UNITED STATES GOVERNMENT

Memorandum

TO : DM-A

DATE: 9 MAY 1978

In reply refer to:
2098 (013)

FROM : Chief, Division of Resource Management

SUBJECT: 44 LD 513, RS 2477 in Alaska

Attached is a staff report prepared in response to a series of recurring questions concerning the nature and application of 44 LD 513, RS 2477 and section line easements in Alaska. This report was prepared by Pat Beckley of my staff and has been reviewed by Robert Mothershed of the Regional Solicitor's staff.

Donovan Ginger

Enclosure:
Report with enclosures

cc:
DMF (case)

44 LD 513

REPORT

ON

44 LD 513, RS 2477

AND

SECTION LINE EASEMENTS

IN

ALASKA

Prepared by: Patrick C. Beckley
Chief, Branch of Lands and Minerals

Reviewed by: Robert Mothershed, Solicitor
Julienne Gibbons, Realty Specialist

OCTOBER 1977

TERRY HASSET 271-3404
BRANCH OF EASEMENT IDENTIFICATION
ANCHORAGE, BLM

I. 44 LD 513

44 LD 513 is an abbreviation that refers to a letter of instruction found in volume 44, Land Decisions, page 513, dated January 13, 1916. This instruction provides that where telephone lines, roads, trails, bridges and similar improvements have been constructed on federal lands with federal monies and are being maintained by and for the United States, the lands needed for such improvements may be retained for the use of the United States through the insertion of a reservation in final certificates and subsequent patents.

A good discussion of the 44 LD 513 may be found in the June 30, 1964, Regional Solicitor's memo on this subject (attached).

II. QUESTIONS ABOUT 44 LD 513

1. What actually makes the 44 LD 513 reservation effective?

Two actions are required:

a. Legislation or appropriation which authorizes federal money for a proposed project or existing federal projects where money has already been spent in construction.

b. There must be a showing (evidence) on the ground of the project. If the road or trail is existing , a notation on the land records will evidence the appropriation. If the road, etc., is not existing or in such disrepair so as to require extensive repair before use, the appropriation would require some action on-the-ground, i.e., staking of a centerline survey.

2. If federal monies were expended and construction done, but no notation is made on the records, is there still a 44 LD 513 right-of-way?

Yes, the actual showing on the ground constitutes the appropriation and thereby sets the effective date of the appropriation.

3. If a notation on the records is made for an existing road or trail on federal lands but no government money has been expended, is there an effective 44 LD 513?

No. Notation of the public land records does not by itself constitute appropriation. The purpose of notation is to provide notice to the public that the improvement is the property of the United States and to facilitate that reservation in subsequent conveyances of the land. Public use of an area, by itself, does not establish a 44 LD 513 right-of-way.

4. A 44 LD 513 reserves trails or other improvements for the federal government. Does this insure unrestricted public use of the improvement?

No. A road or trail may be a federally owned facility on public lands, and not be a public highway, even though the public may be permitted to use it. In Alaska, there has been little intensive land management of federal lands and properly reserved 44 LD's have been generally open to public use. An exception to this is the White Alice system and other 44 LD's reserved for the military.

5. What rights accrue to the public through public use of a 44 LD road and what happens if it's closed to public use by an entryman or land owner?

No rights accrue to the public through use permitted (or allowed informally) by the governement. The 44 LD only protects the government's rights and the public's use is incidental to that. The 44 LD does not become a public highway through permitted use by the general public. If a properly established 44 LD preceded an entry and public use of the 44 LD occurred before or after the entry, the entryman would not have the right to legally close off either the government's use or the public's use. If closure (physical blockage) does occur, the public and/or the government would each have to secure its rights through the court system, if necessary.

6. How do 44 LD's affect settlement claims?

In the case of entered lands, if a road was protected by a 44 LD or was a public highway at the time the land was entered, the entryman receives title to the land subject to the right-of-way. If the road was originally a federal improvement which was formally abandoned by the government prior to entry, the entryman would not take subject to the right-of-way. Similarly, if the road was formally abandoned after the initiation of the entry, the entryman would be entitled to take free and clear of the right-of-way. Finally, if the road was formally abandoned by an agency of the government prior to entry but appropriated through 44 LD procedures by BLM, prior to entry, the entryman would take subject to the appropriation of the right-of-way by BLM. The question of abandonment is to be resolved in each instance by determining whether the government has formally abandoned the right-of-way through both non-use and a formal action indicating the intent of the government to abandon.

If construction has not taken place prior to entry, 44 LD 513 requires some action upon the ground itself that the tract had been devoted to the public use - such as staking the area to be traversed, and therefore retained by the United States, accompanied by a setting aside of a sufficient part of the

appropriated money for construction. In other words, according to the instructions, construction must have been provided for prior to entry and will be immediately undertaken. It follows then, that the U.S. may not establish a 44 LD 513 right-of-way after land is properly entered for a settlement claim. It is important to bear in mind that the notation on the land records is not essential to the appropriation of the right-of-way.

7. Can the location of a 44 LD right-of-way be moved unilaterally; by either a landowner or the government on a settlement claim or private land? If so, how is it made a part of the public land records?

No, it cannot be moved. As the basic authority for 44 LD 513's has been replaced by the Federal Land Policy and Management Act of 1976, neither landowners nor the government may move a 44 LD 513. The process now available to consenting parties (landowners and the government) is a formal relinquishment of the 44 LD and acquisition of an easement by the government. The relinquishment procedure involves a formal statement by the appropriate government official that the intent of the United States is to relinquish all rights relative to the right-of-way. This document should also be accompanied by a memo to the Branch of Land Title and Records requesting a removal of the 44 LD from the public land records. The other

step in the process is acquisition of an easement by the government which would follow already established BLM procedure (BM 2130).

8. If an entryman agrees to build alternate access leading from a public highway to a 44 LD 513 trail, how do we note the records to assure a reservation in the subsequent patent to protect the alternate access?

If the entryman provides alternate access on his claimed land, the U.S. could relinquish the old route and accept the alternate route using the procedures outlined above. It should be noted, however, that this action should be preceded by a field report and environmental analysis report. In some cases, this type of action can be locally quite controversial and public involvement should be incorporated into the environmental analysis as provided for in our standard Bureau procedures.

9. Can a 44 LD be legally restricted or blocked by a land owner?

A proper 44 LD 513 may not be blocked by private individuals, it may be blocked or restricted only by the federal government. A blockage on federal land by a private individual would be a form of adverse possession against the government and many courts have held that you cannot acquire any rights by adverse possession against a sovereign.

II. RS 2477

1. What is an RS 2477 road and how are they established?

A highway is a public road (trail) which anyone is free to use. In Alaska, some highways have been created by acceptance of a Congressional grant of right-of-way across vacant unreserved public lands. This grant is known as RS 2477, as derived from section 8 of the Act of July 26, 1866 (14 STAT 253, 43 USCA 932 (1964) RS 2477) which states:

> "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Acceptance of the above Congressional grant has been through an act by the appropriate public authorities or it may have been accepted by public user for such a period of time and under such conditions so as to prove that the grant has been accepted. The primary condition is that the land was not reserved for public uses, i.e., vacant public land. (Note: The present land status in Alaska is such that there is no vacant public land as of March 28, 1974, when PLO 5418 withdrew all remaining vacant lands.) RS 2477 has since been revoked by the Federal Land Policy and Management Act of October 21, 1976, PL 94-579.

RS 2477 is still of great interest as many public highways were established in Alaska in the past by both public user and by the appropriate public agencies. The establishment of a RS 2477 right-of-way was by construction and/or use on the ground. Appropriation by the U.S. under 44 LD instructions does not establish an RS 2477 right-of-way.

In the future, public or private roads on federal lands will be established by agencies or private persons by application for a right-of-way under the authority of the Federal Land Policy and Management Act of 1976.

2. How do RS 2477 rights-of-way affect settlement claims or private lands?

In much the same way as 44 LD's. That is, if the public's right was established prior to the entry, the entryman will take title subject to the RS 2477 right-of-way. If not established prior to entry, RS 2477 does not apply as the land is no longer vacant or unappropriated land. If an RS 2477 is properly established prior to entry, it is not necessary to insert into a conveyance document notice of the 2477 right-of-way.

IV. SECTION LINE EASEMENTS

1. Background

The legal origin for section line easements is again the Act of July 26, 1866 supra which made an offer of a free right-of-way over unreserved public land for highway purposes. This offer was accepted in Alaska on April 6, 1923, when the territorial legislature enacted Chapter 19 SLA. Beginning on that date, any land patented by the federal or territorial governments was subject to an easement four rods (66 feet) wide along the surveyed section lines.

The evolution of RS 2477 into a "section line easement," by definition required that the land be surveyed under the rectangular system. The centerline of the easement is the section line, therefore, lands surveyed by "special survey" or "mineral survey" are not affected by section line easements since such surveys are not a part of the rectangular system. A similar situation exists in the areas of large State selections where only a perimeter survey was run with monumentation every two miles. In these areas, there are no interior section lines surveyed, hence no section line easements.

2. Further History

The section line easement law remained in effect as described above until January 18, 1949. On this date, the territorial legislature adopted a compilation of Alaska's laws. In doing so, they also repealed any law not included in the compilation. The section line easement law was not included and thereby repealed. This repeal began a period of time, from January 18, 1949, to March 26, 1951, when no new section line easements were established either on federal or territorial lands or lands acquired therefrom.

On March 26, 1951, the territorial legislature passed an easement law (Chapter 123 SLA) which dedicated a section line easement 100 feet wide on lands owned by or acquired from the territory. Note that the 1951 law did not provide a section line easement on federal lands. The 1951 law was modified on March 21, 1953, so as to provide an easement 100 feet wide on surveyed territorial lands and 66 feet (four rods) wide on all other lands surveyed under the rectangular system. From March 21, 1953 on, the section line easement legally remained the same until its revocation on federal lands by PL 94-579, October 21, 1976. Its use on federal lands, however, has been continually reducing since 1953 as more and more land became appropriated for various uses (withdrawals, settlement claims,

etc.). On March 28, 1976, all remaining vacant federal land was withdrawn by PLO 5418, thereby effectively removing section line easements from federal lands. It should be noted that while the section line easement did not apply to land patented by the federal government between January 18, 1949 and March 21, 1953, RS 2477 itself was still operative during that time on unreserved federal lands, for example, establishment of a road by a public user. The following summary may additionally clarify this history.

APPLICATION OF SECTION LINE EASEMENTS

Date	Federal Land or Land Patented By the U.S.	State or Territorial Land or Land Acquired From the State or Territory
July 26, 1866 to April 6, 1923	No section line easement although RS 2477 applied to all vacant federal land; width of easement determined by width of road constructed.	No. Alaska became a territory on August 24, 1912.
April 6, 1923 to January 18, 1949	Yes; 66 feet wide along section lines plus RS 2477 on remainder of vacant land.	Yes; 66 feet wide on surveyed land.
January 18, 1949 to March 26, 1951	No section line easement, although RS 2477 applied to all vacant federal land.	No.
March 26, 1951 to March 21, 1953	No section line easement, RS 2477 still applied.	Yes; 100 feet wide on surveyed land.
March 21, 1953 to March 28, 1975	Yes, 66 feet wide <u>if</u> land was <u>vacant</u> and surveyed.	Yes; 100 feet wide on surveyed land.
March 28, 1978 to Present	No. No federal land was vacant after March 28, 1978, and the law (RS 2477) was repealed on October 21, 1976.	Yes; 100 feet wide. Present codification is AS 19.10.010.

3. Questions About Section Line Easements

A. What are the legal rights under "section line" easements for:

1. State of Alaska
2. Private individuals
3. Federal government

Section line easements provide for public road development; they cannot be used for utilities, pipelines or private access. If a road was constructed along a section line easement in order to provide access to private property, the road is a public highway on the public lands.

B. When does the federal section line easement become effective?

The date of the approval of the plat of survey for a survey that has been performed on the ground.

On State land, where there has been no "on the ground" survey, the section line easement is effective as of the date the approval of the protraction which is published in the Federal Register. The subsequent "on the ground" survey then would identify its exact location; (see page 7, A.G. Opinion No. 7).

C. Can the State build a road on a section line easement properly established before PLO 5418 (March 28, 1974). What restrictions may be placed on such a road by the federal government?

Yes, State has the right to build a road on a section line easement established prior to reservation of the lands. A private person may not, however. The State's right is derived from their acceptance of the Congressional grant by passage of Chapter 19 SLA in 1923. A private person that did not accept the grant prior to PLO 5418 may not now do so as RS 2477 was extinguished by P.L. 94-579, on October 21, 1976.

The federal government may not place any restrictions on a road built by the State on a properly established section line easement.

D. Can a private individual build a road on a "section line easement" across federal land to reach his entry or patented land without a right-of-way grant from BLM.

No. This easement no longer applies to federal land. BLM may now issue rights-of-way to private persons, but under the authority of PL 94-579 (Federal Land Policy and Management Act of 1976).

E. In view of the present federal laws, does the section line easement still apply anywhere in Alaska?

Yes, in two instances. First, easements established in the past continue to be valid. Secondly, it still applies to surveyed land which is owned by or acquired from the State. This is still in effect due to a law passed by the territorial legislature in 1951 (Chapter 123 SLA, March 26, 1951, present codification is AS 19.10.010).

F. Can a public right-of-way such as RS 2477 be legally blocked so the public rights are restricted or eliminated?

A properly established RS 2477 cannot be legally restricted (blocked) unless abandoned or vacated in accordance with state law. The public's right to use may not be restricted or lost by adverse possession. Additionally, adverse possession does not gain any rights against the public, the federal government, the state government or its municipal subdivisions.

G. If a properly established RS 2477 right-of-way is found to be blocked what is the public users responsibility or remedy?

Settlement of this situation is a local matter, that is to say, defense of the public's right is not the responsibility of the federal government. It is a matter of local and state courts involving the public user(s) and the person(s) who are blocking the right-of-way. Therefore, it is the responsibility of the user to notify the blocker that the right-of-way is considered to be public and that they protest the blockage. Then it becomes a matter of proving the history of the publics right to the road, trail, etc.

H. What is a prescriptive easement or right-of-way?

This is a right-of-way gained through continuous adverse possession or use for a period of ten years. As previously stated, adverse possession is not effective against the public, the federal government, the state government or tis municipal subdivisions, therefore, it only applies to private lands.

Enclosures:

Regional Solicitor's Memo

Attorney General's Letter

STATE OF ALASKA

KEITH H. MILLER, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH

360 K STREET, SUITE 105
ANCHORAGE 99501

December 18, 1969

1969 Opinions of the
Attorney General No. 7

Mr. F. J. Keenan, Director
Division of Lands
Department of Natural Resources
Anchorage, Alaska 99501

RE: Section Line Dedications for Construction of Highways

Dear Mr. Keenan:

Reference is made to your request for an opinion concerning the existence of a right-of-way for construction of highways along section lines in the state.

It is our opinion, subject to the exceptions herein noted, that such a right-of-way does exist along every section line in the State of Alaska. In reaching this conclusion we rely upon the following points:

(1) Congress by Act of July 26, 1866, granted the right-of-way for construction of highways over unreserved public lands.1/ The operation of this Act within the State is well recognized,2/ and it provides as follows:

1/ Act of July 26, 1866, 14 Stat. 253, 43 U.S.C.A. 932 (1964) RS Sec. 2477.

2/ Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). See also: Mercer v. Yukon Construction Company, 420 P.2d 323 (Alaska 1966); Berger v. Ohlsen, 9 Alaska 389 (1939); Clark v. Taylor, 9 Alaska 298 (1938); United States v. Rogge, 10 Alaska 130 (1941); State v. Fowler, 1 Alaska LJ No. 4, p. 7, Superior Court, Fourth Judicial District (Alaska 1962); Pinkerton v. Yates, Civil Action No. 62-237, Superior Court, Fourth Judicial District (Alaska 1963).

> The right-of-way for the construction of highways over public lands not reserved for public uses is hereby granted.

(2) This grant of 1866 constitutes a standing offer of a free right-of-way over the public domain.3/ The grant is not effective, however, until the offer is accepted.4/

(3) In Hamerly v. Denton, supra note 2, the Supreme Court of Alaska stated the general rule regarding acceptance of this federal grant saying at page 123:

> ... before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, 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. (Emphasis added.) 5/

(4) In 1923 the territorial legislature enacted Chapter 19 SLA, which provided as follows:

> Section 1. A tract of 4 rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway be vacated by any competent authority, the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved Apr. 6, 1923)

3/ Streeter v. Stalnaker, 61 Neb. 205, 85 NW 47 (1901), and Town of Rolling v. Emrich, 122 Wis. 134, 99 NW 464 (1904); See also 23 Am.Jur.2d Dedication, § 15.

4/ Hamerly v. Denton, supra note 2; Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 854, (1946); Kolcon v. Pilot Mound TP, 33 N.D. 522, 157 NW 672, (1916); Kirk v. Schultz, 63 Ida. 273, 119 P.2d 266, (1941).

5/ See also Kolcon v. Pilot Mound TP, supra note 4; and Kirk v. Schultz, supra note 4.

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This Act was included in the 1933 compilation of laws as Sec. 1721 CLA 1933; however, it was not included in ACLA 1949, and therefore was repealed on January 18, 1949.6/

In 1951 the territorial legislature enacted Chapter 123 SLA 1951, which provided as follows:

> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways, a section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved March 26, 1951) 7/

In 1953 the territorial legislature enacted Chapter 35 SLA 1953, which provides as follows:

> Section 1. Ch. 123 Session Laws of Alaska 1951 is hereby amended to read as follows:
>
> Section 1. A tract 100 feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract 4 rods wide between all other sections in the Territory; is hereby dedicated for use as public highways, the section line being the center of said right-of-way. But if such highway shall be vacated by any competent authority the title to the respective

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6/ Ch. 1 SLA 1949 provides in part that "All acts or parts of acts heretofore enacted by the Alaska Legislature which have not been incorporated in said compilation because of previously enacted general repeal clauses or by virtue of repeals by implication or otherwise are hereby repealed."

7/ This was a reenactment of the 1923 statute; however, in its amended form it applied only to lands "owned by" or "acquired from" the territory, and the width of the right-of-way was increased to 100 feet.

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> strips shall inure to the owner of the tract of which it formed a part by the original survey. (Approved March 21, 1953) 8/

(5) The foregoing legislative acts clearly establish a section line right-of-way on all land owned by or acquired from the State or Territory while the legislation was in force. In our opinion, the 1923 and 1953 acts also express the legislature's intent to accept the standing federal right-of-way offer contained in the Act of July 26, 1866.

There is no requirement that the act of acceptance contain a specific reference to the federal offer. In Tholl v. Koles, 65 Kan. 802, 70 P. 881 (1920), the Supreme Court of Kansas discussed legislative acceptance by reference to section lines saying at page 802:

> The congressional act of 1866, as will be observed, is, in language, a present and absolute grant, and the Kansas enactment of 1867 is a positive and unqualified declaration establishing highways on all section lines in Washington county. The general government, in effect, made a standing proposal, a present grant, of any portion of its public land not reserved for public purposes for highways, and the state accepted the proposal and grant by establishing highways and fixing their location over public lands in Washington county. The act of the legislature did not specifically refer to the congressional grants, nor declare in terms that it constituted an acceptance, but we cannot assume that the legislature was ignorant of the grant, or unwilling to accept it in behalf of the state for highways. The law of congress

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8/ With this amendment the statute once again applied to both territorial and federal lands, and except for the increased width of the right-of-way on territorial lands, the statute's application was identical to the original 1923 statute. See A.S. 19.10.010 for present codification.

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> giving a right-of-way for highway purposes over the public lands in Washington county was in force when the legislature acted, and it was competent for it to take advantage of that law, and the general terms employed by it are sufficiently broad and inclusive to constitute an acceptance. (Emphasis added.)

Other jurisdictions have enacted similar legislation, and there is abundant authority to support acceptance by legislative reference to section lines.9/

The Alaska statutes employ the phrase "is hereby dedicated", and we recognize that this phrase is not normally used as a term of acceptance. Nevertheless, the language is not inappropriate where a legislative body is seeking to accept the federal offer, while at the same time making a dedication of land it already owns.10/

Furthermore, in attempting to construe these statutes, it is presumed that the legislature acted with full knowledge of existing statutes relating to the same subject,11/ and that it:

9/ Costain v. Turner, 36 NW 2d 382 (S.D. 1949); Pederson v. Canton TP, 34 NW 2d 172 (S.D. 1948); Wells v. Pennington County, 2 S.D. 1, 48 NW 305, (1891); Walbridge v. Board of Com'rs of Russell County, 74 Kans. 341, 86 P. 473, (1906); Korf v. Itten, 64 Colo. 3, 169 P. 148, (1917).

10/ See 23 Am.Jr. 2 Dedication § 41, where it is stated:

> Technically, offer and acceptance are independent acts. Sometimes, however, the offer and the acceptance are so intimately involved in the same acts or circumstances that the necessity and the fact of the acceptance are somewhat obscured, as where the dedication is made by some governmental agency, the property already being public in ownership, or where the dedication is by statutory proceedings, ...

11/ United States v. Rogge, supra note 2.

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> ... had, and acted with respect to, full knowledge and information as to the subject matter of the statute and the existing conditions and relevant facts relating thereto, as to prior and existing law and legislation on the subject of the statute and the existing condition thereof, as to the judicial decisions with respect to such prior and existing law and legislation, and as to the construction placed on the previous law by executive officers acting under it; and a legislative judgment is presumed to be supported by facts known to the legislature, unless facts judicially known or proved preclude that possibility. (82 C.J.S. 544 § 316)

The statutes of 1923 and 1953 purport to act upon all section lines in the territory. Such legislation affecting land not owned by the territory would have been in contravention of 48 U.S.C.A. 77 and invalid were it anything other than an acceptance of the Federal Grant of 1866.12/

The legislature is presumed to have known the law, and to have intended a valid act, and it follows that these statutes were intended as an acceptance of the federal offer.

(6) Like the standing federal offer, the Alaska statutes are continuous in their operation, and they apply to "each" section of land in the state as it becomes eligible for section line dedication. Public lands which come open through cancellation of an existing withdrawal, reservation, or entry, and subsequent acquisitions by the territory (or state), are all subject to the right-of-way.

(7) Our conclusion that a right-of-way for use as public highways attaches to every section line in the State, is subject to certain qualifications:

12/ 48 U.S.C.A. 77 provides in part that: "That legislative power of the territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; ***."

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a. Acceptance under the Act of 1866 can operate only upon "public lands, not reserved for public uses". Consequently, if prior to the date of acceptance there has been a withdrawal or reservation of the land by the federal government, or a valid homestead or other entry by an individual, then the particular tract is not subject to the section line dedication.13/ (However, once there has been an acceptance, the dedication is then complete, and will not be affected by subsequent reservations, conveyances or legislation.)14/

b. The public lands must be surveyed and section lines ascertained before there can be a complete dedication and acceptance of the federal offer.15/

c. The dedication of territorial or state lands does not apply to those tracts which were acquired by the territory and subsequently passed to private ownership during periods in which the legislative dedication was not in effect; that is, prior to April 6, 1923, and between January 18, 1949 and March 26, 1951.

13/ Hamerly v. Denton, supra note 2; Bennett County S.D. v. U.S., 294 F.2d 8 (1968); Korf v. Titon, supra note 9; Stofferman v. Okanogon County, 76 Wash. 265, 136 P.484, (1913); and Leach v. Humbart, 102 Colo. 129, 77 P.2d 652, (1938).

14/ Huffman v. Board of Supervisors of West Bay TP, 47 N.D. 217, 182 NW 459, (1921); Wells v. Pennington, supra note 9; and Lovelace v. Hightower, supra note 4; Duffield v. Ashurst, 12 Ariz. 303, 100 P. 620, (1909), appeal dismissed 225 U.S. 697 (1911).

15/ Note, however, that the Alaska statutes apply to each section line in the state. Thus, where protracted surveys have been approved, and the effective date thereof published in the Federal Register, then a section line right-of-way attaches to the protracted section line subject to subsequent conformation with the official public land surveys

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Anchorage Region
P. O. Box 166
Anchorage, Alaska 99501

June 30, 1964

Memorandum

To: State Director, Bureau of Land Management, Anchorage

From: Regional Solicitor, Anchorage

Subject: 44 LD 513 - Use and Notation

You have requested that I review the memorandum dated May 27, 1964 from the Chief, Lands and Minerals Management, relating to application of the Instructions dated January 13, 1916 (44 L.D. 513) to existing roads and trails providing access to areas of the public domain valuable, or potentially valuable, for recreation, timber, grazing or other types of public lands development. Bob Coffman and I discussed this subject prior to the issuance of his memorandum, and I am in agreement with the views he has expressed therein.

In your covering memorandum, you have raised certain questions concerning the utilization of existing roads and trails by BLM under the principles of 44 L.D. 513. You point out that apart from the system of public roads maintained by the State of Alaska there are existing roads and trails providing access into back-country areas. These roads and trails may be either of two types:

1. Historic roads and trails whose origin can not be definitely ascribed or traced to any federal construction program. These include the gold-rush trails, dog team trails, Indian trails, etc. Many of these trails are of scenic and historic interest and are considered to have value in your recreational program. Maintenance of these roads over the years has been haphazard.

2. Roads and trails originally constructed with federal funds, but which are no longer used or maintained by the constructing agency. As an example, you mention certain trails constructed with funds made available to the Fish and Wildlife Service to provide access to key fishing areas.

You ask whether these existing roads and trails may be appropriated by BLM under the 44 L.D. instructions so as to protect them from appropriation and closure or destruction by patentees under the public land laws. If so, you contemplate staking these roads and trails on the ground and noting their existence on the public land records.

Second, you ask whether the use of roads and trails by the public, absent any federal use or maintenance, would support appropriation under 44 L.D. instructions.

Finally, you present a situation where a road which was constructed by the Federal government with appropriated funds but which has not been federally maintained during recent years traverses entered lands. You wish to know whether this "public road" may be appropriated by notation on the public land records under the 44 L.D. instructions.

Initially, a distinction should be made between a road or trail which is a public highway and a road or trail which is merely a federal improvement or facility. A highway is a public road which anyone is free to use. In Alaska, a highway may be created by an act of the appropriate public authorities manifesting an intention to accept the grant of the right of way for public use or it may be created by public user for such a period of time and under such conditions as to prove that the grant has been accepted. Hamerly v. Denton, 359 P. 2d 121 (Alaska, 1961). R.S. sec. 2477 (43 U.S.C. sec. 932) which provides that

> The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

has been construed by the courts to constitute a congressional grant of a right of way for public highways across public lands. If the grant has been accepted by act of the public authorities or by public user, the road is a public highway and any entry of public lands traversed by it is subject to the easement in the public. An attempted appropriation by the United States under 44 L.D. instructions would be superfluous and inappropriate.

A road or trail, however, may be a federally owned improvement or facility, and not a public highway, even though the public may be permitted to use it. For example, an access road to a fire control station constitutes a federal improvement. In order for it to retain its status when the lands crossed by it have been entered, it must have been appropriated by the United States in accordance with the 44 L.D. instructions. If construction precedes entry of the lands, notation on the land

records evidences the appropriation. If construction has not taken place prior to entry, 44 L.D. 513 requires some action indicating upon the ground itself that the tract had been devoted to the public use--such as staking the area to be traversed, and therefore retained by the United States--accompanied by a setting aside of a sufficient part of the appropriation for construction. In other words, according to the instructions, the evidence must show that construction had been provided for prior to entry and will be immediately undertaken. It is important to bear in mind that the notation on the land records is not essential to the appropriation of the right of way. Appropriation may take place without any notation on the records and conversely, the notation on the land records, in and of itself, would not constitute a valid appropriation of the land. The purpose of the notation is to provide notice to the public that the tangible improvement, that is, the road or trail (or bridge, telephone line, building, etc.) is the property of the United States.

A road or trail originally constructed as a federal facility could, I think, be converted into a public highway through voluntary abandonment by the constructing federal agency and subsequent public use for a sufficient period of time and to a sufficient extent. But so long as it is used and maintained by the federal agency for an authorized federal purpose, it would not become a public highway and would remain the property of the United States.

In the case of entered lands, if the road was a public highway at the time the land was entered, the entryman takes subject to the public easement. Hemerly v. Denton, supra. If the road was originally a federal improvement which had been abandoned prior to entry, the entryman would not take subject to the right-of-way. Similarly, if the road was abandoned subsequent to the initiation of the entry, the entryman would be entitled to take free and clear of the right-of-way. Finally, if the road was abandoned prior to entry and appropriated by BLM for an authorized purpose prior to entry, the entryman would take subject to the appropriation of the right-of-way by BLM. The question of abandonment is one of fact to be resolved in each instance.

With respect to your second question, it should be initially recognized that whenever a right-of-way is desired to be appropriated, the right to appropriate must be established by Congressional authorization. Whether the right-of-way is to be appropriated for an existing road or a road to be constructed with federal funds, there must be authorizing legislation. The mere fact that an existing road or trail is desirable or useful is not sufficient to authorize its appropriation under 44 L.D. principles.

If appropriation of the right-of-way is authorized, it is my view that the 44 L.D. instructions would be applicable whether there was an existing road or whether the road was yet to be constructed. If the road is an existing facility, a notation on

the land records would evidence the appropriation. If the road is in such a state of disrepair as to require extensive repair or reconstruction before it could be used, the appropriation of the right-of-way, to be valid, would probably require some action on the ground, such as staking, accompanied by the setting aside of sufficient funds for its reconstruction or repair.

Finally, it is my view that public use alone is not a sufficient basis for a 44 L.D. notation. If the road is a public highway, the notation is without significance; the public easement is reserved under R.S. sec. 2477, supra. Use by the public, in and of itself, is not authority for appropriation by BLM under 44 L.D. principles. It must be borne in mind that BLM is not charged with the responsibility for maintaining the public road system in Alaska, and that any appropriation of a right-of-way for a road or trail must be pursuant to a function conferred upon BLM by the Congress.

William W. Redmond

William W. Redmond
Regional Solicitor

d. Acceptance of the federal grant applies only to those lands which were "public lands not reserved for public uses", during periods in which the legislative acceptance was in effect; that is, between April 6, 1923, and January 18, 1949, and after March 21, 1953.

In summary, each surveyed section in the state is subject to a section line right-of-way for construction of highways if:

1. It was owned by or acquired from the Territory (or State) of Alaska at any time between April 6, 1923, and January 18, 1949, or at any time after March 26, 1951, or;

2. It was unreserved public land at any time between April 6, 1923, and January 18, 1949, or at any time after March 21, 1953.

The width of the section line reservation is four rods (2 rods on either side of the section line) as to:

1. Dedications of territorial land prior to January 18, 1949, and;

2. Dedications of federal land at any time.

The width of the reservation is 100 feet (50 feet on either side of the section line) for dedications of state or territorial land after March 26, 1951.16/

Opinion No. 11, 1962 Opinions of the Alaska Attorney General, to the extent it is inconsistent with the views expressed herein, is disapproved.

16/ For further discussion of section line right-of-way width, see Opinion No. 29, 1960 Opinions of the Alaska Attorney General.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By: John K. Norman
John K. Norman
Assistant Attorney General

GKE:JKN:bl

cc: The Honorable Keith H. Miller
Governor for the State of Alaska

The Honorable Robert L. Beardsley
Commissioner, Department of Highways

The Honorable Thomas E. Kelly
Commissioner, Department of Natural Resources