MEMORANDUM
Department of Natural Resources

State of Alaska
Division of Mining, Land & Water
Northern Region Lands Section

DATE: 9/6/2016

TO: File ADL 414756

AJP 9/6/16

FROM: AJ Wait, Permits and Easements Team Manager

SUBJECT: Public Use Determination

History

On 5/25/1993, this office issued an Administrative Finding and Decision (AFD) proposing to authorize issuance of a Private Non-Exclusive Easement to Montine Evans; on 7/1/1993 a Final Administrative Finding and Decision (FAFD) was issued with slight modifications authorizing issuance of the easement. This easement has been assigned a number of times and is currently held by Denali ATV Adventures. This office has received a number of inquiries through the years regarding the public's right/ability to use the easement. Inconsistent answers have been given. The purpose of this memo is to make a final determination regarding the nature of the easement, and whether the public has the right/ability to utilize the easement, and whether the easement holder, has the right to block off the easement.

The AFD contained a section titled "Public Versus Private Road" which stated the following:

> *Private easements can be issued for one of two uses – either exclusive or nonexclusive. An exclusive use is granted when it is determined that the State's interest is served by granting the easement for the sole use and enjoyment of the applicant. A nonexclusive use private easement is issued when it is determined that the State's interest is best served by granting the easement subject to a reservation to grant concurrent private easements, or to allow other compatible uses. Agency comments were moot on the issue of authorizing the road for public or private use. The State of Alaska has no plans to construct and maintain a public road from the Parks Highway to the remote disposal area. Through a stipulation to the authorization the state could preserve its option to convert the road to public access should future conditions warrant.*

In the section titled "Finding and Decision", it was determined that it was in the interest of the State to authorize construction of the proposed road in a Private Non-Exclusive (PNE) easement adjacent to the existing 50' public access "to and along" easement along Dry Creek. Additionally, it stated the Department would reserve the right to grant additional private non-exclusive easements on the route in the future, and/or convert the easement to a public easement at our discretion.

During the Public Notice period, additional comments were received from SHPO and among other changes, the following language was added: "to protect the archaeological site, public vehicle access may be regulated and/or prohibited" and "this may be accomplished through the use of barricades, gates or other appropriate means." Further communication from SHPO states:

> *You raised the question about the applicant fencing the road at some point. Our recommendation would be to fence the road shortly after it leaves the Parks Highway. The archaeological site is not signed, interpreted, patrolled, or otherwise protected. Therefore, we would not encourage public use of the Evans ROW for access to the site.*

Neither the Entry Authorization nor the ultimate easement contained an authorization to gate the road or reserved the right to convert to a public easement; the easement document contained a reservation allowing us to issue other PNEs along the route.

In a memo dated 3/31/1998, it was stated that the grantee did not have the authority to gate the road and stated the following:

> *In the past David Evans has indicated his desire to gate the ROW and in fact a pipe gate of some sort has at times been seen as gating the road. Evans has cited the final paragraph under amendments in the Final Administrative Finding and Decision prepared by Bruce Stafford and signed July 1, 1993. The paragraph reads: "to protect the archaeological site, public vehicle access may be regulated and/or prohibited. This may be accomplished through the use of barricades, gates or other appropriate means."*
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> *We read "may be regulated" as indication that the regulation is not a necessity. As a Private Non-Exclusive ROW this road is open for public access and should not be barricaded. We also understand the Evan's interest in gating the road is to restrict access to the family parcel, and not to protect the archaeological site.*

On July 1, 2003, this view was reiterated in a letter to Martha Betts, which stated, "In response to your 11/18/02 letter, the non-exclusive private right-of way issued to Montine Evans is available for public use."

In 1994, the land surrounding the second half of the easement was QCD'd to the Mental Health Trust, subject to the easement.

In 2009, the land surrounding the first half of the easement was approved for transfer to the Denali Borough (ADL 417602), subject to the easement

Analysis

The AFD is clear that the Department issued a variant (non-exclusive)of a private easement, and specifically required the easement remain outside of a public access easement along Dry Creek. The rationale for issuing a non-exclusive easement was to retain the authority to issue separate authorizations to other users as necessary.

Private non-exclusive easements in general, and this authorization in particular, are not public access easements. This does not mean that the public typically cannot use them, but it means that the use is at the discretion of the grantee and/or the Department through issuance of a separate authorization.

When examining other private non-exclusive access easements adjudicated by the Department, it becomes clear the private non-exclusive easements are issued and used for specific purposes when they are not public access easements. For example, Alyeska ROW's (access and other) are routinely issued as PNE's, and are routinely gated. Where the Alyeska ROW is required to be open to public access, there are special provisions in the "Special Stipulations" such as those in ADL 414521 which stipulate that "the permitee shall not block or restrict public access from the Elliot Highway westerly along 63 APL-2 to the Olnes Pond State Recreation Area". Another example is from ADL 416952, an easement for a bridge. The decision found that it was unfair to require the applicant get the certifications necessary for the bridge to be open to the public, thus it was to be authorized under a private non-exclusive easement and the applicant was actually required to control access to prevent use by the public.

Previous interpretations from this office indicating ADL 414756 was open for public access and should not be gated were erroneous and based on an incorrect interpretation of the file and decision document. The AFD clearly indicates that the Department was issuing a private easement, in part due to liability concerns regarding public use of a road that was not constructed to "standard". The AFD was modified after public notice to specifically include a statement that public access "may be regulated and/or prohibited". This specific modification indicates there was a desire at one point to authorize blockage of public access along the road. This was in response to comments from SHPO indicating concern with public access to a sensitive historic site. While the grantee is not required to regulate access as previously noted, it is clearly contemplated that they could do so. Though it is clear the intent of this access regulation is to protect the archeological site, there is no requirement that the grantee can control access exclusively for the purposes of protection of the site. Additionally, the decision noted that the Department would retain the ability to convert the easement to a public easement in the future; although this provision was not included in the actual easement document.

Determination

The road is a private easement which did not grant public access, and the grantee may block access along the route.