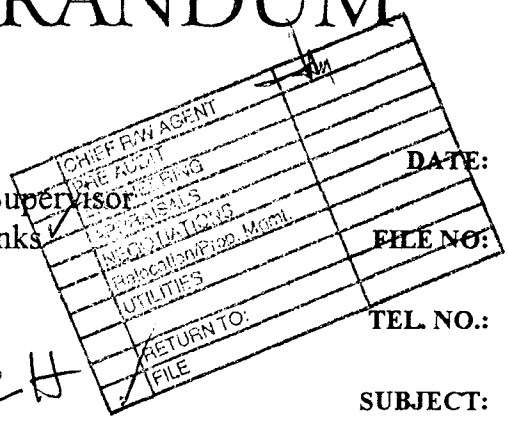
MEMORANDUM

State of Alaska

Department of Law



TO: John Bennett
Engineering Supervisor
ROW, Fairbanks

DATE: October 16, 1996

RECEIVED
OCT 21 1996

FILE NO: 665-96-0152

TEL. NO.: 451-2905

FROM: Leone Hatch LH
Assistant Attorney General

SUBJECT: Elliot Highway ROW

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

You have asked whether a 1917 territorial act can be used to establish the width of the right of way on a section of the Elliott Highway. The 1917 act establishes a territorial road commission and dictates a sixty foot right of way. A 1938 federal district court decision found that the 1917 act's right of way width did not apply to roads which had not been built or maintained at least in part by the territorial road commission, as opposed to the federal Alaska Road Commission. Clark v. Taylor, 9 Alaska 2988 (D. Alaska 1938).[1] You have located documents that verify that the territorial road commission partially funded the maintenance and reconstruction of bridges along the subject length of road.

You have also asked whether the relevant PLOs established prior[2] to private entry established a valid ROW even if they were not specifically listed in the Omnibus Act Quit Claim Deed (QCD).

---

[1] The analysis in Clark which limits the 1917 Act's application to roads the territory financed is somewhat questionable. Although the case is technically binding precedent, if challenged it is possible that the Alaska Supreme Court might overturn it and find that the designation of a 60 foot ROW was an RS 2477 acceptance of all public roads in existence during the life of the territorial statute. The court may be primarily reluctant to overturn Clark, not out of deference to the 1938 reasoning, but because landowners have relied upon the limits it set all these years.

[2] Your memo suggests that at least some of the land had been entered upon prior to the relevant Public Land Order. PLOs, like RS 2477 lands, cannot impose a ROW on land which had already been appropriated (at least not without compensation to the landholder). A prescriptive easement or implied dedication, however, could have been impressed on the actually traveled way. Swift v. Kniffen, 706 P.2d 296 (Alaska 1985).

Please keep in mind that this response is limited to the particular situation and location identified in your question. This memo does not constitute an Attorney General's Opinion and should not be interpreted or used as such.

Public Land Orders

A series of Public Land Orders (PLOs) were issued in Alaska which were intended to facilitate the establishment of a transportation system. They tend to leave a rather complicated trail as subsequent orders modify earlier orders, and the earlier orders are reservations rather than easements. Easements of specific width for existing roads and trails were established in Secretarial Order 2665 in 1951, along with a specific procedure for establishing easements for new roads. Existing easements were generally protected in the terms of later PLOs from destruction in subsequent recisions of withdrawn lands. E.g. PLO 757 (1951). However, so long as the easements established remained under federal management and control, the federal government could reasonably decrease their width at will. See Secretarial Order 2665, amendment 1 (1952). In examining the effect of a PLO on a specific piece of property, it is critical to keep in mind that to be effected by a federal withdrawal or easement, the land in question must be in the public domain and the road must either have been in existence when the Order took effect in 1951, or at least staked while the order was in effect. Keener v. State, 889 P.2d 1063 (Alaska, Feb 17, 1995); State v. Alaska Land Title Assn., 667 P.2d 714 (Alaska 1983), State, Dept. of Highways v. Green, 586 P.2d 595 (Alaska 1978), Affd. Goodman, v. State of Alaska, 660 P.2d 443 (Alaska 1983).

From the collection of PLOs that you have provided, it appears that in 1951, Secretarial Order 2665 established an easement for highway purposes 50 feet on each side of the centerline for local roads, and 100 feet on each side of the centerline for feeder roads. Section one of the order describes as its purpose to address roads "established or maintained under the jurisdiction of the Secretary of the Interior." Therefore it is likely that a court will limit the effect of this order to roads which the DOI has established or maintained. The Manley Hot Springs to Eureka Road segment is specifically called out as a feeder road to which the Order impliedly applies. Lands in the public domain from the landing to Eureka Road *if* "established or maintained under the jurisdiction of the Secretary of the Interior" were also burdened with PLO easements. If the section in question meets the federal

involvement criteria and have not been otherwise abandoned[3] or terminated, they should exist to this day.

Section 21 of the Alaska Omnibus Act directed the Secretary of Transportation to transfer roads administered by the Bureau of Public Roads in Alaska with several small exceptions. The exceptions were,

> (i) except such lands or interests in lands, ... as the Secretary may determine are needed for the operations, activities, and functions of the Bureau of Public Roads in Alaska after such transfer, including services or functions performed pursuant to section 44 of this Act; and (ii) except such lands or interests in lands as he or the head of any other Federal agency may determine are needed for continued retention in Federal ownership for purposes other than or in addition to road purposes.

The failure of the Omnibus QCD to include some of these easements suggests that if the specific easement did not fall into an exception, either it was overlooked or the Secretary did not view it as under the control of the Bureau of Public Roads.[4] Their failure

---

[3] Generally, in order to prove abandonment of easement created by grant, it is necessary to establish both an intention to abandon and also some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement. Non-use, alone, does not constitute abandonment of easement; a party claiming abandonment generally must show either verbal expression of intent to abandon or conduct inconsistent with intention to make further use. Central Transp. v. Pirate Canoe Club, 463 F.2d 127 (C.A.2 1972); Conner v. Lucas By and Through Lucas 920 P.2d 171 (Or. App. 1996). See United States ex rel. Tenn. Valley Auth. v. Bagwell, 698 F. Supp. 135, 138 (M.D. Tenn. 1988) (federal abandonment). Carolina Land Co. v. Bland, 217 S.E.2d 16, 21 (S.C. 1975) (federal abandonment). Since the circumstances presented in this question involve the width of an easement which has in fact been put to its intended use, an abandonment claim is less likely to succeed. Nonetheless, a lot by lot assessment is called for.

[4] The list of public roads used at the time may have been thought to include all of the roads technically under the Bureau's care.

to appear in the Omnibus QCD alone should not have extinguished them, although the failure does raise some technical questions concerning the authority to reduce or destroy them.[5] The question would be resolved if the Secretary of Transportation would issue a quit claim deed for the relevant easements in the favor of the State pursuant the Omnibus Act.

1917 Act

In 1866 Congress passed RS 2477. It was repealed in 1976. This statute has been interpreted as an offer by the federal government of right of ways across unreserved federal land. The right of ways do not exist until the "offer" has been accepted. Acceptance can be through historic usage by the public, or by appropriate governmental public act such as legislative acceptance. Fitzgerald v. Puddicombe, 918 P.2d 1017 (Alaska 1996); Hamerly v. Denton, 359 P.2d 121 (Alaska 1961); Shultz v. Department of Army, 10 F.3d 649 (9th Cir. 1993). The 1917 Act will likely be interpreted as such an acceptance.[6] Clark, 9 Alaska 298. RS 2477 does not dictate a standard ROW width; the width is generally determined by the nature or terms of the acceptance.

The 1917 act required the territorial Divisional Commission to classify all public territorial roads and trails. The act further states "The lawful width of right-of-way of all roads or trails shall be 60 feet." Section 13. As noted above, the Clark Court interpreted this phrase in its immediate context to apply only to territorial roads, and defined territorial roads as those which received territorial funding either for construction or maintenance. The greatest danger that comes to mind in asserting the 1917 easement is that a modern court may not necessarily be comfortable with the Clark Court's dicta that a "territorial road" is a road that saw some territorial maintenance. On the other hand, it is also possible as noted above, that a contemporary court may be willing to revisit the Clark Court's holding that the 60 foot width was imposed only on territorial roads.

---

[5] The Orders which establish the easements declare their purpose, but do not specifically identify the holder of the easement as the federal government.

[6] There is a federal legislative effort afoot to limit the exertion of RS 2477 rights. Should it pass, its effect upon DOT's assertions of unused ROWs should be examined.

The assertion of a 1917 60-foot easement will be most supportable when, as is the case here, the territorial involvement can be well documented. Like the PLOs addressed above, the property in question must have been in the public domain during the relevant time period. The relevant time period for the Eureka to Manly Landing sections of road are those years when territorial funding and work can be well documented.

Conclusion

In conclusion, the 1917 60-foot easement should be supportable on those lots that were in the public domain during periods of territorial funding and maintenance. It should also be possible to reasonably assert the PLO easements which were left out of the Omnibus QCD if the requirements noted above are met on the relevant parcels. It may be worthwhile to explore the possibility of obtaining another quit claim deed which addresses the easements that were omitted from the original Omnibus QCD to settle any potential managerial authority questions.

LH/arp

I:\HATCHL\ELLIOTTH\BENNETT.M01

Author: JohnF Bennett at FAIBWR-CCMAIL
Date: 10/23/96 2:59 PM
Priority: Normal
Receipt Requested
TO: leone_hatch@law.state.ak.us at DOTPFWAN
Subject: Elliott Hwy ROW
---------- Message Contents ----------

A few questions regarding your opinion:

1. In footnote 1 you suggest the Clark court's reasoning was questionable. If I understand this correctly, you believe the court should have considered the 1917 act as a legislative acceptance of the RS-2477 grant. Therefore, a RS-2477 (not eligible for a PLO ROW) road or trail constructed across unreserved federal or territorial/state lands after 1917 and prior to the 1963 enactment of AS 19.10.015 (Establishment of Highway Widths) may be subject to a minimum 60' ROW.

There is one late breaking reason why the RS-2477 link may be a detriment to us rather than an enhancement over the limitation of the 1917 act to Territorial funded roads. Apparently, the State is in the process of considering a coalition with large private property owners (primarily native corporations) against the federal government with regard to RS-2477. In this agreement, the state would not build a new road across private lands using a validly documented RS-2477 trail or section line easement without paying the land owner fair market value. Although state case law gives us the tools to claim and use a valid RS-2477, the state would essentially make a management decision not to use them without payment.

It may be too early to tell if this will come to pass, but in my mind if we have options as to what type of a ROW claim we can lay on a historic road/trail, the first and best option will be PLO, followed by the 1917 act and lastly and probably never again, RS-2477.

2. In your section on PLO's, you state that "In examining the effect of a PLO on a specific piece of property, it is critical to keep in mind that to be effected by a federal withdrawal or easement, the land in question must be in the public domain and the road must either have been in existence when the Order took effect in 1951....." Granted, that is the year that SO 2665 converted the the "local" and "feeder" roads noted in PLO 601 to easements. However, rights of way for roads that were in place on or constructed after the date of PLO 601 (8/10/49) but prior to reservation of the federal land they crossed were subject first to reservations for ROW and eventually converted to easements. Therefore 8/10/49 is the key date on which our ROW evaluations are typically based. If you are in fact saying that the date of PLO 601 is not applicable when evaluating the existence of PLO rights of way, then we need to talk more about this.

On a side note, a bit of historical trivia, I just reviewed a September 9, 1949 letter between BLM offices and copied to ARC which discussed the fact that they really should have established easements in PLO 601 rather than withdrawals, because of the difficulty in locating and excluding them from homestead entries. This laid the groundwork for converting to easements in SO 2665.

3. Regarding footnote no. 4 "The list of public roads used at the time

may have been thought to include all of the roads technically under the Bureau's care." I don't believe that this was the case any more then than it is now. AS 19.10.020 "Designation of state highway system" gives the department the power to determine what highways constitute the state highway system. This is basically an administrative function in which roads may be reclassified upward, downward, added or dropped from the system by the Commissioner. It basically equates to those roads we actively operate and maintain as opposed to all of the roads and rights of way that we hold title to. Pre-statehood, the feds had a similar administrative classification system. The page in the Omnibus QCD preceding the route descriptions is labeled "Approved Federal Aid System". I have several copies of ARC/BPR memos from the late 50's updating or changing the classifications of certain roads. One item that has always been a problem between the PLO's and the Omnibus QCD was that the PLO "Through", "Feeder" and "Local" classifications appeared to relate directly to the Omnibus QCD's "Primary", Secondary "A" and Secondary "B" classifications. Unfortunately there are several areas where, due to administrative reclassifications, the two do not match. For example, the SO 2665 Am 2 added the Copper River Highway as a "Through" road with a ROW of 150' each side of centerline, where the QCD lists it as a Secondary class "A", suggesting a narrower width. There are several other conflicts. I believe that a few years ago, the Anchorage AGO (maybe Caroline Jones) argued before IBLA that the administrative reclassifications were sufficient to modify the width of a ROW established by a PLO. I think we lost that one. So the general rule we follow is that whatever width is prescribed by the PLO, that is what we claim, not what might be implied by the QCD or any other administrative reclassifications. My point is, and I do have one, ..is that now and I believe then, the ARC/BPR/DOT holds title to many road rights of way not included in our "official" highway system.

You also stated that one reason a road might not be listed is if the Secretary did not view it as under the control of the BPR, then go on to discuss abandonment. I for one, do not recall ever seeing a vacation or relinquishment of right of way document prior to statehood. Therefore, I have no idea what process they would have gone through to release and easement or if they considered non-use acceptable at that time. I suspect that the lack of development in the state and fact thatthere were reletively few private owners adjoining the highway system, that vacations of right of way was a bit of a premature issue.

4. So, in conclusion to your conclusion...although I recognize that this "letter of advice" applies only to this project, I believe it is reasonable to assume that we could likely withstand a challenge to a 60 ROW by virtue of the 1917 act if we could generate an equivilent amount of documentation tieing the construction/maintenence to territorial funds and the lands in question were unreserved at the appropriate times.

With regard to the valid PLO rights of way that were not named in the Omnibus QCD, In my mind, they need not be treated any differently than those public road rights of way reserved by the federal govt. in patents. There seems to be little debate as to the states authority to use a right of way reserved in a patent as in Keener and other prior situations. The Keener patent was "subject to a right-of-way not exceeding 33 feet in width, for roadway and public utilities purposes." These were dedications to the public without identification or conveyance of the easement interest to any public agency or governmental entity.

The PLO's, although issued by federal agencies who had the public road

jurisdiction at the time, specifically created reservations or easements for Public Highways. Given that DOT is statuatorily charged with the management of public highways in Alaska, I would not think it a great leap to believe that the unconveyed PLO rights of way are available for our use. Assuming they met all of the tests of a valid PLO ROW. The PLO question was kind of a bonus as we really do not have that situation on the Elliott highway project. We do have it however, on an adjoining road project that is in the preliminary planning stages. That is the Eureka to Rampart road. We can document the heck out of this road back to the 1920's with all kinds of ARC funds being used for construction & maintenence. Unfortunately, it never got listed in the Omnibus QCD. Because of this, I have only seen references to the ROW existence by virtue of RS-2477. Given the current federal/state relationship, I don't think it will be practical to request additional QCD's from the feds.

Anyway, thanks for your work. I had pretty much convinced myself of the answer but I needed you to either blow me out of the water or confirm that my thoughts were not unreasonable.

JohnB.

Author: Hatchl@tort.law.state.ak.us at dotpfwan
Date: 10/25/96 1:45 PM
Priority: Normal
TO: JohnF Bennett at FAIBWR-CCMAIL
Subject: Re: Elliott Hwy ROW
---------- Message Contents ----------

My Goodness John, I think your comments may be as long as my memo!
I have interspersed responses where it seems appropriate.

> From: JohnF_Bennett@dot.state.ak.us
> Date: Wed, 23 Oct 1996 15:37:35 -0900
> Subject: Elliott Hwy ROW
> To: leone_hatch@out.law.state.ak.us

> A few questions regarding your opinion:
>
> 1. In footnote 1 you suggest the Clark court's reasoning was
> questionable. If I understand this correctly, you believe the court
> should have considered the 1917 act as a legislative acceptance of the
> RS-2477 grant. Therefore, a RS-2477 (not eligible for a PLO ROW) road
> or trail constructed across unreserved federal or territorial/state
> lands after 1917 and prior to the 1963 enactment of AS 19.10.015
> (Establishment of Highway Widths) may be subject to a minimum 60' ROW.

Actually no, the 1917 Act is unquestionably an acceptance of RS-2477, in pretty much the same way section line easements were. That portion of Clark is unlikely to be revised. (Sorry I wasn't clearer) What I meant was that I think that the reasoning limiting the effect of the 1917 Act to the Territorial Road Entity's efforts is suspect. I read the Act as intended to apply to both federal and territorial roads at the time...

>
> There is one late breaking reason why the RS-2477 link may be a
> detriment to us rather than an enhancement over the limitation of the
> 1917 act to Territorial funded roads. Apparently, the State is in the
> process of considering a coalition with large private property owners
> (primarily native corporations) against the federal government with
> regard to RS-2477. In this agreement, the state would not build a new
> road across private lands using a validly documented RS-2477 trail or
> section line easement without paying the land owner fair market value.
> Although state case law gives us the tools to claim and use a valid
> RS-2477, the state would essentially make a management decision not to
> use them without payment.
>
> It may be too early to tell if this will come to pass, but in my mind
> if we have options as to what type of a ROW claim we can lay on a
> historic road/trail, the first and best option will be PLO, followed by
> the 1917 act and lastly and probably never again, RS-2477.
>
> 2. In your section on PLO's, you state that "In examining the effect
> of a PLO on a specific piece of property, it is critical to keep in
> mind that to be effected by a federal withdrawal or easement, the land
> in question must be in the public domain and the road must either have
> been in existence when the Order took effect in 1951....." Granted,
> that is the year that SO 2665 converted the the "local" and "feeder"
> roads noted in PLO 601 to easements. However, rights of way for roads

> that were in place on or constructed after the date of PLO 601
> (8/10/49) but prior to reservation of the federal land they crossed
> were subject first to reservations for ROW and eventually converted to
> easements. Therefore 8/10/49 is the key date on which our ROW
> evaluations are typically based. If you are in fact saying that the
> date of PLO 601 is not applicable when evaluating the existence of PLO
> rights of way, then we need to talk more about this.
>

Talked w/Leone 10/29/96. She agrees the 1951 date relates to when it became an easement as opposed to when it was reserved. 8/10/49 is appropriate.

John, I don't follow you here. Could you elaborate on your reasoning? From my review of the documents and the decision in Alaska Land Title, 667 P.2d 714, 721 (1983) it sure looks to me like 1951 is the salient date. What do you mean by roads built after 1949 had to be first reserved and then converted to easements? Is there another order or authority?

> On a side note, a bit of historical trivia, I just reviewed a September
> 9, 1949 letter between BLM offices and copied to ARC which discussed the
> fact that they really should have established easements in PLO 601
> rather than withdrawals, because of the difficulty in locating and
> excluding them from homestead entries. This laid the groundwork for
> converting to easements in SO 2665.
>
> 3. Regarding footnote no. 4 "The list of public roads used at the time
> may have been thought to include all of the roads technically under the
> Bureau's care." I don't believe that this was the case any more then
> than it is now. AS 19.10.020 "Designation of state highway system"
> gives the department the power to determine what highways constitute
> the state highway system.

Yes, but DOT has not done so, nor is it clear what the effect of designating a federal ROW as part of the state system would be if there was a federal objection...

> This is basically an
administrative function
> in which roads may be reclassified upward, downward, added or dropped
> from the system by the Commissioner. It basically equates to those
> roads we actively operate and maintain as opposed to all of the roads
> and rights of way that we hold title to. Pre-statehood, the feds had a
> similar administrative classification system. The page in the Omnibus
> QCD preceding the route descriptions is labeled "Approved Federal Aid
> System". I have several copies of ARC/BPR memos from the late 50's
> updating or changing the classifications of certain roads. One item
> that has always been a problem between the PLO's and the Omnibus QCD
> was that the PLO "Through", "Feeder" and "Local" classifications
> appeared to relate directly to the Omnibus QCD's "Primary", Secondary
> "A" and Secondary "B" classifications. Unfortunately there are several
> areas where, due to administrative reclassifications, the two do not
> match. For example, the SO 2665 Am 2 added the Copper River Highway as
> a "Through" road with a ROW of 150' each side of centerline, where the
> QCD lists it as a Secondary class "A", suggesting a narrower width.
> There are several other conflicts. I believe that a few years ago, the
> Anchorage AGO (maybe Caroline Jones) argued before IBLA that the
> administrative reclassifications were sufficient to modify the width of
> a ROW established by a PLO. I think we lost that one. So the general
> rule we follow is that whatever width is prescribed by the PLO, that is
> what we claim, not what might be implied by the QCD or any other
> administrative reclassifications. My point is, and I do have one, ..is
> that now and I believe then, the ARC/BPR/DOT holds title to many road
> rights of way not included in our "official" highway system.
>

> You also stated that one reason a road might not be listed is if the
> Secretary did not view it as under the control of the BPR, then go on
> to discuss abandonment. I for one, do not recall ever seeing a
> vacation or relinquishment of right of way document prior to statehood.
> Therefore, I have no idea what process they would have gone through to
> release and easement or if they considered non-use acceptable at that
> time. I suspect that the lack of development in the state and fact
> thatthere were reletively few private owners adjoining the highway
> system, that vacations of right of way was a bit of a premature issue.

By abandonment I was not refering to formal, federal abandonment which would leave a paper trail, but to common-law abandonment which can extinguish an unused claim over time. Keener is likely to make ROW abandonment more difficult under Alaska law than in several other states that have recognised it. As you note, a pretty scary concept in a state like this.

>
> 4. So, in conclusion to your conclusion...although I recognize that
> this "letter of advice" applies only to this project, I believe it is
> reasonable to assume that we could likely withstand a challenge to a 60
> ROW by virtue of the 1917 act if we could generate an equivilent amount
> of documentation tieing the construction/maintenence to territorial
> funds and the lands in question were unreserved at the appropriate
> times.

This is not an AG Opinion and cannot be used as such. It has not been reviewed and adopted by the AG.

Yeah, Yeah, Yeah—

>
> With regard to the valid PLO rights of way that were not named in the
> Omnibus QCD, In my mind, they need not be treated any differently than
> those public road rights of way reserved by the federal govt. in
> patents. There seems to be little debate as to the states authority to
> use a right of way reserved in a patent as in Keener and other prior
> situations. The Keener patent was "subject to a right-of-way not
> exceeding 33 feet in width, for roadway and public utilities purposes."
> These were dedications to the public without identification or
> conveyance of the easement interest to any public agency or
> governmental entity.
>
> The PLO's, although issued by federal agencies who had the public road
> jurisdiction at the time, specifically created reservations or
> easements for Public Highways. Given that DOT is statuatorily charged
> with the management of public highways in Alaska, I would not think it
> a great leap to believe that the unconveyed PLO rights of way are
> available for our use. Assuming they met all of the tests of a valid
> PLO ROW. The PLO question was kind of a bonus as we really do not have
> that situation on the Elliott highway project. We do have it however,
> on an adjoining road project that is in the preliminary planning
> stages. That is the Eureka to Rampart road. We can document the heck
> out of this road back to the 1920's with all kinds of ARC funds being
> used for construction & maintenence. Unfortunately, it never got
> listed in the Omnibus QCD. Because of this, I have only seen
> references to the ROW existence by virtue of RS-2477. Given the
> current federal/state relationship, I don't think it will be practical
> to request additional QCD's from the feds.
>
> Anyway, thanks for your work. I had pretty much convinced myself of
> the answer but I needed you to either blow me out of the water or

> confirm that my thoughts were not unreasonable.
>
> JohnB.
>

CONFIDENTIAL, ATTORNEY CLIENT COMMUNICATION
hatchl@tort.law.state.ak.us
(907)451-2811