

SEWARD HIGHWAY: RIGHT-OF-WAY STUDY LAND EXCHANGE FACILITATION Preliminary Assessment

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Purpose

The Seward Highway and Alaska Railroad rights-of-way from Girdwood to Potter Station intertwine along a narrow corridor between the waters of Turnagain Arm and the base of the Chugach Mountains. The rail and highway corridors have been reconstructed and realigned to varying degrees both before and after statehood. The railroad and highway each have fixed right-of-way interests that require relocation to coincide with the movement of the physical facility. Typically this would be accomplished through traditional ROW acquisition practices. However, in this area, the constrained rail and highway corridors that pass through the lands of the Chugach State Park require an adjustment of the property interests through a land exchange. To accomplish this goal it is necessary to survey, map and identify the interests and parcels to be exchanged.

On May 8, 2013, R&M Consultants, Inc. (R&M) was awarded a contract¹ for the surveying and mapping of the Seward Highway corridor located generally between Girdwood and Potter Station². The mapping project was required to comply with a Memorandum of Agreement³ (MOA) between the Department of Transportation and Public Facilities (DOTPF), the Department of Natural Resources – Division of Parks and Recreation (DNR) and the Alaska Railroad Corporation (ARRC). The MOA was established to facilitate land exchanges that would result from improvements and realignments to the Seward Highway and Alaska Railroad corridors. As an extension of the surveying and mapping effort, the R&M contract was amended⁴ to include the task of “Land Exchange Facilitation”.

Each party to the MOA operates under distinct and separate authorities and missions that can be incompatible. Successful completion of the proposed land exchange requires an understanding of each party’s needs as well as each party’s legal authority to resolve the issues. Additional legal guidance may be necessary to meet the objectives of the MOA.

¹ Seward Highway: Right of Way Study, Project No. 0A31(051)/59765, DOT&PF Agreement No. 02532054 – R&M Contract No. 1964.01

² The project is generally between Mileposts 90 and 118 of the Seward Highway.

³ Memorandum of Agreement, dated October 16, 2001

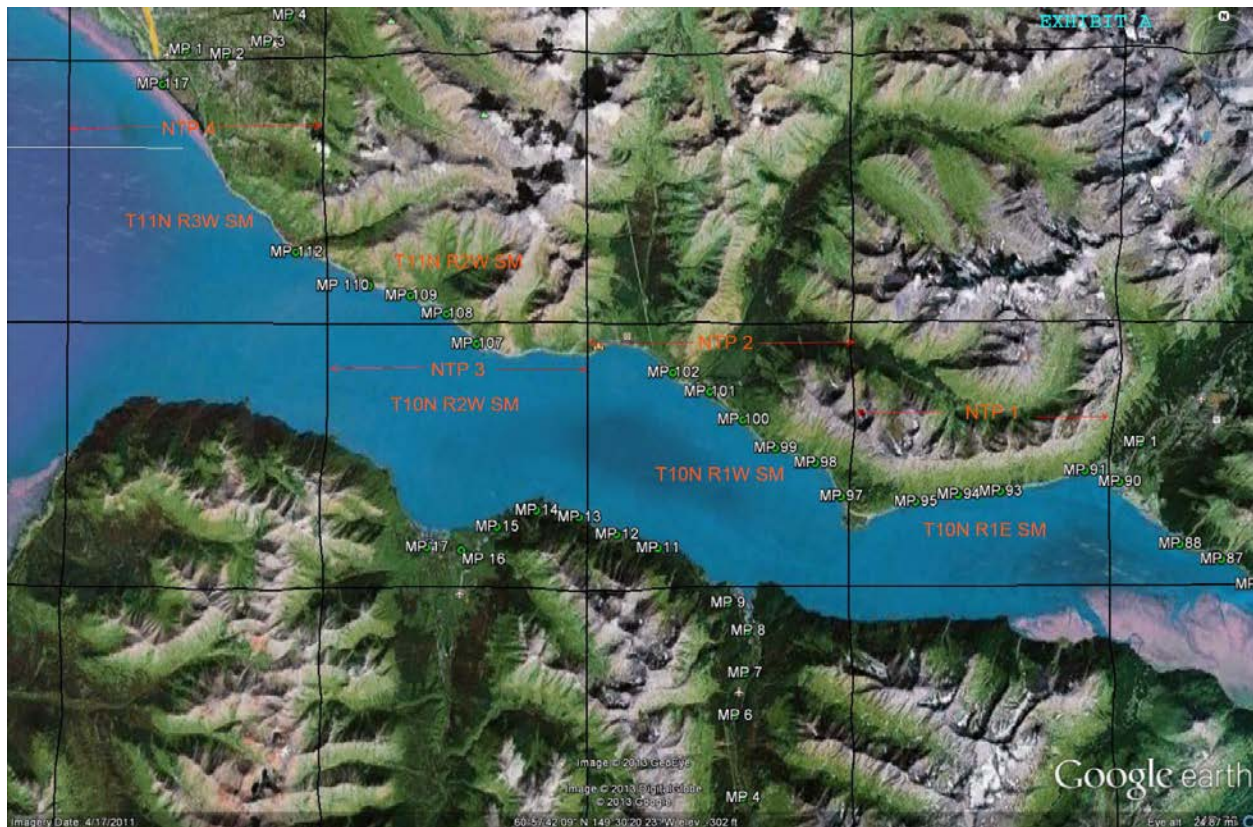
⁴ Am. No. 2 to Agreement No. 02532054, Task Group D, dated 6/19/14; NTP No. 3 dated 6/20/14.



Location

The project is located on the Seward Highway from Girdwood near milepost 90 then northwest to Potter Station near milepost 115 and continuing to the northerly line of T11N near MP 118. The work area is divided into 4 segments referred to as NTP 1⁵ through NTP 4 heading east to west commencing from the Girdwood intersection with the Seward Highway. The Seward Highway segments are approximately 7 miles in length with the east to west limits of each NTP being defined by the Public Land Survey System range lines as follows:

- NTP 1 extends between the E/W boundaries of T10N, R1E, SM
- NTP 2 extends between the E/W boundaries of T10N, R1W, SM
- NTP 3 extends between the E/W boundaries of T10N & T11N, R2W, SM
- NTP 4 extends between the E/W boundaries of T10N & R11N, R3W, SM



Project Segment Map

At this time, R&M has prepared draft ROW Study exhibits for the NTP 1 & 2 areas.

⁵ The referenced NTPs relate solely to project segments and are not necessarily consistent with the contract NTPs.

Chronology

4.7.89: Blanket Permit No. 6012 for Roadways, Road crossings and Automatic Crossing Signals. This permit consolidated prior contracts between ARRC and DOTPF that allowed construction, operation and maintenance of highway facilities within the ARRC rights-of-way including the Seward Highway.

8.10.90: Memorandum of Understanding between DOTPF and DNR. The MOU recognized the separate responsibilities and authorities of the respective agencies and the fact that the Seward Highway alignment had moved since the initial 1951 construction. In order to reduce the uncertainty of a floating easement, the MOU proposed to fix the highway ROW based on DOTPF centerline surveys performed in 1981 and 1983 and a proposed relocation to tidewater. The MOU was intended to foster cooperation between the agencies and reduce the impact to the Park by reducing the acreage encumbered by highway easements.

8.26.93: Amendment No. 1 to Memorandum of Understanding. The Amendment establishes the 300-foot wide tidewater relocation of the highway ROW identified in the initial MOU according to the ROW map for Project IR-OA3-1(11), Girdwood to Bird Point⁶. The MOU provides that excess ROW for the Old Seward highway be relinquished and that the old Seward highway corridor be appraised along with additional areas required by DOTPF or ARRC that are outside the existing ARRC and DOTPF existing ROW. Recognizing that legislative authority is required to convey fee title for legislatively designated (Parks) and ARRC lands, the parties agree to collaborate in preparing the legislation.

6.7.00: Chapter 116, SLA 2000 (SB 235) Effective date June 6, 2000. Article 2. Potter Station to Girdwood.

- Chugach Park – upon a finding by the Commissioner of DNR of no significant adverse effect to the Park, the Chugach Park is authorized to:
 - Grant a highway easement to DOTPF
 - Convey a property interest to ARRC for railroad relocation
 - Grant utility easements
 - Receive interests in land in exchange for interests granted DOTPF & ARRC
 - The interest granted DOT may not exceed the interest necessary to relocate and widen the Seward Highway (highway easement to highway easement)

⁶ See Seward Hwy Gird to Bird "Supermap", Sheets 1 through 6

- ARRC – Provides legislative authorization to convey interests in land in exchange for interests in land conveyed to ARRC.
- The Governor shall report to the legislature by January 8, 2001⁷ or as soon as possible after that date and
 - identify the lands transferred to or from the Chugach State Park that requires an amendment⁸ to statutes and
 - submit any legislation required to make those amendments.

10.16.01: Memorandum of Agreement between DOTPF, ARRC and DNR.

- DOTPF is the lead agency in accomplishing the Seward Highway land exchange goals:
 - Provide as-built surveys and preliminary ROW maps
 - Appraise existing and relocated highway and rail corridors including separate values for additional areas required by DOTPF or ARRC outside the existing corridors.
 - Survey and monument relocated ARRC corridor and utilities. Provide a legal description of relocated ARRC corridor to DNR for DNR conveyance to ARRC.
 - Relinquish highway ROW excess to the relocated 300' corridor.
 - Prepare all required title research, conveyance documents and plats necessary to exchange land interests between the parties.
 - Prepare report to legislature required to define Chugach Park boundaries.
- DNR and ARRC are to cooperate with the land exchange tasks.

5.2011: Chugach State Park Management Plan, Public Draft Review

- Land and Water Conservation Fund⁹ – *“All of Chugach State Park is considered an LWCF protected area and is subject to the program provisions. Any property within an LWCF protected area may not be wholly or partly converted to anything other than public outdoor recreation uses without the prior approval of the Secretary of the U.S. Department of the Interior.”*

3.16.12: Public Facilities Master Agreement between ARRC and ADOTPF; ARRC Contract No. 9670. This contract supersedes the 4/7/89 Blanket Permit No. 6012 between ARRC and DOTPF.

3.5.13: Appendix C - Agency Scoping Seward Highway MP 105-107, Windy Corner

⁷ This was the first day of the First Regular Session of the Twenty-Second Alaska State Legislature.

⁸ A.S. 41.21.121 describing the lands encompassed by the Chugach State Park will require amendment.

⁹ Land and Water Conservation Fund Act of 1965, Public Law 88-578, Title 16 U.S.C.

- *“CSP (Chugach State Park) is considered a Section 4(f) property under the Department of Transportation Act of 1966, and a Section 6(f) property under the Land and Water Conservation Fund Act (LWCF) of 1965”*
- *“The 2004 CE included a Section 4(f) Evaluation and DNR concurrence with the proposed Section 4(f) mitigation, which included exchange of abandoned road right-of-way for the necessary CSP land at slightly less than a 1:1 ratio. DNR concurred that the proposed land exchange would not impair the CSP’s intended purpose, and that the highway realignment would enhance the remaining parkland for its intended purposes, specifically at Windy Corner.”*
- *“DOT&PF would also work with the DNR/LWCF State liaison to complete the conversion and replacement process for 6(f) properties.”*

5.8.13: Seward Highway: Right-of-Way Study, Contract with R&M Consultants, Inc.

Nature of Interests and Valuation of Exchanged Lands

The land exchange will generally be made on the basis of equal value rather than equal area as the value of lands throughout the corridor may vary according to an appraisal, the nature of the interest held by the parties and the encumbrances upon those interests.

1. DOT&PF – The traditional view is that the Seward highway ROW within the project limits is held as a highway easement established primarily by federal Public Land Orders and conveyed to the State in 1959 under the Omnibus Act Quitclaim Deed. While the scope of a highway easement is limited to highway purposes, it represents a strong encumbrance that precludes virtually all alternative uses by the owner of the underlying fee as being incompatible with facility operations and safety. As a result, it is generally accepted that the primary right remaining in the fee owner is that of reversion. At such a time that the highway ROW becomes excess to the department's needs, the fee owner may apply to DOTPF under 17 AAC 10.105 for a disposal. Recognizing the cost of acquiring highway easements and their strong nature, compensation for new easements is typically set at 90-100% of fair market value (FMV). 17 AAC 10.105(b) requires payment to the department of 90% FMV to vacate and release an existing highway easement.

A more recent alternative view is that DOT&PF holds and manages the fee interest in the Seward Highway ROW within the project limits where the lands crossed by the ROW have been TA'd or patented to the State of Alaska. In the spring of 2014, DOT&PF and DNR jointly proposed legislation intended to clarify the land interests held and managed by DOT&PF.¹⁰ The bills were not passed due in part to their late introduction and the Legislature's focus on pipeline related business. It is expected that they will be revived and presented to the 29th Legislature. The bill re-defines the relationship between DOT&PF and DNR and provides some uniform land disposal language across DOT's three areas of authority for airports, highways and public facilities. The legislation also adds language clarifying that PLO rights-of-way, federal ROW Grants and DNR ROW permits crossing state owned lands are managed in fee by DOT&PF.¹¹ With regard to Chugach State Park, the effect of this alternative view is that DOT&PF would hold fee title rather than a highway

¹⁰ House Bill 371B and Senate Bill 211A, 28th Legislature

¹¹ Section 6 of the bill would add a new section to A.S. 19.05 titled Sec. 19.05.124. Surface estate of state highway land. While DOT&PF asserts that fee ownership of highway ROW is already the case under the constitution, the section clarifies that *"The department has primary authority to manage the surface estate of land and property interests acquired or held by the state for the state highway system, including land conveyed by the federal government under sec. 21 of the Alaska Omnibus Act of 1959 (P.L. 86-70, 73 Stat. 141), maintenance yards, materials sites, and other land and property interests necessary for the operation of the state highway system."*

easement to the Seward highway.¹²

Until more clarity can be brought to the nature of title held by DOT&PF, valuation of the Seward highway ROW released as a part of the Land Exchange should be set at 90% FMV based on the traditional view of their status as a highway easement.

2. Chugach State Park - CSP was legislatively designated in 1970 by A.S. 41.21.121. Lands within T10N, R1E, SM (NTP 1) were conveyed from the federal government to the state on March 27, 1964 by Tentative Approval (TA0019640160). Lands within T10N, R1W, SM (NTP 2) were conveyed to the state on October 1, 2002 by Patent No. 50-2004-0004. Lands TA'd to the State are essentially considered to be held in fee except that a survey is required before the patent can be issued.¹³ There are some conflicts that must be resolved regarding the conveyance of CSP lands to ARRC that are discussed in more detail in the Alaska Railroad section below. According to the previously cited Agency Scoping for the Windy Corner project, all of Chugach State Park is considered to be a 4(f)¹⁴ property for FHWA funded projects and a 6(f) property under the Land and Water Conservation Fund Act. At this time it is presumed that any land exchange requirements necessary to comply with the 6(f) restrictions will meet or exceed any similar requirements imposed under 4(f). It may be beneficial for the DOT&PF Environmental staff to coordinate with FHWA and NPS as we get a better handle on the 6(f) "conversion" process. Except where the Park lands are subject to prior existing rights or encumbrances issued subsequent to establishment of the Park, the valuation of Chugach State Park lands conveyed as a part of the Land Exchange should be set at 100% of FMV.

¹² At statehood, transportation and public facilities were reserved out from the multiple use "public domain" (Const. Art VIII, s. 6). When DNR creates a Park or Preserve using a legislative dedication (Art VIII, sec 7), the multi-purpose "public domain" land becomes single purpose land (Parks or DF&G) with whatever reservations the Legislature pulls back for DNR purposes (Oil & Gas, etc). However, since a roadway that may be encompassed by the Park or Preserve was never part of the "public domain" in the first place, it is not converted to Park or Preserve purposes. The purpose of this bill is to clarify that DOT properties have never been multi-purpose public domain lands and so have never been under the control of DNR. - jfb

¹³ Moore v. State of Alaska, 992 P.2d 576, Alaska November 26, 1999 "The act of issuing tentative approval constitutes the formal transfer of land management authority from the United States to the State of Alaska regarding any particular Statehood Act land selections." (FN3); Alaska National Interest Lands Conservation Act (ANILCA) §906(c)(1)"All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed...and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval;"

¹⁴ Section 4(f) of the Department of Transportation Act of 1966 (Pub. L. 89-670, 80 Stat. 931) – 23 U.S.C. § 138 and 49 U.S.C. § 303 – 23 CFR Part 774

3. Alaska Railroad - The interest conveyed to ARRC by the federal government under ARTA lies somewhere between “an exclusive use easement”¹⁵ and fee and is somewhat difficult to assess given the initial language in ARTA, its amendments, State legislation and interpretive differences between the Seward Highway Land Exchange parties.

Under ARTA, the interest conveyed to ARRC by patent was segregated into surface and subsurface estates in which the surface estate was to consist of “not less than an exclusive use easement” and the subsurface estate consisted of the right to use that which was necessary for railroad purposes. In any event, the conveyance was to include the entire federal interest in the rail properties.

In a letter dated April 8, 2013, the ARRC provided comments to DOTPF regarding the Seward Highway MP 105-107 Windy Corner project. *“ARRC’s right-of-way through the project area includes submerged lands along Turnagain Arm, and does not include any section line easements. ARRC expects to receive the same rights on any lands exchanged to accommodate the proposed relocation. However, ADNR has refused to relinquish such rights on similar projects presently ongoing in other portions of the State (citing AK statehood Act Public Law 85-508, the Equal Footing Doctrine, Submerged Lands Act 43 USC 1301-1315, AS 19.10.010, and others). ADOT will have to work with ADNR to allow transfer of like rights as part of this project. ARRC also notes that ADOT and ADNR have yet to transfer the ARRC right of way changes caused by track realignments between Bird and Girdwood in the 1990s and 2000s.”* While the ARRC/DNR issues are not completely clear,

¹⁵ Pub. L. 97-468 Alaska Railroad Transfer Act of 1982 is stated at 45 USC §1205(b)(4)(B) *“Where lands within the right-of-way, or any interest in such lands, have been conveyed from Federal ownership prior to January 14, 1983, or is subject to a claim of valid existing rights by a party other than a Village Corporation, the conveyance to the State of the Federal interest in such properties pursuant to section 1203 (b)(1)(B) or (2) of this title shall grant not less than an exclusive-use easement in such properties. The foregoing requirements shall not be construed to permit the conveyance to the State of less than the entire Federal interest in the rail properties of the Alaska Railroad required to be conveyed by section 1203 (b) of this title. If an action is commenced against the State or the United States contesting the validity or existence of a reservation of right-of-way for the use or benefit of the Alaska Railroad made prior to January 14, 1983, the Secretary of the Interior, through the Attorney General, shall appear in and defend such action.”* Not less than an exclusive use easement as defined by 45 USC § 1202(6): *“(6) “exclusive-use easement” means an easement which affords to the easement holder the following:*

(A) the exclusive right to use, possess, and enjoy the surface estate of the land subject to this easement for transportation, communication, and transmission purposes and for support functions associated with such purposes;

(B) the right to use so much of the subsurface estate of the lands subject to this easement as is necessary for the transportation, communication, and transmission purposes and associated support functions for which the surface of such lands is used;

(C) subadjacent and lateral support of the lands subject to the easement; and

(D) the right (in the easement holder’s discretion) to fence all or part of the lands subject to this easement and to affix track, fixtures, and structures to such lands and to exclude other persons from all or part of such lands;”

(Underline – for emphasis)



the statement suggests an assertion by ARRC that the lands they received by patent under ARTA are neither subject to rights existing prior to the federal railroad interest nor the burdens of post conveyance state statutes. Issues that would be considered in assessing the nature of the ARRC ROW would be reversionary interests, section line easements (federal and state), submerged lands and other prior existing rights.

- a. Reversion: The original §1209 version of ARTA provided for reversion to the United States and patent to abutting land owners upon discontinued use of the lands by the Alaska Railroad. Where the railroad was to cross a federal homestead patent, the patent reservation for railroads would allow the federal railroad to impose a 200-foot wide railroad easement without payment to the homesteader. In the future, reversion would allow the unencumbered use of the land to return to the homesteader when and if the railroad use was no longer required. This reversionary provision was repealed by Pub. L. 108-7 in 2003¹⁶. The result was that where the ARRC ROW was based on an easement interest¹⁷, the repeal of the reversionary clause effectively converted the interest to a fee estate. The repeal of the ARTA reversionary language was in part related to proposed land exchanges between ARRC/DOT&PF/Chugach Native Corporation due the Seward Highway MP 8-18 highway realignment¹⁸. It was also realized that additional land exchanges along the Seward highway would benefit from the repeal of the reversionary language. Under the original §1209 reversions, ARRC would effectively had no trading stock by which to make a land exchange once the rail corridor had been realigned.

The elimination of the reversionary interest was considered by some to have constituted an uncompensated taking of a real property interest. To the extent that this was the case, the statute of limitations for a claim against the U.S. has long since passed.¹⁹ As a result, State legislation was proposed to correct these actions as they applied to certain properties on the Eielson branch line. The Alaska Legislature passed CHSB 146, effective May 17, 2012 which was “...intended to replace the reversionary rights of the abutting land owners that were repealed by the United States Congress in 2003.” A similar situation occurred regarding the relinquishment of the Copper River

¹⁶ Note that paragraph 5 on page 10 of 11 of the October 16, 2001 MOA between DOT&PF/ARRC/DNR calls for the Railroad to “Diligently pursue and seek to obtain a revision to ARTA that would revoke or substantially modify the reversion provisions which apply to ARTA-transferred property no longer used for transportation, communication or transmission purpose, so as to make more feasible the relinquishment of old corridor to DNR for park purposes.”

¹⁷ Act of March 12, 1914 (38 Stat. 30 – 43 U.S.C. 975d) “Alaska Railroad Act”

¹⁸ Draft memo dated May 8, 2006 by Phyllis Johnson, ARRC General Counsel regarding Reversion Repeal.

¹⁹ The Tucker Act (45 U.S.C. § 1205(b)(4)(B)) provides for a 6 year statute of limitations to make an inverse condemnation claim against the Railroad.

and Northwest Railroad ROW in 1941²⁰. However, rather than eliminating the reversionary interest, the railroad ROW was made available for a highway between Chitina and McCarthy. At some point in the future, if the highway ROW was to be vacated, the owner of the underlying fee estate would obtain unencumbered use of their land.

- b. Prior Existing Rights – Section Line Easements under RS-2477: A patent issued by the federal government is subject to prior existing rights whether or not those rights are stated in the patent. A federal patent is essentially the same as a quitclaim deed and can only pass those rights held by the grantor.²¹ The Territorial Legislature accepted the federal RS-2477 offer of a 66-foot wide highway easement along surveyed section lines on April 16, 1923²². As the initial railroad construction was completed by July 15, 1923²³, there was little opportunity for application of federal section line easements in the railroad corridor. However, the Eielson Branch line between Ladd Field (Ft. Wainwright) and Eielson Air Force Base was constructed in the late 1940's and so there existed an opportunity for federal section line easements to come into existence prior to the railroad interest. The current federal position is that RS-2477 section line easements based solely upon legislative acceptance (as opposed to construction) are not valid. This is not critical as the acceptance of RS-2477 section line easements is a matter of state law. While ARTA appears to have eliminated the reversionary interest of the homesteaders, the question is whether the ARTA language could serve to eliminate all valid prior existing rights that were unidentified in the Railroad patents. The answer is in the 1983 Alaska Supreme Court ALTA²⁴ opinion. "...by operation of law, land

²⁰ 9/26/91 excerpt from Opposition to State's Motion for Partial Summary Judgment, Ahtna, Inc. vs. State of Alaska, Case #3AN-91-6957 – "The source of the problem was a 1922 federal statute that said that upon relinquishment of a railroad right-of-way, the parts passing through previously patented lands, like homesteads and mining claims, would become the property of the patentees. See Act of March 8, 1922; Pub.L. 163, ch. 94; 42 Stat. 414; codified at 43 U.S.C. § 912 (1976)...In other words, the effect of the 1922 statute would be to sever the right-of-way between McCarthy and Chitina wherever it crossed private land. At the suggestion of the Secretary of the Interior, Congress passed a law in 1941 that said that the Secretary of the interior could accept the relinquishment of the right-of-way [to be used, operated and maintained as far as may be practicable or necessary, as a public highway...the provisions of the Act of March 8, 1922 shall not affect the right-of-way...][See Act of July 15, 1941, Pub.L. 176, ch. 300; 55 Stat. 594.

²¹ City of Anchorage v. Nesbett, 530 P.2d 1324, Alaska, 1975 – FN9" The United States Supreme Court in describing the legal effect of a patent has stated: 'As a deed, its operation is that of a quitclaim, or rather a conveyance of such interest as the United States possessed in the land' Wilson Cypress Co. v. Del Pozo y Marcos, 236 U.S. 635, 648, 35 S.Ct. 446, 451, 59 L.Ed. 758, 768 (1915), quoting Beard v. Federy, 70 U.S. (3 Wall.) 478, 491, 18 L.Ed. 88, 92 (1866)."

²² The 4-rod (66 foot) wide federal section line easement is based upon the offer of the RS-2477 grant and the initial acceptance of that grant on April 6, 1923 by the Territorial legislature (Ch 19 SLA 1923) for highway purposes. Also see A.S. 19.10.010 Dedication of land for public highways.

²³ Alaska Railroad History - <https://www.alaskarailroad.com/AboutARRC/ARRCHistory/tabid/453/Default.aspx>

²⁴ State v. Alaska Land Title Ass'n, 667 P.2d 714, Alaska, 1983



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."

- c. Application of State Law – State section line easements under A.S. 19.10.010: In addition to RS-2477 based federal section line easements, ARRC lands are also subject to 100-foot wide "State" section line easements that apply to all lands owned by the state or acquired from the state²⁵. ARRC has previously argued that its lands are not state lands because the Alaska Railroad Corporation Act created a legal existence independent of and separate from the state. It is assumed that this is their basis to suggest that their lands are not subject to 100-wide state section line easements. In 2000, the Alaska Supreme Court disagreed with that assertion²⁶ stating that the ARC Act also makes ARRC "*an instrumentality of the State within the Department of Commerce and Economic Development*". ARRC is an Alaskan corporation and subject to Alaska State law. ARRC might argue that the ARTA provision that ensures an interest of "*not less than an exclusive use easement*" (emphasis added) conflicts with the application of State SLEs. ARTA Section 1213 Conflict with other laws²⁷ states that "*The provisions of this chapter shall govern if there is any conflict between this chapter and any other law.*" This is in addition to a general legal rule that when a federal law conflicts with a state law, the federal law takes priority and the state law does not have any effect. However, this rule would only apply when there is an actual conflict and the overlay of State SLE's does not create and conflict with the concept of an "*exclusive use easement*", it just places the management of the ARRC right-of-way over the SLE as a higher priority as long as it is necessary for the safety and security needs of the Railroad. This layering of easement rights also exists within state owned and managed controlled access highways and airports. The State's management authority and its need to ensure the safety and security of the traveling public limits unimpeded public access across highways and airports that are subject to section line easements. But if the Railroad lands or rights-of-way encumbered by the SLEs are eventually disposed, they will be conveyed subject to the existing section line easements.

²⁵ On March 26, 1951, the legislature enacted § 1 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..."

²⁶ Laverty v. Alaska R.R. Corp, 13 P.3d 725, Alaska, December 1, 2000

²⁷ Also see AS 42.40.930. Conflicting laws inapplicable. "If provisions of this chapter conflict with the provisions of other state law, the provisions of this chapter prevail. Provisions of this chapter shall be construed so that they do not conflict with 45 U.S.C. 1201 -1214 (Alaska Railroad Transfer Act of 1982)."

- d. Submerged Lands/Tidelands: The previously mentioned April 8, 2013 letter by ARRC also suggested a conflict with DNR's assertion that ARRC lands are subject to State ownership as "submerged lands" where the ARRC ROW extends out into the waters of Cook Inlet along the Seward Highway and other locations. The State asserts ownership of "submerged lands"²⁸ and tidelands along its coastline. *"The Submerged Lands Act of May 22, 1953 states that all lands permanently or periodically covered by tidal waters up to, but not above, the line of mean high tide and seaward to a line three geographic miles distant from the coast mean low tideline is owned by the state."*²⁹ The question of submerged lands ownership in relation to the land exchange is important for both the status of the previously existing ARRC ROW corridor and the realigned ARRC ROW corridor that will in part consist of lands conveyed from the Chugach State Park.

The first question is whether the existing ARRC corridor included title to the submerged lands. In support of the ARRC position, the Alaska Railroad Corporation Act language suggests that their lands include submerged and tide lands.³⁰ The US Surveys³¹ that defined the Railroad ROW corridor through the NTP 1 & 2 segments distinguished between "lots" (uplands) and "parcels" (submerged lands) with a note on the first sheet stating that "Parcels shown on this plat identify submerged lands". The conveyance³² from the federal government to the Alaska Railroad included "Parcels A to K" for U.S. Surveys No. 9011 and 9012 indicating a federal assertion of some interest in the tidelands within the Railroad ROW and intent to transfer that interest to ARRC. The patent transferring these lands to ARRC was *"Subject to the right, title, and interest, if any, that has otherwise vested in the State of Alaska in any submerged lands among the above-described lands which are situated beneath nontidal navigable waters up to the ordinary high water mark or which are permanently or periodically covered by tidal waters up the line of mean high tide."* The authority of the federal government to reserve tide and submerged lands for Alaska Railroad use prior to statehood was addressed in a 1971 9th Circuit case³³. Specifically this case related to the eastern shore

²⁸ A.S. 38.04.062 Identification of state submerged land. "...the state owns all submerged land underlying navigable water to which title passed to the state at the time the state achieved statehood under the equal footing doctrine or 43 U.S.C. 1301 – 1315 (Submerged Lands Act of 1953)"

A.S. 38.05.965 Definitions (22) "submerged land" means land covered by tidal water between the line of mean low water and seaward to a distance of three geographical miles or further as may hereafter be properly claimed by the state; (23) "tideland" means land that is periodically covered by tidal water between the elevation of mean high water and mean low water;

²⁹ Alaska DNR Fact Sheet "Tide & Submerged Land Ownership" January, 2000

³⁰ A.S. 42.40.980. Definitions (8) "Land" means any interest in real property, including tide and submerged land, and any right appurtenant to the interest;

³¹ U.S. Surveys No. 9011 and 9012 for those portions of the Alaska Railroad lying within T.10N., R.1E. & R.1W., S.M.

³² Corrected Patent No. 50-2006-0161 dated March 17, 2006, recorded as 2006-019804-0 on 3/30/06, Anchorage.

³³ United States of America v. City of Anchorage, State of Alaska, 437 F.2d 1081, January 26, 1971



of Knik Arm and the bed of Ship Creek and the necessity of these lands for wharves and docks in support of the railroad operations. The result was the “...quieting title in the United States to the tidelands and submerged lands contiguous with and adjacent to the Alaska Railroad Terminal Reserve.” Where the submerged lands adjacent to the Terminal reserve were considered necessary for railroad operations, the question along the Seward Highway is whether the submerged lands along the mainline corridor would be considered necessary for railroad operations in the same manner. Another distinguishing characteristic between the Terminal Reserve lands and the mainline railroad corridor is that the Terminal Reserve was based on a withdrawal and considered to be held in fee while the railroad corridor was considered to be an easement interest. One view is that at statehood, Alaska received title to the submerged and tidelands along the Seward Highway subject to the federal railroad easement. The question is whether the repeal of the ARTA reversionary language could have any effect where the underlying fee interest is held by the State of Alaska and is subject to the public trust doctrine.

The second question is whether submerged and tidelands within Chugach State Park lands can legally be conveyed to ARRC in fee and without limitations. The Legislature provided the necessary approvals for the land exchanges required to accomplish the realignments of the Seward highway and rail corridors in 2000. However, the language within Ch. 116 SLA 2000 does not specifically express the intent of the legislature to transfer full title to lands subject to the public trust doctrine. This issue was considered in a 2011 AGO opinion relating to a proposed land exchange with the Izembek National Wildlife refuge³⁴. Similar to the Seward highway land exchange legislation, the Izembek approval appeared to provide an authority to convey the state’s entire interest.³⁵ The nature of public trust submerged lands as defined in the U.S. Supreme Court decision *Illinois Central Railroad Co. v. Illinois*³⁶, and Alaska Supreme Court decision *CWC Fisheries, Inc. v. Bunker*³⁷ suggests that the public’s interest in these lands is to be retained and protected absent the clearly expressed or necessarily implied intent of the legislature. The conclusion of the AG opinion was that “*The passage of House Bill 210 did not authorize DNR to disclaim its ownership or public trust responsibilities in the submerged lands and waters encompassed by the Illinois Central and CWC Fisheries*

³⁴ [Izembek Proposed Exchange: Reservation of Public Trust Submerged Lands](http://www.law.state.ak.us/pdf/opinions/opinions_2011/11-005_661080104.pdf), June 15, 2011, John T. Baker, Sr. Assistant Attorney General, File No. 661080104, http://www.law.state.ak.us/pdf/opinions/opinions_2011/11-005_661080104.pdf

³⁵ [Ch 119 SLA 10 Section 4](#), “EXCHANGE OF STATE LAND FOR FEDERAL LAND. (a) Notwithstanding any other provision of law, the Department of Natural Resources shall convey all right, title, and interest of the state to certain land adjacent to the Izembek National Wildlife Refuge.” House Bill 210, 26th Legislature

³⁶ 146 U.S. 387 (1892)

³⁷ 755 P.2d 1115 (Alaska 1988)

decisions...". It appears unlikely that a different conclusion would be reached for the Seward Highway land exchange legislation. The result may be that CSP conveyance of submerged lands to ARRC would be limited to an easement or other less than fee interest.

4. Valuation: Paragraph 9, page 7 of the 2001 MOA states that DOTPF will *"Appraise the existing Seward Highway corridor, the ARRC corridor, and the relocated highway and railroad corridors within the Area of Interest, and provide separate valuations for any additional area required by DOTPF or ARRC that area are outside the existing corridors;"* No mention is made of an appraisal of Chugach State Park lands that will be conveyed as a part of the three way exchange and in fact this may represent the most complex and time consuming task in the valuation process.

The appraisal issue is directly linked to the land interest issue in order that the land exchange is to be accomplished on an "apples for apples" basis (equal value). A heavily encumbered fee interest cannot be considered equal to an otherwise similar unencumbered property. Having said that, most land sales are subject to existing access or utility easements and assuming that the comparable sales used to appraise the subject property also contain similar types of encumbrances, the existing easements would not detract from the land value unless they significantly reduced the utility of the property. Where a section line easement or a subdivision public utility easement might not encumber a property significantly enough to reduce its value, there are pipeline and power transmission line easements along this corridor that would likely have a value reducing impact. For example, the existing ARRC, DOT&PF and Chugach State Park interests are all encumbered to varying degrees by:

- a. a 100' wide Chugach Electric Assn. transmission line ROW permit (BLM A-029855),
- b. a 100' wide transmission line under FERC License 2170 to Chugach Electric Assn.,
- c. a 30' wide Corps of Engineers pipeline ROW permit (ADL No. 32606).

DNR Parks has stated that they cannot receive lands encumbered by these utility easements as management of these utility permits would constitute a "conversion" of LWCF property, however, as their existing lands are already encumbered by these easements, the issue is likely one of value as opposed to legal prohibition.

If all of the lands to be exchanged were of equal value and resulted in a zero net change in acreage held by each party, then no appraisal would be necessary. However, the land

exchange will result in a net increase or loss of acreage and the parties that have a net loss will be due compensation to offset the imbalance. For the purposes of the Seward Highway exchange, lands held in fee by the parties should be appraised at 100% of fair market value and highway easements held by DOT&PF should be appraised at 90% of fair market value.

To the extent that the exchange of lands held by the Chugach State Park result in a net loss, the transaction will represent a “conversion” of Land & Water Conservation Fund properties. The conversion and valuation process is strictly governed by the National Park Service regulations under 35 CFR § 59.3 Conversion requirements.³⁸ It is not clear whether NPS has ever been contacted with respect to the CSP “conversion” resulting from the Land Exchange proposal, however, they will evaluate the properties to be exchanged based not just on it’s Fair Market Value, but its location, size and utility. Both the converted property and the replacement property will require a separate appraisal report prepared by an Alaska licensed General Commercial appraiser in compliance with the Uniform Appraisal Standards of Federal Land Acquisitions.³⁹ The appraisals will then require a “review” by a qualified review appraiser.⁴⁰ In addition, as NPS includes the Office of Valuation Services (OVS) as part of its compliance and oversight, OVS may provide direction regarding appraiser and review appraiser selection.⁴¹ It is recommended that DOTPF coordinate with DNR/NPS/OVS before any action is taken to define the appraisal assignment or select an appraiser or review appraiser.

Given the strict appraisal and review guidelines required for the CSP parcels, we can expect that these standards can be applied to the appraisal and review of the DOTPF and ARRC Land Exchange parcels and meet or exceed all of DOTPF and ARRC’s appraisal requirements. DOT Highway ROW exchanges are governed by 17 AAC 10.120 and are based on an equal value exchange.

The MOA appraisal requirements seem to be a bit muddled in that they specify the appraisal of the existing and relocated corridors along with separate valuations for additional lands required outside the existing corridors. If compensation is only required for

³⁸ § 59.3(b)(2) “The fair market value of the property to be converted has been established and the property proposed for substitution is of at least equal fair market value as established by an approved appraisal (prepared in accordance with uniform Federal appraisal standards) excluding the value of structures or facilities that will not serve a recreation purpose.”

³⁹ UASFLA 5th Ed. Dated December 20, 2000, Interagency Land Acquisition Conference
<http://www.justice.gov/enrd/land-ack/Uniform-Appraisal-Standards.pdf>

⁴⁰ Paragraph 6, Frequently Asked Questions Appraisals And The LWCF State Assistance Program, March 2013

⁴¹ <http://www.blm.gov/wo/st/en/prog/more/lands/appraisals.html>, BLM Lands and Realty, Real Estate Appraisal

the net change resulting from the land exchange, one option would be to only appraise those parcels. It may be that the intent of appraising the corridor is to establish a “larger parcel” unit value that can be applied to the “net” acreage to be exchanged as the size and shape of these parcels may not reflect a reliable value if appraised individually. Once again this is an issue that will need to be cleared with NPS/OVS.

R&M Mapping:

1. Milepost 90-97 (NTP1)

- a. 59765 Seward Highway MP 90-97 EF HWY 12-27.pdf: The focus of this drawing set is the colored cross-hatching of the existing Seward highway ROW easement (based on PLOs or federal ROW grants) where it is now excess to the department’s needs. Portions lying within the realigned ARRC corridor will be released to the benefit of ARRC by Commissioner’s Deed of Vacation with the remainder being released to Chugach State Park where they hold title to the underlying fee estate.
- b. 59765 Seward Highway MP 90-97 EF RR 12-27.pdf: The focus of this drawing set is the colored cross-hatching of the patented railroad ROW to be relinquished where it falls outside of the realigned railroad corridor. Portions lying within the realigned Seward highway corridor would be conveyed to DOTPF and the remainder would be conveyed to DNR Parks by an ARRC quitclaim deed.
- c. AREAS-Parcels.pdf: This document represents a tabular balance sheet that shows the acres and number of parcels including both uplands and tidelands that are to be exchanged between the parties. The table indicates a net gain of 0.898 acres by ARRC, a net gain of 35.517 acres by DNR Parks and a net loss of 39.690 acres by DOTPF. To a large degree, the net loss by DOTPF is the result of having more of realigned highway corridor being merged into a joint use area within the realigned ARRC corridor. This portion of the new Seward highway corridor will be permitted under the 3/16/12 Public Facilities Master Agreement between DOTPF and ARRC.

2. Milepost 99-105 (NTP2)

- a. 59765 Seward Highway MP 97-105 EF HW2.pdf: Same comments as NTP1 above.
- b. 59765 Seward Highway MP 97-105 EF RR2.pdf: Same comments as NTP1 above.

- c. AREAS-Parcels NTP2.pdf: The table indicates a net loss of 0.848 acres by ARRC, a net loss of 24.765 acres by DNR Parks and a net gain of 9.877 acres by DOTPF.
 - d. For the purposes of the land exchange, the mapping exhibits within NTP2 end at MP 99.5 where the highway and railroad realignments end.
3. Combined NTP 1 & 2 Acreage balances: (Note that the net gain or loss of acreage is not very meaningful at this stage given the effect on value that the nature of interests and encumbrances can have on the parcels to be exchanged.)
- a. ARRC – Net gain of 0.050 acres.
 - b. DNR Parks – Net gain of 10.752 acres.
 - c. DOTPF – Net loss of 29.813 acres.

Land Exchange Authority :

1. ARRC – ARRC has authority to exchange land under AS 42.40.435.⁴² Even though approval to dispose of their full interest in land has been received by the Legislature, it is expected that ARRC Board approval may be required upon final definition of the lands and interests to be exchanged.
2. DOT&PF – The department's statutory authority to exchange excess lands resides in A.S. 19.05.070.⁴³ The intent of the 2001 MOA was to supersede the typical decision making process of the parties to dispose of excess lands. With regard to DOT&PF it is considered to have overridden the regulatory requirement to prepare a decisional document, solicit internal comments and offer the excess lands to other agencies for parks and recreational

⁴² A.S. 42.40.435 Exchange of Land. "The corporation may exchange land subject to AS 42.40.285. [Legislative approval required.] The corporation is an instrumentality and agency of the state for purposes of exchanging land with the United States, municipalities, corporations including corporations formed under U.S.C. 1601-1628 (Alaska Native Claims Settlement Act), and individuals."

⁴³ Sec. 19.05.070. Vacating and disposing of land and rights in land. (a) The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district. Upon filing, title to the vacated land or interest in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the commissioner and set out in the deed.

(b) If the department determines that land or rights in land acquired by the department are no longer necessary for highway purposes the department may

(1) transfer the land or rights in land to the Department of Natural Resources for disposal; or

(2) sell, contract to sell, lease, or exchange land or rights in land according to terms, standards, and conditions established by the commissioner.



purposes. (17 AAC 10.100(b)).

3. Chugach State Park: The authority for DNR to exchange lands on behalf of CSP is found in A.S. 38.50.010-170.⁴⁴ It is presumed that many steps in the approval process have been superseded by the 2001 MOA and the 2000 Legislative approval.
4. Public Notice: The 2001 MOA was likely insufficient to comply with the constitutional public notice requirements for either DOT&PF or DNR.⁴⁵ ARRC is also required to post a public notice prior to a disposal of land. (See previously cited Laverty v. Alaska Railroad Corp.) While Ch. 116 SLA 2000 provided legislative approval for a land exchange and disposal of ARRC and CSP lands, the specific lands to be disposed had not yet been identified and so this approval is likely insufficient to meet the public notice requirement.

Next Steps in the Process

1. Schedule meeting with representatives of the parties in Anchorage to review concerns and view the project area.
2. Due to the significant impact to land value resulting from the transmission and pipeline easements, R&M should provide area calculations as to how much of each easement lies within lands proposed for exchange.

Notes/Questions

1. Is there an August 26, 1993 MOA between ARRC & DOTPF as noted on page 5 of 11 of the MOA? There is an August 26, 1993 MOA between DOTPF and DNR Parks but ARRC is not included in this document. Was a separate MOA was executed with ARRC on the same day?
2. Has NPS been contacted or involved in the land exchange proposal given that they are required to approve the “conversion” of LWCF 6(f) lands and the valuation process?
3. The 2001 MOA expired on October 16, 2011. Is it necessary to expend any effort to extend the MOA? The intent, desire to cooperate and obligations of the parties are generally clear and the legislative authority to proceed with the land exchange is still in effect.

⁴⁴ Sec. 38.50.010. Authorization. “Subject to the requirements of this chapter, the director, with the concurrence of the commissioner, is authorized to dispose of state land or interest in land by exchanging it for land, interest in land, or other consideration. Exchanges shall be for the purpose of consolidating state land holdings, creating land ownership and use patterns which will permit more effective administration of the state public domain, facilitating the objectives of state programs, or other public purposes.”

⁴⁵ Alaska Constitution Section 8.10 Public Notice: “No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.”

4. Do any of the parties question the intended outcome of the MOA? Do any of the parties have changed expectations or previously unidentified legal requirements?
5. Can the parties come to a meeting of the minds regarding Nature of Interests and Valuation of Exchanged Lands?
6. Need to further investigate the DNR Parks issue of accepting relinquished DOTPF highway easement subject to utility permits. Is the issue that they cannot manage lands subject to utility permits, or that the LWCF 6(f) provisions will consider them a “conversion”? Clearly, the level of encumbrance significantly reduces the value of the relinquished easement as compared to unencumbered lands offered in exchange by DNR Parks. Segregating and removing the utility permit areas from the exchange will create oddly shaped and sized parcels with little to no utility. The alternative is that DOTPF retains that portion of the existing highway easement that is encumbered by the utility permits and manage them as a separate corridor. Note: CSP lands prior to the exchanges are already encumbered by these utility easements. The exchange would just add to that inventory. The issue may be establishing a value that considers the effect of the encumbrance.
7. Is the intent of the parties to proceed with land exchange conveyances based on the currently mapped segments once agreement has been reached on the issues or to wait until the four NTP segments have been mapped? Does it also make sense to hold off on the appraisal assignment until all segments have been designed, constructed and mapped? It may be possible to execute land exchange documents on a segment by segment basis with the balance established by an appraisal to be settled upon completion of segment 4.
8. Verify: Are the interests held in the existing Seward highway ROW all PLO/federal grant/DNR easements or permits as opposed to fee or dedication? [There is dedicated ROW in Plat 2013-34 (ASLS 2005-36, ROW sheet 10 of 21, NTP2) and fee acquisition adjacent to Lots 15-20, Chugach Park View Subd. (ROW sheet 17 of 21, NTP2) Both of these areas are beyond MP 99.5 and not subject to the land exchange as a result of the realignments.
9. If DOT&PF is successful with its legislation that could result in them holding fee to the surface estate instead of easements where PLO’s, federal Grants and DNR ROW Permits cross state lands, that will result in a significant change to the basis for exchange, the appraisals and the documents used to transfer excess DOT land interests. DOT&PF should communicate with Dep. Commissioner Rice to see if they intend to pursue the legislation in the next session and if so, if the land exchange should be deferred until the outcome is known.
10. There are some legal issues relating to title interests that may benefit from a review by a DNR or DOT AAG. Do we want to pursue their services now to see if we can resolve some of the issues and determine where we have flexibility and where we don’t?