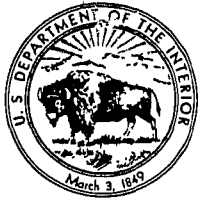


#36.1



United States Department of the Interior

NATIONAL PARK SERVICE

ALASKA REGIONAL OFFICE
2525 Gambell Street, Room 107
Anchorage, Alaska 99503-2892



IN REPLY REFER TO:

L3027 (ARO-OL)

OCT - 4 1991

Mr. John D. Horn
Regional Director, Northern Region
Alaska Department of Transportation and Public Facilities
2301 Peger Road
Fairbanks, Alaska 99709-5316

Dear Mr. Horn:

In your letter of April 2, 1991, you maintain that the State of Alaska has jurisdiction over the Kantishna airstrip by virtue of an underlying Revised Statute 2477 right-of-way. We disagree with your position.

Under Department of the Interior policy, rights-of-way established pursuant to RS 2477 must meet established criteria to be administratively recognized by a bureau of the Department. The National Park Service has neither received an assertion of an RS 2477 right-of-way along the Kantishna airstrip, nor independently reviewed any factual evidence on the RS 2477 status of such a road. Therefore, we do not currently recognize the existence of any RS 2477 right-of-way or State jurisdiction north of the 4.5-mile-long Omnibus Act road that ends at the south end of the Kantishna airstrip.

Furthermore, it is the position of the Department of the Interior that RS 2477 was a grant of right-of-way for highway purposes only. Permanent aircraft landing facilities are not a highway purpose. Therefore, even if an RS 2477 right-of-way were to be asserted and its existence under the Kantishna airstrip administratively recognized, such a right-of-way would not justify the State of Alaska using the highway as a permanent airstrip.

While it is still our position that the Kantishna airstrip is federally owned, the National Park Service remains committed to continued, safe aircraft access to the Kantishna area and intends to ensure the airstrip is maintained in a manner which will afford reasonable public access into this area. However, as we stated in a letter to Commissioner Turpin on September 11, 1991, the State may apply for an NPS right-of-way permit for airport purposes under Title XI of ANILCA, or develop a Memorandum of Understanding with the NPS for cooperative maintenance of the Kantishna airstrip.

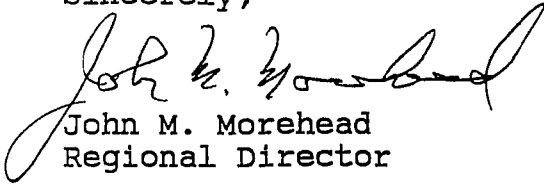
RECEIVED R/W

OCT 07 1991

North Region DOT & PF

If you would like to further discuss the ownership of the Kantishna airstrip or a cooperative maintenance agreement concerning this or any other airstrip, please contact David Funk, Realty Specialist, Land Resources Division at 257-2589.

Sincerely,



John M. Morehead
Regional Director

cc:

John Bennett, Acting Chief, Right of Way, DOT&PF
Russell Berry, Supt., Denali National Park & Preserve

MEMORANDUM

State of Alaska

Department of Law

TO: Stephen C. Sisk
 Director Design & Construction
 DOT&PF Northern Region

DATE: September 11, 1991

FROM: Carolyn E. Jones *cej*
 Assistant Attorney General
 Transportation, Anchorage

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PRIVILEGE

This memorandum summarizes the three way telephone conversation between Virginia Rusch, Rod Platzke and me regarding whether DOT&PF may enter onto Chisana and May Creek Airports for the purpose of designing, constructing, and maintaining the airports without notification or permission from the National Park Service. Both airports are presently included within the Wrangell-St. Elias National Park and our response requires an analysis of whether the state holds a valid existing property right to either or both airports. In view of the difference of opinion which DOT&PF and NPS hold in this regard and given the opinion below, we believe that the State's right to enter onto the land should be established before entering on the airports for the purposes you described. The following memorandum addresses the four possible options that we discussed.

I. Lease Application for May Creek Only

In October, 1959, the State of Alaska filed an airport lease application with the Department of Interior, Bureau of Land Management (BLM) for a 20-year lease of May Creek Airport.¹ In December, 1989, Commissioner Hickey of DOT&PF asked this office for an opinion regarding the state's likelihood of success in pursuing this application. This office wrote a lengthy memorandum of advice to Commissioner Mark S. Hickey at that time and I attach a copy for your convenience as Exhibit A.

In summary, a strong argument can be made that the state possessed a valid existing right by virtue of the pending application for a 20-year lease of May Creek Airport at the time the airport was included in the Wrangell-St. Elias National Park in 1980. In 1982, however, the BLM closed its file on this lease

¹ To the best of our knowledge, no lease application was ever filed for Chisana Airport.

Stephen C. Sisk, P.E.
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application because the land was now under the jurisdiction of the National Park Service (NPS). In 1985, NPS denied the state's request for a lease application on the grounds that NPS lacked the authority to issue a lease. To date the state has taken no action to challenge either BLM's closing its file or NPS' refusal to issue the lease. Therefore, we can't assure you that the State will prevail on its lease application because of the untimely delay between the BLM and NPS administrative actions and the state's challenge.

II. Claims Under The Statehood Act

A. Chisana Airport

We have reviewed a 1989 memorandum prepared by the Division of Land and Water Management (DLWM), State Selections Unit regarding Chisana Airport. The facts relied on here are taken from that memorandum. Here is a chronology of Chisana Airport's status:

03-15-72 Public Land Order (PLO) 5180 withdrew land on which Chisana Airport is located from the public domain

11-14-78 SOA filed state selections GS-4255 and GS-4266 for land that included Chisana Airport

11-16-78 PLO 5653 withdrew the relevant land for purpose of preserving, protecting and maintaining the resource value of the land

12-01-78 Proclamation 4625 created the Wrangell-St. Elias National Monument (WSENM) and included the Chisana Airfield in the lands withdrawn for the WSENM

12-29-78 SOA reasserted its selections

01-01-79 SOA reasserted its selections

12-23-79 SOA reasserted its selections

12-02-80 Alaska National Interest Lands Conservation Act (ANILCA) became law. WSENM became the Wrangell-St. Elias National Park (WSENP) and Chisana Airport was included in the WSENP. Lands included in the WSENP were subject to valid existing rights but no future selections could be made of the land

12-24-80 SOA relinquished all selections initially filed by it on 11-14-78 that were within the boundaries of, among others, the Wrangell-St. Elias National Park.

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In summary, under Section 6(a) and (b) of the Alaska Statehood Act, the State of Alaska was entitled to select vacant, unappropriated, and unreserved public land in Alaska. Unfortunately, at the time the State selected the Chisana Airport, it had already been withdrawn under PLO 5180. Since its withdrawal in 1971, it has never been returned to the public domain. In fact, several additional layers of appropriations were added to it: PLO 5653; Proclamation 4625 and ANILCA. Equally important is that the state relinquished its selection in December, 1980. Consequently, there is currently no viable land selection under the Statehood Act that can be pursued.

B. May Creek

We have reviewed a May, 1987 memorandum prepared by DLWM, Title and Contracts Unit, regarding May Creek Airport. The facts relied on here are taken from that memorandum. Here is a chronology of May Creek Airport's status:

02-29-49 Air Navigation Site (ANS) Withdrawal No. 137 withdrew May Creek Airport from all forms of appropriation under the public land laws for the use of the Alaska Road Commission in the maintenance of air navigation facilities

06-14-55 ANS No. 137 Withdrawal Order modified by transferring jurisdiction over May Creek Airport from the Alaska Road Commission to the Department of the Interior

10-08-58 State releases any interest it may have in ANS No. 137 in favor of its 20-year lease application

03-15-60 State files land selection pursuant to Statehood Act but does not include May Creek Airport in land selected

09-18-65 ANS No. 137 was revoked; the State had 90-day preference right to select the released land but did not do so

05-16-68 BLM published notice of proposed classification of land, effectively segregating the May Creek Airport from State selection (Multiple-Use Classification Order AA-2779)

12-18-71 ANCSA revoked previous public land withdrawal orders and withdrew all public lands in Alaska for 90 days

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03-15-72 PLO 5180 withdrew land on which May Creek Airport is located from the public domain

06-16-72 SOA filed several amendments, reassertions and reaffirmations on this date and until passage of ANILCA

12-02-80 ANILCA became law and May Creek Airport -- like Chisana Airport -- was included within the Wrangell-St. Elias National Park.

In summary, the State had an opportunity at the time of Statehood and again in 1965 to exercise its preferred right to select the May Creek Airport lands for state ownership. The State did not exercise this right. From May 15, 1968 to the present, the land has been and is segregated from selection. Consequently, there is currently no viable land selection under the Statehood Act that can be pursued.

III. Alaska Omnibus Act

A. History

The Alaska Road Commission (ARC) was created by the Act of January 27, 1905 to construct and maintain a wagon road and pack trail system from navigable waters to towns, mining camps and settlements, and between settlements for the development of Alaska. In 1929 the ARC constructed a trail and transportation system that included the Chisana airfield. Records of the ARC reflect expenditures by the ARC on the Chisana Airfield until statehood. State records reflect periodic state expenditures on the airfield since statehood.

On June 25, 1959, the Alaska Omnibus Act became law. Section 21(a) of the Act directed the Secretary of Commerce to transfer to the State of Alaska all lands, interests in lands and records pertaining to roads in Alaska which were held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska except for those roads the Secretary determined were needed for the continued functioning of the Bureau of Public Roads, and those determined were needed for continued retention in Federal ownership for nonroad purposes. In addition, Section 45(a) of the Act authorized the President to convey any real property associated with functions the federal government had terminated or curtailed and that the State was assuming. Disputes between the United States and the State of Alaska regarding the transfer, conveyance or disposal of real property and arising before January 1, 1965 were to be determined by a temporary commission appointed by the President. Alaska Omnibus Act, Sec. 46(a). (1959).

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B. Chisana Airport

In 1929, the ARC constructed a trail and transportation system that included the Chisana Airport. It is arguable and likely that the Chisana Airport should have been conveyed to the State under the Omnibus Act.

The Department of Natural Resources, Division of Land and Water Management (DLWM) does not believe, however, that Chisana Airport was conveyed to the State. Records available to DLWM show that the Chisana Airport was not on the list of disputed properties addressed under Section 46(a).

A creditable argument could be made that the Chisana Airport and other airfields constructed by the ARC should have been transferred to the state under Section 21(a) or 45(a) of the Act. The State could have asserted the claim to the Airport or disputed its omission under Section 46(a).

Section 46(a) provided, however, that all disputes had to be identified prior to January 1, 1965. The administrative mechanism for resolving disputed claims under the Alaska Omnibus Act no longer exists. Consequently, we don't think pursuing an ownership interest in the Chisana Airport under the Alaska Omnibus Act will be successful.

C. May Creek Airport

One of the transportation systems constructed by the Alaska Road Commission (ARC) was a road system in the McCarthy area that connected McCarthy, through the mining community of May Creek, to the mining community of Dan Creek. In 1934 the ARC constructed the May Creek Airport as a replacement for the Nizina Bridge and to relink the mining communities with McCarthy and the rest of the state. In 1940, the Secretary of the Interior issued ANS No. 137 withdrawing the land where the airport was located for the use of the ARC in the maintenance of air navigation facilities.

It is arguable and likely that May Creek Airport should also have been transferred to the State under the Statehood Act. When the airport was not transferred, the State could have disputed the omission and asked for resolution by the Temporary Alaska Claims Commission. The deadline for making such a request was January 1, 1965. Since the State did not make its request within the time allowed, we don't think pursuing an ownership interest in the May Creek Airport under the Alaska Omnibus Act will be successful.

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IV. RS 2477

A. History

Section 8 of the Act of July 26, 1866, now known as Revised Statute 2477 (RS 2477) provided a right of way for the construction of highways over public lands not reserved for public uses. 43 U.S.C. sec. 932. The purpose of Section 8 of the Act was to ensure access for the exploration and occupation of mineral land in the public domain.

The Alaska Road Commission constructed and maintained several roads and trails over public land under the authority of the Act. The rights of way are known as RS 2477 roads and trails.

B. Chisana Airport

According to the Division of Water and Land Management (DWLM), ARC constructed and maintained the Chisana Airport. In addition, the maps attached to the DLWM May, 1989 memorandum show a number of trails radiating out from the airport. These trails and the airport were continuously used for the transportation of mining supplies and equipment.

Since Revised Statute 2477 permits the construction of highways, the critical question is whether an airfield comes within the accepted meaning of the term. State law controls what constitutes an RS 2477 highway within each state. See 1984 Memorandum of Understanding between Alaska Department of Natural Resources, Alaska Department of Transportation and Public Facilities and Bureau of Land Management.

The earliest reference that I found to a state definition of "highway" appeared in 1957. Alaska Compiled Laws, Section 14A-1-3(9) provided,

highways means all highways (whether included in primary or secondary systems), roads, streets, trails, walks, bridges, tunnels, drainage structures and other similar or related structures or facilities and further includes ferries and all such related facilities.

An earlier 1933 statute on the reservation of rights of way in patents or deeds refers to a right-of-way for "roads, roadways, highways, tramways, trails, bridges, and appurtenant structures. Alaska Compiled Laws, Sec. 41-1-4. Neither of these references suggests that an airfield for air transportation comes within the meaning of a highway or right-of-way.

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On the other hand, we could make an interesting and novel argument that the authority in the early 1900s to construct highways included the authority to construct an airfield that was an integral part of a highway; that given the size, geography and weather considerations in the state, that air travel was an important factor in the development of the State and a basic component of the state's fledgling highway system.

We have found no case law or other citation that supports the theory that a pre-Statehood airfield is an RS 2477 right of way. The case would be a case of first impression. The theory would have to be tested in federal district court and there are no guarantees that the court would buy this argument.

CONCLUSION

There are four potential legal options for asserting the state's interest in Chisana and May Creek Airports: continue processing the lease application for May Creek only; assert a claim under the Alaska Statehood Act or the Alaska Omnibus Act, or ask a federal court to declare an RS 2477 right of way over each airfield for either or both Airports. The lease application has some legal merit but the time for pursuing the claim has probably run. The claim under the Alaska Statehood Act is not viable because both airports had already been withdrawn from the public domain when the state exercised its right to make land selections. The state probably was entitled to the airfields under the Alaska Omnibus Act but the deadline for exercising the right has passed. The claim that the airfields are RS 2477 public rights of way has never been asserted but a creditable argument could be made in light of Alaska's unique size, geography and weather. Of the options remaining to the state at this time to assert an interest in the airfield, the RS 2477 option is the most viable but untested.

Records in the file indicate that the previous DOT&PF Commissioner, Mark Hickey, had declined to pursue the lease application for May Creek Airport. Please have Commissioner Turpin authorize us to go forward if DOT&PF now wishes to pursue its interests in these airports.

CEJ/sh

Attachment

cc: Doug Blankenship w/attachment