

# MEMORANDUM

# State of Alaska

## Department of Transportation & Public Facilities

TO:       DATE:

FILE NO:

TELEPHONE NO:

FROM:    SUBJECT:

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474-2413

Disposals/Vacations of  
DOT&PF Managed Right of  
Way Easements

This memo was requested to clarify the process and authority by which the Department vacates rights of way no longer needed for current operations. It was also requested to address the potential vacation of the Mentasta road and a portion of the Old Elliot highway in terms of how it could be accomplished and to predict some of the problems that may be encountered.

### **AUTHORITY:**

The authority for the disposal of DOT&PF rights of way lies within the following Statute:

**AS 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.

(c) Proceeds received from disposal of land or rights in land as authorized by this section shall be credited to the funds from which the purchase of the land was made originally.

## **POLICY:**

The DOT&PF Right of Way manual interprets this statute into department policy under Property Management Section 9.11.00 Excess Land Management and Disposal. This section discusses the disposal procedures for rights of way owned in fee as well as easements. Rights of Way owned in fee that are determined to be excess to the needs of the department can be disposed by sale. This requires that the purchaser pay fair market value for the property so that the Federal Aid project for which the property was acquired can be credited with a refund.

For the purpose of this memo, only right of way easements not purchased as a part of a federal project and therefore eligible for the vacation process will be considered. As the majority of DOT&PF managed rights of way are easements created by Public Land Orders, they will be disposed by a Commissioner's Deed of Vacation.

Before the sale, vacation or relinquishment of any excess department right of way can be made, a determination of need is required. The Right of Way Manual describes this process in Section 9.11.02 Determination of Need.

Before disposal of any property, the various sections within the region (Design, Planning, Maintenance, etc.) are consulted to ascertain if there is any foreseeable need for the property. If so, leasing the land should be considered.

Only those lands that are to be utilized in the foreseeable future shall be leased. All other excess lands should be considered for disposal as promptly as possible and in a manner that will reflect the greatest long-range public benefit.

Right of Way Manual Section 9.11.11 Disposal by Vacation then speaks to the subject at hand as follows:

Lands acquired by dedication (public land order, patent reservation, etc.) for highway right of way purposes are considered easements and are not considered subject to "sale" but are vacated by Commissioner's Deed of Vacation, Exhibit 9-12. **Public notice is not required for these vacations.** (Emphasis supplied) A processing fee of \$200 is applicable to process the vacation request and complete the Deed and notation on the plans.

In proceeding toward such a release of easement, the Regional Chief ROW Agent shall recommend by memorandum to the Director of Design and Construction that a parcel of land is no longer needed for highway purposes and should be vacated.

Upon receipt of approval for release of the easement, a Commissioner's Deed of Vacation shall be prepared by the Regional Chief ROW Agent for official approval by the Director and execution by the Commissioner.

After the Commissioner or the Commissioner's designee has signed the deed, the Regional Chief ROW Agent shall have the deed recorded in the proper recording district. Upon recording said deed, title to the vacated land or interest in land is vested in the owners of the adjacent real property in the manner and proportion considered equitable by the Commissioner and set out by the Commissioner in the deed.

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See AGO Opinion - Nature of property interest/title conveyed to State of Alaska in highway rights-of-way at statehood dated February 19, 1993.

## GUIDELINES:

In addition to the statutory authority and department policy as stated by the Right of Way manual, the Northern Region Property Management unit issues an informational flyer regarding vacations of highway rights of way. This flyer, titled Guidelines for applying for a Commissioner's Deed of Vacation requires as a part of a request for vacation the following:

1. A sketch of the site showing the location.
2. An up to date title report verifying the ownership of the area to be vacated.
3. A \$200 processing fee payable to DOT&PF

## ISSUES & CONCERNS:

Although a seemingly straightforward process, questionable interpretations of the authority and policy that govern easement vacations have in the past and will continue in the future to cause problems for the department. The following is a discussion of several of the issues:

1. **Processing fees** - According to the approved Right of Way manual, certain processing fees are required for several property management activities including disposals of excess lands by sale, relinquishment and vacation. Although these fees represent department policy by virtue of their citation in the ROW manual, they have apparently been instituted without benefit of the regulatory process required by the Administrative Procedure Act (AS 44.62). The requirements for following a regulatory procedure has been most recently recognized by the department when attempting to establish new lease rates for airport properties. This particular problem was resolved by enactment of legislation during the 1993 session that partially exempted DOT&PF from the Administrative Procedure Act and allowed the Commissioner to fix fees at the state international airports with the provision that there would be public notice and opportunity to comment prior to an order taking effect.

A review of 17 AAC, the administrative code for DOT&PF indicates that fees for several other activities including rental/lease rates at rural airports, utility permits and industrial use highway permits were instituted through the regulatory process. Given this background it is unlikely that the current property management fees which were enacted without benefit of regulation could withstand a challenge.

Therefore, unless there is another process that allows the department to initiate fees for services, the property management fees should either be dropped or validated by regulation.

2. **Recording/Title requirements** - Prior to 1988, Commissioner's Deeds of Vacation did not list a specific Grantee. This was due to the fact that the Deeds of Vacation were essentially releasing the highway easement, therefore allowing the unencumbered use of the fee estate to return to whomever held title of the fee estate. In principle this procedure was appropriate but in fact it created problems for anyone attempting to prepare a title report for a particular parcel. Generally, documents affecting a property can be obtained from the Recorder's office by using indices listing a Grantor, Grantee, or location. With regard to a CDV, searching for the "State of Alaska" as Grantor would require the review of thousands of irrelevant documents due to the large number of documents produced by various agencies of the State. There could be no search of a CDV by Grantee as no Grantee was named. A search by location description is usually the least desirable due to the generality and inaccuracy of the abbreviated descriptions used in the indices.

In 1988, A.S. 40.17.030 was enacted which required among other things that the document provide the names and addresses of the Grantor and Grantee for indexing purposes.

This provision requiring the naming of Grantees creates two problems for the department. First, it implies that DOT&PF is conveying an interest to an individual as opposed to releasing an encumbrance. Second, the department incurs a potential liability by creating wild deeds when the title to the underlying fee estate is questionable and we name the Grantee erroneously.

Early in 1993 we requested that our local AGO provide appropriate and specific wording for a title disclaimer. The AGO verbally replied that a disclaimer would not necessarily provide the protection we sought as the State would likely be named in any suit due to our "deep pockets". The AGO recommended that we either require the applicant to provide a title insurance policy for the area to be vacated naming the State as beneficiary or to cease executing vacations altogether. In either case, they would not issue a written opinion as they believed that this was a statewide issue that should be pursued by a formal request for an opinion through our Commissioner.

As there were requests for vacations being processed while we were waiting for advice from the AGO, we decided that it would not be acceptable to deny all vacation requests or to further burden the process by requiring title insurance. Therefore, we elected to formulate our own title disclaimer.

In a recent vacation of the Copper River Railroad loop line at Chitina, where clear title to property has long been questionable, we included a disclaimer referenced to the Grantee's name. The disclaimer states that *"The Grantee named is the ostensible owner and is named for recording indexing only. The unencumbered use of the land underlying the vacated easement reverts by operation of law to the owner of the fee estate, whomever that may be."* Even with this disclaimer, there were accusations of impropriety made against the department for naming a particular Grantee when there arose a dispute over title to the underlying estate.

If problems continue with regard to this issue, it is recommended that management either request a formal opinion which discusses the department's liability in vacating rights of way and whether a disclaimer can limit that liability or as an alternative, require the applicant to provide title insurance prior to execution of the deed.

3. **Conflicting jurisdictions** - The department utilizes various types of rights of way such as PLO easements, subdivision dedications, section line easements and patent reservations for roads, all of which have differing procedures for disposal. As previously discussed, the department has authority under A.S. 19 to dispose of rights in land acquired for highway purposes. Subdivision street rights of way that have been dedicated by virtue of a local platting authority may be vacated according to AS 29.40.120 and more specifically through the respective platting ordinances of the local authority. Section line easement vacations fall under the jurisdiction of DNR's administrative code which requires public notice, a plat, the concurrence of the

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A.S. 29.40.120 Alteration or replat petition. A recorded plat may not be altered or replatted except by the platting authority..... A platted street may not be vacated, except on petition of the state, the borough, a public utility, or owners of a majority of the land fronting the part of the street sought to be vacated.

Commissioners of DNR and DOT&PF as well as local platting approval if applicable. The vacation of a patent reservation for road purposes that is not a part of the DOT&PF system would require local platting approval within organized boroughs or the approval of DNR in the unorganized borough.

Generally, in the past there have been few conflicts of jurisdiction. One recent conflict occurred in 1991 when the planning director of the Fairbanks North Star Borough claimed that DOT&PF had violated AS 29.40.140 Hearing and determination when it executed a Commissioner's Deed of Vacation for a portion of Airport road that was established by a Public Land Order. The claimed violation was due to the fact that the department had not complied with the portions of Title 29 which requires a public hearing and local platting approval on vacations of public rights of way. The FNSB stated that they did not believe that DOT&PF had authority to vacate highway rights of way within organized boroughs under A.S. 19. This was the first instance to our knowledge that any local government had questioned the department's authority to vacate highway rights of way. In response, the DOT&PF Regional Director stated that A.S. 29 applied only to platted streets created by local platting authorities through the dedication process. It also stated that in situations where the department intended to vacate a right of way created by dedication to the public on a subdivision plat, it would follow the appropriate procedure according to the ordinances of the local platting authority.

Given that rights of way may be created in several ways, there exists the potential for different types of rights of way to be layered on top of each other. Therefore it is necessary to recognize that a Commissioner's Deed of Vacation which releases a PLO right of way would have no effect on an RS-2477 trail right of way or a plat dedication which exists in the same location.

For example, in 1991 as a part of a negotiated settlement during the acquisition of the South Fairbanks Expressway, the department agreed to vacate a portion of the Old Richardson Highway which intersected Cushman Street at 27th avenue. The right of way was originally created by a road right of way deed conveyed by the owner to the Alaska Road Commission in 1941. Subsequently, the same right of way was dedicated to the public as a part of the Bjerremark Subdivision plat. It was therefore determined that a Commissioner's Deed of Vacation would be required to release the original ARC easement, and a vacation plat would need to be submitted to the FNSB platting board in order to release the subdivision dedication.

In conclusion, a CDV can only release that interest in a right of way that the department has authority to release. Therefore, a party requesting a vacation of right of way should be aware that a public easement of another kind may still exist after DOT&PF releases its interest.

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A.S. 40.15.075 Authority in the unorganized borough and third class boroughs. The Department of Natural Resources is the platting authority in the area outside organized boroughs and outside cities in the unorganized borough and in the third class borough for only the purposes of hearing and acting on petitions for the change or vacation of plats....

Letter From John Horn to Rex A. Nutter dated May 21, 1991. Re: Vacation of Highway Rights of Way.

DNR is currently processing a draft rewrite of 11 AAC 53, the regulations which govern their surveying procedures. This draft also addresses Vacations of RS 2477 Rights of Way under 11 AAC 53.256. This process will require a public notice and hearing, a plat, and possibly the dedication and construction of alternate access. Procedures for section line easement vacations are described under 11 AAC 53.255.

4. **Public involvement** - Currently, requests for comments on vacations of department rights of way are circulated internally. Additionally, comments are now being requested from DNR and Fish & Game on a courtesy basis. As previously stated, the DOT&PF right of way manual claims that public notice is not required for lands disposed by vacation, where interests disposed by sale or lease do require public notice.

A provision requiring public notice can be found in the Constitution of the State of Alaska as follows:

Article VIII Natural Resources, Section 10. Public Notice. No disposals or leases of state land, or interest therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

DOT&PF Headquarters personnel have previously stated that our exemption from this provision lies in the fact that a right of way easement is not an interest in State land, but an interest the State holds in the land of another. While this logic is in itself questionable, a larger problem results when access to public or private lands are unilaterally eliminated because the department has not adequately considered the current or potential uses of a road right of way.

We are aware of situations where a parcel adjoining a highway right of way has become landlocked due to a vacation because the fee estate underlying the highway right of way was under different ownership. There has also been a recent situation where a request was made to vacate a section of right of way but was rejected due to the comments of several adjoining property owners and interested agencies. The comments received in that case were unsolicited as there had been no public notice. There are likely to be several other situations where rights of way have been vacated to the detriment of an individual, agency or utility that were not contacted for input.

Avoiding public input has the positive effect of streamlining the process and I am only aware of one benefit that the department derives from this. During the negotiation process, an offer may be "sweetened" by suggesting that the department would approve and process a vacation of excess rights of way throughout the project. With a public hearing process the offer of a vacation could have a significant added cost and would be subject to the results of the public and agency input.

It is recommended that the department policy be changed to require some form of public notice such as advertising, notice by mail or public hearings. I believe that we are in a very weak position to defend our current policy and its negative effect of antagonizing the agencies, utilities and individuals who are not consulted during one of these actions and subsequently have their access limited.

5. **Surveys & Mapping** - An area to be vacated must be able to be described such that there is no ambiguity as to its location on the ground. The majority of our highway easements were conveyed to the State by virtue of the 1959 Omnibus Act Quitclaim deed. Many of these easements, both on and off the current highway system are without benefit of a survey or mapping and are described only as a fixed width on either side of an as-built centerline. It is possible to vacate an interest in a road right of way by granting a blanket vacation within a particular parcel. It is more difficult to describe the limits of the vacation particularly where the right of way to be vacated ties into right of way that is to be retained. There is also a problem

where multiple or braided trails create an ambiguity that cannot be solved by a blanket vacation. Typically, the department bears the expense of preparing plats and descriptions of areas to be vacated.

It is recommended that the parties requesting a vacation of right of way be required to submit a plat and description prepared by a licensed land surveyor according to specifications defined by the department. In situations where the record information is insufficient to define the right of way to be vacated, the applicant would also be required to have a survey performed.

- 6. Compensation/Value** - Periodically, the issue arises of whether compensation should be received for the vacation of a highway easement or whether the department can trade an area vacated for another area that it requires.

The DOT&PF ROW manual states that these easements are not considered to be subject to "sale". Previous discussions with FHWA have suggested that they would not support the concept that compensation was required to vacate an easement primarily because the State received the easements at no cost. An exception to this would be a highway easement that was acquired using Federal Aid funds and the fair market value amount is more than \$2000. In this case, compensation must be received for the vacation and a refund made to the federal agency.

The issue of trading vacated area for a new area was decided in the Alaska Supreme Court case Vezev v. State in 1990. The Court ruled that the state's vacation of its pre-existing right of way was not a special benefit which could be set off, and could not be considered part of the just compensation to which the condemnee was entitled.

A Superior court decision regarding the "Parrish" acquisition on the South Fairbanks Expressway suggested that the fee estate underlying a section line easement had only a "nominal" value. This decision suggested that an area encumbered by a highway easement had such limited use to a property owner, that the majority of the value resided with the easement interest.

Although this may suggest that value can be derived from the vacation of unnecessary easements, the question of whether we should extract compensation for a easement vacation is subject to debate and should be left for management to decide.

## **SPECIFIC CASES:**

- 1. Mentasta Road** - This involves a loop of the Old Glenn Highway which was realigned prior to Statehood in 1951 and redesignated as FAS "B" Route 8921 "Mentasta Spur". This road loops around Mentasta lake and has been a constant thorn in M&O's side due to villager's claims that it is a private road. These claims have been periodically asserted through the building of barricades across the road and the placement of signs which claim that travel on the road can only be by virtue of permission from Mentasta village.

The department's historical claim for a public right of way was validated in 1991 when we prevailed in an IBLA decision against a Native Allotment which straddled the road. This decision clearly stated that there existed a highway easement along the Mentasta Spur of 50 feet on each side of centerline.

The majority of the lands served by the Mentasta road have been IC'd or patented to the

Mentasta Village Corporation or to the Ahtna regional corporation. The road also provides access to several individual native allotments and some state land on the south end. There are also some state "Open to Entry" tracts along the southerly edge of Mentasta lake. These OTE's came into existence at a time when both the state and the native corporations had conflicting selections around Mentasta Lake. As a result of a suit, the native corporations were IC'd the lands subject to the "OTE's" that had been staked. It does not appear that any of the "OTE's" have access directly from the Mentasta road and that access is likely to be by floatplane.

It also appears that the northerly portion of the road is used as access from the Glenn Highway to an RS 2477 trail that leads to Mankommen Lake to the West. The issue of "layered" rights of way comes to light on this road as a substantial portion of the Mentasta loop road also appears to be coincident with the "Eagle" trail which is one of the most heavily documented and historically important RS 2477 trails.

**Recommendation:** If the department wishes to consider vacating this road in order to alleviate management problems, the two primary issues that will require consideration are those of public involvement and conflicting jurisdictions.

We have made a best guess at determining who uses this road by virtue of the adjoining land status. It is more difficult to determine who uses the road to access other easements, such as the access to Mankommen Lake. In order to flush out all of these uses a notice of the proposed vacation should be advertised in several papers including local papers in Tok and Glennallen. Notices should also be sent to agencies, utilities, the appropriate native corporations and to BIA as representative of the native allottees. Only after a suitable period of time has passed for comments should further action on vacation be considered.

The issue of conflicting jurisdiction is most relevant in this case. As it appears that the Eagle trail is nearly coincident with the Mentasta Spur over a large percentage of the loop, a vacation of the PLO right of way will still leave an RS 2477 right of way undisturbed. As the native corporation lands were selected after 1966, the state would claim a right of way of 50 feet on each side of centerline for the trail. Given the emphasis this administration has placed on RS 2477, it is unlikely that much consideration would be shown for a proposed vacation of the Eagle trail.

Therefore, although it is possible for the department to vacate our interest in the PLO right of way and cease maintenance activities, it may be pointless because a public right of way will still exist.

- 2. Old Elliot Highway** - The section of the Elliot highway in question begins at approximately milepost 65 and heads northwesterly for about 6 miles to Livengood. It passes primarily through sections 22, 23, 26, 25 of T.8N., R.5W., F.M.. The land has generally been tentatively approved for conveyance to the State of Alaska, however, it is subject to several patented and unpatented federal mining claims as well as a fairly complete overlay of state mining claims. The PLO right of way for the Old Elliot may be either 100 feet on each side of centerline or ditch to ditch depending on the status of the federal mining claim entries.

This portion of the Old Elliot was isolated by construction and realignment of the New Elliot in 1979. The Old and New road intersect at the East end of section 25 although a cut bank at that location makes access between the two impossible. A temporary access road through

U.S. Survey 1958 has been used since 1979 until 1990 when the owners notified DOT&PF that the access road was in trespass. Initial attempts to negotiate with the owner were unsuccessful and it was decided that access at that end was not critical and would therefore not be further pursued.

On June 14, 1990, the Northern Region D&C Director commented by memo that "it is important to maintain access from the New Elliott Highway to the Old Elliott Highway at or near MP 65. Sportsmen, miners, area residents, and tourists use the existing access road." By this memo the ROW section was directed to pursue another location for an access road in the vicinity. At this time, M&O forces have constructed a 400 foot long access road on the westerly boundary of USS 1958 under permit from DNR.

Besides our current activity to maintain access to the Old Elliot, we have been working on resolving our radio site occupancy problems on Smokey Dome. The vehicular access for Smokey Dome is from the Old Elliot approximately half way between Livengood and our newly constructed access road.

**Recommendation:** In this case, the logic of vacating the Old Elliot right of way escapes me as we still require access to the radio site, and as we have just completed construction of an road to provide access to the Old Elliot. Also, the surrounding lands, which are almost entirely encumbered by federal or state mining claims would benefit from continued public access.

As recommended in the above Mentasta Spur case, should vacation be considered, it should be after an effort has been made to contact all private parties and agencies through notice or advertisements.