

TO: Richard J. Knapp
Commissioner
Department of Transportation
and Public Facilities

DATE: May 20, 1985

FILE NO. 366-473-85

TELEPHONE NO: 465-3603

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: BLM's jurisdictional
claim over Richardson
Highway right-of-way
located at approximately
57.4 mile out of Valdez

By: Jack B. McGee *J.M.*
Assistant Attorney General
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The legal issue that you asked us to review in your note of April 22, 1985, can be stated as follows:

Does BLM have legal authority to regulate the use of that portion of the Richardson Highway right-of-way on which certain buildings owned by Mr. and Mrs. Wayne Powers sit?

The short answer to this question is no. Our legal analysis follows.

Statement of Facts:

Mr. and Mrs. Wayne Powers occupy and maintain a cabin, storage shed, and wood shed at about mile 57.4 of the Richardson Highway outside of Valdez. The cabin, storage shed, and wood shed are all within the original 150-foot right-of-way of the Richardson Highway that was created by Public Land Orders 601 and 1613. 1/ See attached map drawn by BLM and marked as Appendix 1. On September 24, 1984, the Powers were granted an encroachment permit by DOT/PF. (A copy of this permit is attached and marked as Appendix 2.) On October 1, 1984, the Federal Highway Administration approved this encroachment permit. (A copy of this approval is attached and marked as Appendix 3.)

On January 2, 1985, the Assistant Regional Solicitor of the Alaska Region of the Department of Interior issued a legal opinion that held that the Bureau of Land Management has authority to regulate the use of the right-of-way area on which the

1/ PLO 601, issued on August 10, 1949, created a highway withdrawal for the Richardson Highway of 150 feet on either side of the highway center line. PLO 1613, issued on April 7, 1958, changed this withdrawal to an easement.

Powers' buildings sit and concluded that the Powers are trespassing notwithstanding the fact that they have an encroachment permit from the Alaska Department of Transportation and Public Facilities that was approved by the Federal Highway Administration. BLM has since notified the Powers that they are trespassing against the United States.

Because BLM is asserting jurisdiction over a highway right-of-way that appears to fall within the exclusive jurisdiction of the State of Alaska, BLM's assertion is likely to have far-reaching effects on future federal/state relations as they relate to Alaska's highway system. Accordingly, the remainder of this memorandum will consider the legal merits of BLM's claim.

A. BLM's Legal Reasoning:

The legal reasoning set forth in the January 2, 1985, memorandum by the assistant regional solicitor can be summarized as follows: The right-of-way area on which the Powers' buildings sit was established by Public Land Order 1613 as well as by a Title 23 right-of-way grant dated October 21, 1977, from BLM to the State of Alaska. ^{2/} The memorandum concluded that the Powers are trespassing on the PLO 1613 easement because they "have not obtained permission from the Secretary [of Interior] or his delegate to use or occupy the land in dispute for a purpose other than a highway, telegraph line or pipeline use" as is required by paragraph 6 of PLO 1613. See p. 2 of Assistant Regional Solicitor's opinion dated January 2, 1985. The memorandum also concluded that the Powers are trespassing on the Title 23 right-of-way grant to the State of Alaska because the Powers did not secure BLM's approval for nonhighway use of the right-of-way under the federal regulations that were incorporated by reference in the grant document. See pp. 3 and 4 of Assistant Regional Solicitor's memorandum dated January 2, 1985.

B. Analysis of BLM's Legal Reasoning:

BLM's position in reference to the public road right-of-way created by PLO 601 and PLO 1613 rests on the assumption that BLM still retains some sort of interest in this road easement. However the validity of this assumption becomes doubtful when one attends to the effect of the quitclaim deed issued on

^{2/} Authority for a Title 23 right-of-way grant is set out in U.S.C.A. 317 (West 1966).

January 30, 1959, by the United States Secretary of Commerce to the State of Alaska. This quitclaim deed, which was issued pursuant to the Alaska Omnibus Act, Pub. Law 86-70, § 21, 73 Stat. 141, 145 (1959), conveyed to the State of Alaska all interests in any lands "which are owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." 3/ Among the lands administered by the Department of Commerce was the right-of-way for the Richardson Highway. See entry at p. 5 of Schedule A of the quitclaim deed dated January 30, 1959, from the Secretary of Commerce to the State of Alaska identified as FAP Route 71 from the port of Valdez to FAP Route 62 at Big Delta. (A copy of this quitclaim deed and p. 5 of Schedule A is attached and marked as Appendix 4.)

Since all of the Department of Commerce's interest in the original Richardson Highway right-of-way was conveyed to the State of Alaska by the secretary's quitclaim deed and since the buildings in question are all located within this original right-of-way, BLM does not have any outstanding interest in this right-of-way on which it might base a legitimate jurisdictional

3/ As a technical matter, no governmental agency can be said to "own" a public road right-of-way in the traditional sense one is said to own a parcel of property. Public roads are held in trust for the public. See *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 639 (1879). The major "interest" that the Department of Commerce had in this right-of-way was the responsibility to carry out the general governmental duty to maintain public highways for public use. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969). In other words, a major interest Commerce had in the Richardson Highway was the duty to hold this road in trust for the public. This duty, relative to roads in Alaska, was codified in 48 U.S.C.A. § 321(a) (West 1952) and at one time was a responsibility of the Department of Interior. In 1958, the responsibility for the duties set out in 48 U.S.C.A. 321(a) (West 1952) was transferred by law to the Department of Commerce. See Act of August 27, 1958, Pub. Law 85-767, § 119, 72 Stat. 881, 890 (1958). The duty to maintain a public road, of course, implies a right of control over the road. Thus, PLO 1613 must be interpreted in a way that brings it into harmony with § 119 of Pub. Law 85-767. See 2A N. Singer, Sutherland Statutory Construction § 51.01 (4th ed. 1984).

claim over matters concerning its use. 4/ After the responsibility for public roads in Alaska had been transferred to the Department of Commerce in August of 1958, BLM had no statutory duty to maintain the Richardson Highway. All maintenance of this highway after the August 1958 transfer, as a matter of law, was required to be performed by the Department of Commerce. See note 3 below. In the absence of the duty to maintain the Richardson Highway in trust for the public, BLM had no right of control over the highway. Accordingly, BLM's claim of a right to exercise control over the Richardson Highway right-of-way created by PLO 601 and PLO 1613 is unfounded. 5/

BLM's jurisdictional claim based on the Title 23 right-of-way grant is also flawed. First, the Title 23 grant, by its terms, does not include the right-of-way area on which the Powers' buildings sit. The right-of-way area granted by the Title 23 grant does not include the original right-of-way area granted by public land orders 601 and 1613. Rather, it includes only that area shown by the shaded area of the attached right-of-way map marked as Appendix 5. 6/ As is clearly shown by this map, the Title 23 right-of-way grant does not include the original right-of-way area on which the Powers' buildings sit.

However, even if the Title 23 right-of-way grant dated October 21, 1977, did purport to grant that portion of the original PLO 601 and PLO 1613 right-of-way on which the Powers' buildings sit, it could not have legally done so because, as a result of the quitclaim deed of 1959, the BLM had no interest in that original right-of-way at the time the Title 23 right-of-way grant was issued.

4/ Section 21 of the Alaska Omnibus Act authorized the Secretary of Commerce to transfer to the State of Alaska all interest of the United States in highways in Alaska.

5/ It should be pointed out here that section 21(c) of the Alaska Omnibus Act required the State of Alaska to assume responsibility for the maintenance of the roads transferred by the quitclaim deed. Alaska has been maintaining the Richardson Highway since the date of the quitclaim deed.

6/ The area that is the subject of the right-of-way grant is described in the grant document as being that area shown on pp. 1-24 of the right-of-way map for Project F-071-1(22) Tiekel North.

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Conclusion:

The BLM's assertion of jurisdiction over the segment of the Richardson Highway right-of-way at issue here has no legal basis. By virtue of the quitclaim deed issued by the United States Department of Commerce to the State of Alaska, any and all interest of the United States that existed in that right-of-way segment was transferred to the State of Alaska.

JBM:ebc

Attachments