MEMORANDUM

State of Alaska
Department of Transportation & Public Facilities

TO: John Athens
Assistant Attorney General
Northern Region

DATE: January 25, 1996

FILE NO:

TELEPHONE NO: 451-5426

FROM: John F. Bennett, PLS
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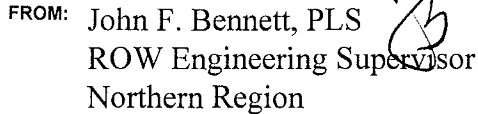

SUBJECT: Project STP-0680(26)/66493
Elliott Hwy. ROW Mapping
Right of Way Research

We currently have a contract out to perform surveying and mapping of the Elliott highway right of way between the Dalton Highway and the Tanana River at Manley Landing. The right of way is primarily based upon PLO's and has not previously been mapped except for portions of the road depicted on BLM or DNR land surveys.

I am seeking advice with regard to the right of way status on certain portions of the 2 mile long road between Manley and Manley Landing.

There are a couple of U.S. Surveys that the existing road passes through where the date of entry precedes the effective date of PLO 601 (8/10/49). In these situations, we would generally concede that our right of way is limited to "ditch to ditch" by virtue of either prescription or RS-2477. For this project, however, I decided to investigate the applicability of a 1917 Territorial Legislative act that would appear to establish a 60 foot wide right of way for roads constructed or maintained by the Territory.

Back when Doug Blankenship was working on the RS-2477 project, we discussed whether their might be stronger mechanisms for claiming a right of way rather than get bogged down in the RS-2477 assertion process. The two mechanisms we discussed were the 1917 Territorial right of way legislation and an expanded assertion of PLO rights of way.

When I say an expanded use of PLO assertions, I mean expanded beyond those roads listed in the Omnibus Act QCD. From what I can tell in the files, we have traditionally only asserted a PLO right of way if that road was named in the QCD. The QCD list contained a summary of the roads on the State system in 1959 and not a summary of all the roads constructed or maintained by the Alaska Road Commission and possibly subject to a PLO right of way. My assumption is that once a right of way has been established under the terms of the appropriate PLO, the fact that it was not named in the QCD conveyance could not extinguish the right of way although it may have some implication regarding management authority. Although I have not had much need to use this in the past, I believe that once I can establish construction or maintenance activity by the ARC according to the ARC reports and other historical documents, and I can show in the chain of title that the land was unreserved public lands at the time the PLO was in effect, we should be able to claim a valid PLO right of way. This is the first question I would like answered in a MOA.

The second question relates to the Territorial right of way Legislation (Ch 36 SLA 1917). This legislation provided that "the lawful width of right of way of all travelled roads and trails shall be sixty feet." Doug Blankenship referred me to the 1938 District Court case Clark v. Taylor et al..

This case appears to clearly state where the 1917 legislation cannot be applied. And conversely, it appears to offer a guide as to where it can be applied. Essentially, the court ruled that the 1917 law cannot apply to roads constructed or maintained by the federal Alaska Road Commission as it was only intended to apply to roads constructed or maintained by the Territory. Blankenship did not appear to give this law much weight because he said he had been unable to find a concise summary of construction and maintenance activities performed by the Territory.

When I began researching the Manley-Manley Landing road, I noted in several of the Alaska Road Commission Annual Reports that work performed and funded by the Territory was distinctly reported separately from the work performed and funded by the Alaska Road Commission. In fact, for any given road where the ARC and the Territory jointly performed construction or maintenance activities, the funding from each group was accounted for to the penny. Therefore, in areas where the dates of entry pre-dated PLO 601, and post dated the 1917 legislation, I have asserted a 60 foot wide right of way.

My question to you is whether this logic should be supported or rejected on a legal basis. First, can the 1917 legislation be used under the circumstances that I have described? Although not stated in the legislation, I assume that Ch 36 SLA 1917 could only apply to roads constructed or maintained across unreserved public lands. In 1917 most of the lands in Alaska were under the jurisdiction of the federal government. I don't have a clear picture in my mind as to the relationship between the Territorial government and the federal government although I believe that the territory was established and operated under the authority of the federal government. Therefore, I have assumed that Ch 36 SLA 1917 applied to Territorial constructed and maintained roads which crossed unreserved federal lands. Otherwise, there would have been little point to it.

Please prepare a MOA which will give me guidance as to the application of Ch 36 SLA 1917 and PLO's for roads not named in the Omnibus Act.

I have attached my research summary, a copy of Ch 36 SLA 1917, Clark v Taylor, and excerpts from the ARC annual reports. You may charge your time to LC 30849922.