

MEMORANDUM

State of Alaska

Department of Law

TO: Tom Schmid, P.E.
Dept. of Transp. & Pub. Fac.

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FILE No: JU2015200072

FROM: Sean Lynch
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SUBJECT: Seward Highway
Right-of-Way Ownership

You asked whether the Department of Transportation and Public Facilities (DOT)¹ holds a fee interest in the Seward Highway right-of-way where the highway passes through the Chugach State Park. You also asked whether DOT can convey portions of its right-of-way to the Department of Natural Resources (DNR)² and to the Alaska Railroad Corporation (ARRC) as part of the Seward Highway realignment project.

The short answer to both of your questions is “yes.” As explained in detail below, DOT received title to the Seward Highway right-of-way pursuant to a 1957 authorization by the Alaska Legislature. DOT is fully authorized to exchange or dispose highway rights-of-way that are no longer necessary to DOT’s needs. Therefore, DOT can convey excess right-of-way to DNR and ARRC as part of the Seward Highway realignment project.

I. DOT was empowered to receive the Seward Highway right-of-way.

In the first legislative session following the ratification of the Constitution of Alaska, the Territorial Legislature created the Alaska Highway and Public Works Department for the purpose of “carrying out a highway planning, construction, and maintenance program which will provide ... a network of highways linking together cities and communities throughout Alaska.”³ The newly created highway department was authorized to “purchase, acquire, take over, or condemn” private land and public

¹ This memorandum uses the acronym “DOT” to identify the Department of Transportation and Public Facilities and all predecessor agencies.

² This memorandum uses the acronym “DNR” for the Department of Natural Resources and the department’s land division.

³ 152 SLA 1957, tit. I, art. I, § 2.

land deemed necessary and reasonable for the highway use.⁴ More specifically, the department was empowered to “accept and dispose of Federal funds or property available for highway and public works construction, maintenance, equipment or other like purposes.”⁵ Therefore, when Alaska statehood was proclaimed in 1959 the predecessor agency to DOT was the executive branch agency empowered by law to receive all federal property dedicated to highways.

Shortly after statehood, the Alaska Legislature created DNR’s Division of Lands—the predecessor to DNR’s Division of Mining, Land and Water—which was the agency authorized to “manage, inspect and control all Alaska lands and improvements thereon belonging to Alaska and under the jurisdiction of the Division.”⁶ DNR’s original powers recognized DOT’s authority to independently acquire and dispose real property,⁷ which indicates the Legislature’s acknowledgement that transportation and public facility properties were not under the jurisdiction of DNR. In the second session of the first Alaska Legislature, the Alaska Land Act was amended to clarify “The provisions of this [Alaska Land] Act shall not apply to any power, duty or authority now or in the future granted to the Alaska Highway and Public Works Department.”⁸ Thus, DOT’s explicit authority to receive highway property from the federal government, and to dispose of the same, was unaltered by the Legislature’s creation and empowerment of DNR’s land division.

On June 25, 1959, the Alaska Omnibus Act became effective and authorized the federal government to transfer government purpose properties to the State of Alaska, including highways, airports, and public facilities.⁹ Five days later the United States issued the Omnibus Quitclaim Deed (OQD), which released to the State of Alaska all rights, title and interest held by the Department of Commerce (which included the federal Bureau of Public Roads) in certain federal properties, including the Seward Highway. In June 1959, and continuing to this day, DOT was the only state agency authorized to “accept and dispose of Federal funds or property available for highway and public works

⁴ *Id.*, at tit. IV, art. I, § 1 (codified at AS 19.05.080).

⁵ *Id.*, at tit. I, art. III, § 2 (codified at AS 19.05.040(9)).

⁶ 169 SLA 1959, art. II, § 5(2) (codified at AS 38.05.035(2)).

⁷ 169 SLA 1959, art. XIII, § 3.

⁸ 61 SLA 1960, § 20 (codified at AS 38.05.030(b)).

⁹ P.L. 86-70, §§ 21, 35, and 45, respectively; 73 Stat. 141 (1959).

construction, maintenance, equipment or other like purposes.”¹⁰ Therefore, the OQD transferred to DOT the constructed Seward Highway, and a 300-foot wide right-of-way for the length of the highway corridor, that was formerly held and managed by the federal Bureau of Public Roads.

For decades to follow, state and federal land management agencies argued whether the OQD transferred a fee interest or an easement interest for the state highway rights-of-way. That debate became mostly academic once the Alaska Supreme Court indicated its unwillingness to decide the fee vs. easement issue in a way that would partially invalidate certain patents issued by the federal government after statehood.¹¹ This memo does not attempt to resolve the decades-long debate, as both sides of that argument lead to the same result of DOT holding fee title to the Seward Highway right-of-way. As examined more fully in Section III of this memo, it is important to understand that the federal government could have retained no more than two property interests in the Seward Highway right-of-way when the infrastructure was transferred to the state under the OQD. In order to properly track the property interests and related management authorities transferred under the OQD, and then under the state selection process, one must remain cognizant of the federal government’s disposal of the two last sticks in the bundle of sticks: a reversionary interest and an interest in authorizing non-highway uses of the OQD properties.

II. DNR’s and DOT’s land management authorities align with the Alaska Constitution’s classifications of state land.

The Alaska Constitution’s Article VIII authorizes the Legislature to provide for the administration of three types of state land. Article VIII, Section 5 authorizes laws for the administration of public facilities and transportation systems,¹² which includes

¹⁰ 152 SLA 1957, tit. I, art. III, § 2; AS 19.05.040(9).

¹¹ *State, Dep’t of Transp. and Pub. Fac. v. First National Bank of Anchorage*, 689 P.2d 483, 486 at fn. 13 (Alaska 1984)(“The government should not be permitted retroactively to invalidate the deliberate actions of its officers after they have been reasonably relied on for 34 years.”); *See also*, AS 09.45.015 (presumption of a less-than-fee interest in the OQD highway rights-of-way in those post-statehood federal patents issued to private parties).

¹² **Article 8, Section 5. Facilities and Improvements.** The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and water.

state highway facilities.¹³ Article VIII, Section 6 authorizes laws for the administration of the public domain,¹⁴ which by definition was designed to exclude highway facilities.¹⁵ Article VIII, Section 7 authorizes the legislature to designate areas of the public domain for specific purposes,¹⁶ and to close those lands from general public domain disposal authorities.¹⁷ Each of the competing land management authorities in the Seward Highway corridor originates under one of the Constitution's three state land classifications.

¹³ “[Article 8, Section 5’s] purpose is to authorize the state to provide those aids and facilities which might assure the fuller utilization of resources, such aids as roads, for example, to undeveloped areas. ... We don’t know what the legislature will provide, but it is enabled, in this language, to enter such areas should that be its wish.” Burke Riley, Secretary Resources Committee, Alaska Constitutional Convention, Proceedings Part 4 (January 17, 1956), page 2451-2452.

¹⁴ **Article 8, Section 6. State Public Domain.** Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.

¹⁵ “The State public domain is defined to include all lands and interests therein that are acquired by the State except for (1) lands used or intended to be used exclusively for governmental operations, and (2) those sites and areas that have been acquired or reserved for special scenic, historic, cultural, recreational, or scientific interest.” Alaska Constitutional Convention, Resources Committee Commentary on Article VIII (January 16, 1956), page 4.

¹⁶ **Article 8, Section 7. Special Purpose Sites.** The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.

¹⁷ “[Article 8, Section 7] reflects some delegate proposals whereby particular areas or sites may be set aside apart from the disposable public domain for their historic, recreational, or cultural interest of the people.” Burke Riley, Secretary Resources Committee, Alaska Constitutional Convention, Proceedings Part 4 (January 17, 1956), page 2452.

Pursuant to these constitutional powers, the Legislature made DOT “responsible for the planning, construction, maintenance, protection, and control of the state highway system.”¹⁸ To carry out those responsibilities the Legislature empowered DOT to acquire and dispose real property, specifically including the power to accept federal highway funds and property.¹⁹ In July 1960, DOT completed the transfer of all formerly federal-owned highway properties from the federal Bureau of Public Roads and took title to these properties on behalf of the state.²⁰ DOT’s authority to hold and manage these highway properties has continued unbroken since statehood.

Since statehood, DNR has been likewise empowered to hold, manage and dispose state land.²¹ The Alaska Land Act (ALA) defines ‘state land’ or ‘land’ to mean “all land ... or resources belonging to or acquired by the state.”²² Read expansively, the ALA definition of state land contradicts statutes granting DOT independent authority to hold

¹⁸ 152 SLA 1957, tit. I, art. III, § 1; AS 19.05.010.

¹⁹ 152 SLA 1957, tit. I, art. III, § 2; AS 19.05.040.

²⁰ “[DOT] Commissioner Richard A. Downing received a telegram from the Bureau of Public Roads, Washington, D.C., advising that the Department of Commerce had certified that Alaska now has an operating highway department so that we are in a position to assume all duties and responsibilities of the State Highway Department as of July 1st. Also, the Bureau of Public Roads advised that the transfer documents had been signed transferring all of the property previously controlled by the Bureau to the State so now ‘we are in a position to operate on our own.’ [DOT] Commissioner Downing stated that he felt that the State was doing what it should do, that is, taking over on July 1, 1960, instead of waiting until June 30, 1964, as the State could have done under the Omnibus Bill.” Department of Public Works, Alaska Reporting Service Report No. 41 (July 4, 1960). *See also*, Department of Public Works, Alaska Reporting Service Report No. 42 (July 11, 1960)(“On the 6th of July Governor William A. Egan signed the transfer documents of all federally controlled property in Alaska previously controlled by the Bureau of Public Roads with reference to the functions assumed by the state. The papers had been sent to the Governor from Washington, D.C. The [DOT] Commissioner estimated that the value of the property transferred, including buildings and equipment and supplies, would run from twenty to forty million dollars. The [DOT] property division now is busy checking the inventories and setting up property control records.”).

²¹ 169 SLA 1959, art. II, § 5; AS 38.05.035.

²² 169 SLA 1959, art. I, § 2; AS 38.05.965(24).

and manage property for state-owned infrastructure.²³ However, reading the ALA definition of ‘state land’ to include state-owned land other than the Constitution’s Article VIII, Section 6 state public domain would lead to peculiar results. For instance, the ALA authorizes DNR to lease state land for mining, mineral extraction, and other commercial developments.²⁴ Read expansively the ALA would appear to make the state’s transportation and operations infrastructure available for lease to commercial and industrial developers. The ALA’s constitutional authority for commercial leasing only authorizes leasing of the public domain,²⁵ which by definition excludes government infrastructure property;²⁶ thus, the ALA’s definition of ‘state land’ could not have been intended to extend DNR’s commercial leasing jurisdiction to the state’s transportation and operations infrastructure.

Similarly, the Constitution authorizes the Legislature to reserve portions of the public domain for the state’s preservation and administration of sites having historic, cultural, recreational, or scientific value.²⁷ Since the Constitution’s definition of state public domain excludes government infrastructure properties, when the Legislature designates a special purpose site to be closed from the multiple purpose management of the state public domain—such as the Chugach State Park—the special purpose site does not include any single purpose state transportation properties that may be located within the designated area.²⁸ If the Legislature established a special purpose site to include state-owned properties from outside the state public domain—such as exclusive

²³ AS 02.15.070 (airports); AS 19.05.080 (highways); AS 35.20.010 (public facilities).

²⁴ AS 38.05.205; AS 38.05.135; AS 38.05.070, respectively.

²⁵ Const. art VIII, § 8.

²⁶ Const. art VIII, § 6.

²⁷ Const. art VIII, § 7.

²⁸ *See e.g.*, AS 41.21.120 (“Purpose of AS 41.21.120 – 41.21.125. Under AS 38.05.300 [Alaska Land Act], state land, water, or land and water containing more than 640 acres may be closed to multiple purpose use only by act of the legislature. Because the area described in AS 41.21.121 [Chugach State Park designation] exceeds 640 acres, AS 41.21.120 – 41.21.125 are intended to provide for the closing of the described land and water to multiple purpose use in conformity with AS 38.05.300 and its subsequent designation as a special purpose site in accordance with art. VIII, § 7, of the Constitution of the State of Alaska.”).

government purpose transportation properties—the Legislature would be acting in excess of its authority under the Constitution’s Article VIII, Section 7. Inclusion of a state transportation property into a legislatively designated special purpose site would also create unresolvable property management dilemmas, where state laws and federal funding requirements would require two separate government agencies to manage the same property for two incompatible restricted uses.

The legislation that established the Chugach State Park, by reserving land from the state public domain, expanded DOT’s maintenance responsibilities to the public roads within the park.²⁹ Therefore, DOT became responsible for state-owned roads within the park, like the access road to the Eagle River Nature Center, even though the park roads are not part of the state highway system. The Legislature also gave DNR the authority to control highway access from and roadside structures adjacent to state-owned roads within the park, like the Rainbow Valley Road, which are authorities normally reserved to DOT.³⁰ Of course, DNR and DOT would have to coordinate and align the exercise of their respective road powers along the perimeter of the 300 foot right-of-way (i.e., DNR would not have unfettered discretion to locate a driveway or road at the highway right-of-way perimeter), as DOT’s powers to manage and control the state highway rights-of-ways must be exercised in conformance with the geometric and safety standards of the American Association of State Highway and Transportation Officials.³¹ The Legislature’s grant of limited powers to DNR for control of roads within the park and the Legislature’s expansion of DOT’s maintenance responsibilities to include park roads should foster agency cooperation for the benefit of the park. These slight modifications to the agencies’ existing authorities certainly cannot be read to eliminate DOT’s authority to control, protect, and manage the Seward Highway corridor.

Reading the state’s land management authorities in unison and consistent with Article VIII of the Constitution, DOT holds title to the rights-of-way for state-owned transportation facilities and exclusively manages those properties as government purpose facilities under the authorities of its statutes and regulations. DNR likewise holds title to

²⁹ AS 41.21.122 (“... the Department of Transportation and Public Facilities is responsible for the repair and maintenance of all existing public roads within the park.”).

³⁰ *Compare*, AS 41.21.122 (“The control of highway access and roadside structures within the Chugach State Park is the responsibility of the department [DNR].”); and AS 19.05.040(5) (“The department [DOT] may control access to highways”); 17 AAC 10.020-10.095 (DOTs regulations and standards for driveway and approach road permits).

³¹ AS 19.10.160.

the state public domain and manages those properties under the multiple use and sustainable yield requirements of its statutes and regulations. In the context of the Seward Highway corridor, DOT owns and has management authority over the 300 foot highway right-of-way and DNR owns the adjacent Chugach State Park, which is managed by DNR's Division of Parks for the attributes and values identified by the Legislature.

III. DOT holds fee title to the Seward Highway right-of-way.

In the years leading up to statehood, the United States Secretary of the Interior issued a series of public land orders ("PLOs") withdrawing from the public domain sufficient lands for the construction, maintenance, and operation of the highways located within the Territory of Alaska.³² On October 16, 1951, 150 feet of land on each side of the centerline of "the Seward-Anchorage Highway (exclusive of that part thereof within the boundaries of the Chugach National Forest)" was ordered "withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and reserved for highway purposes."³³ Under the original PLOs, and until the eve of statehood, the highway rights-of-way for the Territory of Alaska were exclusively held and managed by the Department of Interior's Alaska Road Commission and, later, the Department of Commerce's Bureau of Public Roads.

In 1956, Congress authorized the federal government to revoke earlier issued PLOs concerning land in Alaska to allow a more simplified transfer of highway infrastructure without surveys of the underlying public lands and to allow the disposal of excess highway and utility rights-of-way.³⁴ On April 7, 1958 the Secretary of the Interior issued PLO 1613 that converted to easements those specific federal highway and utility properties earlier withdrawn from the public domain.³⁵ PLO 1613 also standardized the width of the federal highway corridors in Alaska at 150 feet on each side of the centerline, which reduced the width of the Alaska Highway right-of-way from 600 feet wide to 300 feet wide.³⁶ Lands outside the newly standardized right-of-way corridor on

³² The federal government's issuance of PLOs for public roads in Alaska is discussed in detail in *First National Bank*, 689 P.2d 483 (Alaska 1984), and in *Hahn v Alaska Title Guaranty Company*, 557 P.2d 143 (Alaska 1976).

³³ PLO 757; 16 Fed. Reg. 10749.

³⁴ P.L. 892; 70 Stat. 898.

³⁵ 23 Fed. Reg. 2376, ¶¶ 1-4.

³⁶ *Id.*, ¶ 1.

the Alaska Highway were released from the single-purpose management authority of the Bureau of Public Roads and transferred to the federal government's public domain management agency—the Bureau of Land Management—for that agency's management and disposal.³⁷ PLO 1613 did not divest the Bureau of Public Roads of its exclusive authority to manage the lands within 150 feet of centerline of the identified highways in Alaska, including the Seward Highway, and the order directed that the highway rights-of-way “shall not be occupied or used for other than the highways.”³⁸ Consistent with the highway corridors' new status as easement interests, PLO 1613 required the Bureau of Public Roads to seek consent from the underlying property owner prior to authorizing a non-highway occupation or use within the boundaries of the newly created federal highway easements.³⁹

Thus, on the eve of statehood the Seward Highway had a 300 foot wide easement that was dedicated exclusively for transportation purposes, and the Bureau of Public Roads had complete authority over the management and control of the highway and the associated right-of-way. Viewed as property rights comprising a bundle of sticks, the Bureau of Public Roads held all but two sticks in the bundle. The owners of the underlying lands crossed by the Seward Highway easement retained the two “non-highway” sticks: 1) a reversionary interest if the purpose of the easement was no longer necessary; and 2) a right to withhold consent to proposed non-highway uses or occupations within the highway right-of-way.

Upon statehood Congress directed that the federal government “shall transfer to the State of Alaska by appropriate conveyance without compensation ... all lands or interests in lands ... pertaining to roads in Alaska which are owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska.”⁴⁰ Pursuant to that authority, the United States issued the Omnibus Quitclaim Deed that “does hereby devise, release, and quitclaim unto the State of Alaska ... all rights, title, and interests of the Department of Commerce in and to all of the real properties ... now owned, held, administered, or used by the Bureau of Public Roads in Alaska.”⁴¹ The dissimilar descriptions of property interests in the congressional directive

³⁷ *Id.*, ¶¶ 7-10.

³⁸ *Id.*, ¶ 6.

³⁹ *Id.*

⁴⁰ Alaska Omnibus Act, 73 Stat. 141, § 21(a).

⁴¹ Omnibus Quitclaim Deed, p. 1, ¶ 1.

and the conveyance deed led to the decades-long debate whether all of the United States' interests or just the Department of Commerce's interests in government infrastructure were transferred to the State of Alaska by the OQD.⁴² For the purposes of analysis, this memo will consider the transfer of federal property rights to the State of Alaska under the OQD as a transfer of less-than-fee interests—which would be a transfer of all the sticks in the bundle of sticks with the exception of the two “non-highway” sticks: a reversionary interest and a requirement of consent for non-highway uses of the highway rights-of-way.

At statehood, Congress similarly entitled the State of Alaska to select from “public lands of the United States in Alaska which are vacant, unappropriated, and unreserved” to create a state public land base.⁴³ The first Alaska Legislature, following the Article VIII, Section 6 mandate to develop and manage the state public domain,⁴⁴ empowered DNR to “select, accept and secure by any necessary action in the name of Alaska ... any lands ... available to Alaska.”⁴⁵ The infrastructure in Alaska for transportation and government operations was not vacant, unappropriated, or unreserved, so these exclusive government use properties would not be available for a targeted selection of federal land to be included in the state public domain. However, highway properties were included in the state land selections by way of DNR identifying townships and sections that were crossed by the highway easements. The records from Governor Egan's first cabinet show that DNR was occupied with preliminary issues regarding the selection of federal lands during the period of time DOT was selecting federal properties for the state's operational

⁴² The Office of the Attorney General has issued contradictory opinions on this matter, taking both sides of the debate. 1985 Inf. Op. Att'y General (May 20, 1985; 1985 WL 70133)(“By virtue of the quitclaim deed issued by the United States Department of Commerce to the State of Alaska, any and all interests of the United States that existed in that right-of-way segment was transferred to the State of Alaska.”); 1993 Inf. Op. Att'y General (February 19, 1993; unpublished)(“[T]he State of Alaska received from the federal government at statehood only a right-of-way easement for its highways.”)

⁴³ Alaska Statehood Act, 72 Stat. 339, § 6(a) & (b).

⁴⁴ “That section [Article VIII, Section 6] also gives the general authority to the legislature for the selection and administration of land in the state public domain. And, with respect to selection, of course, we face the immediate great problem before the state in the selection of some hundred million acres of land, which will be an enormous task and awareness of which has been a very real part of the problem in writing the resource article.” Burke Riley, Secretary Resources Committee, Alaska Constitutional Convention, Proceedings Part 4 (January 17, 1956), page 2452.

⁴⁵ 169 SLA 1959, art. II, § 5(12); AS 38.05.035(11).

infrastructure.⁴⁶ In fact, those records only show a single instance when DNR was involved with the selection and transfer of Alaska Omnibus Act properties, and that was for the transfer of recreational campsites.⁴⁷ With the possible exception of the two non-highway interests that could have been retained by the federal government, all rights, title and interests in the Seward Highway were transferred to DOT years before DNR selected the public lands crossed by the Seward Highway right-of-way that are now part of the Chugach State Park.

When the lands crossed by the Seward Highway were patented to the State of Alaska in the state land selection process, the Department of Interior's Bureau of Land Management (BLM) removed references to state highway right-of-way from BLM's records of the patented properties; BLM explained that any residual interests held by the United States in the state highway right-of-way merged with the state's fee interest in the larger parcel that was transferred by patent.⁴⁸ BLM held no more than the two "non-highway" interests in the Seward Highway right-of-way after PLO 1613's conversion of Alaska rights-of-way to easements, and could have retained no more than those two interests after the issuance of the OQD, so the reversionary interest and authority to permit non-highway uses were the only property interest in the Seward Highway right-of-way that could have been transferred with the federal patent.

According to state law, DOT received the last two sticks in the bundle of sticks that comprise the fee interest in the Seward Highway right-of-way. The last two sticks in the Seward Highway right-of-way are highway property interests, and DOT is the only state agency specifically authorized by the Legislature to accept and dispose of federal

⁴⁶ "The Alaska delegation in Congress has finally succeeded in getting the Department of the Interior to state what was needed in the way of legislation to correct the land selection program in the State and the delegation, on April 27, 1960, introduced simultaneously in the senate and in the house bills 'to facilitate the selection by Alaska pursuant to the Act of July 7, 1958, of certain public lands under outstanding mineral lease or permit.'" Department of Natural Resources, Alaska Reporting Service Report No. 34 (May 16, 1960).

⁴⁷ "Under the Omnibus Bill these sites [recreational campsites], along with the appropriation of \$100,000, were turned over to the State. This appropriation which actually dwindled down to about \$75,000, [DNR] Commissioner R. Holdsworth stated, was used to complete the projects under way at the time the transfer was made, and to maintain and improve the various campsites." Department of Natural Resources, Alaska Reporting Service Report No. 62 (December 12, 1960).

⁴⁸ BLM Instruction Memorandum No. 82-296 (July 28, 1982).

highway properties.⁴⁹ More specifically, no state agency except DOT could receive the reversionary interest as the Legislature vested in DOT exclusive authority over the disposal of former federal highway properties and the exclusive authority to determine whether and when highway rights-of-way are no longer necessary for highway purposes.⁵⁰ Additionally, DOT is the only state agency tasked by the legislature to protect and control the state highway system, so DOT is the only state agency that can authorize compatible non-highway uses or occupations of a state highway right-of-way. Furthermore, the Alaska Land Act could not be used to acquire or dispose of federal highway properties or interests in federal highway properties,⁵¹ and DNR is not authorized to manage or control highway rights-of-way and infrastructure or other properties under the jurisdiction of DOT.⁵² Since state law directs DOT to accept any federal highway property interests for DOT's management and eventual disposal, if any, fee simple title to the Seward Highway vested in DOT no later than the federal government's patent to the state of the properties crossed by the Seward Highway right-of-way.

IV. Claims to state highway rights-of-way by DNR.

I understand DNR presented a theory that BLM's issuance of patents to the state for the lands crossed by the state highway rights-of-way extinguished any less-than-fee

⁴⁹ AS 19.05.040(9).

⁵⁰ 152 SLA 1957, tit. IV, art. IV, § 4; AS 19.05.060(c) ("if the department [DOT] 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."); *Compare*, AS 38.05.030(b) ("Land assigned by the [DNR] division of lands to the Department of Transportation and Public facilities shall be returned to the management of the division of lands when it is no longer needed for the purposes assigned.").

⁵¹ AS 38.05.030(b) ("The provisions of this chapter [the Alaska Land Act] do not apply to any power, duty, or authority now or in the future granted to the Department of Transportation and Public Facilities in the name of the state, to acquire, use, lease, dispose of, or exchange real property, or any interest in real property.")

⁵² AS 38.05.035(a)(2) ("The director [of DMLW] shall manage, inspect, and control state land and improvements on it belonging to the state and under the jurisdiction of the division.").

interest held by DOT for those rights-of-way, as DOT's rights and interests merged with DNR's rights and interests upon DNR's acceptance of BLM's patent. DNR's theory is defective primarily because the particularities of public highway easements restrict the beneficial rights of the highway property from transfer away from the single ownership of DOT. Additionally, state and federal laws governing highway rights-of-way and authorizing DOT to manage and control state highway rights-of-way leave no room for shared management authority with DNR. Thus, if only an easement interest was transferred to DOT under the OQD, the last two sticks in the fee simple bundle of rights merged with DOT's highway property rights upon delivery of the patent for the lands crossed by the highway right-of-way.

An easement is a form of property servitude and, unlike privately held easements, the beneficial rights in publicly held easements are split into use and control rights.⁵³ The right to control and manage highway easements for the benefit of the public is located in a state or other governmental body.⁵⁴ The right to use the highway easement rests with the public.⁵⁵ Unlike multiple-use public domain properties, highway properties are not available for any alternative use or development that may sever the public's right to use the highway for transportation purposes. It is for this reason that highway rights-of-way are managed exclusively for the continuity of the linear transportation corridor.⁵⁶ As the agency with exclusive right to manage, protect, and control the state highways, DOT holds all rights, title, and interests held by the state in the state's highway rights-of-way. Thus, if the underlying fee interest to the state's highways were not transferred to DOT by way of the OQD, then any remaining residual interest was transferred to DOT when title to the underlying public lands were transferred to the state through the Alaska Statehood Act land selection process.⁵⁷ To accept DNR's merger of title theory would

⁵³ Restatement (Third) of Property, *Servitudes*, § 2.18, Comment a.

⁵⁴ *Id.*, § 2.18, Comment b.

⁵⁵ *Id.*, § 2.18

⁵⁶ "Non-highway uses" (e.g., encroachments, utilities, pipelines) of a highway right-of-way are only allowed under a permit issued by DOT in accordance with DOT regulations, and those non-highway uses cannot pose a risk to the traveling public or to the integrity and safety of the highway facility. AS 19.25.010 and AS 19.25.200.

⁵⁷ AS 19.05.080 (DOT's acquisition of all property rights it considers necessary for and reasonable for highway purposes may be accomplished "notwithstanding that the title thereto may be vested in Alaska or any department, agency, commission or institution thereof.").

mean that DNR holds title to state highway properties, and controls and manages those properties under the Alaska Land Act's multiple use land management requirements, which runs contrary to the entire state land management structure embodied in the Constitution and the state's laws.

A component of the State of Alaska's federal-aid to highways commitment is that DOT "must assure that all real property within the boundaries of a federal-aid highway right-of-way is devoted exclusively to the purposes of that facility and preserved free of all other public or private alternative uses, unless such alternative uses are permitted by Federal regulation or the FHWA [Federal Highway Administration]." ⁵⁸ The FHWA has approved DOT's program for the regulation of the state highway system, so the permitting of alternate uses of the right-of-way is a discretionary function delegated to DOT with FHWA oversight. DOT has the power to control access to the highway rights-of-way and to authorize certain activities or construction within the highway rights-of-way. ⁵⁹ Thus, DOT could consent to DNR's compatible uses of the highway rights-of-way in furtherance of programs under DNR's jurisdiction, such as the leasing of pipeline rights-of-way or issuance of material sales contracts. However, DNR could not independently authorize—nor could DOT consent to—an incompatible use of the highway right-of-way for mining, mineral extraction or other uses that may be allowable under DNR's multiple use requirements for the state public domain if the proposed use may jeopardize the continuity of the highway facility. ⁶⁰

The Alaska Legislature has yet to repeal DOT's authority to exclusively hold and manage rights-of-way accepted from the federal government, including those rights-of-way granted to the state through the OQD. The delivery of the federal patent for the vacant, unappropriated, and unreserved property crossed by the Seward Highway right-of-way did not strip DOT of its mandate to control, protect and manage that state highway facility. Likewise, the Legislature's reservation of that public domain land on both sides of the Seward Highway right-of-way to create the Chugach State Park did not

⁵⁸ 23 CFR 710.403(a).

⁵⁹ AS 19.05.040(5) ("The department [DOT] may control access to highways"); and AS 19.25.200(a) ("An encroachment may be constructed, placed, changed, or maintained across or along a highway, but only in accordance with regulations adopted by the department [DOT].").

⁶⁰ AS 19.05.010 ("The department [DOT] is responsible for the ... protection and control of the state highway system."); 23 CFR 710.403(a) ("An alternative use [of a federal-aid highway right-of-way] must be consistent with the continued operation, maintenance, and safety of the facility.").

obliterate DOT's ownership and responsibility for the Seward Highway right-of-way corridor. Rights, title and interests to the Seward Highway right-of-way was transferred to DOT by way of the Alaska Omnibus Act and the OQD. As an exclusive government purpose property, the Seward Highway never became part of the state public domain. Therefore, DOT holds fee title to the highway right-of-way and has the exclusive power to manage and control the property for transportation purposes.

V. Legislative authorization to exchange land for the Seward Highway realignment project.

In 2000, the Legislature authorized DNR to receive land or interests in exchange with DOT or ARCC for the relocation or widening of the Seward Highway and for the relocation of railroad facilities within Chugach State Park.⁶¹ That same statute authorizes DNR to grant necessary highway and utility easements to DOT, and allows DNR to grant a property interest to ARCC;⁶² thus, DNR is not authorized to grant a fee interest in the state park land as part of the exchange. An easement from DNR that is "adequate for the construction, operation, and maintenance of the resulting facility and for the protection of the facility and the travelling public" would meet the minimum regulatory requirements for a federal-aid highway facility.⁶³ If DNR were to reserve management authority or discretionary decision-making power over the land in the highway easement, the resulting easement may not be sufficient for DOT's federal-aid compliance requirements or for DOT to exercise its statutory requirements to independently protect, control and manage the state highways.

ARCC is likewise authorized to exchange land or interests in land for the Seward Highway project.⁶⁴ And, of course, DOT is fully authorized to independently acquire land necessary for highway rights-of way, dispose of land no longer necessary for highway rights-of-way, and acquire land outside highway rights-of-way for the purpose of exchange.⁶⁵ Therefore, DOT is fully empowered to dispose of any property interest no longer necessary for the Seward Highway, including a fee interest in a portion of the current highway right-of-way.

⁶¹ 2000 SLA 116, art. 2, sec. 6.

⁶² *Id.*

⁶³ 23 CFR 710.201(f).

⁶⁴ 2000 SLA 116, art. 2, sec. 7.

⁶⁵ AS 19.05.080; AS 19.05.070; and AS 19.05.120, respectively.