Highway Rights of Way in Alaska

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rev. 11/1/93

I. Introduction

The following is a compilation of notes relating to highway rights of way in Alaska. It is not to be construed as a comprehensive or complete statement and analysis of the legislation and legal issues upon which these rights of way are based.

The discussion in this paper is primarily limited to those highway rights of way established by State or Federal legislation and under the jurisdiction of the predecessors of the Department of Transportation and Public Facilities. Rights of way created by condemnation, conveyance, prescription, dedication, permitting by the State of Alaska and recent federal acts such as ANCSA, ANILCA, FLPMA, are not covered.

The primary intent of this presentation is to provide the land professional with an understanding of the process by which many of the highway rights of way in Alaska were established as well as some guidelines and sources of information which can be used to determine whether a particular property is impacted by these rights of way.

Daniel W. Beardsley, SR/WA and Attorney at Law is acknowledged for providing portions of the case law summaries and analyses as well as for "firing me up" to put this collection of right of way information to print.

II. History

The Department of Transportation and Public Facilities is the primary management authority for highways in Alaska. Therefore, it is appropriate to review the history of the agency for whose benefit many of the rights of way to be discussed were established.

Prior to the establishment of the Alaska Road Commission, there were several pieces of Federal legislation dating back to 1900 relating to the appropriation of funds for the War Department to construct military roads in Alaska. The Act of April 27, 1904 (P.L. 188 - 33 Stat. 391) was of particular interest in that it provided for mandatory service of the male population in the construction and maintenance of public roads. Specifically, it required that "all male persons between eighteen and fifty years of age who have resided thirty days in the district of Alaska, who are capable for performing labor on roads or trails...to perform two days' work of eight hours each in locating, constructing, or repairing public roads or trails...or furnish a substitute,...or pay the sum of four dollars per day for two days' labor."

The roots of what is now the Department of Transportation and Public Facilities began with the Act of January 27, 1905 (P.L. 26 - 33 Stat. 391) which established the Alaska Road Commission under the direction of the Secretary of War. "The said board (of road commissioners) shall have the power, and it shall be their duty, upon their own motion or upon petition, to locate, lay out, construct, and maintain wagon roads and pack trails from any point on the navigable waters of said district to any town, mining or other industrial camp or settlement, or between any such towns, camps, or settlements therein."

In 1917 the Territorial legislature created a territorial Board of Road Commissioners and appropriated funds for road construction. On May 3, 1917 (Ch. 36, SLA 1917 Section 13) the legislature also addressed rights of way..."The Divisional Commission shall classify all public Territorial roads and trails in the divisions as wagon roads, sled road, or trails...The lawful width of right of way of all roads or trails shall be sixty feet (60).

Pursuant to the Act of June 30, 1932 (P.L. 218 - 47 Stat. 446)(48 USC 321a), Congress transferred administration over the roads and trails in Alaska to the Secretary of the Interior and authorized the construction of roads and highways over the vacant and unappropriated public lands under the jurisdiction of the Department of the Interior. This statute did not specify the width of the rights-of-way which may be established.

The Secretary of the Interior's jurisdiction over the Alaskan road system ended on June 29, 1956 when Congress enacted section 107(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), which transferred the administration of the Alaskan Roads to the Secretary of Commerce. The Commerce department operated the system as the Bureau of Public Roads.

On April 1, 1957 the Territory of Alaska enacted the Alaska Highway & Public Works Act of 1957 in order to create a Highway Division to carry out a planning, construction, and maintenance program.

The transfer of the Department of Interior's jurisdiction to the Department of Commerce was reiterated on August 27, 1958, when Congress revised, codified, and reenacted the laws relating to highways as Title 23 of the U. S. Code. (P.L. 85-767, Sect. 119 - 72 Stat. 898).

The Alaska Omnibus Act, enacted on June 25, 1959 (P.L. 86-70 - 73 Stat. 141), directed the Secretary of Commerce to convey to the State of Alaska all lands or interests in lands "owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." On June 30, 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued a quitclaim deed to the State of Alaska in which all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with the activities of the Bureau of Public Roads were conveyed to the State of Alaska. Although not all of the conveyed rights of way were considered "constructed", the system mileage of the rights of way included 2,200 miles classified as "primary" system routes, 2,208 miles of "secondary class A" routes, and 990 miles of "secondary class B" routes for a total of 5,399 miles of rights of way.

As the State of Alaska was not quite prepared to handle the operation of the road system, the Governor as authorized by the Omnibus Act, entered into a contract with the Bureau of Public Roads on July 1, 1959 to continue certain highway survey, design, construction and maintenance functions in connection with the Federal-aid highway program until the State Department of Public Works was suitably organized and equipped to perform these functions. The State assumed full highway functions in mid- 1960.

Legislative action in July of 1977 merged the State Department of Highways, Public Works (which included the Division of Aviation) and the Alaska Marine Highways into the Department of Transportation and Public Facilities.

III. RS 2477

The Mining Law of 1866 - Lode and Water Law, July 26, 1866 (Section 8 - 14 Stat. 253) The Federal offer for road easements over public lands was made through the following:

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

The above referenced Section 8 of the 1866 Mining Law was re-designated as Section 2477 of the Revised Statutes 1878. (43 U.S.C. 932)

Generally, the issue of RS 2477 brings to mind remote or historic trails. However, certain portions of primary and secondary highways may exist without benefit of a clearly established right of way. In some cases, the public may claim an easement by prescription. In other areas, the easement may exist by virtue of RS 2477. In the Alaska Supreme Court case State v. Alaska Land Title Ass'n, a memo from the Chief Counsel of BLM dated 2/7/51 noted that "Prior to the issuance of Public Land Order No. 601...,nearly all public roads in Alaska were protected only by easements. Right of way easements were acquired under section 2477 of the Revised Statutes (43 U.S.C. sec. 932) by the construction of roads."

a. Trails

The interpretation and application of RS 2477 in Alaska is a highly debated and controversial subject. The opinions of the State and Federal agencies as well as those among the private sector vary considerably. The primary issues to be resolved include the matters of legal jurisdiction, allowable use, management authority, width of right of way, and determination of whether a particular trail meets the validity tests of an RS 2477 grant.

Rather than debate the entire issue in this paper, the reader is directed to review the State and Federal guidelines for RS 2477 as well as the relevant Federal and State case law which is summarized at the end of this section.

Federal position: See BLM memorandum to the Secretary of the Interior regarding Departmental policy on RS 2477 dated December 7, 1988.

In general, in order for the RS 2477 grant to be accepted under the Federal position, the following conditions must have been met:

1. The lands involved must have been public lands, not reserved for public purposes, at the time of the grant.

2. Some form of construction of the highway must have occurred.

3. The highway must be considered a public highway.

Under the Federal position the width of the right of way depends on whether at the time of acceptance, the RS 2477 trail was under the jurisdiction of a State or local government. If so, then statutory widths may apply. If not, then the width may be based upon the area in use including back slopes and drainage ditches.

In general, the Federal position is that no incidental uses are allowed. (i.e. powerlines)

An accepted RS 2477 grant of right of way may be abandoned or relinquished by the proper authority in accordance with State, local or common law.

During 1992 and 1993 the Federal Government has been holding hearings and soliciting comments from any party with an interest in RS 2477. These hearings have taken place in Alaska and throughout the western states where RS 2477 is an issue. The intent is to submit a final report to the U.S. Congress in anticipation of legislation which would resolve the long standing conflicts over this issue. On June 1, 1993, the Secretary of the Interior, delivered to the Appropriations Committees of the Senate and the House of Representatives, the Report to Congress on RS 2477. In the letter which transmitted the report, the Secretary of the Interior stated:

> "Until final rules are effective, I have instructed the Bureau of Land Management (BLM) to defer any processing of RS 2477 assertions except in cases where there is a demonstrated, compelling and immediate need to make such determinations."

State position: See 11 AAC 51.010 - State of Alaska Administrative Code titled Nomination, Identification, and Management of RS 2477 Rights-of-Way. Note that as of November of 1993, there is intended to be a rewrite of this regulation in order to streamline the process.

Evaluation Criteria:

1. The nominated RS 2477 crossed public land that was not reserved for public use at the time the RS 2477 grant was accepted.

2. Sufficient evidence is provided to show that public use or when relevant (Section line easements) that a positive act on the part of a public authority constitutes acceptance of the RS 2477 grant.

Essentially, the research and evaluation required to determine whether the RS 2477 grant has been accepted is similar to that required for section line easements and public land orders. Many sources of information are available to aid in the establishment of the date that a trail was constructed or in public use. Primary sources include the 1989 "Alaska Trails Database" and the 1973 "Alaska Existing Trail System" maps. The mapping consists of 153 1:250,000 USGS maps with the claimed RS 2477 trails marked and numbered. The 1989 database has over 14,000

entries of trail names, dates, and references. These sources are available for review at the Department of Transportation offices. (See section VI c. of this paper, *Public Land Orders - Practical applications - "Date of Construction"*). To determine whether the land in question was unreserved at the time the grant was accepted, the BLM land status records must be reviewed. (See section VI c. of this paper, *Public Land Orders - Practical applications - "Land Status"* and section III b. *RS 2477 - Section Line Easements - discussion on lands not reserved for public uses.*)

Width of RS 2477 right of way: In a 1962 Superior Court case, State of Alaska v. Fowler, Civil Action No. 61-320 the width of Farmer's Loop Road, established under provisions of RS 2477 by a public user, was at issue. The court determined that only the 1962 width of the road would be considered a part of that right of way and deemed it "a reasonable width necessary for the use of the public generally." The State of Alaska argued that the provisions of Sec. 1 Ch. 19, SLA 1923 (establishing public highways between each section of land in the territory) indicated the local law and reflected the local custom as to the width of the rights of way established pursuant to RS-2477 (33 feet on each side of centerline or 66 feet total). This opinion had been previously stated in the 1960 Opinions of the Attorney General, No. 29. The AGO opinion concluded that the width of Alaska highways constructed under Title 43, Sec. 932 shall be 66 feet except where the actual width is specifically stated in the Public Land Order or set out by later State laws. The court concluded that taking into consideration the character and extent of the user as disclosed by the evidence in Fowler, the "reasonable width necessary for the use of the public" constituted only the present width of Farmer's Loop Road, thirty feet. As if in response to the court's decisions, the State legislature enacted Sec. 1, Ch. 35, SLA 1963:

> Establishment of Highway Widths. (a) It is declared that all officially proposed and existing highways on public lands not reserved for public uses are 100 feet wide. This section does not apply to highways which are specifically designated to be wider than 100 feet. AS 19.10.015.

Therefore, it is argued that the 1963 legislature accepted the RS 2477 grant as it might pertain to those portions of highways still traversing unreserved public lands to the extent of 100 feet even where actual use of such highways was much more restricted. Until that time and with regards to lands which were already withdrawn from the public domain in 1963 but burdened only in part by RS 2477 rights of way, the Fowler decision and the precedent upon which it was predicated seem controlling: "the right of way for such a road carries with it such a width as is reasonable and necessary for the public easement of travel." (Excerpted from 2/1/83 AGO informal opinion.)

Incidental uses such as a powerline or communications line are allowed under State law. See Fisher v. Golden Valley Electric.

Vacation: DNR regulations do not currently address vacations of RS 2477 rights of way at this time. However, in 1992 a request to vacate an adjudicated RS 2477 right of way was received for comment at DOT&PF. Upon discussion with DNR, it was determined that as the RS 2477 trail right of way was based upon the same grant as a section line easement, that the process for

vacation should follow similar guidelines as that for a section line easement. The proposed rewrite to 11 AAC 53, DNR's surveying regulations is purported to deal with the issue of vacation of RS 2477 trails as well as section line easements.

RS 2477 was repealed by Title VII of the Federal Land Policy and Management Act on October 21, 1976. However, the application of the RS 2477 grant was effectively eliminated by a series of public land orders which eventually withdrew all federal public lands in Alaska. (See section III b. *RS 2477 - Section Line Easements - discussion on lands not reserved for public uses.*)

Surveyors with an interest in the RS 2477 issue are advised to recognize that the State and Federal positions differ significantly and are currently in a state of flux. Check with BLM and DNR for the latest information regarding the RS 2477 issue.

b. Section Line Easements

The offer of a right of way for highways across unreserved, unappropriated Federal lands provided in the aforementioned Mining Law of 1866 is also the basis for Section line rights of way. The position of Federal agencies suggests that section line easements cannot exist on Federal lands as the construction requirement of the RS 2477 grant was not fulfilled. The State position on section line easements is outlined in the 1969 Opinions of the Attorney General No. 7 dated December 18, 1969 entitled Section Line Dedications for Construction of Highways.

The acceptance of the offer became effective on April 6, 1923, when the Territorial legislature passed Chapter 19 SLA 1923 which provided that "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 easement law remained in effect until January 18, 1949. On this date the legislature accepted the compilation of Alaska law which also repealed all laws not included. By failing to include the 1923 acceptance, the section line easement law was therefore repealed.

On March 26, 1951, the legislature enacted Ch. 123 SLA 1951 which stated that "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..." The 1953 law was amended on March 21, 1953 by Ch. 35 SLA 1953, to include "a tract 4 rods wide between all other sections in the Territory..." (See Alaska Statute AS 19.10.010 Dedication of land for public highways.)

For a section line easement to become effective, the section line must be surveyed under the normal rectangular system. On large areas such as State or Native selections, only the exterior boundaries are surveyed, therefore no section line easements could attach to interior section lines unless further subdivisional surveys were carried out. The 1969 Opinion of the Attorney General regarding section line easements states that an easement can attach to a protracted survey, if the survey has been approved and the effective date has been published in the Federal Register. The location of the easement is however subject to subsequent conformation with the official public land survey and therefore cannot be used until such a survey is completed.

Land surveyed by special survey or mineral survey are not affected by section line easements since such surveys are not a part of the rectangular net. However, the location of a special or mineral survey which conflicts with a previously established section line easement cannot serve to vacate the easement.

Acceptance of the RS 2477 offer can only operate upon "public lands, not reserved for public uses". Therefore, if prior to the date of acceptance there has been a withdrawal or reservation by the Federal government, or a valid homestead or mineral entry, then the particular tract is not subject to the section line dedication. The offer of the RS 2477 grant was still available until its repeal by Title VII of the Federal Land Policy and Management Act (90 Stat. 2793) on October 21, 1976. However, prior to the repeal, the application of new section line easements was effectively eliminated by a series of public land orders withdrawing Federal lands in Alaska. Public Land Order 4582 of January 17, 1969 withdrew all public lands in Alaska not already reserved from all forms of appropriation and disposition under the public land laws. PLO 4582 was continued in force until passage of the Alaska Native Claims Settlement Act on December 18, 1971. While repealing PLO 4582, ANCSA also withdrew vast amounts of land for native selections, parks, forests and refuges. A series of PLO's withdrew additional acreage between 1971 and 1972. PLO 5418 dated March 25, 1974 withdrew all remaining unreserved Federal lands in Alaska. Therefore it is noted that as of March 25, 1974, there could be no new section line easements applied to surveyed Federal lands.

The Alaska Supreme Court has decided that a utility may construct a powerline on an unused section line easement reserved for highway purposes under AS 19.10.010 Use of rights-of-way for utilities. Alaska Administrative Code 17 AAC 15.031 Application for Utility Permit on Section Line Rights-of-way provides for permitting by the Department of Transportation. The process for vacating a section line easement is provided in the DNR Administrative Code 11 AAC 53. A section line vacation requires approval from the Departments of Transportation and Natural Resources and the approval of a platting authority, if one exists in the area of the proposed vacation.

Research Technique

1. Review the Federal Status Plat and note the patent number or serial number of any action which affects the section line in question.

2. Using either BLM's land status database or Historical Index determine the date of reserved status or the date of entry leading to patent.

3. From BLM's township survey plats extract the date of plat approval.

4. Review the dates and track the status of the lands involved to determine if they were unreserved public lands at any time subsequent to survey approval and prior to entry or appropriation. Particular attention should be directed towards any applicable Public Land Orders. In order for section line easements to have been created, the lands must have been unreserved public lands at some time between April 6, 1923 and January 17, 1949, or between March 21, 1953 (March 26, 1951 in the case of lands transferred to the State or Territory) and March 24, 1974.

5. Using the date of entry or reservation and the date of survey plat approval, prepare an analysis of the data as follows:

    a. If date of entry predated survey plat approval there is no easement.

    b. If entry predates April 6, 1923 (date of enabling legislation for section line easements) there is no section line easement.

    c. If survey plat approval predates April 6, 1923 but date of entry is after April 6, 1923 there is a 66 foot section line easement.

    d. If survey plat approval is during the period of January 18, 1949 and March 20, 1953 and date of entry also falls within this period, there is no section line easement.

    e. If survey plat approval is during the period of January 18, 1949 and March 20, 1953 and date of entry falls after March 21, 1953, there is a 66 foot section line easement.

    f. If survey plat approval was prior to January 18, 1949 and the date of entry was during the period of January 18, 1949 and March 20, 1953, there is a 66 foot section line easement.

    g. If the land is in State ownership or was disposed of by the State or Territory after March 26, 1951, there is a 100 foot section line easement. University Grant

Lands may be an exception as the application of a section line easement may be in conflict with the federal trust obligation.

h. If survey plat approval date and the date land was disposed of by the Territory both fall within the period of January 18, 1949 and March 25, 1951, there is no section line easement.

i. If survey plat approval was prior to January 18, 1949 and the land was disposed of by the Territory during the period of January 18, 1949 and March 25, 1951, there is a 66 foot section line easement.

j. United States Surveys and Mineral Surveys are not a part of the rectangular net of survey. If the rectangular net is later extended, it is established around these surveys. There are no section lines through a U.S. Survey or Mineral Survey, unless the section line easement predates the special survey.

There may be many other situations which will require evaluation and decision on a case by case basis. An attachment is included to demonstrate some of the above points. Any section line easement, once created by survey and acceptance by the State or Territory remains in existence, unless vacated by the proper authority.

Section Line Easement Determinations

In order for easements to exist, the survey establishing the section lines must have been approved or filed prior to entry on Federal lands or disposal of State or Territorial lands. The Federal lands must have been unreserved at some time subsequent to survey and prior to entry.

Surveyed Federal lands that were unreserved at any time during the indicated time period.	Effective Dates	Surveyed lands that were under State or Territorial ownership at any time during the indicated time period. (University Grant lands may be an exception.
none	April 5, 1923	None
66'	April 6, 1923 to January 17, 1949	**66'**
none	January 18, 1949 to March 25, 1951	None
none	March 26, 1951 to March 20, 1953	**100'**
66'	March 21, 1953 to March 24, 1974	**100'**
none	March 25, 1974 to Present	**100'**

Note: This table assumes the same land status on both sides of the section line. A review of the land status can result in total easement widths of 0', 33', 50', 66', 83', and 100'. A section line

easement, once created by survey and accepted by the State, will remain in existence unless vacated by proper authority.

c. RS 2477 Case Law Summary (From DNR paper RS 2477s - Building on Experience)

1. Clark v. Taylor, 9 Alaska 928 (4th Div. Fairbanks 1938). The public may, by user, accept the RS 2477 grant, and 20 years of "adverse" public use was sufficient in this case. However, the case also intimates that there is no such thing as an unsurveyed "section line" acceptance of the RS 2477 grant.

2. Berger v. Ohlson, 9 Alaska 389 (3rd Div. Anchorage 1938). The RS 2477 grant may be accepted by the general public, through general user, even absent acceptance by governmental authorities, although there must be sufficient continuous use to indicate an intention by the public to accept the grant.

3. U.S. v. Rogge, 10 Alaska 130 (4th Div. Fairbanks 1941). Same as 2.

4. Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). Same as 2. In addition, this case held that AS 19. 10.010 (the section line dedication) was equivalent to a legislative acceptance of the RS 2477 grant.

> But 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 a public user for such a period of time and under such conditions as to prove that the grant has been accepted.

The court defined public lands as: "lands which are open to settlement or other disposition under the land laws of the United States. It does not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler." Once there is a valid entry the land is segregated from the public domain.

In this case there were a number of entries which were subsequently relinquished or closed prior to the Hamerley's home site entry which went to patent. The public usage to establish acceptance of the grant had to be established when the land was not subject to an entry. The court found that there was no evidence of public use during the times the land was not subject to an entry. "Where there is a dead end road or trail, running into wild, unenclosed and uncultivated country, the desultory use thereof established in this case does not create a public highway."

5. Mercer v. Yutan Construction Co., 420 P.2d 323 (Alaska 1966). Trial court was correct in finding that the issuance of a grazing lease, expressly subject to later rights of way, did not reserve the leased land such that the government could not accept the RS 2477 grant and build a right of way.

6. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.)(enbanc), cert. denied 411 U.S. 917 1973). AS 19.40.010 (concerning the Trans-Alaska pipeline haul road) properly accepted the RS 2477 grant, the court citing Hamerly v. Denton favorably. This is the only reported federal court case dealing with an Alaska RS 2477 issue as of October 1, 1987.

7. Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975). Same as Hamerly v. Denton.

8. Anderson v. Edwards, 625 P.2d 282 (Alaska 1981). Where the state has not stepped in to regulate a section line right of way created via AS 19.10.010, a private citizen may use it, but only up to a width that is reasonable under the circumstances. Consequently, a citizen using a right of way who had cut too many trees to widen it must compensate the fee owner.

9. Fisher v. Golden Valley Electric Association, 658 P.2d (Alaska 1983). Utility use of an otherwise unused (i.e., it was not otherwise regulated or used by the State) RS 2477 section line right of way for a powerline was permitted not withstanding the underlying fee owners' objections. The case leaves room to argue for additional incidental and subordinate uses that "are the progression and modern development of the same uses and purposes" (referring to the "transmission of intelligence, the conveyance of persons, and the transportation of commodities.)

10. Alaska v. Alaska Land Title Association, 667 P.2d 714 (Alaska 1983). RS 2477 did not establish the width of rights of way created under it. The Department of the Interior's Order No. 2665 for certain RS 2477 roadways did, however, establish a width. See further discussion of this case in section VI f. Public Land Order Case Law Summary.

11. Brice v. State, 669 P.2d 1311 (Alaska 1983). Pre-existing section line highway easements created under AS 19.10.010 remained valid even when the law was temporarily repealed between 1949 and 1953.

12. Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 4110 (Alaska 1985). This case reaffirmed the holding of Hamerly v. Denton, and then found that relatively slim evidence of user was sufficient to prove the acceptance of an RS 2477 grant. In Hamerly the court had found inadequate evidence of user. The different results of the two cases probably rest on the fact that in Hamerly the evidence of use was disputed, but in Dillingham no rebuttal evidence showing lack of use was submitted. The Dillingham court also held that once the RS 2477 road was created, it could be used for any purpose consistent with public travel.

IV. The Act of 1947

a. Background: The Act of 1947 was one of three similar right of way reservations that are commonly noted in federal patents in Alaska. When researching title of lands along the highway system, you may find a document called a "Notice of Utilization". This notice declares the use of the right of way reservation provided by the Act of 1947. Of the three patent reservations, only the Act of 1947 specifically reserves rights of way for roads, however, the others are briefly mentioned due to the similarity of their intent.

The first act provided a right of way for "Ditches and Canals" to be noted in all patents as of August 30, 1890. (26 Stat. 391 - 43 U.S.C. 945) At the time of enactment, the United States had no canals or ditches either constructed or in the process of construction. The congress was however, concerned that disposal of land in a region under the land laws might render it difficult and costly to obtain the necessary rights-of-way when the work was undertaken. This act was eventually amended to require payment for land even if it was patented subject to the reservation.

The second act provided a right of way for the future construction of "Railroads, telegraph and telephone lines. (38 Stat. 30 - 43 U.S.C. 975 March 12, 1914) Section 615(a)(i) of The Alaska Railroad Transfer Act of 1982 (ARTA), P.L. 97-468 revoked 43 U.S.C. 975 in its entirety. The United States consequently has no remaining authority to utilize the 975d reservations. Section 609 of ARTA specifically states the requirement that future rights-of-way be obtained from current land owners under applicable law.

b. The '47 Act: The Act of July 24, 1947 (Pub. L. 229 - 61 Stat. 418)(48 U.S C. 321d) applied only to lands which were entered or located after this date. This act reserved rights of way for roads, roadways, highways, tramways, trails, bridges, etc. Also commonly known as the "'47 Act".

> *"In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska, and in all deeds hereafter conveying any lands to which it may have reacquired title in said Territory not included within the limits of any organized municipality, there shall be expressed that there is reserved, from the lands described in said patent or deed, a right of way thereon for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under the authority of the United States or any State created out of the Territory of Alaska. When a right of way reserved under the provisions of Sections **321a-321d** of this title is utilized by the United States or under its authority, the head of the agency in charge of such utilization is authorized to determine and make payment for the value of the crops thereon if not harvested by the owner, and for the value of any improvements, or for the cost of removing them to another side, if less than their value."*

The U.S. Senate Committee on Public Lands submitted a report leading to the passage of the "'47 Act" stating the following: "The bill is designed to facilitate the work of the Alaska Road Commission. As the population of Alaska increases and the Territory develops, the Road Commission will find it increasingly difficult to obtain desirable highway lands unless legislative provision is made for rights-of-way. The committee believes that passage of this legislation will help to eliminate unnecessary negotiations and litigations in obtaining proper rights-of-way throughout Alaska."

This act provided for a taking of right of way across land subject to the reservation without compensation except for the value of crops and improvements. The act only authorized the first take. Subsequent acquisitions required compensation for the land taken.

Width of Right of Way: This Act did not specify right-of-way widths. However, a right-of-way of any width could be acquired over such lands by merely setting it by some sort of notice, either constructive or actual insofar as new roads are concerned, and since it did not limit the reservation to new roads only, it would also affect subsequent settlements on existing roads.

The Act of 1947 was repealed by Section 21 of the Alaska Omnibus Act, P.L. 86-70, June 25, 1959 (73 Stat. 146). The repeal became effective on July 1, 1959. This repeal only eliminated the insertion of the reservation into the patents of lands as of July 1 date, therefore lands patented or entered after this date are not subject to the act. Lands patented before the repeal were still subject to the reservation.

c. Right of Way Act of 1966 - This act repealed the use of '47 Act reservations by the State of Alaska (HB 415 Ch. 92, 1966 - April 14, 1966)

> *"Section 1. PURPOSE. This Act is intended to alleviate the economic hardship and physical and mental distress occasioned by the taking of land by the State of Alaska, for which no compensation is paid to the persons holding title to the land. This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions to many citizens of the State of Alaska, and which, if not curtailed by law, will continue to adversely affect citizens of this state. Those persons who hold title to land under a deed or patent which contains a reservation to the state by virtue of the Act of June 30, 1932, ch. 321, sec.5, as added July 24, 1947, ch. 313, 61 Stat. 418, are subject to the hazard of having the State of Alaska take their property without compensation because all patents or deeds containing the reservation required by that federal Act reserve to the United States, or the state created out of the Territory of Alaska, a right-of-way for roads, roadways, tramways, trails, bridges, and appurtenant structures either constructed or to be constructed. Except for this reservation the State of Alaska, under the Alaska constitution and the constitution of the United States, would be required to pay just compensation for any land taken for a right-of-way. It is declared to be the purpose of this Act to place persons with land so encumbered on a basis of equality with all other property holders in the State of Alaska, thereby preventing the taking of property without payment of just compensation as provided by law, in the manner provided by law."*

The Alaska Statutes also reflect the elimination of the '47 Act in AS 09.55.265 and AS 09.55.266. AS 09.55.265 Taking of property under reservation void states that "After April 14, 1966, no agency of the state may take privately owned property by the election or exercise of a reservation to the state acquired under the Act of June 30, 1932, ch 320, sec. 5, as added July 24, 1947, ch.313, 61 Stat. 418, and taking of property after April 14, 1966 by the election or exercise of a reservation to the state under that federal Act is void. (2 ch 92 SLA 1966)" AS 09.55.266 Existing rights not affected. states that "AS 09.55.265 shall not be construed to divest the state of, or to require compensation by the state for, any right of way or other interest in real property which was taken by the state, before April 14, 1966, by the election or exercise of its right to take property through a reservation acquired under the Act of June 30, 1932, ch 320, sec. 5, as added July 24, 1947, ch.313, 61 Stat. 418.

d. '47 Act Case Law Summary:

1. Hillstrand v. State, 181 F. Supp 219 (1960) Once right of way has been selected and defined, later improvements, necessitating utilization of land upon which road is not already located, can only be accomplished pursuant to condemnation and compensation provisions.

2. Myers v. U.S., 210 F. Supp, 695 (1962) Where the United States issued patent which stated that lands conveyed were subject to a reservation for right of way for roads, and grantees accepted patents with full knowledge of reservation, grantees received and held titles subject to such reservation.

3. SOA v. Crosby - Alaska Supreme Ct. No. 322, February 3, 1966. All lands disposed by BLM under the Small Tract Act (Act of June 1, 1938, 52 Stat. 609) which was made applicable to the State of Alaska in 1945 (Act of July 14, 1945, 59 Stat. 467) are not subject to the Act of 1947. This exception applies even if the small tract patent contains a '47 Act reservation.

V. 44 LD 513

A 44 LD 513 notation is not a "public" right of way in the sense of an RS 2477 or a PLO right of way. However, as they are noted on the BLM master title plats and historical indices, the question often arises as to whether they are available for general use. Therefore, a short discussion of their intended purpose is presented with the following excerpts from a June 15, 1979 letter from the Department of the Interior to the General Services Administration regarding the Haines-Fairbanks pipeline.

> Prior to the enactment of the Federal Land Policy and Management Act, there was no general statutory provision for the setting aside of rights-of-way for Federal agencies, and the Bureau of Land Management customarily employed the procedures set out in the 44 LD 513 (Page 513, Volume 44 of Land Decisions of the Department) Instructions to accomplish that purpose. The 44 LD 513 Instructions, issued in 1916 pursuant to the Secretary of the Interior's general management authority over the public lands, advised the General Land Office (now BLM) regarding procedures to: put the public on notice of the existence and location of Federal improvements on the public lands; and to protect those improvements when the public lands upon which they were constructed were conveyed out of Federal ownership. The Instructions directed the Bureau to make appropriate notations in the tract books to accomplish the first purpose and to insert exception clauses in the land patents to accomplish the second.
>
> The principle underlying the Instructions is that the construction of a Federal facility on public lands appropriates the lands to the extent of the ground actually used and occupied by that facility and for so long as the facility is used and occupied by the United States. When a federal agency no longer needed the facility, the agency would send a "Notice of Intention to Relinquish" to the BLM. BLM would then determine whether the lands would be turned over to the General Services Administration for disposal or returned to the public domain.
>
> Unlike withdrawals and reservations, 44 LD 513 notations do not continue in effect once the Federal Government's use and occupancy terminates. The notations draw the efficacy from the Federal use and occupation. They have no existence separate and apart from that Federal use and occupancy. Once the Federal use and occupancy terminates in fact, the notations have no segregative effect even though they still remain on the land records. Therefore, it is not possible for any Federal agency to transfer 44 LD 513 notations to third parties.

VI. Public Land Orders

a. Introduction

It is fairly clear from Alaska Supreme Court decisions that ignorance of the PLO rights of way is no defense against their effect. Professionals in the title, surveying, and real estate fields must be sufficiently knowledgeable of PLO's such that they can recognize their possible impacts on a given property. At a minimum the professional needs to be aware of the available resources that can aid in determining whether a PLO right of way exists. The following is a summary of the PLO's affecting highway rights of way in Alaska:

b. Public Land Order Summary

1. 4/23/42 E.O. 9145

   This order reserved for the Alaska Road Commission in connection with construction, operation and maintenance of the Palmer-Richardson Highway (Now Glenn Highway), a right of way 200 feet in width from the terminal point of the highway to its point of connection with the Richardson Highway. The area described is generally that area between Chickaloon and Glennallen.

2. 7/20/42 PLO 12

   This order withdrew a strip of land 40 miles wide generally along the Tanana River from Big Delta to the Canadian Border. It also withdrew a 40 mile wide strip along the proposed route of the Glenn Highway from its junction with the Richardson Highway, East to the Tanana River.

3. 1/28/43 PLO 84

   This order withdrew all lands within 20 miles of Big Delta which fell between the Delta and Tanana Rivers. The purpose of the withdrawal was for the protection of the Richardson Highway.

4. 4/5/45 PLO 270

   This order modified PLO 12 by reducing the areas withdrawn by that order to a 10 mile wide strip of land along the now constructed highways. The highways affected by this order are as follows:

   1. Alaska Highway - from Canadian Border to Big Delta
   2. Glenn Highway - from Tok Junction to Gulkana

5. 7/31/47 PLO 386

Revoked PLO 84 and PLO 12, as amended by PLO 270. The order withdrew the following land under the jurisdiction of the Secretary of the Interior for highway purposes:

1. A strip of land 600 feet wide along the Alaska Highway as constructed from the Canadian Boundary to the junction with the Richardson Highway at Delta Junction.

2. A strip of land 600 feet wide along the Gulkana-Slana-Tok Road (Glenn Highway) as constructed from Tok Junction to its junction with the Richardson Highway near Gulkana. This order also withdrew strips of land 50 feet wide and 20 feet wide along the Alaska Highway for purposes of a pipeline and telephone line respectively. Pumping stations for the pipeline were also withdrawn by this order, as well as 22 sites which were reserved pending classification and survey.

6. 8/10/49 PLO 601

This order revoked E.O. 9145 as to the 200' withdrawal along the Glenn Highway from Chickaloon to Glennallen.

It also revoked PLO 386 as to the 600 foot wide withdrawal along the Alaska Highway from the Canadian Boundary to Big Delta and along the Glenn Highway from Tok Junction to Gulkana.

Subject to valid existing rights and to existing surveys and withdrawals for other than highway purposes...PLO 601 withdrew and reserved for highway purposes... a strip of land 300 feet on each side of the centerline of the Alaska Highway, 150 feet on each side of the centerline of all **Through** roads as named, 100 feet on each side of centerline of all **Feeder** roads as named, and 50 feet on each side of the centerline of all **Local** roads. **Local** roads were defined as *"All roads not classified above as Through Roads or Feeder Roads, established or maintained under the jurisdiction of the Secretary of the Interior".*

It is important to note that PLO 601 did not create highway easements. This Order was a withdrawal *"from all forms of appropriation under the public land laws, and reserved for highway purposes."*

This was essentially the first, and therefore one of the most important acts to comprehensively classify and define the width of the rights of way over public lands in Alaska.

7. 10/16/51 PLO 757

This order accomplished two things:

1. It revoked the highway withdrawal on all "feeder" and "local" roads established by PLO 601.

2. It retained the highway withdrawal on all the "through roads" mentioned in PLO 601 and added three highways to the list.

After issuance of this order the only highways still withdrawn included the Alaska Highway (600'), Richardson Highway (300'), Glenn Highway (300'), Haines Highway (300'), Seward-Anchorage Highway (300'), Anchorage-Lake Spenard Highway (300'), and the Fairbanks-College Highway (300').

The lands released by this order became open to appropriation, subject to the pertinent easement set by Secretarial Order No. 2665, discussed below.

8. 10/16/51 S.O. 2665

The purpose of this order, issued on the same date as PLO 757, was to *"(1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights of way or easements over or across the public lands for such highways."* It restated that the lands embraced in "through roads" were withdrawn as shown under PLO 757. It also listed all the roads then classified as feeder roads and set the right of way or easement (as distinguished from a withdrawal) for them at 200'. The right of way or easement for local roads remained at 100 feet.

This Order provided what was termed a "floating easement" for new construction. Under this provision, *"rights of way or easements....will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at the appropriate points along the route of the new construction specifying the type and width of the roads."*

9. 7/17/52 Amendment No. 1 to S.0. 2665

This amendment reduced the 100' width of the Otis Lake Road, a local road not withdrawn in the Anchorage Land District, to 60 feet.

10. 9/15/56 Amendment No. 2 to S.O. 2665

This amendment added several roads to the "through" (300' width) road list including the Copper River Highway , the Sterling Highway, and the Denali Highway. Several highways were deleted from the "feeder" (200' width) road list including the Sterling

Highway and the Paxson to McKinley Park Road. The Nome-Kougarok and Nome-Teller roads were added to the list of "feeder" roads.

11. 8/1/56 Public Law 892 - Act of August 1, 1956

The purpose of this Act (P.L. 892 - 70 Stat. 898) was to provide for the disposal of public lands within highway, telephone and pipeline withdrawals in Alaska, subject to appropriate easements. This Act paved the way for the issuance of a revocation order (PLO 1613) which would allow claimants and owners of land adjacent to the highway withdrawal a preference right to acquire the adjacent land.

12. 4/7/58 PLO 1613

This order accomplished the intent of the Act of August 1, 1956. Briefly, it did the following:

1. Revoked PLO 601, as modified by PLO 757, and provided a means whereby adjacent claimants and owners of land could acquire the restored lands, subject to certain specified highway easements. The various methods for disposal of the restored lands are outlined in the order.

2. Revoked PLO 386 as to the lands withdrawn for pipeline and telephone line purposes along the Alaska Highway. It provided easements in place of withdrawals.

Prior to PLO 1613 the road rights of way classified as "feeder" and "local" were defined as easements whereas the "through" roads were still withdrawals. PLO 1613 effectively eliminated the last of the withdrawals established by the aforementioned Land Orders by converting the "through" roads to easements.

To more clearly relay the intent of the Federal Government in issuing PLO 1613, the following is quoted from a BLM informational memo titled -

> *INFORMATION REGARDING LANDS ADJOINING CERTAIN HIGHWAYS*
>
> *"Between August 10, 1949, and April 7, 1958, the lands underlying the following highways in the Fairbanks Land District were withdrawn from entry for highway purposes:.....The acquisition of rights in homesteads, homesites, etc., along these highways during this period included property only up to the boundary line of the highway withdrawals. They did not include any part of the reserved area. On April 7, 1958, Public Land Order 1613 was issued revoking the withdrawals and opening the lands to application for private ownership under the public land laws. However, the Government retained an easement for highway and other purposes extending 150 feet from the centerline of each highway listed here. The effect on you, as owner of land or as an applicant for land adjoining these highways is as follows:*
>
> *PRIVATE OWNERS OF PATENTED LAND: ....If you own land with frontage on any of the other highways listed above, there now exists 150 feet of public land between your boundary and the centerline of the highway. The same Government easement applies to this 150 feet. It cannot be*

used for other than highway purposes without permission of the Bureau of Public Roads. However, should the highway be changed or abandoned, the owner would have full use of the

land. Owners of private lands will have a preference right of purchase at the appraised value the released land adjoining their private property. This right will extend to land only up to the center line of the highway concerned. ....<u>However, at the time of purchase he must furnish proof that he is the sole owner in fee simple of the adjoining land.</u>

<u>CLAIMANTS WITH VALID UNPERFECTED ENTRIES OR CLAIMS FILED BEFORE APRIL 7, 1958:</u> ...In this instance , you may exercise a right to amend your entry or claim to include the property (Underlying the highway easement). This additional land will not be included in the area limitation for your type of filing.

<u>TIME LIMITATIONS:</u> The preference right applications mentioned above must be filed in the Land Office within 90 days of receipt of the appropriate Notice from the Land Office. If not filed within at that time, the preference right will be lost. <u>The lands then will become subject to sale at public auction."</u>

As might be expected from the previous sentence, the preference right sales offered a great potential for future problems. A Department of Natural Resources internal memo to the Commissioner dated June 18, 1984 discusses the problems that arose.

The memo described a situation along the Old Glenn Highway in which BLM had sold the original patentee, Mr. Setters, a PLO 1613 highway lot based upon his preference right. Prior to this preference right sale, Mr. Setters had conveyed away his original patent and it was now owned by a Mrs. Pavek. At this point there was not a conflict as Mr. Setter's PLO 1613 Lot was subject to a highway easement and Mrs. Pavek had direct access onto the easement. However, DOT&PF had relinquished a portion of the right of way without realizing any ramifications. Mr. Setter now owned a strip of unencumbered land between Mrs. Pavek and the highway. Mr. Setter then approached Mrs. Pavek with an offer to sell access rights across his strip of land for $30,000. Mr. Setters had paid BLM $25 for the entire PLO 1613 highway lot.

In order to prevent additional occurrences of this problem, the Alaska Statutes were modified as follows:

A.S. Sec. 09.45.015. Presumption in certain cases.

(a) A conveyance of land after April 7, 1958, that, at the time of conveyance was made, adjoined a highway reservation listed in section 1 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958), is presumed to have conveyed land up to the center-line of the highway subject to any highway reservation created by Public Land Order 601 and any highway easement created by Public Land Order 1613.

(b) The burden of proof in litigation involving land adjoining a highway reservation created by Public Land Order 601 or a highway easement created by Public Land Order 1613 is on the person who claims that the conveyance did not convey an interest in land up to the center-line of the highway. (2 ch 141 SLA 1986)

A.S. Sec 09.25.050. Adverse Possession.

(b) Except for an easement created by Public Land Order 1613, adverse possession will lie against property that is held by a person who holds equitable title from the United States under paragraphs 7 and 8 of Public Land Order 1613 of the Secretary of the Interior (April 7, 1958)

This problem also raised the issue as to whether the State had received a fee interest or an easement interest when the highway rights of way were conveyed from the Federal Government by virtue of the 1959 Omnibus Act Quitclaim Deed. If the State had in fact received a fee interest, then there could be no sales to third parties of these highway lots and therefore no conflict. Our initial reading of the Public Land Orders suggests that by time of PLO 1613, all highway rights of way created by the PLO's existed as easements. However, over the years this has been interpreted differently by other agencies and various informal opinions from the Department of Law. The Department of Transportation has for many years and does now treat these PLO rights of way as easements. In April of 1991 the Northern Region of DOT&PF requested a formal Attorney General's Opinion on the issue of fee or easement in order to set this question aside. On February 19, 1993 the opinion was issued concluding that "under the Alaska Omnibus Act and resulting Quitclaim Deed, the State of Alaska received, in general, easements for its roads at statehood."

13. 6/11/60 Public Law 86-512 - Act of June 11, 1960

This Act amended the Act of August 1, 1956. This was a special act to allow the owners and claimants of land at Delta Junction and Tok Junction a preference right to purchase the land between their property and the centerlines of the highway. The Act was necessary since the land in both towns was still reserved for townsite purposes, even after the highway, telephone line, and pipeline withdrawals were revoked.

14. 8/19/65 DOI Memorandum - Revocation of S.O.2665 and amendments

This memo served as notification that several Secretarial Orders were to be revoked on December 31, 1965 including S.O. 2665 and its amendments.

c. Practical Applications:

One of the many points that the 1983 Supreme Court case State of Alaska v. Alaska Land Title Association established was that the publication of a public land order in the Federal Register imparted constructive notice as to the land it affected. Therefore the title companies were liable to the policy holders for not disclosing the existence of PLO rights of way which encumbered their property.

Once a person has become involved in researching several PLO rights of way, it is fairly clear that this much of the required information is obscure and of limited availability. We realize that if it is challenging research for our in-house staff that regularly work with these issues, then it

will be very difficult work for private sector professionals and virtually impossible for the layman.

I have found form letters in the Northern Region Right of Way office dating to 1980 that one of the major title companies intended to submit to DOT&PF for each title report that they were to prepare. The letters each stated the following:

> "We are presently engaged in a title search of the following described real property. Since alleged highway rights-of-way created by Public Land Orders 601, 757, 1613, or Department Order 2665 are not recorded by property description, please advise us if the State of Alaska is claiming a right-of-way for a local, feeder, or through road on the following property and specify the width of the right-of-way you are claiming:"

DOT's response to the form letters at the time was essentially the same as it is today. That is, our files are open to whomever needs to research the necessary information, but unfortunately we do not have the personnel to review and respond to these requests for every title report generated in the State.

Therefore, if you have a need to know the status of a highway PLO with respect to a particular piece of property, then you also have the need to know how to perform the proper research.

In order to evaluate the effect of a PLO, you must review three items:

1. Land Status - Dates of Entry
2. Effective Date of Public Land Order
3. Date of Road Construction (or Posting)

Land Status: A common element of each PLO that served to establish a highway right of way was that they were "subject to valid existing rights". Our interpretation of that stipulation is that if the land was withdrawn or reserved prior to the effective date of a PLO, then the PLO could not act to create a right of way. These reservations or withdrawals could include homestead entries, mineral entries, military withdrawals, and such.

The primary source of information on land status with respect to the validity of a PLO are the Bureau of Land Management status records. Generally the process is to -

1. Review the Master Title Plat in order to locate the property in question.

2. Review the Historical Index for actions involving the property in question and the dates that they occurred.

Caveats: Not all land actions would serve to preclude the application of a highway PLO. For example, in one particular situation involving a federal grazing lease the lease document stated that "Nothing herein shall restrict the acquisition, granting, or use of permits or rights-of-way under applicable law."

Actions that might serve to create a "valid existing right" may have preceded the earliest date noted on a BLM Historical Index. For example, some very early mining claim and homestead location notices were filed in the Federal Magistrate's office (now the Recorder's office) and are not noted on the Historical Index.

There may be gaps in the "valid existing rights" that would allow a PLO right of way to take effect. For example, a homestead entry that may have precluded the application of a PLO right of way at one point in time may be relinquished, returning the land to the public domain. Upon relinquishment, the PLO right of way may be created.

Effective Date of Public Land Order: This may be the easiest part of a PLO right of way review. Assuming that you have copies of all of the pertinent Land Orders, the process can be as follows:

1. Review the PLO's to see when the road in question is specifically named. (For example, the Taylor Highway and the Manley Hot Springs to Eureka roads were named as Feeder roads with a ROW of 100' each side of centerline in DO 2665, but were not specifically named at all in PLO 601.) This exercise is necessary in order to establish the earliest date that a PLO highway right of way may have been created.

Caveat: It may be the easiest part of the research but it isn't foolproof. For example, the Edgerton Cutoff and New Edgerton highway have long been a point of confusion. The Edgerton Cutoff is the old road which has been noted in the ARC report since the 1920's as a cutoff from the Richardson to Chitina. It is the road that is specifically referenced in PLO 601 and SO 2665 as a "feeder" road (200' ROW). The new Edgerton highway was also created under SO 2665 but was not specifically mentioned as it was created under the "posting" requirements for new construction. An ARC public notice dated 9/15/56 designated the new Edgerton as a "feeder" road under SO 2665 as staked.

If you do not have copies of the PLO's available, bound volumes of all Alaska Land Orders can be viewed or copied at the BLM public room. Another interesting resource within BLM is the index of "Orders Affecting Public Lands in Alaska". This index lists the Order number, reference number, date, description, approximate land area involved, and a cross reference to other relevant land orders.

Date of Road Construction (or posting): This is likely to be the most difficult aspect of the research due to the relatively unorganized state of the documents that will establish such a date. The date of construction is particularly important when attempting to establish whether an unnamed local road right of way is subject to a conflicting land reservation or withdrawal.

1. Alaska Road Commission Annual Reports: These reports, dating from 1905 to 1954 name each road that was constructed and maintained under ARC jurisdiction along with

the amount of public funds expended. Many of these reports can be viewed at the BLM Resource Library in Anchorage, DOT&PF Right of Way offices in Anchorage and Fairbanks, the University of Alaska Rasmussen Library in Fairbanks, DOT&PF Northern Region Planning in Fairbanks, and the Alaska Branch of the National Archives in Anchorage.

2. As-built plans, Field Books - ARC/BPR: Each DOT&PF Regional office has retained some records from the Alaska Road Commission and the Bureau of Public Roads. For example the Northern Region (Fairbanks) has ARC field books dating as early as 1907. We also have some road as-builts from the 1940's and 1950's.

3. USGS Mapping Base Photography and other Historical Aerial Photos: Private Photogrammetry firms often have an extensive photo archive which can fix a date for certain improvements such as roads. Aeromap USA of Anchorage claims to have archive photos dating back to the 1940's. Early 1950's and later photography which was the basis for the USGS quadrangle mapping is also a prime source for fixing dates on roads. Note that just because a road is shown on a USGS quad does not mean it truly exists. There have been a few occasions where roads were placed on USGS quads based upon proposed plans but for some reason were never constructed.

4. Federal Records Center/National Archives Documents: After statehood, a large amount of the archived records of the ARC/BPR were retained by the Federal Highway Administration and transferred to their regional headquarters in Portland, Oregon. These records were eventually sent to the Federal Records Center in Seattle for storage and eventual transfer into the National Archives. Almost two years ago, the National Archives opened a branch office in Anchorage (Old Federal Courthouse), and received records relating to Alaska from the Seattle office. In their possession are dozens of cases of correspondence, weekly/monthly/annual reports, field books and plans relating to the construction of roads in Alaska. A few years ago, the DOT&PF Northern Region Planning office hired U of Alaska history professor Klaus Naske to research these records for information relating to certain RS-2477 roads. The result was a 14,000 record database indexing references to particular roads as found in the ARC Annual Reports, Miscellaneous ARC/BPR documents in possession of the Federal Records Center, and references from the files of the U of Alaska Rasmussen Library (mostly newspaper clippings). Also submitted with the database were xerox copies of all of the documents referenced. Although this database has served to facilitate access to thousands of the available archived documents, there still exist many thousands of additional un-indexed documents in the ARC/BPR files at the National Archives.

5. Miscellaneous Mapping, Surveys, and Reports: Other sources of information that can be used to date the existence of a particular road can be the plats and field notes of GLO/BLM surveys. Generally the plats and running field notes for U.S., Mineral, and Township surveys will note the intersection of survey lines with existing roads and trails. Also references of access can be found in the mineral reports of the U.S. Geological

Survey. Descriptions of control monumentation established by the U.S. Coast and Geodetic Survey have also served to establish the dates of roads.

d. Evaluation of Information: Many times it will be necessary to perform a cost/benefit analysis in order to establish what level of research is warranted. Although each evaluation will necessarily include a comprehensive review of the "land status" and the "effective date of PLO" portions of the research, the "date of construction" portion can easily involve a seemingly endless number of manhours. Once you have invested an amount of research into these areas that balances with the risk you may incur, then the evaluation of whether a PLO right of way exists is fairly straight forward. For example:

1. A local (secondary) road crosses your property. The State of Alaska claims jurisdiction for the road, however the right of way was never specified in your homestead patent and you have never given a specific easement for the road. Is the road subject to a PLO right of way?

a. If your homestead date of entry preceded August 10, 1949 (PLO 601) then there is no PLO easement.

b. If your homestead date of entry was after August 10, 1949 but preceded the date of construction (or posting when allowed by SO 2665), there is no PLO easement.

c. If your homestead date of entry was after August 10, 1949 and after the date of construction (or posting when allowed by SO 2665), there will be a PLO right of way easement.

Caveats: Some items to be aware of when evaluating your research data are as follows:

1. Road re-classifications and name changes - Note that PLO 601 classified the Nome-Solomon road as a "feeder" road. SO 2665 maintained the "feeder" classification but extended the route and changed the name to the "Nome-Council" road. Under PLO 601, the "Taylor" highway would have fallen under the classification of an unnamed "local" road. SO 2665 upgraded the classification to a "feeder" road. SO 2665 classifies the Paxson to McKinley Park road as a "feeder". Amendment No. 2 to SO 2665 changes the name of the road to "Denali Highway" and reclassifies it to a "Through" road.

2. Note that the preceding research and evaluation will only establish whether a PLO right of way exists or not. It generally does not take into account the location of the physical road with respect to a particular piece of property or the fact that they road may have shifted by maintenance or construction realignment over a period of time.
3. Note that in some records - particularly BLM status maps and land adjudication documents, that a right of way may be noted as a "50' CL", "100' CL", or a "150'CL".

Many people have erroneously interpreted these notations to mean total right of way widths when in fact they represent the half widths. (i.e. 50' on each side of centerline).

e. Case Study:

The following excerpts from IBLA case 88-589 provide a good discussion of the history of roads in Alaska and the application of laws relating to PLO rights of way.

April 29, 1991 (IBLA 88-589 Frank Sanford Et. Al.) Alaska: Native Allotments

A decision recognizing that a Native allotment is subject to an easement for highway purposes extending 50 feet on each side of the centerline of a road conveyed to the State of Alaska by a quitclaim deed issued pursuant to the Alaska Omnibus Act, P.L. 86-70, 73 Stat. 141, will be affirmed where an easement of that width had been established under the Act of June 30, 1932, 47 Stat. 446.

The quitclaim deed cited in BLM's decision refers to Schedule A which is a list of highways. FAS Route No. 8921 is listed as a secondary class "B" highway named the Mentasta Spur with 7.0 miles constructed and described as follows: "From a point on FAS Route 46 approximately 10 miles west of Little Tok River, west to Mentasta Lake." Although this describes the road crossing Sanford's parcel, the conveyance does not indicate its width. The State contends that a 100-foot right-of-way is proper; other parties contend either that the road was abandoned or, alternatively, that only a 60-foot right-of-way is appropriate.

In a recent decision, Lloyd Schade, 116 IBLA 203 (1990), we provided a brief outline of the history of the administration of roads in Alaska:

> *Pursuant to the Act of January 27, 1905, 33 Stat. 616, as amended by the Act of May 14, 1906, 34 Stat. 192, Congress authorized the Secretary of War to administer the roads and trails in Alaska. In 1932, Congress transferred administration over those roads and trails to the Secretary of the Interior pursuant to the Act of June 30, 1932, 47 Stat. 446.*

The State's response to the Sanford appeal included an affidavit by John Bennett, a registered professional land surveyor employed as Engineering Supervisor in the right-of-way division of the State's Department of Transportation and Public Facilities. Bennett states that he has examined records in an attempt to learn when the Mentasta Spur Road was established. Excerpts from a 1960 document by the Division of Highways of the Alaska Department of Public Works entitled Fifty Years of Highways is attached to Bennett's affidavit as Exhibit A. The document refers to a "Tok Cutoff Glenn Highway" as "constructed during World War II." A copy of Alaska Road Commission Order No. 40, Supplement No. 1 (August 1, 1952) includes an attachment which refers to a "Mentasta Loop." Exhibit B consists of a quadrangle map and a list of monument descriptions indicating that the road through Sanford's allotment existed in the 1940's. The map bears a hand-written notation indicating that the present location of the Tok Cutoff of the Glenn Highway which does not cross Sanford's parcel was a "1951 Reroute."

Public Land Order No. 601 of August 10, 1949, 14 FR 5048 (August 16, 1949), revoked a prior PLO and divided all roads under the Secretary's jurisdiction in Alaska into three classes: through roads, feeder roads, or local roads. That order withdrew from all forms of appropriation under the public land laws public lands within 150 feet of each side of the center line of all through roads, 100 feet of each side of the centerline of all local roads and reserved the lands for highway purposes.

On October 19, 1951, PLO 757 amended PLO 601 by revoking the general withdrawal for local and feeder roads (16 FR 10749, 10750 (Oct. 19, 1951)). Simultaneously, the Secretary issued Secretarial Order (SO)

2665 establishing easement for, rather than withdrawals of, 50 feet on each side of the center of each local road and 100 feet on each side of the center line of each feeder road. 16 FR 10752 (Oct. 19, 1951). Because the Mentasta Spur was not listed as a through road or feeder road, the size of the easement established was 50 feet on each side of the center, or 100 feet in total width.

As authority for the establishment of these easements, the PLO cited the Act of June 30, 1932, identified earlier as the statute by which Congress transferred administration over roads and trails from the Secretary of War to the Secretary of the Interior. Section 5 of that statute required the Secretary to reserve in patents a right-of-way for roads "constructed" or to be constructed by or under the authority of the United States." Act of June 30, 1932, ch. 320 as added, Act of July 24, 1947, ch 313, 61 Stat. 418. Reference to the more recent history of the administration of Alaskan roads discloses:

> *The Secretary of the Interior's jurisdiction over the Alaskan road system ended in 1956 when Congress enacted section 107(b) of the Federal-Aid Highway Act of 1956, 70 Stat. 37, which transferred the administration of the Alaskan roads to the Secretary of Commerce. This change in authority was reiterated on August 27, 1958, when Congress revised, codified, and reenacted the laws relating to highways as Title 23 of the United States Code. See 23 U.S.C. 119 (1958). The Commerce Department's Bureau of Public Roads reclassified and renumbered the Alaskan roads under its jurisdiction as primary, secondary "A", and secondary "B" routes, but did not specify the widths of those classes of roads.*
>
> *Section 21(a) of the Alaska Omnibus Act, 73 Stat. 145 (1959), enacted on June 25, 1959 directed the Secretary of Commerce to convey to the State of Alaska all lands or interests in lands "owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." Section 21(d)(3) an (7) of that Act repealed 23 U.S.C. 119 (1958), and the Act of June 30, 1932, 47 Stat. 446, effective July 1, 1959. 73 Stat. 145-46 (1959).*

Lloyd Schade, supra at 204-205. On June 30 1959, pursuant to section 21(a) of the Alaska Omnibus Act, the Secretary of Commerce issued the quitclaim deed which included the road in question.

Accordingly, we conclude that BLM properly recognized that Sanford's Native allotment is subject to an easement for highway purposes extending 50 feet on each side of the centerline of a road transferred to the State of Alaska by a quitclaim deed issued pursuant to the Alaska Omnibus Act, P.L. 86070; 73 Stat. 141, when an easement of that width had been established under the Act of June 30, 1932, 47 Stat. 446. Any issue concerning the abandonment of such a right-of-way is properly within the jurisdiction of the state courts.

f. Public Land Order Case Law Summary:

1. United States v. Anderson, 113 F.Supp., 1, 14 Alaska 349 (D. Alaska 1953) Land withdrawn by PLO 386 for the Alaska Highway was not subject to entry by individuals.

2. Matanuska Valley Bank v. Abernathy, 445 P.2d 235 (Alaska 1968) Purchasers were entitled to rescind sale agreement where there was a mutual mistake as to the status of title of land. (Land was subject to a PLO 1613 highway easement.)

3. Hahn v. Alaska Title Guaranty Co., 557 P.2d 143 (Alaska 1976) A Public Land Order published in the Federal Register constitutes a "public record" which imparts constructive notice with regard to a particular tract of real estate. The appellee, a title insurance

company was determined to be liable to the extent that the right of way crossing the insured land exceeded that indicated on the policy. (PLO 601).

4. State, Dep't of Highways v. Green, 586 P.2d 595 (Alaska 1978) A 50 foot right of way reservation provided by SO 2665 for local roads applied to subject lot only if the effective date of the Small Tract Act lease was preceded by both construction of road and issuance of secretarial order.

The Greens argued that the PLO did not apply as their lot was subject to a specific reservation (33') by virtue of the Small Tract Act. SO 2665 is a general order whereas the reservation created by the small tract act was specific. The Court ruled the two conflicting orders should be "harmonized if possible" unless there is a conflict. Since the 33 foot reservation was for access streets serving interior lots and the 50 foot reservation was for local roads there was not a conflict. The court relied on the rule of construction that "where language of a public land grant is subject to reasonable doubt such ambiguities are to be resolved strictly against the grantee and in favor of the government".

5. 823 Square Feet, More or Less v. State, 660 P.2d 443 (Alaska 1983) Surveying, staking, stripping, and clearing of entire 100 feet were sufficient act of appropriation to create a 100 foot wide right of way although the road with ditches was only 48 feet wide. Discusses application of SO 2665 and PLO 601 on lots created under the Small Tract Classification order No. 22 of March 23, 1950.

6. State v. Alaska Land Title Ass'n, 667 P.2d 714 (Alaska 1983) This is the primary case for PLO rights of way. By virtue of PLOs 601, 757, and 1613 and D0 2665, the State of Alaska and the Municipality of Anchorage claimed easements for local, feeder and through roads greater than shown in the patents. Three properties, owned by Pease, Boysen and Hansen, were involved in the appeal.

PLO 601 was effective on August 10, 1949; PLO 757 and DO 2665 on October 19, 1951 and PLO 1613 on April 7, 1958.

The lease for the Pease small tract was dated May 1, 1953. The patent, issued on October 4, 1955, contained 33 foot easements along two boundaries, one of which was Rabbit Creek road, and a blanket reservation under 43 USC 321d (the '47 Act). Rabbit Creek Road was in existence at the time of the original leases.

Boysen had property bordering the Seward Highway. The date of entry was January 2, 1951 and the patent was issued on May 15, 1952 with a 47 Act reservation. The Seward highway was constructed prior to the effective date of any of the PLOs.
Hansen's property was entered on January 23, 1945 with a patent issued on June 1, 1950. Hansen's property was entered prior to 1947 therefore it was not subject to a 47 Act reservation.

As to the Hansen property, the Court ruled that the property was not subject to PLOs or DO since the entry in January, 1945 was prior to the effective date of any of them. The other two properties were found to be subject to PLO rights of way. A number of arguments against the validity of the PLO rights of way were dismissed by the Court.

Right of Way Act of 1966: The Pease and Boysens patents were subject to a '47 Act reservation. They argued that the Right of Way Act of 1966 precluded the State and Municipality's claims for feeder and local roads under the DO 2665. The Court ruled that the ROW Act applied only to the '47 Act reservation, 43 USC 321d. DO 2665 was promulgated under 43 USC 321a, which was not repealed by the ROW Act.

Constructive Notice: The PLOs and DO were not recorded. On April 4, 1959 the Federal government conveyed its interest in the Alaska highways to the State. That deed was not recorded until October 2, 1969. Pease and Boysen claimed the State's interest was invalid against them as subsequent innocent purchasers in accordance with AS 34.15.290 which protects subsequent innocent purchasers for value who are without notice of a prior interest. The Court distinguished PLOs and the DO from a wild deed outside the chain of title. Issue in this case was whether the publication of the PLOs and DO in the Federal Register was constructive notice. The Court reaffirmed its earlier decision in Hahn v. Alaska Title Guaranty Co. that publishing in the Federal Register was constructive notice; therefore subsequent purchasers were not innocent purchasers protected by the recording statutes.

Title Company Liability: The Court was asked to overturn Hahn v. ATG, since the PLOs and DO were not recorded in Alaska. The Court refused to do so. The title companies were subject to the claims of Pease and Boysen.

Estoppel: Pease and Boysen claimed the State and Municipality were estopped from claiming an interest due to the fact that for over 20 years they had been allowed the property to be developed in a manner inconsistent with the assertion of the claimed easements. Relying on its finding that the constructive notice was imparted by the Federal Register, the Court ruled that notice made reliance by the parties unreasonable therefore the estoppel claim lacked merit.

Patent Statute of Limitations: The patents did not contain any reservation for the PLO and DO rights of way. This six year statute of limitations to contest a patent had expired long before the State claimed its easement interest. In reaffirming State, Department of Highways v. Green, the Court found that a right of way not expressed in the patent was a valid existing right and the patentee takes subject to such right.

> By operation of law, land conveyed by the United States is taken subject to previously established rights of way where the instrument of conveyance is silent as to the existence of such rights of way. No suit to vacate or annul a patent in order to establish a previously existing right of way is necessary because the

patent contains an implied by law condition that it is subject to such a right of way.

Staking: The lower court held that the additional widths created by DO 2665 did not apply to the rights of way for adjacent to the Pease and Boysen properties because the road had not been "staked" in accordance with the terms of DO 2665. The Supreme Court rejected that conclusion on the basis that the staking was only required for new construction. Since the roads were in existence at the time of the DO, staking was not required.

7. State, DOT&PF v. First National Bank of Anchorage, 689 P.2d 483 (Alaska 1984) The Bank's predecessor, Pippel, on June 10, 1946, entered onto land that was secretly withdrawn for the military by PLO 95 in 1943. BLM canceled the entry, then subsequently reinstated it. A patent was issued to Pippel on October 11, 1950. PLO 95 was not revoked until April 15, 1953.

The state argued that the entry was not a valid existing right due to the invalid entry on withdrawn land, therefore the property was subject to a 300 foot wide right of way under PLO 601. However, the Court ruled that once a patent is issued, defects in the preliminary process are cured. Since the state did not contest the patent within the six year statute of limitations, the patent made the 1946 entry presumptively valid. Consequently the entry related back to 1946, prior to the PLO.

8. Resource Investments v. State, DOTPF, 687 P.2d 280 (Alaska 1984) Reaffirms the decision in the Alaska Land Titles case that a homestead entry constitutes a "valid existing right" as defined by PLO 601.