

# MEMORANDUM

**State of Alaska**  
**Department of Transportation & Public Facilities**  
**Northern Region Preconstruction**

**TO:** Jeff Stark  
Assistant AG

**DATE:** May 29, 2007

**FILE NO:**

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**FROM:** John F. Bennett, PLS, SR/WA  
Chief, Right of Way  
Northern Region



**SUBJECT:** Project STP-0525(12)/54302  
Wasilla Fishhook Road Rehab.  
Parcel 1 – ROW Evaluation

I was requested to perform an analysis of the existing road right of way through Lot 18A, Block 1, Parks Manor Subdivision (Parcel 1). My understanding of the controversy is that the Parcel 1 acquisition was considered to be existing ROW by virtue of a public prescriptive easement. The State then offered only a nominal amount to increase the easement interest to a fee interest. The State also intended to acquire a 10' wide utility easement (E-1). The owner had many objections relating to value of the part taken, damages to the remainder, necessity of the taking and the validity of the State's prescriptive easement assertion. Ultimately, the State dropped E-1 in favor of an easement granted by the property owner directly to Matanuska Electric Assn. and also determined that the need to increase the State's prescriptive easement to a fee interest was not warranted given the potential costs. The property owner now argues that although the State may have had a prescriptive easement in the vicinity of Parcel 1 at one time, a previous project that realigned Wasilla-Fishhook road away from the property constituted an abandonment of the easement and that the use of the property for the subject project resulted in a taking.

## **PLO Rights of Way**

I reviewed Jay Sullivan's April 24, 2007 letter and agree with his assessment regarding the Omnibus Act Quitclaim Deed and the effect of Public Land Orders on the subject property. The 1959 QCD makes reference to the Fishhook-Knik-Goose Bay Road as FAS Class "A" Route No. 525. However, the QCD does not specify the nature of the interest or the width of right of way for any of the named routes. It would only transfer the interest held by the federal government at the time of conveyance, if any. At statehood, the majority of highway rights of way were based on Public Land Orders. The PLO's relating to highway rights of way were established between 1942 and 1958 and were subject to valid existing rights. As Jay Sullivan stated, the entry leading to the federal patent for the subject property was in 1915, several decades prior to any of the PLO's. Any interest conveyed to the State under the QCD would not be based on the Public Land Orders.

## **RS-2477 Trail Right of Way**

Jay Sullivan's letter goes on to say that "the only interest that the federal government had affecting the parent parcel which could be conveyed by the Omnibus Act was a prescriptive use right." A footnote in the 1983 case *State v. Alaska Land Title Ass'n* (667 P.2d 714) stated that "*A memorandum from the Chief Counsel of the Bureau of Land Management to the Director of the Bureau, dated February 7, 1951, explains well the extent of the authority granted to the Secretary of the Interior under § 321a. The memorandum states in part: 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. This section granted a*

*right-of-way for the construction of highways over public lands not reserved for public uses.*” The highway right of way interests conveyed to the State by the QCD consisted of a variety of interests including PLO’s, ’47 Act patent reservations, 1917 Territorial rights of way (Ch. 36, SLA 1917 Section 13), RS-2477 and specific grants of rights of way from property owners to the Alaska Road Commission. However, at the time of entry leading to patent for the subject property, it appears that the only two viable options would be an easement by prescription or RS-2477.

As a way of referencing the subject parcel to the rectangular system, the parcel plat for Parcel 1 and the Plat of Parks Manor Subdivision (Plat # 71-27) indicate that approximately 80% of Parcel 1 lies east of the west 1/16 line and the remainder lies to the west of the 1/16 line. The rectangular survey plat for Township 17 North, Range 1 West, Seward Meridian approved February 19, 1915 (attached) graphically shows an existing trail labeled “Knik to Cottonwood” intersecting the southerly line of Section 3 near the west 1/16 corner and heading north. Page 39 of the field notes for the subdivision of the township (attached) note that the southerly line of Section 3 was run and completed on August 18, 1911. The running field notes identify a “Trail from Knik to Willow Creek” bearing north and south at a point 59.33 chains from the southeast corner for Section 3. The April 11, 1956 BPR Vicinity Map No. 260 (SOA-0002) indicates that the “Fishhook-Knik-Goose Bay Road Route 525” intersects the south line of Section 3 in a north-south alignment. With the N-S alignment and the relationship between the 1/16 line and the noted tie to the centerline of the “Knik to Cottonwood” trail, the trail alignment would be approximately 54 feet east of the 1/16 line which is within about 5 feet of what I can scale between the 1/16 line and the easterly boundary of Parcel 1 (Centerline of Fishhook Road) according to the Parcel 1 plat.

The evidence suggests to me that a valid RS-2477 right of way for the “Knik to Cottonwood” trail existed prior to the entry leading to patent for the subject parcel and that the location of “Fishhook Road” as shown on the easterly boundary of Lot 20, Block 1, Parks Manor Subdivision plat (Now Lot 18A, Block 2 of Plat 2004-114, SOA-0061) is in reasonable proximity to the location noted on the original township survey.

Unfortunately, there are two weaknesses with the RS-2477 argument. First is width. The original township survey cites the centerline location but does not note a width of the trail. For lands reserved prior to the enactment of A.S. 19.10.015 Establishment of Highway Widths the claimed width of an RS-2477 right of way would be limited to that which was in use or “ditch to ditch”. It is possible that further research might disclose a width, but the width we could claim would be that which was in existence prior to the entry date of September 17, 1915. I suspect it would be in the range of 8 to 12 feet wide. The other issue is whether the RS-2477 has been realigned. The 1971 Parks Manor Subdivision plat (SOA-0007) and the 1969 Fred Nelson Subdivision Plat (SOA-0006) both indicate that the centerline of Fishhook road curve significantly to the southeast from the subject property. I scaled the distance from the Fred Nelson Subd. Plat (SOA-0006) and the Parks Manor Subd. (SOA-0007) and found that the Fishhook road centerline is 195-200 feet east of the west 1/16 corner. Both plats were prepared by John O’Malley (500-S) and so it is reasonable to believe that they were based on the same survey. Scaling from the west 1/16 corner along the section line to the existing centerline as shown on Sheet 4 (SOA-0042) of the Bogard Road Intersection Improvements ROW plans I find a distance of about 185 feet. In either case, this is a significantly greater distance than the 54 feet estimated from the original Township survey notes.

Although there is a discrepancy with regard to an accurate location and width of the RS-2477 trail right of way, the RS-2477 interest has never been vacated or abandoned. The property owner asserts that

the state abandoned or terminated its claim to the old alignment when it moved Fishhook road to the east as a part of the Bogard Road Intersection Improvement project. I believe the timeframe for construction of this project was between 2001 and 2002. By this time A.S. 19.30.410 Vacation of Rights of Way was in place (1998) and specified when a vacation of an RS-2477 could take place. The process to vacate, modify or relocate an RS-2477 ROW is found in 11 AAC 51.065 Vacation of Easements. The vacation, modification or relocation of an RS-2477 ROW requires a positive act in the form of a platting action approved by the local platting authority, the Commissioner of DNR and the Commissioner of DOT&PF. While there may be an issue as to location, I believe an argument can be made that the subject property may still be subject to a public highway easement under RS-2477.

### **Public Prescriptive Easement**

Jay Sullivan's research states that in 1971 the Wasilla – Fishhook road was 28 feet in width. This may be based on the “existing roadway” note shown on the typical section for Project S-0525(6) (SOA-0017) which was constructed between 1973 and 1974 and indicates a “shoulder to shoulder” width of 28 feet (plus or minus). As the 1971 Parks Manor Plat shows the road centerline as being the easterly boundary of Lot 18A, the public's prescriptive easement within Lot 18A would amount to a width of 14 feet. He then goes on to say that the road was relocated by the State to the east between 2000 and 2002 and that the act of relocation constituted an abandonment of the public's rights. Then, as a result of this abandonment, that portion of Lot 18A that was used for the latest construction of Wasilla Fishhook constituted an uncompensated taking.

In contrast to the subdivision plats that appear to show the centerline of Fishhook road as being coincident with the east boundary of Lot 18A, the graphic representation of the existing road as shown on the ROW plans for Project RS-0525(5) (SOA-0009) suggest that most of the road lies within Lot 18A. These 1973 plans appear to propose a re-alignment to the east of Lot 18A that did not take place until the 1998 Bogard Road project. This appears to be supported by the photo overlay shown on sheet 1 (SOA-0033) for Project RS-0525(5). Due to the potential for errors when using un-rectified aerial photography and inaccurate registration of the property line mapping, I tend to be suspicious about using this kind of evidence without a lot more knowledge of how it was prepared. The 1998 Bogard Road project (SOA-0043) also indicates that the bulk if not all of the existing Fishhook road at the time of survey lies within the subject parcel. An April 13, 2004 email from Rick Bennett, a land surveyor with R&M Consultants, clarifies that the westerly existing ROW line for Parcel 1 (Project STP-0525(12)) was based on a field survey of the toe of the existing road performed by Tryck Nyman Hayes (surveying and engineering consultants) for this project. Furthermore, the survey was completed before the Bogard Road project was moved toward the east and therefore provides the best representation of what existed prior to the Bogard Road construction and what was likely in place since the previous 1973 construction of Fishhook Road. The variations in the physical location and width of the road over the years may be the result of survey errors, errors in interpreting the physical section of the road or more likely, the road has been widened and re-aligned over the years.

Whether the public prescriptive easement was only 14 feet wide (as per Jay Sullivan) or constitutes the entirety of Parcel 1 as asserted by DOT, the owner's opinion is that the 1998 relocation of Fishhook road to the east of Lot 18A constituted an abandonment of the prescriptive easement. By scaling the movement of Fishhook road on sheet 5 (SOA-0043) of the Bogard Road Intersection project, the new centerline appears to have moved 30 feet to the east of the old centerline measuring from the northeast corner of Parcel 1 and 50 feet to the east of the old centerline measuring from the southeast corner. If the

owner's interpretation of the law regarding abandonment of a public easement is correct, then it appears that a taking may have occurred over the bulk of Parcel 1.

Although Jay Sullivan cites the Dillingham case as the basis for a public prescriptive easement, the 1993 Weidner case (860 P.2d 1205) may provide a better illustration in that it relates to a relocation of a road by DOT&PF that resulted in a successful assertion of a public prescriptive easement. It also suggests that the State abandoned the old road. Unfortunately, it doesn't speak to the disposition of the right of way for the old road but a written statement by the State's Right of Way Chief at the time was not helpful our current case. "*Sandberg also referred to a portion of the Old Road as follows: As to the recent use by others of any portion of this old abandoned road, we feel that this would constitute trespass against the property owner.*"

With regard to the 1998 relocation of Fishhook road and whether the old easement was abandoned and terminated, I have more questions than answers. I reviewed an old copy of the Bruce & Ely reference titled The Law of Easements and Licenses in Land to look for similar easement termination cases. What I have read is that there are a couple of different ways of viewing the termination of this type of easement. The options appear to be termination by abandonment or termination by prescription. With regard to termination by prescription, Bruce & Ely say that "*the generally accepted view is that a public right of way cannot be terminated by adverse possession...in order for the easement to be extinguished by prescription, the servient owner's use or possession must satisfy the same elements required for obtaining an easement by prescription.*" Time doesn't run against the sovereign, so the same prohibition against adversely possessing lands of the State of Alaska (Sec. 09.45.052. Adverse possession) would prohibit the termination of an easement by prescription. One of my questions is whether this concept serves to prevent termination of all easements held by the public, or just all except those initially created by prescription. I didn't read about any exceptions so my understanding is that the public just cannot lose an easement by prescription no matter how it was created. The next question is whether the public can have an easement terminated by apparent abandonment. Bruce & Ely say that "*As a general proposition, nonuse alone does not constitute abandonment. Abandonment occurs when an easement holder ceases to use the servitude with the intent to relinquish it and manifests that intent by affirmative conduct. The party claiming abandonment must generally establish the easement holder's intent to abandon by clear and convincing evidence.*" They then go on to say that courts may more readily infer the abandonment of a public easement as opposed to a private easement but that there is considerable judicial uncertainty regarding the elements of this doctrine. My argument is that the mere re-alignment of a public road does not imply the intent to terminate or abandon an existing easement. Roads are re-aligned on a regular basis within a right of way corridor consisting of a variety of interests including fee, PLO, RS-2477, prescriptive easements, federal grants and so on. Just because a portion of the right of way corridor is not currently occupied by the physical section of a highway does not imply an intent to abandon, terminate or vacate the public's interest. To my knowledge, we never ceased to use the easement with the *intent to relinquish it*. And we would never do so given that we have a statutory process under A.S. 19.05.070. Vacating and disposing of land and rights in land which standardizes the affirmative act required to relinquish an easement through the execution of Commissioner's Deed of Vacation by the DOT&PF Commissioner.

## Summary

I believe the evidence supports a case for a public prescriptive easement across the entirety of Parcel 1 based upon the TNH survey prior to the Bogard road relocation of Fishhook road. The evidence suggests

that the public's total occupation of Parcel 1 commenced with the 1973 Fishhook road construction project. However, additional support for this assertion could be obtained by checking the archives of AeroMetric, Inc. for additional photography in the vicinity of Parcel 1 between 1973 and 1998. Until shown the contrary, I also hold the position that a public easement (prescriptive or otherwise) cannot be terminated by apparent abandonment.