs 1/ withdrew lands in 1971 and 1972, in addition to those withdrawn by the ANCSA itself. RS 2477 was revoked by the Act of October 21, 1976, prior to any relative change in the withdrawal status of all of Alaska's public lands. Thus the offer by Congress of a right of way grant pursuant to RS 2477 effectively ceased to exist in Alaska on January 17, 1969 (a small window between December 18, 1971, and March 9, 1972, and some scattered areas not withdrawn by the 1971/72 series of PLOs were available for operation of RS 2477).

III. ACTUAL CONSTRUCTION

RS 2477 grants a right-of-way for the construction of highways. BLM believes that the plain meaning in RS 2477 is that there must have been actual building of a highway; without some actual construction the grant could not have been accepted.

"Construction" means the "[p]rocess or act of constructing; act of building; erection; act of devising and forming; fabrication; composition; also a thing constructed; a structure." Webster's New International Dictionary, second edition, 1941 (unabridged), p. 572.

Would an act of mapping a highway route and filing such in an appropriate office constitute construction? We think not. Construction contemplates some action such as grading, surfacing, flagging, or some other physical change or addition to the natural area as may be necessary for the customary or usual passage or use by horses, wagons, cars, tracked vehicles, or even foot traffic. A residence is not constructed simply by illustrating an architectural drawing and announcing intent to build the residence. It is constructed when the foundation is laid and the sides and roof erected.

Federal decisions (administrative and judicial) are not helpful in interpreting "construction" as most, if not all, involve roads actually constructed. For example, see Nick Dire, et al., IBLA 80-420 (June 8, 1981); Wilderness Society, supra; United States v. Dunn, C.A. Cal 1973, 478 F.2d 443.

"Construction" may possibly occur over time by the passage of vehicles, however, this may be insufficient for "construction" or may not have developed to the stage of being "constructed" while the servient estate was public lands not reserved for public uses. The BLM believes that a "road" originally created merely by the passage of vehicles could have become a highway within the meaning of RS 2477 if state or local government had subsequently improved and maintained it by taking measures which qualify as "construction," i.e., grading, paving, placing culverts, etc. 2/

1/ PLO 5150 withdrew the Transportation Corridor (the Trans Alaska Pipeline), PLO 5156 withdrew the former Native Reserves, PLOs 5169 through 5181 withdrew most of the balance of Alaska for various purposes under the ANCSA.

2/ Such subsequent improvement must have occurred while the lands were still public lands not reserved for public purposes.

Roads that simply came into existence by the passage of individuals may also meet the test of "construction" by the action of the individuals. Without "construction" by state or local governments, however, such roads are not likely to qualify as highways.

IV. HIGHWAYS

A highway is a road freely open to everyone; a main road or thoroughfare; a public road; a thoroughfare from place to place, as where the context shows an intention to distinguish it from a private way intended primarily for the use of inhabitants of a particular locality; in its general sense, however, it is used to include any way, of whatever nature, which the law makes open to the use of all who pass. See, e.g., Webster's, supra, p. 1179; Harris v. Hanson, 75 F. Supp. 481 (D. Idaho 1948); Karb v. City of Bellingham, 377 P.2d 980 (Wash. 1963). Because a private road is not a highway, no right of way for a private road could have been established under RS 2477.

Where a road is constructed and/or maintained by an appropriate public body, this highway criteria is probably met. Where this is the case, the BLM need look no further.

Where a road comes into existence through passage of vehicles over time, including "construction" by non-public entities, the question becomes whether there is sufficient "public use" to clearly indicate an intent by the public to accept dedication as a highway.

> Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient *** Passive permission by a landowner is not initself evidence of intent to dedicate. *** Intention must be clearly and unequivocally manifested by acts that are decisive in character. [Footnotes omitted.] Hamerly v. Denton, 359 P.2d 121 at 125 (Alaska 1961).

> [T]he fact that at one time a road or trail may have been created by rolling the "big rocks out of the roadbed" does not establish any historical use. An entryman could have built the road one day and abandoned it the next. Mere existence of the road for 15 years does not necessarily establish any use of the road. Nick Dire, supra.

> Desultory use of dead-end road or trail running into wild, unenclosed, and uncultivated country, does not create a public highway. Evidence of public use of road during periods that land was not subject of homesteaders' claims was insufficient to justify finding that public highway was created across homestead. Party claiming that road became public highway under RS 2477 by virtue of public use had burden of proving that highway was located over public lands and that character of use was such to constitute acceptance by public of the grant under RS 2477. Hamerly, supra.

In action to establish a public highway, evidence sustained judgment for defendant on ground there were no positive acts on part of public authority clearly manifesting an intention to accept trail as a public highway as required by RS 2477, and that use of the trail by public was merely casual and was insufficient to establish the highway. Kirk v. Schultz, 1941, 119 P.2d 266, 63 Idaho 278.

Protective provisions of RS 2477 recognizing roads constructed over public lands by private persons was not applicable where defendants, who were asserting an easement for a road across public lands, had not readied claimed road for use. U.S. v. Dunn, supra.

Even though it has been held that a road may be a public highway when it provides access to only one land owner, Leah v. Manhart, 102 Colo. 129, 77 P.2d 652 (1938), courts look closely at the type of use which a road receives. Nick Dire, supra.

In summary, BLM's position is that RS 2477 was an offer by Congress that could have been accepted upon actual construction by the State, local government, or by an authorized private individual, of a highway open to and used by the public during a period when the servient lands were public lands not reserved for public uses. Insofar as highways meet this criteria, BLM will not question their validity.

State Laws Construing RS 2477

State court decisions and state statutes are in conflict with each other on the issue of how a right of way under RS 2477 is perfected. Generally, the approach of the states appears to fall into three general categories. First, some (Kansas, South Dakota, and Alaska) have held that state statutes which purport to establish such rights-of-way along all section lines are sufficient to perfect the grant upon enactment of the state statute, even if no highway had either been constructed or created by use. Tholl v. Koles, 70 P. 881 (Kan. 1902); Pederson v. Canton Twp., 34 N.W. 2d 172 (S.D. 1948); Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alas. 1975), contra Warren v. Chouteau County, 265 P. 676 (Mont. 1928). Second, states such as Colorado, Oregon, Wyoming, New Mexico, and Utah have held that RS 2477 rights-of-way can be perfected solely by public use, without any construction or maintenance. Nicolas v. Grassle, 267 P. 196 (Colo. 1928); Montgomery v. Somers, 90 P. 674 (Ore. 1907); Hatch Bros Co. v. Black, 165 P. 518 (Wyo. 1917); Wilson v. Williams, 87 P.2d 683 (N.M. 1939); Lindsay Land & Livestock Co. v. Churnos, 285 P. 346 (Utah 1930). Third, Arizona courts have held that rights-of-way can be established only by a formal resolution of local government, after the highway has been constructed. Perfection by mere use is not recognized. Tucson Consol. Copper Co. v. Reese, 100 P. 777 (Ariz. 1900).

The term "construction" must be construed as an essential element of the grant offered by Congress; otherwise, Congress' use of the term is meaningless and superfluous. The states could accept only that which was offered by Congress

and not more. From the BLM's point of view, the Arizona interpretation is the only correct one; the positions taken by the other states do not meet the express requirements of the statute. For example, the Kansas, South Dakota, and Alaska approach based on section lines does not even require that there be a highway or access route, much less that it be constructed. The approach taken by the other states that RS 2477 rights-of-way may be perfected by access ways created by use alone, without any construction, also fails to meet the plain requirement of RS 2477 that such highways be "constructed."

Thus, rights-of-way which states purport to accept but on which highways were not actually constructed while the lands were public lands not reserved for public uses do not meet the requirements of RS 2477 and therefore no perfected right-of-way grant exists.

Assertions, Validity, Acceptance

BLM's regulations at 43 CFR 2802.5(b) provide that an entity which has constructed highways under RS 2477 may file with BLM a map showing the location of such a public highway. Further:

> The submission of such maps showing the location of RS 2477 highway(s) on public lands shall not be conclusive evidence as to their existence. Similiarly, a failure to show the location ... shall not preclude a later finding as to their existence.

A claim of an RS 2477 right-of-way is like a miner's location of a claim under the Mining Law of 1872, for which no application is required either. Like a mining claim, however, a claim to a RS 2477 right-of-way does not necessarily mean that a valid right exists. The United States has often successfully challenged the validity of mining claims because of the failure of the claimant to establish rights under that law. See, e.g., Cameron v. United States, 252 U.S. 450 (1920); United States v. Coleman, 390 U.S. 599 (1968); Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). The BLM has not previously determined the validity of claimed rights under RS 2477 because it has had no land or resource management reason to do so; i.e., conflicts generally did not arise between the existence of claimed rights-of-way under RS 2477 and the management of the public lands affected by such claims. If there is a resource management reason to do so, claimed rights-of-way may be reviewed to determine their validity under RS 2477.

Under Sections 201 and 202 of the Federal Land Policy and Management Act (43 U.S.C. 1711 & 1712) (FLPMA), the BLM is required to prepare and maintain inventories of public lands and prepare land use plans.

In concert with this, the BLM has encouraged states and local governments to assert those state and local government highways they believe are RS 2477 highways. Where such asserted highways appear to meet the criteria of construction on public lands not reserved for public uses, the BLM will note the records. This is similar to the "acceptance" and noting of a mining claim notice filed pursuant to Section 314 of FLPMA (43 U.S.C. 1744).

Where the asserted RS 2477 highway involves land which is (was) not public lands not reserved for public uses, or construction does not appear to have been involved, the BLM will not note the records and should inform the asserter that the BLM does not believe the assertion is valid. The BLM will not adjudicate the validity of such assertions unless there is a conflicting land or resource management concern that cannot be resolved without determining the validity of the RS 2477 assertion.

BLM Regulation of Public Highways

A valid RS 2477 right-of-way consists of a grant of right of way from the United States. The right-of-way is for public highway use and only highway uses (see Gates of the Mountains, supra.).

If BLM is the manager of the servient estate, it may challenge the holder of the RS 2477 right-of-way whenever the holder seeks to do something beyond the rights granted. Uses other than highways within or adjacent to the RS 2477 highway may not be made except under appropriate federal law and, where required by such law, with authorization from the BLM.

Appropriate uses within the RS 2477 right-of-way generally will not be a concern of the BLM nor will the BLM seek to regulate such uses either administratively or through judicial proceedings. However, should the BLM believe that a proposed use/action within a RS 2477 right-of-way would have an adverse impact on adjacent BLM managed lands or resources, BLM will take appropriate steps to protect such lands or resources.

RS 2477 and Lands Conveyed from the United States

A RS 2477 right-of-way was a grant offered by the United States, was accepted by action of appropriate public officials, and required no approval by the administering federal agency. As such the existence of such a right-of-way is not included in the reservations or exceptions in the patent or other document conveying public lands to states, local governments, or private entities. The new owner takes the title to the land from the United States subject to any RS 2477 rights that may exist.

It is the responsibility of the entity claiming the RS 2477 right-of-way to protect its interest against the new owner, or, conversely, the responsibility of the new owner to protect his property against the assertions of others. The BLM has no role in any such disputes.

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0124B

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