a. Nature of the Interest Conveyed by the QCD

Many times I have heard the term "*right-of-way*" used as if it defined a specific type of interest. As in, "*is it a right-of-way or an easement?*" The general definition I have used in this paper is a common interpretation used among right-of-way professionals. Lumped together within the term "*right-of-way*" are a multitude of interests ranging from a limited and revocable permit to fee simple. These varying interests and authorities under which they were acquired are discussed in the following sections.

What is the nature of the property interest/title conveyed to the State in highway right-of-way at statehood? The Omnibus Act QCD conveyed 5,400 miles of roads to the State of Alaska. The PLO's appear to indicate that by the time the QCD was issued, all of the PLO rights-of-way were an easement interest. However, the question of whether they were fee or easement continued to pop up. In 1993 the Attorney General's Office issued an opinion[1] concluding that concluded that conveyed PLO rights-of-way were highway easements. This reversed a 1985 Attorney General opinion[2] that the State had received the entire interest of the United States or the fee interest in the road rights-of-way. State's rights activists assert that the State should have received the full interest held by the United States under the Equal Footing Doctrine. However, the Omnibus Act QCD on its face only conveyed the title held by the Department of Commerce. It must be recognized that some of the conveyed highway ROW might have been in fee if it was acquired in fee, however, most of it was based on '47 Act, RS-2477, PLO or other patent reservation and these are generally held to be easement interests. It is interesting to note that Alaska Road Commission memos issued just a few months after the effective date for PLO 601 recognized the potential problem that had been created by initially establishing the PLOs as withdrawals rather than easements. They intended to avoid the difficulty of having to survey the exact location of the road for each individual patent. This could be accomplished with easements but withdrawals would require the survey of all of the highway rights-of-way to determine the boundaries for patents. This led to the subsequent PLOs that converted the withdrawals to easements. The concept that the PLO's were conveyed as an easement interest is supported in the language of A.S. 9.45.015 and A.S. 9.25.050 that speak to the protection of owners adjoining PLO 1613 highway easements.

What is the nature of property interest in our highway rights-of-way today? This is difficult to quantify but as we review the varying authorities that form the system of highway rights-of-way, my educated guess is that 90% of the system inventory are highway easements as opposed to fee interests. First consider that in 1959 we received the bulk of the 5,400 mile highway system as an easement interest. (Note that only 4,304 miles was listed in the QCD as

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[1] Whether the State received a fee or easement interest in PLO based rights-of-way had been a subject of debate for several years. On February 19, 1993 the Attorney General's Office issued an opinion concluding that "*under the Alaska Omnibus Act and resulting Quitclaim Deed, the State of Alaska received, in general, easements for its roads at statehood.*" See Nature of property interest/title conveyed to State of Alaska in highway rights-of-way at statehood, Carolyn E. Jones, AAG and Rhonda F. Butterfield, AAG.

[2] BLM's jurisdictional claim over Richardson Highway right-of-way located at approximately 57.4 mile out of Valdez, Jack B. McGee, AAG; "*By virtue of the quitclaim deed issued by the United States Department of Commerce to the State of Alaska, any and all interest of the United States that existed in that right-of-way segment was transferred to the State of Alaska.*"

"*constructed*"). The State Highway System inventory as of 12/31/12 was 5,620 miles.[3] Simple math might suggest that we have only added 1,016 miles to the State Highway System since statehood, but you must recognize that the inventory is dynamic with roads being dropped due to changing priorities and land use patterns or by transfer to municipalities while others are added as a result of new highway construction. Then consider that of Alaska's 375,000,000 acres, 59% is held by the federal government, 28% belongs to the State, and 12% represent Alaska Native Claims Settlement Act (ANCSA) entitlements leaving only 1% in private ownership. Right-of-way Grants from the federal government including Title 23 Grants through the Federal Highway Administration and Federal Land Management Policy Act (FLPMA) Title V Grants are effectively easements for highway purposes. The Departments of the Army and Air Force also issued specific highway easements. DNR issues ROW permits for highways and given the nature of permits, they might be considered something less than a strong highway easement. But as DOT&PF is an agency of the State of Alaska, we generally are not in fear that they will be unilaterally revoked and so for all intents and purposes, we treat them somewhat equivalent to a highway easement. The general ANCSA corporation policy of "*no net loss*" often results in a resistance to conveying a right-of-way in fee. Generally, for rural highway projects, a strong easement for highway purposes is acquired

Another important note is that a quitclaim deed only conveys those interests held by the grantor at the time the conveyance is executed. A summary page at the end of Omnibus QCD's Schedule A – Highways reveals that of the 5,399.1 miles listed in the highway system, only 4,303.6 miles had been constructed. Many of these routes had been in the planning or design stages and not yet moved into construction. These include the last sections of the Parks Highway connecting to the Denali Highway near the Denali Park entrance, much of the road between Nome and Teller[4] and a road that is now re-emerging as one of our priority projects, the road to Tanana.[5] Once we reached statehood, applications were made to BLM to secure the right-of-way now that new highway easements by PLO were no longer available. In the case of the additional 95 miles of road from Eureka to Tanana[6], as the "*Proof of Construction*" was never filed within the prescribed period of time, the BLM Grants were voided.

An example of a road named in the QCD for which the Commerce Department never had title to convey would be the Denali Park Road from the now named Parks Highway to the North Park Boundary[7]. Once the road passes the old North Park Boundary, the road becomes the Kantishna road which would have been subject to a Public Land Order right-of-way and conveyed to the state.[8] The Park road west of the Parks highway was listed in the QCD because while National Park funds were appropriated to construct the road, the Alaska Road Commission provided the engineering and construction services as if they were a contractor to the Park Service. The Park was established in 1917 prior to any available authority for a right-of-way

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3 The current version of this list of roads under DOT&PF jurisdiction the "State Highway System" as authorized under A.S. 19.10.020. 2011 Certified Public Road Mileage for DOT&PF roads. See: http://www.dot.alaska.gov/stwdplng/transdata/public-road-data.shtml

4 Federal Aid Secondary Class "A" Route 131 – 20 of 71 miles constructed.

5 Historically referenced as one of the first stops on the proposed "Road to Nome".

6 Federal Aid Secondary Class "A" Route 680 – 106 of 201 miles constructed.

7 Federal Aid Primary Route 52 – the extension of the Denali Highway west of the Parks Highway

8 Federal Aid Secondary Class "B" Route 6021 – Kantishna Road

could apply to a newly constructed road. The portion of the Park road north of Kantishna was constructed prior to the expansion of the Park and while a Public Land Order authority was available for right-of-way.

b. Scope of a Highway Easement

Using the "*Bundle of Sticks*" analogy, the U. S. Supreme Court introduced a concept that ownership of property may consist of a variety of rights some of which may be retained and others that may be sold or acquired by another entity. *"An easement is commonly defined as a non-possessory interest in the land of another."*[9] A highway easement represents a few or possibly most of the sticks in the bundle depending on purpose and limitations of the easement. What is the scope of a highway easement? Once you have accepted that most of the highway right-of-way consists of easement interests, the re-occurring question is …what can the easement be used for? This is a complex issue and there is no one straight forward answer. A significant issue is the difference between lands subject to state law as opposed to lands subject to federal law. The federal agencies narrowly construe "*highway purposes*" and specifically do not believe it includes the right to permit utilities. When DOT permits a utility in a highway easement where the underlying fee is held by a federal agency, our utility permit is considered to be no more than a non-objection. We then inform the utility that they will need to acquire a utility permit from the federal agency. Where our easements cross lands subject to state law (state land, private and ANCSA corporation lands) DOT asserts a unilateral authority to issue utility permits within the highway easement. We base this on the Fisher v. GVEA case (see RS-2477 case law summary) that allowed utility use of a section line highway easement for incidental and subordinate uses. A 2000 case titled Simon v. State[10] focused on the scope of the PLO 1613 highway easement for the Glenn Highway. The Superior Court found that PLO 1613's language was ambiguous as to the precise scope of the easement. Simon argued that "*…the easement did not allow the state to alter the highway's course or to move or use subsurface material."* The Supreme Court affirmed the Superior Court's decision that the use of the easement by DOT&PF was reasonable.

There are many other "*scope of use*" issues that are less clear such as camping, fishing and other incidental uses that have yet to be settled in Alaska. We have heard complaints in the past regarding hunting and fishing within Public Land Order rights-of-way that such use was not within the scope of a highway easement. A 1996 South Dakota Supreme Court case[11] suggests that such recreational uses are not necessarily unreasonable. This case specifically focused on section line easements based on RS-2477 and accepted by the South Dakota Territorial legislature much in the same manner as they were accepted by Alaska's Territorial legislature. The court concluded that hunting, fishing and trapping are allowable uses within the public right-of-way easements in South Dakota. *"The legislature and this court have recognized the right to use public highways for recreational purposes. The use by the public of the section line rights-of-way for recreation, which includes hunting dates back to the 1880s and has not been successfully challenged in this state to our knowledge."* South Dakota does have some limitation in that fishing, hunting, and trapping are not allowed within *"unimproved"* section lines or within

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9 The Law of Easements and Licenses in Land - Bruce and Ely, 2010

10 Simon v. State, 996 P.2d 1211, March 3, 2000

11 Reis v. Miller, 550 N.W.2d 78 (1996); 1996 SD 75; Decided June 19, 1996

660 feet of an occupied dwelling. It is possible, if the challenge arises, that such a scope of use would also be found to be within the realm of customary and traditional use of a highway easement by Alaska's courts. Alaska does have some statutory limitations[12] on hunting from a road but they are more related to weapons misconduct than scope of use of a highway easement.

c. Right-of-way Location

The paper being presented is intended to assist you in determining whether a highway right-of-way exists, how wide it may be, and what the nature of the interest is. How one locates the right-of-way is a completely different subject. When the PLOs came into effect, they were uniform in nature and referenced to the physical centerline of the road. This made it relatively easy for the Road Commission or the adjoining owner to measure 50-feet, 100-feet or 150-feet from centerline to the right-of-way boundary. Realignments and acquisition of new right-of-way have to a large degree made the location of right-of-way much more complex. My thoughts on how highway rights-of-way can be located are addressed in a paper I presented at the 1996 Alaska Surveying & Mapping Conference titled Highway Right-of-way Surveys.[13]

Today, more than half a century after statehood and conveyance of the highway system from the federal government to Alaska, it would be reasonable to ask why we can't just look at an accurate map to determine the width and location of a highway right-of-way. I believe the answer would be that since statehood, the majority of the funding for highways has come from the Federal Highway Administration. And the focus of those funds is on road construction. So only when new right-of-way mapping is required as a result of new roads or re-alignment of old roads would right-of-way mapping be considered necessary. In the last 20 years we have seen more mapping for purposes other than land acquisition for new construction.[14] That is mapping with the intent of providing information to facilitate maintenance, property management, asset management and to advance long range planning and design efforts. Someday, Alaska will have a publically available on-line GIS system that will provide accurate highway right-of-way mapping. Until then, you may need to rely upon your own research skills.

Does the lack of accurate mapping place the public's interest at risk? It certainly can make management of the right-of-way more difficult. DOT&PF has an obligation under both state[15] and federal[16] statutes and regulations to keep the right-of-way free and clear of unpermitted

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[12] A.S. 11.61.210 Misconduct involving weapons in the fourth degree "*(a) A person commits the crime of misconduct involving weapons in the fourth degree if the person…(2) discharges a firearm from, on, or across a highway;*"

[13] A copy of this paper can be obtained from the Alaska Society of Professional Land Surveyors website at http://www.alaskapls.org/docs/row_surv.pdf

[14] While I admit to a certain bias, this is in part due to the acceptance and proliferation of licensed professional land surveyors within DOT&PF.

[15] A.S. 19.25.200 Encroachment Permits *"An encroachment may not be constructed, placed, maintained, or changed until it is authorized by a written permit issued by the department,…"* Also see 17 AAC 10.011-015 Encroachments.

[16] 23 CFR § 710.403(a) *"The STD must assure that all real property within the boundaries of a federally-aided facility is devoted exclusively to the purposes of that facility and is preserved free of all other public or private alternative uses…"*

encroachments and to ensure it is exclusively dedicated to highway use. But the public cannot lose its title interest by prescription or adverse possession as a result of unmanaged encroachments.[17] Claims have been made against the State based on a lack of or erroneous mapping. The claims were based on the doctrine of Laches and Quasi Estoppel. The case Keener v. State[18] relates to the widening of Davis road in Fairbanks in 1989. While Davis road was having its right-of-way mapped for the first time, the West end of Davis where it intersects with University Avenue had been graphically depicted on prior plans for University Avenue as encumbering 33-feet of the Keener's lot rather than the 50-feet now claimed by the State under Secretarial Order No. 2665. The claim under Laches is that the State unreasonably delayed its determination of the Davis Road right-of-way with resulting prejudice to Keener. The claim under Quasi Estoppel asserted that the State should be prevented from taking a position inconsistent with one previously taken (50 vs. 33 feet) where circumstances render assertion of the second position unconscionable. The Laches claim failed in that the period of delay did not commence until the conflict was identified. And in this situation the conflict was not identified until the current project mapping made both parties aware. In that sense, there was no unreasonable delay that prejudiced Keener. The Estoppel claim failed on the basis that the earlier graphic representation of the Davis road right-of-way was not based on a full knowledge of the facts. The State was not changing its previous determination of the Davis road right-of-way; it was more correctly, determining it for the first time on the current project. The fact that the State prevailed in this case is not an argument against the development of accurate mapping for our highway rights-of-way. While the public's rights may have been preserved, it still cost the State a significant amount of resources to defend its claim.

d. A Variety of Interests

What about all of the other authorities for rights-of-way? Along with PLOs, '47 Act reservations and RS-2477, the highway system also includes post-statehood federal highway grants, Alaska DNR rights-of-way, interests acquired by negotiation or condemnation, other federal patent reservations, street dedications, ANCSA rights-of-way, public prescriptive easements, and probably a few others that I have missed. To the extent that these existing interests can be used for public road purposes, DOT&PF will incorporate them into a project right-of-way corridor. In that sense, when you look at a set of right-of-way plans, realize that while the corridor widths might be uniform, the nature of the right-of-way represents a patchwork quilt of varying interests. This is important to know when considering allowable uses and methods of disposal. As the rights-of-way were created under a variety of authorities, the disposal or vacation of them may also be under separate authorities and require varying procedures.

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[17] A.S. 38.95.010 State's interest may not be obtained by adverse possession or prescription.

[18] Keener v. State. 889 P.2d 1063, February 17, 1995