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MEMORANDUM State of Alaska

TO. Jim Frechione
Natural Resource Officer
Retained Lands Section
Div. of Land & Water Mgmt.

DATE: February 1, 1983
FILE NO. 566-104-83
TELEPHONE NO:

FROM. Norman C. Gorsuch
Attorney General

By:
Larry D. Wood
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SUBJECT: Circle-Fairbanks Historic Trail

Your December 21, 1982, memorandum posed essentially two questions: first, may a public right of way accepted by actual use under provisions of R.S. 2477 (43 USCA §932) be restricted to recreational uses only? Secondly, is it necessary to reserve an easement in State land disposal documents along the Circle-Fairbanks Trail where physical existence of the trail is no longer apparent?

In brief, a highway created by public user under provisions of R.S. 2477 cannot be narrowly restricted to a particular type of public travel except in those situations where road closure to certain vehicular use is necessary to protect road surfaces during certain seasons of the year. Also, the cases seem divided on the question of whether a public right of way created under this federal grant may be legally abandoned by non-use. For this and other reasons, we therefore recommend that the Circle-Fairbanks Trail be expressly reserved in those areas where its physical existence is no longer apparent.

Both the Northcentral District office and the North Star Borough have agreed that the Circle-Fairbanks Historic Trail, the old route to Circle, is a "highway" within the meaning of §932, Title 43 USCA, which provides:

> The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted. Public Highway Act of July 26, 1966, 14 Stat. 253, R.S. §2477, 43 USCA 932 (1964) [Repealed. Pub. L. 94-579, Title VII, §706(a), October 21, 1976].

The operation of this statute in Alaska has been long recognized within the State and former territory. Clark v. Taylor, 9 Alaska 298 (D. Alaska 1938); Hammerly v. Denton, 359 P.2d 121 (Alaska 1961); Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975); Mercer v. Yutan Construction Co., 420 P.2d 323 (Alaska 1966). The historical conditions leading up to the enactment of this federal grant and the circumstances of its operation are set

out and explained in Central Pacific Railway v. Alameda Co., 284 U.S. 463, 52 S.Ct. 225, 76 L.Ed. 402 (1932). The statute is an express dedication of a right of way for roads over unappropriated government lands, acceptance of which by the public results from "use by those for whom it was necessary or convenient." It is not required that "work" shall be done on such a road or that public authorities take action with regard to it. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices. Anderson v. Richards, 608 P.2d 1096, 1098 (Nev. 1980) (citing: Brown v. Jolley, 387 P.2d 278 (Colo. 1963)). Although the act constitutes a congressional grant of right of way for public highways across public lands, before a highway may be created, there must be either some positive act on the part of the appropriate public authorities, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted. Hammerly v. Denton, supra, 359 P.2d at p. 123.

Here, you submit that the Circle-Fairbanks Trail constitutes a "highway" under the terms of the federal grant which was accepted by public use. If there are lingering concerns regarding the nature and extent of public use required for court recognition of such rights of way, you may wish to consider these opinions: State of Alaska v. Fowler, Alaska Superior Court, Civil Action No. 61-320 (4th District, September 26, 1962) (Farmer's Loop Road); Pinkerton and Pinkerton v. Yates, Alaska Superior Court, Civil Action No. 62-237 (4th District, September 10, 1963) (Good Pasture Trail); Hammerly v. Denton, supra; Ball v. Stephens, 158 P.2d 207 (Cal.App. 1945).

Central to the borough's request that the State limit use of the Circle-Fairbanks Trail in some locations only to recreational use is the meaning of "highway." Given the State's own definition, recreational limitations placed on use of the trail (hiking, skiing, horseback riding, etc.) are clearly too restrictive:

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

Whether designated a part of the State highway system (AS 19.10.020) or not, highways granted under the federal legislation cannot be narrowly restricted to a few particular uses. Indeed, even where the Department of Transportation and Public Facilities has accepted management and maintenance responsibilities of particular roads, vehicular restrictions and highway closures are not predicated upon a particular mode of public travel alone, but upon the extent and nature of vehicular traffic during certain seasons of the year or under certain road conditions. AS 19.10.060; 19.10.100. It would be a rare case indeed where road conditions called for recreational means of travel only. There has also been doubt expressed as to the ability of a public authority to waive a right of way granted under this federal legislation inasmuch as it serves only as a trustee for the public to manage and protect the easement. Small v. Burleigh County, 225 N.W.2d, 295, 298 (N.D. 1974). Arguably, restriction of such highway use may usurp the very public access rights the federal statute was created to protect and to provide. In short, where a R.S. 2477 highway exists, public users are free to use those means of transportation compatible with the trail's integrity. The notion of "highway" also suggests that users may maintain and upgrade the road to the extent necessary to facilitate use of the right of way. I agree with your analysis that an R.S. 2477 highway cannot be arbitrarily limited to specific recreational uses.

Where a highway is clearly designated and delineated by use, State reservation of a R.S. 2477 road in disposal documents is unnecessary. Once unreserved public domain was appropriated for highway use under the federal grant, subsequent patents, the legal effect of which is tantamount to a quitclaim deed (Cypress Co. v. Del Paszo y Marcos, 236 U.S. 635 (1915); City of Anchorage v. Nesbett, 530 P.2d 1324, 1329 (Alaska 1979)), passed title already subject to this public right of way. Ball v. Stephens, 153 P.2d 207, 210 (Cal.App. 1945). Land affected by those portions of the Circle-Fairbanks Trail which constitute a R.S. 2477 "highway" will remain impressed with the right of way even after State conveyance. Yet, to avoid later claims of surprise I would recommend that the highway's existence be noted in sales brochures.

The width of a R.S. 2477 right of way may also be of concern to you since there has been talk of dedication of a 300 foot easement along portions of the Circle-Fairbanks Trail.

Now Supreme Court Justice Jay Rabinowitz ruled squarely on this issue in a 1962 Superior Court matter, State of Alaska v. Fowler, Civil Action No. 61-320, supra. Here the width of

Farmer's Loop Road, established under provisions of R.S. 2477 by public user, was at issue. Justice Rabinowitz determined that only the 1962 width of of the road would be considered a part of that right of way and deemed "a reasonable width necessary for the use of the public generally." Id. He calls our attention to Bishop v. Hawley, 238 P.2d 284, 286, note 10 (Wyo. 1925), in determining the question of the width of a R.S. 2477 right of way:

> From the cases concerning the width or height of rights of way arising from private grant, we find that it is a general principle that, when such an easement is granted but not defined, the privilege must be a reasonable one for the purposes for which it was created....
>
> Practically the same rule is applied to determine the width of highways established by prescription or adverse user. The right of way for such a road "carries with it such a width as is reasonably necessary for the public easement of travel"....

Similarly, Justice Rabinowitz drew support from Montgomery v. Somers, 90 P. 674, 678 (Or. 1907): "Where the right to a highway depends solely upon user by the public, its width and the extent of the servitude imposed on the land are measured and determined by the character and the extent of the user, for the easement cannot on principle or authority be broader than the user...." The State of Alaska in the Fowler case relied primarily upon the approach taken by the court in City of Butte v. Mikosowitz, 102 P. 593 (Mont. 1909) in support of its contention that the width of the Farmer's Loop right of way was 66 feet. At pages 595 and 596 of that opinion, it is stated:

> In using the term "highway" the Congress must have intended such a highway as is recognized by the local laws, customs and uses; and, since in this state public highways generally are 60 feet in width..., the Court did not err in its judgment in this record....

Justice Rabinowitz rejected the State's further argument that provisions of Sec. 1, Ch. 19, SLA 1923 (establishing public highways between each section of land in the territory) indicated the local law and reflected the local custom as to the width of rights of way established pursuant to R.S. 2477. He concluded that taking into consideration the character and extent of user

as disclosed by the evidence in Fowler, the "reasonable width necessary for the use of the public" constituted only the present width of Farmer's Loop Road, thirty feet. In a later decision he found the width of another trail R.S. 2477 right of way, the Good Pasture Trail, to be eight feet. Pinkerton and Pinkerton v. Yates, supra, p. 6, n. 8.

As if in response to Justice Rabinowitz's decisions, the State legislature enacted Sec. 1, Ch. 35, SLA 1963:

> Establishment of Highway Widths. (a) It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet. AS 19.10.015.

Hence, there is an argument that the 1963 legislature accepted the R.S. 2477 grant as it might pertain to those portions of highways still traversing unreserved public lands to the extent of 100 feet even where actual use of such highways was much more restricted. Until that time and as regards lands which were already withdrawn from the public domain in 1963 but burdened only in part by R.S. 2477 rights of way, the Fowler decision and the precedent upon which it was predicated seem controlling: "the right of way for such a road carries with it such a width as is reasonable and necessary for the public easement of travel." That determination will obviously call for analysis of various portions of the Circle-Fairbanks Trail since the character and extent of user may vary from location to location.

Finally, I would recommend that especially those portions of the Circle-Fairbanks Trail which have disappeared over time be specifically reserved in State disposal documents. Three reasons support this suggestion: first, the State and Borough share an obvious interest in maintaining the trail's identity and use in future years and such designation would reiterate that commitment; secondly, specific designation of trail location and width will prevent or help avoid conflicts with respect to lands assertedly burdened by the trail right of way after State disposal; and, thirdly, some cases have suggested that R.S. 2477 rights of way may be abandoned by public non-use. If this is indeed the rule later adopted in Alaska, designation of indiscernable portions of the Circle-Fairbanks Trail will assure a public right of way.

The division of authority on the question of non-user

is best explained by a legal encyclopedia, 39 Am.Jur.2d, Highways, Streets, and Bridges, Sec. 151, pps. 524-525:

> It has been held or intonated in a number of cases that neither the character of a public highway as such nor the right of the public at all times to use it can be lost by non-user. It has also been held that mere non-user will not operate to discontinue a legally established highway unless coupled with affirmative evidence of an intent to abandon, particularly where there is no use of the premises adverse to the right in the public. In other cases it has been held, however, that the right of the public to use a highway may be abandoned by non-user for a considerable length of time. The trend of authority seems to be that mere non-user for the period fixed by the statute of limitations for acquiring title by adverse possession affords a presumption, though not a conclusive one, of extinguishment, even in a case where no other circumstance indicating an intention to abandon appears***
>
> In the determination of whether a highway has been abandoned, it is proper to consider the mode in which the abutters and the public acquire their rights, as well as what the necessity and convenience brought about by subsequent progress and growth may require. Some courts make a distinction, in this connection, between the case where the public right has been acquired by user and the case where it has been acquired by grant, holding that where an easement has been acquired by grant, a mere non-user, without further evidence of an intent to abandon it, will not constitute abandonment. (Emphasis added)

Disuse of many portions of the Circle-Fairbanks Trail right of way occurred following construction of the present Steese Highway. At least one case has said that whether relocation of a highway and non-user of its former site constitute an abandonment of the public interest by implication depends upon two factors: (1) the character of the interest originally acquired by the public and (2) compliance with statutory formalities. Smith v. Ricker, 37 Cal.Rptr. 769, 772 (Cal.App. 1964). In the absence of statute a proprietary interest in the highways site, acquired by deed or dedication, may be lost only through express abandonment;

but a public interest acquired by occupancy and use, without a formal grant, may be extinguished by non-user, relocation or other evidence of an intent to abandon. Id. If statutes provide a method for abandonment or vacation of roads, that method is exclusive under further ruling of the California court. The Department of Transportation and Public Facilities is vested with the authority to vacate or dispose of property acquired for highway purposes. AS 19.05.040; 19.05.070. Here, however, it is absolutely clear that no official proceedings were ever taken to officially vacate this formerly important link to Circle. As noted above, doubt has even been expressed as to the power of a public authority to waive a right of way grant under the federal statute. Small v. Burleigh County, supra. Hence, it may be argued that a right of way effected through a grant to the public under R.S. 2477 may not be extinguished by non-user, relocation or other evidence of intent to abandon. Indeed, this is a result also suggested by People v. Miller, 41 Cal. Rptr. 645, 647 (Cal.App. 1964). Yet, cause for concern is raised by those cases which state that, although abandonment must be demonstrated by clear and cogent proof, and although it is not important how extensively a road was used, or whether it was used at all, after acceptance of the right of way under R.S. 2477, it may become subject to legal abandonment (Ball v. Stephens, 153 P.2d 207, 210 (Cal.App. 1945) determined by the "acts and doings of the parties entitled to the [road], and not from the adversary or hostile possession of others." Connell v. Baker, 458 S.W.2d 573, 577 (Mo.App. 1970). However, an additional caveat is that by the term "legally abandoned" even Ball suggests that some statutory procedure must be implemented to abandon or vacate a public highway grant. Nonetheless, the issue need not be decided now. Instead, I would only recommend that these portions of the Circle-Fairbanks Trail be specifically reserved to avoid the question entirely.

This memorandum has assumed that the Circle-Fairbanks Trail was established as an R.S. 2477 right of way through public user. I must caution that prior entry on public lands will defeat such an easement in most circumstances. The State must be careful not to warrant the existence of a R.S. 2477 highway unless acceptance by public use over unreserved public lands has been carefully researched. Where established, a R.S. 2477 right of way cannot be limited to specific modes of travel unless some public authority has taken those lawful steps necessary to restricting or closing portions of the road due to season or road conditions. Although discernable portions of the trail need not be reserved in State disposal documents, where the road has lost its physical appearance, the Northcentral District office may wish to specifically designate the highway location and width to

positively avoid later incompatible uses and argument.

Please let me know whether our office may be of furth
assistance to you.

LDW:bsw

cc: Jerry Brossia
District Manager
Northcentral District
Div. of Land & Water Mgmt.