

From: John Bennett
To: "[Griffin, David W \(DNR\)](#)"; [Burton, Alban L \(DOT\)](#); "[Tom J. Schmid \(tom.schmid@alaska.gov\)](#)"
Cc: [Thomas, Ryan J \(DNR\)](#)
Subject: RE: State Parks and LWCF
Date: Tuesday, December 02, 2014 11:52:00 AM

Dave, I've decided to add comments to your bullet list as well as add a few more bullets. Let me know if you have any questions. See item No. 16. I will need to know whether you will be calling me or a number that I can call you for the Thursday teleconference. JohnB

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From: Griffin, David W (DNR) [<mailto:david.griffin@alaska.gov>]
Sent: Monday, December 01, 2014 2:33 PM
To: Burton, Alban L (DOT); John Bennett
Cc: Thomas, Ryan J (DNR)
Subject: State Parks and LWCF

Al and John,

I'm going to be meeting with our departments AG on Wed. and want to be sure that I have captured a couple of the major issues/concerns I think DOT has regarding projects, conversions, mitigations, etc. for the Seward Hwy within Chugach State Park.

I would love to have a bullet list (in your guys' own words) of questions that you/you're agency has. Examples could include things like:

1. Relinquished ROW and associated encumbrances (SB 235 – Chapter 116, SLA 2000...still valid after 14 years?).
 - Unless there is a general sunset rule for legislation after years of inaction, I would say yes, ch 116, SLA 2000 is still valid. Even the Section 8 provision that the adjusted CSP boundaries be reported by the "first day of the First Regular Session of the Twenty-Second Alaska State Legislature" was qualified with the statement "...or as soon as possible after that date." We are currently moving toward "as soon as possible".
2. Relinquishment of ROW trigger a conversion – even though state to state still triggers a conversion?
 - Depending on the language of the 6(f) grants, the old existing highway ROW may also be subject to the 6(f) provision such that it may not be eligible for use as a "replacement" parcel. Hopefully the grants will say that 6(f) defined boundaries

excluded the existing highway ROW but I can understand the scenario Martha poses if they were not specifically excluded. The old highway ROW was an easement. Additional layers of rights or constraints could be applied to those lands but they would be subject to the prior existing rights of the highway ROW and not become effective until the ROW is vacated. When the highway ROW goes away by vacation, those layered rights or constraints rise to the surface and come into full effect. The LCWF law already says that you cannot use other “park” lands as “replacement” parcels to make up for “conversion” parcels. If the vacated ROW is currently subject to 6(f), then those lands could not be used as “replacement” parcels. This is fairly critical as the relinquishment of the old highway ROW is to a large degree the basis for the original land exchange concept. Another question would arise about whether the highway ROW would have been affected by 6(f) if it was held in fee by DOT rather than an easement. Possibly not. But that issue won’t be resolved unless DOT successfully pursues its legislation this session regarding the nature of highway interest held by DOT. DOT is re-introducing the legislation that the highway rights of way are special interest lands under the constitution and so would have been excluded from the initial creation of the park boundaries. I guess we will just have to wait and see if we need to worry about that.

- If the LWCF grant language includes the Seward Highway ROW and that fact effectively eliminates the use of the vacated easement as trading stock for the “land exchange”, do we have another option? One possibility is an assertion that the Seward highway ROW corridor is held in fee by DOT&PF and that this would have prevented inclusion in the CSP under its forming statutes. Under Title 19 DOT&PF has authority to acquire, manage and dispose of land interests necessary for highways. These lands are held separately from other State public domain lands. In my preliminary assessment report I mentioned the legislation jointly offered by DOT&PF and DNR in the spring of 2014 that would clarify the land management relationship between the two agencies. While the bill was shelved at the end of last session due to time limitations, DOT expects to re-submit it in the coming session. Section 6 of the bill would add a new section to AS 19.05 that would define the surface estate of state highway land and clarify that it is held in fee by DOT. DOT&PF asserts that fee ownership of highway ROW is already the case under the constitution. *“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 (Seward highway Preliminary Assessment report)*

3. What becomes of the existing ROW that’s relinquished?

- The current view is that the CSP is subject to an easement for highway purposes for

the Seward highway. The execution of a Commissioner's Deed of Vacation for the old ROW releases that interest and the CSP lands remain, now unencumbered by the easement. There is nothing in AS 41.21.121 that excluded the Seward highway ROW corridor from the Park boundaries. This is consistent with the easement interest. Once vacated, no other action by DNR/MLW would be required. If a vacation of excess highway easement was the only transaction to be carried out, no change to the current CSP boundaries would be necessary.

4. Road existed prior to statehood – how does park legislation affect this?
 - To the extent that the Seward highway ROW is an easement, it was a prior existing right that subsequent land conveyances, rights, and classifications would be subject to. In the same manner that the Park was subject to pre-existing power and pipeline easements, the Park is subject to the pre-existing highway easement.
5. Legislation states that DOT maintains and repairs existing roads.
 - (AS 41.21.122 Management Responsibility) I'm not sure what the context of this question is but I would expect that like all other roads within the State Highway System inventory where maintenance and repairs are prioritized due to need, condition and funding, DOT maintenance of public roads within the CSP would likely be addressed under that same set of rules. I see nothing in AS 41.21.122 that sets a specific level of maintenance or funding for CSP roads.
6. Is the road part of the park are an "in-holding".
 - Under ANILCA, an "inholding" could include private, state or other non-federal lands or valid occupancies within the boundaries of a CSU or effectively surrounded by a CSU. Under ANILCA, an "inholding" may be a parcel of land or interest in land that may require access across the CSU for use of the parcel. The Seward highway is a public ROW that provides access to other inholders within CSP. How would consideration of the Seward highway ROW as an "inholding" be beneficial or detrimental to the land exchange issue?
7. Did the legislation convey the Seward Hwy ROW to parks, but DOT is required to maintain and repair.
 - If the highway ROW is an easement interest, then the legislation established the CSP subject to the existing highway easement that is managed by DOT&PF under their AS 19 and AS 44.42 authority. I believe that even without the AS 41.21.122 statement that DOT would maintain all public roads within the CSP, DOT has an obligation to maintain (or have maintained) all roads listed on the State Highway System inventory. But the level of maintenance is discretionary according to the availability of funding.
8. Tidelands?
 - This is a difficult issue because as a result of ARRC's title assertions and the lack of clarity as to how they should be viewed: as just another state agency or as a quasi-public corporation. ARRC asserts that to the extent their original 200-foot wide

corridor went out into the tidelands, they owned those tidelands in fee. At this point I don't see the support for that position and I believe they have an easement over the tidelands that the state received at statehood. But because they believe they own the tidelands within their original ROW, they believe that any exchange lands they receive as a part of this "exchange" would include fee title to tidelands as opposed to an easement interest. John Baker's opinion regarding the exchange of lands with USFWL for the Izembek project suggested that without a very specific statement of intent by the legislature, these "public trust" lands could not be conveyed out of state ownership. While ch 116, SLA 2000 provided approval for the CSP boundaries to be adjusted as a result the corridor realignments, there was no language that could be considered a clear intent to dispose of the full tidelands interest. But the question is whether conveying the tidelands in fee to ARRC is considered to be conveying them "out of state ownership". There would be a check on loss of these public trust lands in that under AS 42.49.285(1) ARRC cannot divest themselves of their entire interest in land without legislative approval. Under AS 42.40.360 ARRC may request conveyance of state land that may be necessary for railroad purposes and under AS 42.40.980 the definition of "land" includes tide and submerged lands. So it may be that there is no issue here and DNR/MLW can convey fee title to even the tidelands to ARRC. Because of the fuzziness of this issue, it would just be better if we could get AGO confirmation.

9. Can DNR/Parks grant additional ROW (for instance if current ROW is 300', can we, in some locations, grant a 400' ROW?)
 - There does not appear to be any limiting language in ch 116 SLA 2000 regarding width. It just says that DNR upon a finding of no significant adverse effect, may grant a highway easement to DOT&PF. The 2001 MOA spoke to the existing and relocated 300-foot wide ROW for the Seward Highway. At some point in the future a widened ROW could be required to expand the number of lanes, or to accommodate large cuts or fills, or to construct waysides and parking areas. As the grant of an easement does not constitute a "subdivision" of land it also would not modify the fee boundaries of a parcel including the CSP. Under AS 41.21.122 legislative approval is required to modify the boundaries of the CSP. It is reasonable to assert that a DNR grant of a highway easement that does not change CSP boundaries does not trigger the requirement for legislative approval. An alternative mechanism could be for DOT to acquire new ROW under its Title 19 authority. AS 19.05.080 allows DOT to acquire or condemn land in fee or easement that is reasonably necessary for public use. This includes both land and materials *"notwithstanding the fact that title to it is vested in the state or a department, agency, commission, or institution of the state."* The question is whether a taking of CSP land in fee would still trigger the requirement for legislative approval due to the change in Park boundaries. Although a "friendly condemnation" of DNR lands for the purposes of a land exchange under AS 19.05.110 has been accomplished in the past, DOT generally attempts to secure land interests for ROW from DNR using DNR's Title 38 processes.

10. Bundling of conversion parcels seems possible as long as it makes sense and is doable per appraisal rules.
 - I think Martha (NPS) made the correct call in deferring to the appraiser as to how these parcels should be valued. I believe all of the small “exchange” parcels will be considered as a single “larger parcel” for appraisal purposes. This is common in the appraisal of partial acquisitions for right of way.

11. List of structures/improvements that may be relinquished as a result of the new ROW survey (i.e. utilities, buildings, towers).
 - I think it may be too early to tell until ARRC provides us with their “modified” corridor. It if appears reasonable we will need to adjust the mapping before we can tell what will be available for relinquishment.

12. State Section Line Easements
 - Are CSP lands subject to State SLEs?
 - Yes – CSP formed from state public domain lands. No SLE prohibition in LDA language (See AS 41.21.121-130 - § 1 ch 112 SLA 1979 – effective 8/6/1970)
 - Yes – but most of the section lines in CSP are only protracted at this time. (See Editor’s note: 11 AAC 51.025 Section Line Easements “5. for any surveyed land owned by the Territory of Alaska or the state on or after March 26, 1951 through June 30 1960, the width identified in ch. 123, SLA 1951 for any section-line easement is 50 feet;” & “ 7. for surveyed or un-surveyed land owned by the state on or after July 1, 1960, the width, as identified in AS 19.10.010, is 50 feet.)
 - If not, release of exchange lands from CSP & subsequent conveyance from MLW to ARRC in fee would create SLEs. (AS 19.10.010 “A tract 100 feet wide between each section of land owned by the state, or acquired from the state,...” Also see “11 AAC 51.025”)
 - Review Mapping – how much land are we talking about? (I counted 13 sheets of the draft R&M ROW maps that indicated section lines running through CSP and ARRC lands.)
 - Pt. McKenzie – ARRC says they will not accept lands subject to SLE
 - Option 1 – vacate offending SLEs
 - Option 2 - Can any public access across these SLEs be subject to DNR/MLW Permit requiring ARRC concurrence? If DNR is now “actively” managing all (not DOT) SLEs through LNOs or permits, this might be a solution. ARRC concurrence would be subject to resolution of safety concerns.

- This management resolution would apply both to “exchange” lands conveyed to ARRC lands w/ SLEs and assertion of existing SLEs across current ARRC corridor.

13. Disposition of DOT issued utility permits within vacated highway ROW

- Parks is concerned about their ability to manage utilities permitted by DOT once the highway ROW has been vacated. I don't yet have an inventory of the number and types of permitted utilities that reside in these ROW. Parks said it is less of an issue if they are underground but it may be that the utility strips may need to be defined and removed from the park boundaries such that DNR/MLW could issue an easement for them. This would likely result in a complete segregation of Park land from one side of the utility strip to the other. We need to further discuss alternative solutions.

14. Land Exchange balances

- Our initial mapping holding a 200' wide ROW for the new alignment of the railroad and a 300' wide ROW for the new alignment of the highway suggests that the CSP lands unencumbered by the highway easement would increase by more than 30 acres. This number is currently pending receipt of ARRC's preferred definition of their ROW corridor which may be offset from the rail centerline as opposed to 100' each side of centerline. Also it didn't consider the possibility that the vacated highway ROW would be considered as 6(f) lands or how the permitted utilities in the vacated ROW would be handled. All of this could significantly change the balance but rather than speculate we will wait until we have a better assessment.

15. Release of 6(f) provisions vs. Park boundary adjustment

- At an internal DOT meeting regarding Windy Corner, there was a discussion of whether a release of 6(f) provisions and a Park boundary adjustment necessarily went hand in hand. If we assert that the Seward Highway ROW is an easement interest, then it is likely that the existing highway easement can be vacated or a new highway easement imposed without needing to adjust the Park boundaries. If the highway ROW is asserted to be held in fee, that might resolve the 6(f) underlying the easement issue but would require a change in Park boundaries. There was concern that Park boundary revisions would cause project delays. This may not be an issue as the survey to define the changes is already in progress, the legislation is permitting a boundary adjustment is already in place (my opinion) and the intent is to commence construction at Windy Corner using rights of entry allowing the final documents to be completed at a later date. There may be other benefits to releasing 6(f) provisions over the material

sites while leaving them within the Park boundary, but that is not a part of the "legacy" project that I am involved in.

16. Other????

- Teleconference call in? Dave, in looking at your teleconference invite for the Thursday (12/4/14 10:00-11:00 am) teleconference, I did not see a number for me to call in at. Or should I expect a call from you? If you were to call me my conference room number is 907-458-4305.

Thanks!

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