

Bennett, John F (DOT)

From: John F. Bennett
Sent: Wednesday, March 10, 2004 3:57 PM
To: John F. Bennett
Subject: Re: RS2477 Klutina Opinion

----- Original Message -----

From: [John F. Bennett](#)
To: [Tina Cuning](#)
Sent: Wednesday, March 10, 2004 2:10 PM
Subject: Fw: RS2477 Klutina Opinion

Tina, below is an email I had sent to Paul suggesting that his interpretation might be a bit conservative. I don't see that I have a reply on file but I think it might have been low on the priority list and then we had a big shakeup with our Fairbanks AGO and Paul moved out of the transportation section. I have attached the October 23 "clarification" memo. Although I think it is ok to draw upon Paul's ideas, as he said, please don't pass it around or he will have a cow. In my opinion, your office is doing more to "fight the good fight" right now and should have the benefit of any information we have on hand. JohnB

----- Original Message -----

From: [John F. Bennett](#)
To: [Paul R Lyle](#)
Sent: Wednesday, March 19, 2003 1:56 PM
Subject: RS2477 Klutina Opinion

Paul, at Mason's party I mentioned that I had a couple of thoughts about your Klutina opinion. Upon re-reading your original July 17, 02 opinion, I thought your discussion regarding scope of use was coming across very conservatively. You cite the 1996 Fitzgerald v. Puddicombe case as one of the Alaska cases that hold that RS2477 grants are to be interpreted with Alaska law. In your conclusion you state that "Alaska courts will apply state law to determine the scope of an RS 2477 right of way..." then state that the "allowable improvements to an RS 2477 right of way and the allowable uses by the public will most likely be measured by that which is reasonably necessary in light of the historic uses made of the road before October 21, 1976" You cited federal case law for the proposition that authorized uses should be "measured in light of traditional uses to which the right of way was put".

Ahtna made the same argument in their trespass case against the Hughes. They argued that as there was no evidence of commercial guide operations using the Klutina RS2477 right of way prior to the RS2477 repeal in 1976, it could not be allowed now as that use would exceed the historic use.

I went back and reread the 1996 Fitzgerald v. Puddicombe case and found that it was remanded to superior court to determine the precise location and extent of the RS2477 right of way. Judge Shortell ruled on the location and width, but believed the Supreme court did not intend for him to determine scope. In 1998 something made Shortell change his mind and revisited the issue of scope of use. He said that "Alaska views the scope of an RS2477 generously" and referred to the Dillingham case in which the Alaska Supreme court that "If there is a public road on Survey 2541, it may be used for any purpose consistent with public travel".

Apparently Shortell's rulings were appealed again and on August 25, 1999 the Supremes issued a Memorandum Opinion and Judgment on the Puddicombe v. Fitzgerald case and reaffirmed Dillingham and that the scope of an RS2477 right of way "could be used for any purpose consistent with public travel."

In my mind, any use "consistent with public travel" sets no limitations on historical uses as of 1976. So I am asking that upon your review, if your original statement regarding scope might be a bit conservative considering state rulings on the issue. I suppose it is possible that the issue could be decided under federal law, but if I were a betting man, I would bet that the scope of use for Klutina would be decided under state law.

Am I wishfully thinking by asserting the more liberal scope interpretation stated in Dillingham and Puddicombe, or are we better served to accept your more conservative interpretation.

I have copies of Shortell's orders and I will put them in the mail to you for your reference. JohnB