#25.1

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities

TO: John Athens
Assistant Attorney General
Attorney General's Office

DATE: November 25, 1986

FILE NO: 24.13 D/10

TELEPHONE NO: 451-5150

FROM: John D. Martin, P.E.
Chief of Planning & Research
Northern Region

SUBJECT: Section Line Easements

as friend of the court

The Federal government has filed an amicus curiae brief (copy attached) in an Anchorage civil case challenging the existence and proposed development of a section line easement. The plaintiff in that case argues that the section line easement doesn't exist, but even if it does, construction of a drainage ditch which isn't needed for a road is not an allowable use of the easement. The amicus curiae brief expands the issue to the point of challenging the existence of any section line easement on Federal land where no road construction was undertaken. The Federal argument is that since section line easements are based on RS2477 and, since RS2477 requires construction, no automatic section line easements exist where construction was not undertaken.

Since the land law community, including the Federal government, has long recognized and relied on section line easements, and since it is common for property owners to rely on section line easements for physical and/or legal access, a determination that they do not, and never did, exist on Federal land would cause a severe hardship to many property owners and to the State. It is important that the State develop and present a case protecting them and that we not miss any court deadlines for filing a responsive amicus curiae brief. Given the historic ability of states to define the details of RS2477 and given the 60 plus year history of recognition of section line easements in Alaska, we believe the State can successfully defend them. Please review the attached Federal brief and get back to us on this as soon as possible.

Work on this issue should be charged to our Northern Region ROW Acquisition project, number 24200495-57801-30184181.

Pam - Where does this come from? Okay

NP/bt

Attachment

cc: Mark Hickey, Special Assistant for External Affairs, Juneau

Please Copy for comment -
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA GREENHOUSES, INC. Plaintiff, v. MUNICIPALITY OF ANCHORAGE, et al., Defendants.	Case No. A85-630 Civil BRIEF AMICUS CURIAE OF THE UNITED STATES

By Order filed August 6, 1986, this court invited the United States to submit a brief amicus curiae setting forth the views of the United States on this action. The United States informed the court on October 6, 1986 that it desired to file an amicus brief.

This case is, from one perspective, a dispute between a private party, the Municipality of Anchorage, and a private contractor. It is in essence a dispute over money. Plaintiff Alaska Greenhouses, Inc. argues that no highway right-of-way exists along the section lines where the Municipality plans to construct or permit to be constructed certain drainage ditches. Plaintiff also argues

cc: Dan Beardsley

that if a right-of-way exists, the drainage ditches are outside the scope of that right-of-way. If plaintiff prevails, it will be entitled to just compensation if the Municipality or intervenor-defendant Cross Pointe Ventures takes the drainage ditches. The ability of the Municipality to condemn such easements is not questioned.

The United States has no direct interest in whether Alaska Greenhouses, Inc. receives such compensation. However, the United States has a strong interest in the proper interpretation of a federal statute (R.S. 2477, 43 U.S.C. § 932 (repealed 1976)) [1/] which provided for the establishment of rights-of-way for the construction of highways across the unreserved public lands. Defendants and intervenors base their asserted right-of-way on that statute. The interpretation of the statute asserted by the Municipality of Anchorage impermissibly enlarges the scope of the federal offer contained in R.S. 2477 in a manner which could pose a substantial threat to the management of federal lands in Alaska. As the validity of the purported acceptance by various states of R.S. 2477 rights-of-way by enactment of section line easement statutes has never been squarely litigated in a federal court, this case has implications far exceeding the specific controversy between

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1/ R.S. 2477 was enacted as Section 8 of the 1866 Lode Law, 24 Stat. 253, and repealed by Section 706(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, 90 Stat. 2703.

Alaska Greenhouses and the Municipality of Anchorage.

Accepting this court's invitation, the United States will demonstrate: 1) That federal law controls on the scope of the federal offer in R.S. 2477; 2) That R.S. 2477 rights-of-way do not include the right to build drainage ditches unrelated to any highway; and 3) That no R.S. 2477 highway right-of-way exists along the section lines at issue in this case.

FACTS

The United States, in its capacity as amicus, is not in a position to create the factual record. See Sony Corp. of America v. University City Studios, 104 S. Ct. 774, 785 n.16 (1984). However, as a friend of the court, the United States believes that it is important to alert the court to serious gaps in the record before it, and to suggest that this court require that the parties complete the record before the court determines the dispositive motions before it.

The factual chronology of the land status of the Alaska Greenhouses' property over the last few decades is complex, but undisputed. For this brief, suffice to say that there was a period (1923 to 1944) when:

(1) the section lines at issue here had been surveyed;

(2) the parcel was federal unreserved public land not subject to any third-party claim under the homestead or similar public land laws; and

(3) a statute of the Territory (now State) of Alaska was in effect purporting to designate highway easements along all section lines in the Territory.

The Municipality maintains that the simultaneous occurrence of those three events established a right-of-way for public highway purposes along all section lines here. Amicus and plaintiff disagree. Based on the confusion in the record, however, it is not clear whether this legal dispute must be resolved.

While clear on the land status, the record is extremely unclear on the construction which precipitated this action. Counsel for the United States was unable to determine from the record whether any drainage ditches had been dug; whether, when and where any roads had been built and what if any relationship exists between the roads and the drainage ditches. Alaska Greenhouses alleges that the Municipality has permitted the construction of two drainage ditches on Alaska Greenhouses' property. The Affidavit of Jerrold Hanson, submitted by the Municipality, states:

> 3. The section lines along Alaska Greenhouses, Inc., property will be used to construct a road and drainage ditch along the east-west section line and a drainage system along the north-south section line,
>
> 4. Such drainage systems are routinely built to channel the flow of water off property, and
>
> 5. Such drainage systems are routinely built in conjunction with roads to protect the integrity of the roadway.

The facts on construction are important because if, as the United States believes, the ditches here are in fact unrelated to any highway, then this action can be decided on a narrow ground based upon clearly controlling and recent Ninth Circuit precedent. In the absence of such clarification, this court is asked by the parties to decide an issue of first impression in the federal courts which has potential implications in all states with section line right-of-way legislation.

As stated above, the United States as amicus is not in a position to create the factual record. The following is what the United States believes the record would show and is based primarily upon a visit to the site and examination of various plats and aerial photos.

Alaska Greenhouses holds a long-term lease on a parcel in the northeast corner of Section 24, T13N, R3W Seward Meridian. The parcel is fronted by Muldoon Road on the west and is generally located just southeast of the intersection of DeBarr and Muldoon Roads. The northern boundary of the Alaska Greenhouses' property is the section line between Sections 24 and 23, T13N, R3W Seward Meridian. The eastern boundary is the section line between Sections 24 and 13, T13N, R3W Seward Meridian. The Municipality claims that an R.S. 2477 highway right-of-way exists along both section lines and that that right-of-way includes the right to construct drainage ditches within the right-of-way. The Municipality has issued a permit to intervenor Cross Pointe

Ventures to construct such ditches. Cross Pointe Ventures is apparently the developer of a subdivision northeast of the Alaska Greenhouses' property. The ditches would encroach onto the Alaska Greenhouses' side of the section lines. Neither drainage ditch has yet been constructed. The planned north-south drainage ditch is unrelated to any road. The situation is more complicated with the planned east-west ditch. There is an existing road and drainage ditch running along the section line between Sections 24 and 23. The entire road and drainage ditch are located adjacent to, but north of the section line; that is, they are completely in Section 23 and do not encroach on Alaska Greenhouses' property.

The road was constructed in three segments. The middle (but chronologically first) segment was constructed approximately ten years ago and serves a subdivision developed at that time. The second segment, which runs between Muldoon Road and the middle segment, was constructed approximately two years ago. The final segment extends the road eastward to a new subdivision of Cross Pointe Ventures. All three portions have already been constructed and all three were constructed with a drainage ditch entirely north of the section line which appears to be adequate to drain water from the roadway.

These factual issues are relevant because, as we shall demonstrate below, even if an R.S. 2477 highway easement exists, it does not include the right to construct

drainage ditches unrelated to the construction of the highway. United States v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 (9th Cir. 1984). The United States recognizes, however, that the construction of ditches is often an integral and necessary element in the construction of highways and thus within the scope of the highway easement. The Municipality has not alleged that this is the case here. It alleges merely that drainage ditches are routinely built either to drain the water off property or to maintain the integrity of highways. The relevant issue here is not the routine use of ditches, but rather the actual use of the proposed east-west ditch and its relationship to the road. The fact that the road sections have been built with an existing non-encroaching ditch suggests that the new ditch is for the convenience of the new subdivision and not an integral and necessary part of the road.

If this is true, the United States advises the court that this action can be decided on the basis of United States v. Gates of the Mountains, supra, and therefore recommends that the court require the parties to clarify the facts relating to the ditches, either by stipulation or a limited evidentiary proceeding. The court clearly has discretion to do so under Rule 56, Federal Rules of Civil Procedure. Fine v. City of New York, 71 F.R.D. 374, 375 (S.D.N.Y. 1976).

ARGUMENT

I. Federal Law Controls The Scope Of The Federal Offer.

This action involves the interpretation of a deceptively simple statute, R.S. 2477, 43 U.S.C. § 932 (1970)(repealed 1976), which provides:

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

This provision has been construed as a federal offer of rights-of-way which may be accepted by the states. Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). The scope of the federal offer is a question of federal law, United States v. Gates of the Mountains Lakeshore Homes, 732 F.2d 1411, 1413 (9th Cir. 1984); Frank A. Hubbell Co. v. Gutierrez, 22 P.2d 225, 37 N.M. 309 (1933), but within the scope of that offer, state law controls whether a right-of-way has been validly accepted as a public highway. Cochise County v. Pioneer National Title Insurance Co., 565 P.2d 887 (Ariz. 1977). Put another way, states may accept less than the federal government has offered, but the states may not accept more than the federal government has offered.

The Municipality argues that state rather than federal law controls the existence vel non of an R.S. 2477 right-of-way here because this is a dispute between private parties not involving the federal government. This argument will not withstand scrutiny. R.S. 2477 is an offer for the establishment of rights-of-way across the federal unreserved

public lands and no other kind of land. If a right-of-way exists at all here, it exists because prior to the entry of Alaska Greenhouses' predecessor-in-interest, the United States offered and the State (then Territory) validly accepted a right-of-way grant. When the entry by the homesteader of the public land was allowed, the land was no longer "unreserved", and an R.S. 2477 right-of-way could no longer be be established. If, however, the right-of-way was established prior to the entry, the homesteader took subject to that right-of-way because the United States cannot grant to one what it has already granted to another. See Leavenworth L&GR Co. v. United States, 92 U.S. 733, 745-46 (1875). The subsequent patent to the homesteader is a quitclaim from the United States to the homesteader. Wilson Cypress Co. v. Del Pozo y Marcos, 236 U.S. 635 (1915). It passes to the patentee everything the United States has, except those reservations to the United States contained in the patent or implied by existing law. Energy Transportation Systems, Inc. v. Union Pacific R.R., 435 F. Supp. 313, 317 (D. Wyo. 1977), aff'd, 606 F.2d 934 (10th Cir. 1979). It can in no way constitute a second conveyance to the state. Logically then, the state's right-of-way is no greater after the patenting of the surrounding land than it was when the land was public domain.

As the Ninth Circuit held only two years ago in United States v. Gates of the Mountains Lakeshore Homes, supra at 1413, "[t]he scope of a grant of federal land is,

of course, a question of federal law." While in some instances federal law adopts state law in the construction of its grants, such is not the case with R.S. 2477. Id.

The cases cited by the Municipality for the proposition that state law is controlling are inapposite. Standage Ventures, Inc. v. State of Arizona, 499 F.2d 248 (9th Cir. 1974), held that no federal question jurisdiction exists in an R.S. 2477 case where the only issue was whether there had been an acceptance of a right-of-way under state law and there was no dispute as to the scope of the federal offer. Here the dispute goes to the scope and meaning of R.S. 2477 itself.

Reliance on United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943), is likewise misplaced. In that case, the federal statute specifically incorporated state law. However, the Ninth Circuit has squarely held in Gates of the Mountains, supra at 1414, that R.S. 2477 is a statute in which Congress neither explicitly nor implicitly adopted state law on the scope of the grant. The Ninth Circuit specifically rejected the reliance of defendant in that case on Oklahoma Gas & Electric.

The cases cited by intervenor Cross Pointe Ventures are likewise inapposite. Alaska Greenhouses has already argued in its Reply to Cross Pointe Ventures Opposition to Plaintiff's Motion for Summary Judgment that Hyman v. State Land Commission, 543 F. Supp. 118 (C.D. Cal. 1982), is no longer good law after Summa Corp. v. California ex rel

State Lands Commissioner, 104 S. Ct. 1751, 1753 n.1 (1984). Even before Summa, however, Hyman did not support resort to state law in this case. Hyman related to claims under Mexican grants in California. These are grants by the Spanish and Mexican governments prior to the cession of California to the United States. The United States recognized and confirmed such prior grants, but the lands never belonged to the United States.

> It is undisputed that if plaintiffs' land once belonged to the United States and was subsequently granted by the United States, federal law would determine exactly what passed from the United States. But the instant case involves land which never belonged to the United States.

543 F. Supp. at 121.

Reliance on Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1980), is likewise misplaced. That case involved the question of whether state or federal law controlled the issue of whether submerged lands which had admittedly passed from the United States could be lost through accretion or avulsion. Here the issue is whether a highway right-of-way has ever passed from the federal government and if so, the extent of the right-of-way. The Supreme Court in Corvallis reaffirmed that federal law applies to such situations.

> Whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States. (Emphasis in original.) 429 U.S. at 377.

That the disputing claimants are now both private owners does not alter the rule that the validity and extent of the grants are to be determined by federal law. Thus, in Energy Transportation System, Inc. v. Union Pacific R.R., 435 F. Supp. 313 (D. Wyo. 1977), aff'd, 606 F.2d 934 (10th Cir. 1979), the court concluded that it had federal question jurisdiction to decide a dispute between the holder of a railroad right-of-way under the 1862 Railroad Act, 43 U.S.C. § 934, and a coal slurry pipeline company which had acquired a subsurface pipeline easement from the successor-in-interest of the homesteader who had received title to land traversed by the railroad. The specific question was whether the railroad right-of-way included the right to use the subsurface mineral estate. Although the United States was not a party, the issue was one of federal law because it was "a controversy respecting construction of federal acts and the nature of the estate granted to defendant by them." 435 F. Supp. at 314.

In Chicago & Northwestern Ry. v. Continental Oil Co., 253 F.2d 468, 472 (10th Cir. 1958), the Tenth Circuit rejected the theory that the extent of a railway right-of-way would vary depending on whether the United States were a party.

> In the first place, we can find no valid basis for the inapplicability of Great Northern [a federal decision in which the United States was a party] to a contest between parties other than the Government.

See also Northern Pacific Ry. v. Townsend, 190 U.S. 267, 271 (1903).

In sum, there is no doubt that federal law controls here. In applying that federal law, it must be kept in mind that in interpreting a grant from the federal government, all doubts are resolved in the government's favor. Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982); Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 617 (1978). Nothing passes except what is conveyed in clear language. United States v. Union Pacific R.R., 353 U.S. 112, 116 (1957). This rule applies to grants to states or corporations for the construction of public works. United States v. Michigan, 190 U.S. 379 (1903).

II. A Section Line Easement, Even If It Exists, Does Not Include The Right To Build A Drainage Ditch Unrelated To A Highway.

Although R.S. 2477 is a statute providing for the construction of highways, no highway encroaches on the Alaska Greenhouses' property. This case involves drainage ditches, not highways.

The United States submits that under United States v. Gates of the Mountains Lakeshore Homes, supra, drainage ditches unrelated to a highway are outside of the scope of an R.S. 2477 right-of-way. The United States recognizes, however, that construction of a highway often requires the construction of a drainage ditch as a necessary and integral part of the highway itself. Such drainage ditches would not

be considered outside the scope of the easement since they result from the construction of the highway itself. As explained in the statement of facts, clarification of the record is necessary before the court can pass on the validity of the drainage ditches here. At first blush, they appear to be unrelated to the road construction and invalid.

The issue of whether an R.S. 2477 right-of-way includes the right to construct drainage ditches unrelated to a highway is clearly controlled by the Ninth Circuit decision in United States v. Gates of the Mountains Lakeshore Homes, supra. As stated in Part I of this memorandum, the Ninth Circuit held in that case that the scope and extent of the easement which may be acquired pursuant to R.S. 2477 is a question of federal law and that the United States had not impliedly adopted state law as federal law in determining the scope of the R.S. 2477 grant. The Ninth Circuit then held that an R.S. 2477 right-of-way does not include an easement for powerline purposes. Those holdings (though in apparent conflict with the earlier Alaska Supreme Court decision in Fisher v. Golden Valley Electric Ass'n, 658 P.2d 127 (Alaska 1983)) are controlling in this court.

There are only two factual distinctions between this action and Gates of the Mountains. First, the R.S. 2477 right-of-way in Gates of the Mountains traversed what later became reserved national forest land rather than private land. Second, Gates of the Mountains involved a powerline rather than a drainage ditch. Neither factor

alters the conclusion that no easement for drainage purposes exists here.

As demonstrated in Part I of this memorandum, the scope of an R.S. 2477 right-of-way over private lands is the same as over public lands.

Nor does the distinction between powerlines and drainage ditches require this court to resort to state law to determine the scope of the R.S. 2477 right-of-way. The Ninth Circuit's decision in Gates of the Mountains that Congress did not intend to adopt state law was based primarily on the existence of statutes which specifically authorized the Secretary of the Interior to grant powerline easements over the public lands under certain conditions. The Act of February 1, 1901, 43 U.S.C. § 959 (repealed 1976), on which the Ninth Circuit relied, applied on its face not only to the granting by the Secretary of powerlines over the public lands, but to drainage ways as well. Thus, the same result is necessary for drainage ditches as for powerlines. Significantly, 43 U.S.C. § 959 does not apply to the Indian lands which were at issue in United States v. Oklahoma Gas & Electric, 318 U.S. 206 (1943). Indeed, the Ninth Circuit in Gates of the Mountains specifically rejected the type of reliance placed on Oklahoma Gas & Electric both by defendants here and the Alaska Supreme Court in Fisher v. Golden Valley Electric, supra. Gates of the Mountains is clearly controlling here.

III. R.S. 2477 Requires Construction In Order to Establish A Right-Of-Way.

The issue in this action that is not controlled by recent Ninth Circuit precedent is whether the Territory of Alaska's enactment of legislation purporting to designate highways along all section lines in Alaska was ineffective because it was not consistent with the scope of the federal offer in R.S. 2477. [2/] The Supreme Court of Alaska held in Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975), that the statutory designation was a valid acceptance of the federal offer and upheld the validity of section line rights-of-way under R.S. 2477. No federal court has squarely decided this issue.

We shall show, based on the clear language of the statute, [3/] the language of statutes to be read in pari materia, federal cases interpreting R.S. 2477 and administrative construction that the Supreme Court of Alaska has overestimated the scope of the federal offer in R.S. 2477.

2/ The Alaska statutes operate in two ways. They purport to designate highway rights-of-way along section lines in the unreserved federal public lands. They also impress a section line easement on the State owned lands. The authority of the State to impress easements of whatever scope over its own lands is not doubted. Thus on lands conveyed to the State pursuant to the Alaska Statehood Act (which comprise the bulk of the federal lands surveyed by the United States before 1969, Declaration of Francis D. Eickbush), an easement will exist regardless of the outcome of this action. We deal here only with the former issue.

3/ The Legislative history is silent on the interpretation of R.S. 2477.

That statute requires actual or, at least, imminent construction. To the extent the Alaska statute purports to accept rights-of-way without any actual or even planned construction, the purported acceptance exceeds the scope of the offer and is invalid.

In analyzing each of these factors, the court must keep in mind the rules constraining federal grants in favor of the government set out on page 13.

A. The plain meaning of the statute.

The starting point, for statutory construction, is the plain meaning of the words of the statute. Alaska v. Lyng, 797 F.2d 1479 (9th Cir. 1986).

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

R.S. 2477

Alaska Greenhouses has already focused the attention of the court on the word "construction" in the statute (Alaska Greenhouses' Reply to the Municipality's Opposition to Plaintiff's Motion for Summary Judgment at 15), the need to give that term its ordinary dictionary meaning (see Powell v. Tucson Air Museum Foundation of Pima, 771 F.2d 1309, 1311 (9th Cir. 1985)), and the rule of construction that a statute must be interpreted to avoid surplusage. United States v. Menasche, 348 U.S. 528, 538-39 (1955). Rather than repeat those points about the existence of the word "construction", the United States would focus the

attention of the court on its location in the statute. The provision grants a right-of-way "for the construction of highways over public lands." The construction must be over public lands, that is, it must occur while the land is unreserved public land. Had Congress intended to offer rights-of-way in the absence of actual construction, the statute would have read:

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

or

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

B. Similar statutes confirm the actual construction requirement.

The fallacy of the overbroad construction of R.S. 2477 by the Supreme Court of Alaska is apparent when one examines other federal easement statutes from the mid-nineteenth century. These statutes must be read in pari materia with R.S. 2477. See Sands, Sutherland Statutory Construction § 64.07.

Most notable is 30 U.S.C. 51 which is the section immediately following R.S. 2477 in the Act of July 26, 1866, 4/.

4/ Of course, a provision of a statute must be read in the context of the whole statute. Richards v. United States, 369 U.S. 1 (1962).

C. 262 § 9, 14 Stat. 253 (repealed 1976)

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: Provided, however that whenever after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Despite the strong reference to state and local law and customs, the Supreme Court has interpreted this section to include an actual construction requirement.

> Under this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests as against the government, in the party entering upon possession from the mere fact of possession unaccompanied by the performance of any labor thereon.
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> * * *
>
> It is the doing of the work, the completion of the well or the digging of the ditch, within a reasonable time from the taking of possession, that gives the right to use the water in the well or the right of way for the ditches or the canal upon or through the public land. Until the completion of this work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the person taking possession has no

> title, legal or equitable, as against the government.

Bear Lake Irrigation v. Garland, 164 U.S. 1, 18-19 (1896).

Similarly, Section 2 of the Act of July 6, 1866 allows the patenting of mining claims to those who have "occupied and improved the same ... having expended in actual labor and improvements thereon an amount not less than one thousand dollars". § 2, 14 Stat. 251.

In 1875, Congress granted a right-of-way across the public lands for railroad purposes. Act of March 3, 1875, 18 Stat. 483, 43 U.S.C. 934 et seq. The right-of-way may be accepted either by actual construction, Great Northern R.R. v. United States, 315 U.S. 262 (1942), or by filing a profile of the route with the Secretary of the Interior. 43 U.S.C. § 937. If acceptance is by filing, the railway must be actually constructed within five years or the right-of-way is forfeited. Id.

The conclusion is inescapable. Congress was generous with those who actually placed improvements on the public lands but never consented to the cluttering of the public domain with paper rights-of-way by those who had not constructed, nor were about to construct, such improvements.

C. Federal case law supports the actual construction requirement.

While the federal cases have never squarely addressed the issue of whether section line legislation

exceeds the scope of the federal offer, [5/] they clearly indicate that Congress' concern in enacting R.S. 2477 was with highways actually constructed. Thus in Central Pacific Ry. v. Alameda County, 284 U.S. 463, 473 (1932), emphasized that:

> The section of the Act of 1866 granting rights of way for the construction of highways, ... was, so far as then existing roads are concerned, a voluntary recognition and confirmation of preexisting rights brought into being with the acquiescence and encouragement of the general government.

In one decision, United States v. Dunn, 478 F.2d 443, 445 n.2 (9th Cir. 1973), the Ninth Circuit went even further and suggested that the construction had to have occurred prior to 1866. Later Ninth Circuit opinions have questioned Dunn on the issue of the non-prospective nature of R.S. 2477, Humboldt County v. United States, 684 F.2d 1276 (9th Cir. 1982); United States v. Gates of the Mountains Lakeshore Homes, supra at 1413 n.3, but as these cases involved actually constructed highways, they do not undercut the emphasis placed in Dunn and Central Pacific on actual construction.

[5/] The Eighth Circuit has decided two cases involving section line easements. Bennett County, South Dakota v. United States, 394 F.2d 8 (8th Cir. 1968); Bird Bear v. McClean County, 513 F.2d 190 (8th Cir. 1975). Both cases were decided on the basis of the land status of the parcels at issue. Admittedly, the Eighth Circuit assumed that section line easement legislation could form a valid acceptance, but it appears from the opinions that the actual

(Footnote Continued)

Cross Pointe Ventures cites Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), for the proposition that R.S. 2477 contains no construction requirement. However, Wilderness Society is in no way inconsistent with the principle in Bear Lake Irrigation Co. that the rights-of-way and other rights offered in the 1866 Act vest upon construction while the land is in public domain status or within a reasonable time thereafter. In Wilderness Society, the imminent construction of the North Slope haul road was clear and definite. Indeed, the actual construction of the road occurred while the land was in public domain status for purposes of establishing a highway under R.S. 2477. 6/

D. Administrative interpretation confirms the existence of the actual construction requirement.

The Department of the Interior is the agency within the federal government responsible for the administration of unreserved public lands and, indeed, of the bulk of all federally owned lands. See generally Titles 16 and 43 U.S.C. On April 28, 1980, the Deputy Solicitor of the Interior issued an opinion entitled "Standards to be applied

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(Footnote Continued)
construction requirement was neither argued to nor addressed by the court.

6/ This is so because the action under attack in Wilderness Society was the decision of the Secretary to lift partially Public Land Order (PLO) No. 4582 for the purpose of construction of the highway. As the PLO was lifted for that purpose only, the construction did occur while the lands were in public land status. See 479 F.2d 842, 882 n.90.

in determining whether highways have been established across public lands under the repealed statute R.S. 2477 (43 USC §932)." Federal Ex. 1. [7/]

The Deputy Solicitor concluded that actual construction was a condition of the grant and that the state statutes purporting to accept easements along each section line within the state were insufficient to establish R.S. 2477 rights-of-way. Federal Ex. 1 at 11. The opinion's conclusions are reflected in the Bureau of Land Management Manual. Federal Ex. 2.

The interpretation of a statute by the agency charged with its administration is granted substantial deference. Udall v. Tallman, 380 U.S. 1, 16 (1965). If a statute is silent or ambiguous with respect to the specific issue, the court may not substitute its own construction for a reasonable interpretation by the agency. Chevron USA, Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984). Indeed, deference requires affirmance of any agency interpretation "within the range of reasonable meanings the words permit, comporting with the statute's clear purpose."

[7/] That this first comprehensive analysis by the Department of the Interior of R.S. 2477 followed the enactment of the statute by more than a century is not at all surprising. Although the statute had been the subject of numerous state court cases and a few federal court cases, the United States was almost never a party. It was only after the repeal of R.S. 2477 and the passage of the Federal Land Policy and Management Act of 1976 [FLPMA] that it became necessary for the Solicitor's Office to take a comprehensive look at R.S. 2477.

Alaska v. Lyng, 797 F.2d 1479 (9th Cir. 1986). The Solicitor's opinion fully comports with the clear purpose of the 1866 Act to secure and reward those who actually placed improvements on the public lands. Indeed, since only a small minority of states have adopted section line easement statutes, it is not possible to argue that the absence of section line rights-of-way frustrates R.S. 2477.

The only objection which may be said against the Solicitor's opinion is that it contradicts the decisions of four state courts. The Deputy Solicitor recognized that his opinion was inconsistent with some state court decisions, but noted that the state decisions are themselves inconsistent. Thus while some state courts (Alaska, the Dakotas and Kansas) have recognized section line rights-of-way, Montana has interpreted the federal offer in R.S. 2477 to require construction.

> Further, it is immaterial that the lands now owned by plaintiff were public domain at the time the road petition was presented and acted upon, as section 2477, U.S. Revised Statutes (43 USC §932), but grants a right of way for highway purposes over the public domain, which grant does not become operative until accepted by the public by the construction of a highway according to the laws of the state.

Warren v. Chouteau Co., 265 P. 676, 679 (Mont. 1929). (Emphasis added.)

In any event, it is not at all unusual for federal courts to have to interpret federal statutes in a manner inconsistent with prior state law which remained

unchallenged for a long period of time by federal authorities. The Deputy Solicitor in his opinion pointed to the Supreme Court's decision in United States v. California, 332 U.S. 19 (1947), in which the Supreme Court held that the United States owned the sea bed in the three mile belt coastal, despite the long time belief of the California legislature and courts that the state owned the submerged lands. This is not an isolated instance. See Minnesota v. United States, 305 U.S. 382 (1939)(federal statute permitting states to condemn Indian allotment implicitly requires that action be brought in federal court despite nearly four decades of condemnation actions brought under statute in state courts.); Joint Council of Passamaquoddy and Penobscot Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975)(Indian Nonintercourse Act, 25 U.S.C. 177 applies to Maine Indians despite almost two century long practice that it did not.) Indeed, we already know from Gates of the Mountains, supra, that the Alaska Supreme Court in Fisher v. Golden Valley Electric, supra, seriously misinterpreted R.S. 2477 on the scope of the right-of-way and must be disregarded at least in part.

While the Solicitor's opinion is reasonable and comports with the purpose of R.S. 2477, the Alaska Supreme Court's interpretation leads to absurdities Congress could not have intended. The state statute ignores not only construction but the feasibility of construction. We believe the court can take judicial notice of the fact that

the topography of Alaska precludes the use of section line easements for highway purposes in much, indeed most of the state. It may not seem that an easement for a highway which could not be built is a serious encumbrance on the land. However, the Alaska Supreme Court has sanctioned the use of section line easements for utility lines even where no highway is constructed. In this manner, the state law has completely distanced itself from the original Congressional offer "for the construction of highways across the public lands".

The state interpretation is likewise incongruous in that it would substantially interfere with the ability of the federal government to establish large reserves. Very often access to such reserves must be carefully limited--military or Indian reserves, for example. Because of the construction requirement, the federal government has been able to locate its reserves so as to avoid intersecting transportation routes. The section line easement statutes largely deprive the federal government of that ability--a result Congress could not have intended. Indeed under the "no construction requirement" theory, there was nothing to prevent states from placing floating highway easements over the entirety of the public lands. See e.g. 48 U.S.C. § 321d (repealed 1959). In sum, R.S. 2477 clearly requires actual construction over the unreserved public lands and no highway easements exist over the section lines here.

CONCLUSION

With a slight clarification of the record, this could be a simple case controlled by Gates of the Mountains. The United States believes the court should require clarification of the record before deciding the summary judgment motion. In any event, Alaska's purported creation of R.S. 2477 rights-of-way over all section lands on the public domain was ineffective because it was outside the scope of the federal offer.

RESPECTFULLY SUBMITTED this 23 day of October, 1986 at Anchorage, Alaska.

BRUCE M. LANDON
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA GREENHOUSES, INC. Plaintiff, v. MUNICIPALITY OF ANCHORAGE, et al., Defendants.	Case No. A85-630 Civil DECLARATION OF FRANCIS D. EICKBUSH

1. My name is Francis D. Eickbush.

2. I am the Deputy State Director for Cadastral Survey, Alaska State Office of the Bureau of Land Management, U.S. Department of the Interior. I have held this position for approximately five years.

3. Only a small part (less than 15 million out of 365.3 million acres) of the State of Alaska had been surveyed prior to 1969. The great bulk of the lands surveyed prior to 1969 were selected by the State under the Alaska Statehood Act and other land grants to the State.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Francis D. Eickbush
FRANCIS D. EICKBUSH

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

APR 23 1980

Honorable James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Re: Standards to be applied in determining whether highways have been established across public lands under the repealed statute R.S. 2477 (43 U.S.C. § 932).

Dear Mr. Moorman:

I. Introduction

This is in response to your letter of March 12, 1980. The statute in question, R.S. 2477 (43 U.S.C. § 932), was originally section 8 of the Act of July 26, 1866 (14 Stat. 253). It was repealed in 1976 by section 706(a) of the Federal Land Policy and Management Act. Prior to its repeal, it provided in its entirety as follows:

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

Because of the repeal, we are only concerned with grants of rights-of-ways perfected prior to October 21, 1976, the date of the enactment of FLPMA.1/

As you are probably aware, R.S. 2477 has been the subject of inconsistent state statutes and state court decisions, and a handful of inconsistent federal court decisions, during its 110-year existence.2/ Even if the stat interpretations were fully consistent with each other, they would not neces sarily control, especially where, as here, almost all of the reported state court decisions involved competing rights of third parties and the United States was not a party to them. The analysis in the various federal

1/ A valid R.S. 2477 highway right-of-way is a valid existing right which is protected by FLPMA's sections 701(a) (43 U.S.C. § 1701 note), and 509(a) (43 U.S.C. § 1769(a)).

2/ The legislative history is silent as to the meaning of this section of the 1866 statute. See generally The Congressional Globe, Vol. 36, 39th Cong., 1st Sess. (1866).

cases involving R.S. 2477 also are not only inconsistent with each other, but none of them definitively come to grips with the precise issue we now face: Exactly what was offered and to whom by Congress in its enactment of R.S. 2477, and how were such rights-of-way to be perfected?

In the face of this tangled history,3/ we outline below what we believe to be the proper interpretation of R.S. 2477. Our interpretation comports closely with its language which, because of the absence of legislative history, is especially appropriate. Our view is also consistent with many of the reported decisions. It has the added virtue of avoiding what would otherwise be a serious conflict between highway rights-of-way established under R.S. 2477 and the meaning of the term "roadless" in section 603 of FLPMA, which deals with the Bureau of Land Management (BLM) wilderness review responsibilities.

3/ A similar situation existed in the dispute over the ownership of the submerged land off the coast of California. In United States v. California 332 U.S. 19 (1947), the state argued that the United States was barred from asserting its title to the area because of the prior inconsistent positions taken by its agents over the years. The Supreme Court refuted this contention, stating in part (332 U.S. at 39-40):

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government has had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act. (Citations omitted, emphasis added.)

1. Does R.S. 2477 Apply to Highways Constructed After 1866?

A threshold issue here is whether the statute sought only to validate highways previously constructed in trespass, or to apply prospectively as well. This Department has always regarded R.S. 2477 as applying prospectively to highways constructed after 1866. In United States v. Dunn, 478 F.2d 443, 445, note 2 (9th Cir. 1973), however, the court of appeals held that the Act was designed only to cure the trespass of those persons who had already (prior to 1866) "encroached on the public domain without authorization." The court said R.S. 2477 was "not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefinable." The Ninth Circuit relied on Supreme Court decisions in Jennison v. Kirk, 98 U.S. 453, 459-61 (1878), and Central Pacific Ry. Co. v. Alameda County, 284 U.S. 463 (1931).

Jennison concerned section 9 of the 1866 Act, R.S. 2339, which -- besides confirming and protecting the water rights of those who had perfected or accrued water rights on the public domain under local custom and laws -- held liable for damages any person who, in constructing a ditch or canal, impaired the possession of any settler on the public domain. This section immediately followed section 8 of that Act (R.S. 2477) with which we are here concerned. The dispute in that case concerned two competing miners, the second of which (the plaintiff) had constructed a ditch for hydraulic mining which had crossed, and interfered with the first miner's working of, his mining claim. The first miner (defendant) had cut away the second miner's ditch in order to work his claim as before, and the Court held this did not give rise to the second miner's claim for damages under section 9. In dictum, the Court acknowledged that the broad purpose of the 1866 Act was to cure prior trespasses on the public domain, but made no specific comments on R.S. 2477.

The Central Pacific Ry. case did involve R.S. 2477, but only the validity of roads constructed prior to 1866. The Court said that, like section 9 construed in Jennison, section 8 (R.S. 2477) was, "so far as then existing roads are concerned, a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government." 284 U.S. at 473 (emphasis added). The underlined clause is ambiguous, but might be read as suggesting that R.S. 2477 could apply to highways constructed after 1866, and indeed this is now the Department applied it both before and after the Dunn case.

We find implicit support for the Department's view in Wilderness Society v. Morton, 479 F.2d 842, 882-83 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973), which upheld the validity of an R.S. 2477 grant of a right-of-way for a highway constructed in 1970 along the Trans-Alaska Pipeline. Dunn's holding to the contrary, therefore, does not find unambiguous support in the cases it cites as support for its holding, and most reported decisions assume to the contrary; as a result, it has not been followed by the Department, in the Ninth Circuit, or elsewhere.

While the Ninth Circuit is correct in finding that one major purpose of the 1866 Act, taken as a whole, was to validate various prior trespasses on the public lands, it does not follow a fortiori that R.S. 2477 applies only retroactively. The statutory language, fairly read, looks forward as well as backward in time, and the great bulk of case law also supports the Department's consistent administrative interpretation.

III. Determining whether an R.S. 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. 966 (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 favorably 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. 668 (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). Thus, in accordance with these rules, any ambiguities which exist in the statutory language must be resolved in favor of the federal government.

The question of whether a particular highway has been legally established under R.S. 2477 remains a question of federal law. It is a settled rule of statutory construction that all words in a statute are to be given effect. It must be assumed that Congress meant every word of a statute and that, therefore, every word must be given force and effect. United States v. Menasche, 348 U.S. 528, 538-39 (1955); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 387 F. Supp. 1194, 1200 (D. South Dakota 1975); see also Zeigler Coal Co. v. Kleppe, 536 F. 2d 398, 406 (D.C. Cir. 1976); Wilderness Society v. Morton, 479 F. 2d 842, 856 (D.C. Cir. 1973),

cert. denied, 411 U.S. 917 (1973); United States v. Yano Kim Co., 472 F. 2d 720, 722 (5th Cir., 1972); Consolidated Flower Ship. Inc.-Bay Area v. C.A.B., 205 F.2d 449 (9th Cir. 1953). This is especially so when, as here there is no legislative history to suggest otherwise.4/

Thus in order to determine whether a valid R.S. 2477 highway exists on the federal lands, the several elements of the offer provided by the terms of the statute must be met. First, was the land reserved for a public use? Second, was there actual construction? Third, was what was constructed a highway?

A. Land reserved for public use

R.S. 2477 only grants rights of way over public lands "not reserved for public uses." Therefore, Indian reservations, Wildlife Refuges, National Parks, National Forests, Military Reservations, and other areas not under the jurisdiction of BLM are clearly not open to construction of highways. The extent to which withdrawals of public lands constitute "reservations for public uses" is potentially complicated -- see, e.g., Executive Order 6910 (54 I.D. 339) (1934); Wilderness Society v. Morton, 479 F.2d 842, 882 n.90 (D.C. Cir. 1973) — but for present purposes it is sufficient to observe that R.S. 2477 was an offer of rights-of-way only across public lands "not reserved for public uses."

B. Construction

Consistent with the rules of statutory interpretation previously discussed the choice of the term "construction" in R.S. 2477 necessitates that it be considered an essential element of the offer made by Congress. "Construction" is defined in Webster's New International Dictionary, (2d Ed. 1935) (unabridged) at 572, as: "act of building; erection; act of devising and forming." Construction ordinarily means more than mere use, such as the creation of a track across public lands by the passage of vehicles. Accordingly, we believe that the plain meaning of the term "construction," as used in R.S. 2477, is that in order for a valid right-of-way to come into existence, there must have been the actual building of a highway; i.e., the grant could not be perfected without some actual construction.

4/ An analogy can be drawn from the law of contracts. It is a basic tenet of contract law that no more than is offered is susceptible of a valid acceptance. Maddox v. Northern Natural Gas Co., 259 F. Supp 781, 783 (D.C. Okla. 1966). Thus, in order for rights-of-way to have been validly accepted under the instant statute, such acceptance must have been performed in accordance with the terms and conditions of the offer. Minneapolis & St. L.R. Co. v. Columbus Rolling Mill Co., 119 U.S. 149, 151 (1886); Tilley v. County of Cook, 103 U.S. 155, 161 (1880); National Bank v. Hall, 101 U.S. 43, 49 (1879)..

We believe the correct interpretation on this point is that adopted by the New Jersey Supreme Court in Paterson R.R. Co. v. City of Paterson, 86 A. 68 (N.J. 1912) construing the nearly identical phrase "construction of a highway" which appeared in a 1911 state statute. The court noted (86 A. at 69-70, emphasis added):

> [T]he first question that arises is what is meant by the "construction of a highway." Does it mean simply to lay out the highway on paper and file a map thereof in some public office, or does it contemplate such grading, curbing, flagging, planking, or other physical alteration or addition as may be necessary to prepare the crossing for use by horses, wagons and other vehicles, [and] foot passengers. . . . The plain words of the statute indicate to my mind that the latter is the intention.
>
> To survey a piece of lands and make a map of it, to designate it as a public street, and to file the map cannot in any sense be said to be the construction of a highway. To construct a building it is not sufficient to make a drawing of it and file it: it is necessary to make a physical erection which can be used as buildings ordinarily are used, and so I think that a highway cannot be said to be "constructed" until it shall have been made ready for actual use as a highway. The word "construction" implies the performance of work; it implies also the fitting of an object for use or occupation in the usual way, and for some distinct purpose; it means to put together the constituent parts, to build, to fabricate, to form and to make. The use of the word in connection with a highway manifestly means the preparation of the highway for actual ordinary use, and not the mere delineation thereof, or the taking of land for the purpose of a street.

The federal court decisions are not helpful in interpreting "construction." For example, both Dunn and Wilderness Society involved roads actually constructed. One might find a faint suggestion in the Central Pacific Ry. case that an R.S. 2477 highway may be created solely by actual use,5/ but the Court never addressed the question whether some "construction" in the ordinary, dictionary sense of the word was necessary.

5/ See 284 U.S. at 467, where the Court noted in passing that the original road in question "was formed by the passage of wagons, etc., over the natural soil . . . ." Earlier the Court noted that the highway had been "laid out and declared by the county in 1859, and ever since has been maintained." 284 U.S. at 465.

The administrative difficulty of applying a standard other than actual construction would be potentially unmanageable. If actual use were the only criterion, innumerable jeep trails, wagon roads and other access ways — some of them ancient, and some traversed only very infrequently (but whose susceptibility to use has not deteriorated significantly because of natural aridity in much of the West) -- might qualify as public highways under R.S. 2477.6/ Requiring highways to be constructed will prove, we believe, much more workable in determining whether an R.S. 2477 right-of-way existed prior to October 21, 1976.7/

6/ For example, the State of Utah, which argues that R.S. 2477 highways can be perfected merely by public use without construction, is by state law in the process of mapping such "roads" which it considers were in existence as of October 21, 1976, the date of the repeal of R.S. 2477. (Section 27-12-3, Utah Code Annotated 1978). Our initial review of these maps indicates that the State of Utah considers all of the numerous trails across federal lands to be R.S. 2477 highways, regardless of extent of construction, maintenance or use.

7/ In the decades leading up to the repeal of R.S. 2477 in FLPMA, there occurred a colloquy between Senators Stevens (Alaska) and Haskell (Colorado) which mirrors the confusion in the reported decisions about the meaning of R.S. 2477. See generally 120 Cong. Rec. 22283-84 (July 8, 1974). For example, Senator Stevens refers at one point to "de facto public roads" which are created from trails that "have been graded and then graveled and then are suddenly maintained by the state." He was concerned that repeal of R.S. 2477 might eliminate rights-of-way for such highways if there had been no formal declaration of a highway under R.S. 2477, even if the state "did, in fact, build public highways across federal land." Senator Haskell assured him that such formal perfection of the grant was not necessary; i.e., that actual existing use as a public highway under state law at the time FLPMA becomes law is sufficient to protect the highway right-of-way as a valid existing right not affected by the repeal of R.S. 2477. Senator Haskell referred to a North Dakota state court decision which recognized both formal and informal acceptance of the R.S. 2477 grant, the latter being done by "uses sufficient to establish a highway under the laws of the State." Whether either Senator thought use without construction was sufficient is doubtful. Senator Stevens raised the point in the context of highways which had been graded, graveled and otherwise built. Finally, of course, this debate, occurring nearly 110 years after enactment of R.S. 2477, sheds no light on Congress' intent in 1866.

this is not to say that if a road was originally created merely by the passage of vehicles, it can never qualify for a right-of-way grant under R.S. 2477. To the contrary, we think such a road can become a highway within the meaning of R.S. 2477 if state or local government improves and maintains it by taking measures which qualify as "construction"; i.e., grading, paving, placing culverts, etc. If the highway has been "constructed" in this sense prior to October 21, 1976, it can qualify for an R.S. 2477 right-of-way whether or not constructed ab initio.8/

C. highway

A highway is a road freely open to everyone; a public road. See, e.g., Webster's New World Dictionary, (College Ed. 1951) at 666; Harris v. Hanson, 75 F. Supp. 401 (D. Idaho 1948); Kerb v. City of Bellingham, 377 P.2d 984 (Wash. 1963). Because a private road is not a highway, no right-of-way for a private road could have been established under R.S. 2477. Insofar as the dicta in United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963) concludes otherwise, we believe the court was clearly wrong. The court's error in that case was in confusing the standards of R.S. 2477 with other law of access across public lands; i.e., the road at issue in that case was a road to a mining claim, and the Department had previously distinguished such roads from public highways such as might be constructed pursuant to R.S. 2477. See Rights of Mining Claimants to Access Over the Public Lands to Their Claims, 66 I.D. 361, 365 (1959). The court in 9,947.71 Acres of Land specifically found that the road in question was not a public road or highway, 220 F. Supp. at 336-37, and it therefore follows that it could not have been an R.S. 2477 road.9/ Rather, it was an access road under the Mining Law of 1872, and even assuming the court correctly concluded that its taking by the government was compensable, the court's discussion of R.S. 2477 was not pertinent to the legal question presented.

In summary, it is our view that R.S. 2477 was an offer by Congress that could only be perfected by actual construction, whether by the state or local government or by an authorized private individual, of a highway open to public use, prior to October 21, 1976, on public lands not reserved

8/ It is not necessary to deal herein with whether and how an R.S. 2477 right-of-way can be terminated. Because only a right-of-way rather than title is conveyed, however, it seems clear that such a right-of-way can be terminated by abandonment or failure to maintain conditions suitable for use as a public highway. Cf. United States v. 9,947.1 Acres of Land, 220 F. Supp. 328, 334 (D. Nev. 1963).

9/ In fact, the State of Nevada had officially taken the position that the road in question was not considered a public road or highway. See 220 F. Supp. at 337.

for public uses. Insofar as highways were actually constructed over unreserved public land by state or local governments or by private individuals under state or local government imprimatur prior to October 21, 1976, we do not question their validity.

D. State law construing R.S. 2477

As noted above, state court decisions and state statutes are in conflict with each other on the issue of how a right-of-way under R.S. 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); Pedersen v. Canton T 34 N.W. 2d 172 (S.D. 1948); Gieves 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 R.S. 2477 rights-of-ways 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 883 (N.M. 1939); Lindsay Land & Livestock Co. v. Churnos, 285 P. 146 (Utah 1930). Third, Arizona courts have held that such 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 above analysis of the plain meaning of R.S. 2477 shows that the Arizona interpretation is the only correct one, and that the positions taken by 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 states such as Colorado, Utah, New Mexico, Oregon and Wyoming, that R.S. 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 R.S. 2477 that such highways be "constructed."

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. Thus, rights-of-way which states purported to accept but on which highways were not actually constructed prior to October 21, 1976, do not meet the requirements of R.S. 2477 and therefore no perfected right-of-way grant exists.

IV. The regulation at 43 C.F.R. § 2822.1-1 (1979) did not make the question of whether a highway has been established under R.S. 2477 a question of state law.

The language of this regulation first appeared in a Circular dated May 25, 1938 (Circ. 1207 a, ¶ 54). At pertinent part, the regulation provides (43 C.F.R. § 2822.1-1):

> No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.

This is a correct statement, but it does not mean that the grant may be perfected on whatever terms a state deems appropriate, without regard to the conditions on which the grant is offered.

Rather, a state claim of an R.S. 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 an R.S. 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); Nickel v. Oil Shale Corp., 400 U.S. 48 (1970). The Department has not previously determined the validity of claimed rights under R.S. 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 R.S. 2477 and the management of the public lands affected by such claims. If there is a resource management reason to do so, such as the review of public lands for wilderness values, claimed rights-of-way may be reviewed to determine their validity under R.S. 2477.

43 C.F.R. § 2822.2-1 further provides:

> Grants of rights-of-way under R.S. 2477 are effective upon construction or establishment of highways in accordance with the State laws over public lands that are not reserved for public uses.

In the context of the above analysis, the question presented by this sentence is whether "establishment" can mean less than "construction." We think lawfully it could not because the explicit language of R.S. 2477 required "construction." If "establishment" as used in the Circular and subsequent regulations meant less than "construction," it was an unauthorized exercise of power by the Secretary of the Interior. Congress has plenary power over the public lands and the Secretary can only do those things authorized by Congress. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976).

this way, the two statutes are consistent with each other,10/ and with the settled rules of statutory construction that Congress is presumed to be cognizant of prior existing law,11/ and that statutes should be construed consistent with each other where reasonably possible.

Finally, it should be noted that in states such as Alaska, which have enacted statutes designating all section lines as highways, purporting to constitute the perfection of the R.S. 2477 grant, see Girves v. Kenai Peninsula Borough, 536 P. 2d 1221, 1225 (Alas. 1975), no public lands in the entire state would qualify for wilderness study because there would be no "roadless" areas over 640 acres, and section 603 of FLPMA requires a roadless area of 5000 acres as a minimum in order to be considered for wilderness area designation. There is absolutely no indication in the legislative history of FLPMA that Congress thought such a bizarre result would be possible. On the contrary, all indications are that Congress thought that all areas of public lands without constructed and maintained roads would be considered for possible preservation as wilderness.

I trust you will find this explanation of our position useful. I look forward to our meeting on May 2 to discuss this further.

Sincerely,

Frederick N. Ferguson

DEPUTY SOLICITOR

10/ It is significant that in formulating its definition of "roadless" that the House Committee identified no conflict between that definition and R.S. 2477. See H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976). The transcript of the House Committee markup session reveals that Congressman Steiger of Arizona suggested the definition of "road" which appears in the House Report. Arizona is an arid state where "ways" can be created and used as roads merely by the passage of vehicles, and Congressman Steiger took some pains to draw the distinction between a "way" and a "road" for wilderness purposes. The latter, he insisted, was any access route improved or maintained in any way, such as by grading, placing of culverts, or making of bar ditches. See Transcript of Proceedings, Subcommittee on Public lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-33.

11/ See, e.g., United States v. Robinson, 359 F. Supp. 52 (D. Fla. 1973); In re Vinarsky, 287 F. Supp. 446 (D. N.Y. 1968).

2. The regulations (43 CFR 2802.5) have set a goal of identifying all the R.S. 2477 highways. The Bureau should work with each State, county, and municipality to identify all of the existing public highways. The equivalent of an application for this type of public highway is any map that clearly shows the location of the highway on public land. Additional information such as right-of-way width would also be desirable. Compare the map with criteria .24B1a through c. If the roads identified on the map submitted by State agree with the criteria assume that the roads are bona fide R.S. 2477 highways. If differences are found between the map and criteria, further research with the local government may be necessary. A letter of acknowledgement with a map or listing to the appropriate local government that identifies the public highways is sufficient. There is no grant form.

a. Assign a serial number and set up a case file. Minimize the number of serial numbers and files by consolidating roads under each governing body. However, if the State Office already has an existing serialization system with individual numbers, it may be continued.

b. Note the Master Title Plat. Authority to be cited on the serial register page is R.S. 2477 (43 U.S.C. 932).

3. Roads existing on public land, other than public highways are generally Bureau-administered roads. State, local governments, and others may file an application for a right-of-way grant for roads that do not meet the criteria listed in .24B1. R.S. 2477 did not specify the terms and conditions of the rights conveyed. In some instances, it is necessary to know the terms and conditions in order to manage the adjoining public land. As a general rule, terms and conditions can be determined by examining the State laws or practices for similar public highways.

a. Terms - perpetual.

b. Right-of-way width - As specified by State law or commonly used on similar public highways.

c. Extent - public use as a roadway. This would not include material sites, stockpile sites, or other ancillary facilities.

4. Other rights-of-way use within a R.S. 2477 right-of-way after December 9, 1974, must be authorized by a separate right-of-way grant. Separate right-of-way requirements prior to December 9, 1974, were waived by the Bureau. However, when these pre-1974 rights-of-way require a new location or ownership change, they should be updated with a new right-of-way grant.

B. Revised Statute 2477. The Act of July 26, 1866, R.S. 2477 (43 U.S.C. 932) provided:

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

This statute, which was repealed by FLPMA, has been interpreted as a right-of-way grant for highways over the public land without any limitation as to the manner of the establishment. The grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located. The Act did not specify the extent of the grant, the width of the right-of-way, or the nature of the rights conveyed. To facilitate proper management of the public land, the Bureau has to have a sound transportation plan. Therefore, it is necessary to identify all public roads.

1. Criteria for identification of R.S. 2477 Public Highways, include four elements:

a. In order for a valid right-of-way to come into existence, there must have been the actual building (construction) of a highway. Mere use, planning, or surveying, does not equal construction. However, construction may not have occurred all at once. Road maintenance often equals improvement, or even construction. Increments of maintenance over several years may equal construction. When public funds have been spent on the road it may be a public road. When the history of a road is unknown or questionable, its mere existence in a condition adequate for public use may be evidence that construction has taken place.

b. A highway is freely open to everyone. Roads that have had access restricted to the public by locked gates or other means may not be public highways.

c. The construction of a public highway on unreserved public land must have occurred prior to October 21, 1976.

d. A State has to have a procedure to confirm the R.S. 2477 public highway right-of-way grant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 1986, a copy of the foregoing BRIEF AMICUS CURIAE OF THE UNITED STATES was served by United States mail, first class, postage paid, to the following counsel of record:

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