ROW Mapping Case Studies:

"The Older I Get, the Less I Know…"

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I. Introduction

How we got here:

Some of you may have wondered about how I came up with the course title and what it means. The part about "The older I get, the less I know" is an often stated quote with many variations:

"The older I get, the less I know and by that I mean the less I am sure of."
"The older I get, the less I know and the more I want to know."

What does it mean with respect to ROW Mapping?

The idea behind the subtitle is that we should as we grow in experience and education; we often realize that things are not quite as simple as we thought when we started our profession.

If you reach a point after 20, 30 or 40 years of professional experience and claim that, "Now I know everything!" Well, I'm not sure I'm going to buy that.

Many years ago I participated in the development of the AKLS portion of the surveying exam. We had about a dozen PLS in the room with varying subject matter expertise. We got off to a rocky start. Initially there was a bit of trying to impress each other with our knowledge, but that tapered off to just trying to impress the applicants with the complexity of our questions. The Warner brothers (testing experts), hired to ensure that the exam questions were statistically defensible, straightened us out. They said the difficulty of the exam questions had to be written such that the exam could be passed by the "minimally competent" applicant. We didn't like that term. Who in their right might would want to hire a "minimally competent" professional surveyor? But reality set in. Whether you are a doctor, lawyer or land surveyor, you do not start as a professional with 30 years of experience. You start with minimum requirements for education and experience and then you build on that.

That is the point of the title. The older we get, the more surveys you perform, the more cases you review and the more layers of the onion get peeled back to reveal new issues and information. Sometimes this information confirms your existing beliefs. Sometime it conflicts with what you had previously known. There is no point in your career at which you will know everything! You will just know more of what you know and what you don't know.

Getting started: When I began my career, I understood that if you owned a parcel of land, you needed to be able to get to it. You needed access. In the context of a subdivision, you had to design a layout of streets that would provide access to each of the newly created lots. In the context of a retracement, you would research the basis of the easement or ROW that provided access to the subject property. In my early years, I figured that research would consist of going to the recorder's office and pulling a copy of the relevant ROW deed.

I soon found out once I began mapping rights-of-way that the interests they were based on would be anything but uniform. I then began to refer to them as a "*patchwork quilt of title*

interests."

After a few years of working in ROW Engineering I realized that as I learned about each of these varying interests, I would need to document my findings to keep them straight and to support any conclusions I reached with regard to mapping the existing ROW. This was also necessary for "*defense of right-of-way*" or "*defense of the public right-of-way*". This was both an educational and an enforcement issue. In the context of enforcement, as our property management staff cleared encroachments or assisted maintenance in asserting the full width of the public ROW, we would have to present an argument to the offender or their representatives that they were in fact using the public ROW in an impermissible manner. This was often a bit of a challenge because citizens, particularly Alaska citizens don't like bureaucrats telling them what they may or may not do.

With regard to education it was a lot more civilized, just as we are and hope to remain today. A part of my job was to present courses like this to surveyors, realtors, title agents and others who by the nature of the work would often deal with public rights-of-way but did not have a very good understanding of the issues. I had started writing my paper on Highway Rights-of-Way in Alaska in early 1992. About that time, we found that the International Right of Way Association had awarded the 1997 Annual Education Conference to Anchorage. Recognizing the amount of money it takes to get a program like that off the ground, I joined Dan Beardsley and Jay Sullivan in a full day presentation called Access Law & Issues Affecting Public & Private Lands in Alaska. We put this course on a half dozen times between 1992 and 1996 as a fundraiser for the 1997 IRWA conference. We updated and presented the seminar again in 1997 with about 170 people in attendance indicating the impact that right-of-way has in the work we do. Anchorage was again selected to host the IRWA Education Conference in 2017 and to initiate the fundraising effort; the seminar was presented again in Anchorage in February of 2013 and then Fairbanks in May of 2014.

30 years ago, DOT and their consultant staff could get away with a basic presentation of the existing highway ROW on their preliminary maps, with few notes or explanations supporting their research and conclusions. Who was going to argue? Who was going to have conflicting evidence? Effectively it boiled down to "*it is what it is because we say so…*" That isn't going to fly any more. Certainly land costs more but the cost of acquisition in many cases costs more than the land itself. People are more litigious. They aren't going to accept the government's word without supporting documentation and a good argument. And so today Karen and I have a couple of projects that include a variety of ROW research issues that will provide good examples of how deep you might have to dig to get to the answers you need.

Now that my "*Highways*" paper has grown to almost a hundred pages in the most recent edition, I find that I have never had the time to present all of the components of ROW research that I would like to. While your project may include one or more of these elements, today we will only touch on those items related to the case study projects. But they could include the following:

- Public Land Orders

- RS-2477 Trails
- RS-2477 Section Line Easements
- State Section Line Easements
- 1917 Territorial dedication of right of way
- Federal Patent Reservations ('47 Act)
- 44 LD 513
- Federal ROW Grants (Title 23 Highway Easement Deed & FLPMA Title V)
- Alaska DNR (ROW & Tidelands permits, ILMA/ILMT)
- Negotiated Acquisition by DOT&PF (Easement/Fee)
- Dedications (Statutory & Common Law)
- Federal Patent Reservations (Small Tracts)
- Public Prescriptive Easements
- ANCSA 17(b) Easements & 14(c)(3) Re-conveyances)
- Other Federal Agencies (BLM/BIA/Forest Service
- ANILCA Title XI (In-holder and Transportation & Utility System Access)
- ROW Disposal & Vacations

In the "*Highways*" paper, I covered the history, development and authorities for the above cited rights-of-way in some detail. In this presentation we will apply some of those authorities to determine the location, width and nature of interest in certain highway right-of-way and show that no matter how far down you dig, there is always more to be uncovered.

II. Nome-Council Road MP 14-32

The primary project that I will present today is the ROW mapping for the Nome-Council Road between a point lying 14 miles east of Nome along the coast of Norton Sound and milepost 32 at Solomon.

Why do I find this project so interesting? Certainly not because of its importance to the state economy or national defense. It is an isolated rural gravel road that is not connected to the state highway system. You can't get to Nome by car. You get their either by air, boat or dogsled. The Nome-Council road has an average Annual Daily Traffic (ADT 2013) count of 75. This is likely less than the number of muskox that cross the highway in a given day. In perspective, the 2013 ADT for the Glenn Highway coming into Anchorage is about 55,000. The Nome-Council road heads inland on a northeasterly direction from Solomon to milepost 73.6 on the southerly bank of the Niukluk River opposite the town of Council. This is an area rooted in mining and the artifacts of that time can be found all along the road.

Like a good novel, this project does not consist of just one or two themes, but a full spectrum of right of way mapping issues that never gets boring. And while Wyatt Earp was in fact in Nome operating the Dexter Saloon when this story begins, I haven't quite found a way to weave a gunfight into this story line. The ROW assessment for this project includes elements of:

- Area History
- Aerial Photography
- Construction & Maintenance Records
- Other Public Records
- Background Interviews
- Public Land Orders
- Public Easements by Prescription
- "Floating Easements"
- Federal Right of Way Grants
- "Use & Occupancy" of Native Allotments
- Omnibus Act Quit Claim Deed Issues
- ROW Jurisdiction & Management
- Patent reservations
- RS-2477 Trails
- 1917 Territorial Right of Way Act

You will find that the history of the area and road are certainly interesting, but also interesting is how this project finally was mapped.

Getting Started:

The mapping for this segment of the Nome-Council road was a long time in the making. I posed the question in my 2013 Edition of "Highways": Why, a half a century after statehood and conveyance of the highway system from the federal government to Alaska, can't we just look at an accurate map to determine the width and location of a state highway right-of-way? At statehood the federal government presented Alaska with a deed to 5,400 miles of highways, many of which were based on Public Land Orders. The PLO's were in turn based on physical location of the highway over federal land with a specific width assigned according to highway classification. So for the most part, useful mapping did not accompany the conveyance of the historical rights-of-way, they were where you found them with a width assigned by PLO. As a young state, public funds were always in short supply. Progress was measured in the number of cubic yards of gravel placed, not in the amount of paper work produced. As most of the roads were crossing federal or territorial lands with few third party conflicts, ROW mapping was not considered a high priority. And while we have been working hard over the last few decades to fill in these mapping gaps, we can still find large segments of our highway system for which no ROW mapping exists. This would even include parts of our primary system such as the Richardson Highway between Summit Lake and Fort Greely. Given these constraints, it is not surprising that a low volume road such as the Nome-Council would be without mapping for many years. Earlier mapping projects included the section from Nome to the East Shore of the Nome River (1966), Mile 4 to 15 (Initial mapping 1981) and the Safety Sound bridge (1976). Over the course of my career with DOT&PF Northern Region ROW (1986-2014) we mapped the portions of the Nome-Council road at Cape Nome (MP 11-12), from Solomon to Quigley's Camp (MP 32-42), another section between MP 53-62 and finally the last section up to the Niukluk River across from Council (MP 62-72).

The missing piece for mapping was approximately between mileposts 14 and 32. This last section was a continuous cause of difficulty for DOT&PF as a result of the road following the narrow spit between Norton and Safety Sounds from Cape Nome to Solomon and the recurring winter storms that have been documented as far back as 1900. The Great Storm of 1900 left almost 1,000 people homeless with several fatalities and washed away part of Nome's business district. The Great Bering Sea Storm of 1974 is said to have produced a seawater surge of up to 13 feet and winds up to 90 miles per hour. Storms in 1980, 1992, 2002, 2003, 2004 & 2005 continued to batter both Nome and the highway infrastructure. The epic storm of 2011 was referred to as a "*Snowicane*" with a pressure equivalent to a Category 4 Hurricane. The damage caused by wind and storm surges along Safety Sound tended to range from washouts to total obliteration. Today we are asking, "Where is the right-of-way?" After some of these storm events they were asking "Where is the road?" Anecdotally, I recall conversations with Nome M&O managers stating that after storms, they would blade and repair the road where possible or just push material up into a road bed where little of the original road remained. There was no consideration of whether the repaired road was in the existing ROW or not.

The work to repair the Nome-Council road was more than casual maintenance and typically would exceed the available M&O funds. So the typical response in the last couple of decades was to apply for federal emergency repair funds or "ER" funds. As a requirement of using federal highway funds and prior to advertising a project for construction, the Regional Right of Way Chief must certify to Federal Highways that all ROW necessary to construct the project as shown on the design plans either exists or has been acquired. The fact that we had no ROW plans for the MP 14-32 segment and were aware from conversations with M&O that the alignment may have been moved to some extent after storm activity led us to the conclusion that we could not certify the ROW for the "ER" projects. FHWA provided us a temporary solution. They said that as long as we constructed the road right back to its pre-storm location and did not increase the road footprint, we could "conditionally" certify the ROW for the project in accordance with 23 CFR 635.309(c)(3). While we appreciated the federal cooperation, it still left us with a couple of problems. If we didn't know where the road (or ROW) was before the storm, how could we guarantee that we would put it back to the same place? Certainly in some areas the remaining sections of road could be used to control the location, but in other areas there may be little remaining evidence. Also, engineers are never satisfied to rebuild things to their original condition. They want to improve the facility particularly if in doing so they can reduce or prevent future storm damage. This might include raising the grade, widening the fill slopes, placing rip rap to prevent erosion and improving drainage.

Every time we were faced with another storm repair certification I would lobby for mapping funds so we would not be continually faced with these recurring "emergency" situations. Unfortunately, FHWA "ER" projects have strict time limitations and we just couldn't fit it in to our other statewide project priorities. Also, under A.S. 44.62.270 "*It is state policy that emergencies are held to a minimum and are rarely found to exist."* (That is a real Alaska statute and I included it more for levity than to suggest that it was being applied in this situation!) Finally, as a part of the "Nome Sea Storm Permanent Repairs" (November 2011), we were directed to have the mile 14 to 32 section surveyed and mapped as a record of survey in order to

document both the location of the historic Nome-Council road right of way and the current location of the road footprint. This work was issued to R&M Consultants, Inc. under the Northern Region's Innovative Term Agreement for Land Surveying and Mapping Services. The Notice to Proceed was issue in August of 2013 and the aerial photography and field surveying was complete by the end of the year. I recall that when the project deliverables started coming in I made a point of not reviewing them. My thought was that the project was in good hands on both sides of the fence and I wouldn't be around long enough to see it through anyway.

In May of 2014 I retired after more than 29 years with the Department of Highways and DOT&PF. But I wasn't ready to watch the grass grow just yet. Shortly thereafter, I joined the Fairbanks offices of R&M Consultants. The bulk of the work for the Nome-Council MP 14-32 record of survey and report had been completed by that time and ready for review. Now faced with the opportunity to see this project completed, I couldn't resist.

Finding the Historic Right of Way:

Mapping the historic, or "Omnibus Act" right of way for the Nome-Council road was going to be a bit more of a challenge than other similar roads. The typical method for mapping an Omnibus Act ROW often presumes that the best evidence for its location at statehood is where it is now. So we would generally perform an as-built survey of the road centerline and footprint, construct a centerline of tangents and tangential curves, and then offset the width called for in the Public Land Order that created the ROW. But as the PLO's were subject to prior existing rights, consideration must be given to third party interests. This will require that we locate and tie monuments that define the boundaries of the rectangular surveys, mineral and U.S. surveys and other private surveys where they intersect, straddle or adjoin the highway. The location or entry date for the federal land claim may prevent application of the highway ROW if it precedes the effective date of the PLO. Logically it may be argued that over several decades, the normal maintenance activities of DOT's graders could shift the alignment by some number of feet one direction and then back the other way. So how can one know with any certainty where the true centerline is? Without any prior maps or surveys of adequate accuracy, we may not know where the true centerline was at statehood. And where the road is straddled by large tracts of land, it may not really matter. After all, the public is due only the specific width allowed by the PLO and no more, so whether the alignment today is a few feet different than it was at statehood should have no adverse impact on the land owner. And as previously stated, we are working with the best evidence.

But in the case of the Nome-Council road, our suspicion was that we were looking for quite a bit more than a few feet. The land ownership in the project vicinity consisted primarily of ANCSA corporate lands, federal lands managed by US Fish & Wildlife, state interests in the highway ROW and submerged lands, many native allotments and a few U.S. Survey lots held by parties ineligible for a native allotment. While this might be a rural area with relatively low property values, it was still very important to respect the ownership and boundaries of the properties adjoining the highway. Making ties to boundary evidence in the form of monuments and physical improvements such as the Safety Sound Bridge, and acquiring current aerial photography would be the easy part of the data collection. But where would we find the best

evidence of the road location at statehood? One source of data that was produced for a lot of Alaska near the time of statehood were the USGS Quads. And now with the easy access to the USGS map server you are able to download all available historic versions of a quadrangle map. The bulk of this project would lie within the Solomon B-6 quad. The USGS map server indicated that the earliest version was produced with aerial photography was in 1950.

Granted, working directly from a USGS quad at a scale of 1" = 1mile to locate a road alignment was not going to instill a lot of confidence in the accuracy of the final product. And I had my eyes opened with regard to the mapping limitations of the quads by USGS Cartographer Tom Taylor. I was in my 20's and down in Anchorage for a Surveying and Mapping Conference when I visited Tom at his office to learn about historic versions of the quads. He told me about the artistic license occasionally used by cartographers to more clearly show mapping information. For example, if a cluster of buildings were too close together to be seen distinctly at the 1:63,360 scale, the mapper would adjust the locations of the structures so their separation was more apparent. USGS quad maps were not updated until the print run had been depleted. Until that time arrived, Tom would annotate a set of quads with updated information and identify errors in order to revise the quad prior to the next print run. Tom mentioned another problem that resulted from the preliminary data provided by the Department of Highways and others. Proposed road plans were sometimes added as revisions to for the next edition of a quad on the presumption that it would be constructed as planned and to ensure that the new quad reflected the latest topographic features. Unfortunately, every now and then, plans go awry and the proposed road didn't get built due to lack of funding or a change in priorities or it was constructed but realigned. Tom suggested that there may be more than one section of road shown on a USGS quad that either was not really there or was not in the location shown on the map. So when you are looking for evidence to locate a legal property interest, the USGS quad maps might not be the best choice. The better alternative would be to go to the source data used in preparing the quads or the aerial photography. It appeared that this might be the best documentation of the location of the Nome-Council road at statehood and so the DOT statement of services specifically directed the contractor to collect historic aerial photography in order to map the Nome-Council road ROW.

Research Elements:

Each sub-paragraph below has a few qualifiers in brackets after the heading. These include "Context", "Location", "Width", "Interest", "Policy", and "!!!". The labels identify what I expected to get out of each issue and apply to our project. Generally we accomplish everything we need with the first four labels. Policy only seems to arise when an agency has a couple of choices on how to resolve an issue and has either already arrived at a decision or we will provide a recommendation for them to consider. The three exclamation marks means that this topic is a bit unusual and not something that we have previously addressed or has some odd twist to it. Out of 15 sub-paragraphs I have tagged 7 with triple exclamations. This is why I really like this project.

Area History [Context]

The Alaska Road Commission (ARC) dates back to early 1905 and references to the Nome-Council road (aka Nome-Solomon road) also date back to the ARC Annual Report in 1905. The development of the Nome-Council road began in 1898 with the discovery of gold near Council. In 1904 the road between Nome and Ft. Davis (MP 2) as well as the bridge across the Nome River (MP 3), were operated by private parties as toll facilities. These interests were later purchased by the ARC as it expanded its maintenance and construction of public roads. The ARC Annual Reports indicate extensive maintenance of the Nome-Solomon road in support of mining activities. The reports also reference the 1913 winter storm that destroyed a portion of Nome, all of Solomon, and most of the bridges and large sections of the road bed between Nome and Solomon. 100 years later DOT&PF continues to do battle with Mother Nature. But R&M's task was not to make the Nome-Council road impervious to storm surges, it was just to locate the public right-of-way in a legally defensible manner and make it reproducible after each subsequent winter storm event.

Aerial Photography [Location]

The mapping contract was not limited to location of the historical ROW as it also included survey for design purposes. R&M's sub-consultant, Kodiak Mapping, Inc. acquired new controlled aerial imagery that was in part used to define the location of the existing road. Each edge of the existing gravel road was digitized with centerline points established from splits every 500 feet. From this a best fit centerline was developed using tangents and tangential curves compliant with DOT's 95/5 requirements in which 95% of the splits are to be within 2.5 feet of the developed centerline and the remaining 5% would be within 5 feet.

For the historical photography, KMI initially obtained 1950 Navy aerial photography that resulted in an estimated digitized road location of +/- 8 feet. The USGS Solomon B-6 quadrangle map refers to the 1950 aerial photography as being produced by the "Army Map Service". While this photography provided a snapshot of the road location as of 1950, further research indicated that realignments and improvements to the road had occurred after 1950. A search for later photography turned up 1962 imagery from BLM that may have been generated as a part of the survey of US Survey No. 4107, a 90 lot subdivision along the Safety Sound spit. The benefits of this photography was that they were of higher quality, taken closer to statehood and dated after certain road realignments. KMI ortho-rectified the imagery and estimated the accuracy for the location of the road centerline to be between 3-4.5 feet. Our research had told us that that a stretch of road between 17 ½ mile and Safety Ferry was straightened for approximately 3 ¼ miles, a fact that was not observable on the 1950 photography but was well evident on the 1962 imagery. For the purposes of this project, we referred to the apparently abandoned loop as the "Old Nome-Council" road as opposed to the "Nome-Council" road.

Construction & Maintenance Records [Context/Location]

Often we can find clues that will support centerline location from the records of

DOT&PF and its predecessors. Records that might have assisted us in this effort were in short supply. Our project begins (MP 14) where a previous one ended. (Project RS-0130(26) Nome-Council MP 4 to 15) and ends where another starts. (Nome-Council MP 32-42) This was beneficial to tie into the pre-defined ROW and centerline control monumentation. There was also a bridge project at the end for Bonanza Channel and one in the middle for the bridge crossing the entrance to Safety Sound at MP 22. While bridges tend to be some of the most stable control monuments, collectively, the ROW, design and as-built plans for this project caused more confusion that clarity. (More about that later) There were other projects along this section of road in the last few decades but as they primarily related to emergency repair or maintenance activities, they were either not associated with a control survey or centerline alignment or in the case of M&O activities, likely not documented at all. All in all, the archival construction and maintenance records for the road would not provide much help in resolving our ROW location problem.

Other Public Mapping Records [Location/Width]

We did have other land owners adjoining the highway ROW and so as a normal step in ROW mapping, we would pull title documents identifying both pre and post patent interests as well as any associated mapping including BLM Master Title Plats, Township Plats, U.S. Surveys, ANCSA 14c surveys as well as private subdivisions and records of survey.

Background Interviews [Context/!!!]

Occasionally the written record just doesn't provide all of the information you need. If the events you are researching are not in the too distant past, you might be able to interview people to fill in the blanks. With respect to the Nome-Council road we had two questions we needed answered to help us with the historical background. We answered both in email exchanges with Evan Booth, the current DOT&PF Western District Manager. The first issue he was able to confirm for us was whether the Old Nome-Council road was maintained or considered to be under the jurisdiction of DOT&PF. The response was simple enough, Evan told us that DOT does not now conduct maintenance on the old alignment and hasn't for many years. The second question brought a bit more of a personal touch to the inquiry. Before the bridge was constructed at Safety Sound in 1978, we didn't see evidence that a prior bridge existed. The 1978 as-builts showed the old ferry towers on each side of the channel. We asked whether the ferry was in operation up to the construction of the new bridge and who operated it. Evan responded: "*Yes, the Ferry was in operation until the bridge opened. Ferry was operated by Dept. of Hwys. I was about 8 yrs old when I first crossed*."

It's always helpful to find someone with good on-the-ground experience in your mapping location. Evan is an 8-time winner of the 200-mile Nome-Golovin snow machine race that follows the last segment of the Iditarod trail along the Nome-Council road westerly from Safety Sound.

Nome-Council Road (Current)

Public Land Orders [Width/Interest]

Assessment of PLO's is often the easy part of ROW mapping when compared to other possible interests. When you consider that at statehood, the Omnibus Act QCD conveyed 5,400 miles of roads to Alaska and that most were PLO based, it's reasonable to assume that most of our system still primarily consists of PLO's. Our state highway inventory in 2012 consisted of 5,620 miles so it appears that it hasn't grown much. But what happens is that roads get added, having been created by other authorities, while some of the PLO based roads may have fallen off the system. But without counting mile by mile, it's still reasonable to expect that a lot of the remaining highways to be mapped will contain PLO elements. And that is certainly the case with the Nome-Council road. From the time of the initial construction of the Nome-Council road and up through statehood, the road primarily crossed unreserved federal lands. Up until the PLO's established highway rights-of-way over federal lands, the primary basis for a road ROW was RS-2477.

On August 10, 1949, PLO 601was issued as the first public land order for highway purposes in Alaska with a statewide effect. Subject to valid existing rights, routes were classified as "Through" roads with a 300-wide withdrawal (Richardson/Glenn/Alaska Highways) and "Feeder Roads" with a 200-wide withdrawal (Elliott/Steese/Edgerton Cutoff) and "Local" with a 100-wide withdrawal. "Local" roads were not specifically named but were considered to consist of all roads not classified as "Through" or "Feeder", established or maintained by the Alaska Road Commission. Included within the named "Feeder" routes was the "Nome-Solomon" road. Later in October of 1951, the combination of PLO 757 and Secretarial Order No. 2665 effectively converted the "Feeder" and "Local" road withdrawals created under PLO 601 to highway easements.

Note that nothing in a PLO speaks to the location of the road. They are where you find them. Or where your evidence says they were at statehood. The PLO's define the interest. In this case, as of 1951, the interest held by PLO in the Nome-Council road was that of a highway easement. The PLOs also defined the width of the ROW. In this case it was 200-feet or 100-feet on each side of centerline. But that is "*subject to valid existing rights*". For example, if you can determine that the road in question crosses a homestead whose entry that led to patent preceded the effective date of PLO 601, then the PLO would have no effect over the homestead. Conceivably, a PLO ROW crossing a series of homesteads with entry dates both before and after the effective date of the PLO will result in a ROW that jogs in an out depending on whether the homestead trumps the PLO or the other way around.

In this project, we didn't have homesteads to concern ourselves with, but we did have conveyances to ANCSA corporations as well as ANCSA 14c reconveyances. In both cases they are post-statehood interests and would be subject to the full effect of the PLO right-of-way. And as previously mentioned, we also had federal lands and state lands (submerged) both of which would be subject to the PLO ROW. The big PLO concern was

the effect of the many U.S. Surveys, most of which were claimed as native allotments. Several of these had boundaries that went to the centerline of the road or straddled the road completely. Remember, the highway is an easement interest and the federal government does not want to retain these "underlying fee" interests particularly when a road could be realigned and the old ROW vacated, leaving BLM with an unmanageable remnant to deal with. So typically it's a question of whose interest vests first. We could pull case files and review abstracts to determine the critical dates necessary to make that determination. But the rules are different for lands subject to state law as opposed to lands subject to federal law, particularly those lands held in trust for Alaska natives. Under state law, the Alaska Supreme Court in their Hamerly and Dillingham cases has ruled that the critical date is the date of application. This is the date that vests the entryman's rights if they take it all the way to patent. With regard to native allotments, the federal law focuses on the "*date of occupation and use*" as opposed to a date of application that may come many years after occupation. Ultimately, this issue would affect only a small portion of the Nome-Council road ROW, and because the decision relates to a policy position and is a bit of an anomaly, I'm going to hold off on that discussion for a bit longer.

In the final analysis, the bulk of the project was assigned a 200-foot wide highway easement based on PLO and primarily centered on the alignment derived from the 1962 aerial photography. When compared with today's alignment reflected in the project's 2013 aerial photography, we find that some of the existing centerline is remarkably consistent with the 1962 centerline, and in many other areas, it slides from one side of the PLO ROW to the other. And unfortunately, we did find a couple of short segments where the centerline or at least the fill slopes leave the public ROW completely. Our job was to document the location and width of the existing highway ROW. It will be up to DOT to resolve the errant alignment with the acquisition of new ROW or by realigning the road back into the existing ROW.

Public Easements by Prescription [Width/Interest]

I mentioned that our evaluation of the current alignment with respect to the 200-foot wide PLO right-of-way indicated that in a couple of short segments, the roadway went outside of the ROW. And in a few others, while the driving surface remained within the ROW, the slopes or road footprint wanders outside of the ROW. The first thing that comes to a lot of people's minds is that there would exist a public right-of-way for the road footprint outside of the PLO ROW based on long public use or "*prescription*". "Public prescriptive easement" is the term associated with an easement interest that accrues to the public under Alaska's adverse possession statutes when the public use meets the "*prescribed*" period of time along with other conditions. Another option for an agency with eminent domain authority is acquisition of a public interest by "inverse condemnation". This occurs when a "taking" of private property is inadvertently made by the actions of the condemning authority usually by construction trespass but it can also be by the representations of the agency that make it impossible for a property owner to sell or lease their interest. In an "*inverse condemnation*", the errant construction constitutes a "taking" and the remaining issue is generally what amount of compensation is due the land

owner as opposed to removal of the road. By virtue of the aerial photography obtained for the project, we determined that the road improvements have been in place for a period in excess of that required under A.S. 9.45.052. Paragraph (d) of the statute states that "…*the uninterrupted adverse notorious use, including construction, management, operation, or maintenance, of private land for public transportation or public access purposes, including highways, streets, roads, or trails, by the public, the state, or a political subdivision of the state, for a period of 10 years or more, vests an appropriate interest in that land in the state or a political subdivision of the state."* Unfortunately, the nature of the property interests along the Nome-Council road limits our ability to assert a claim of a "public prescriptive easement."

The 18 miles of the Nome-Council MP 14-32 project generally consists of ANCSA lands, Native Allotments, Federal and State lands. While there are a couple of small privately owned parcels, they are the exception. The few small areas where the road meanders outside of the existing public ROW appear to impact federal, state and ANCSA lands. The following paragraphs discuss why an assertion of a "public prescriptive easement" is not viable for this project:

- **ANCSA Lands:** Section 11 of Public Law 100-241, 101 Stat. 1807, Feb. 3, 1988, "amends section 907 of ANILCA (43 USCS 1636) to provide automatic protection for ANCSA lands. So long as ANCSA lands are not "*developed, leased or sold to third parties, they are exempt from: (a) adverse possession or similar claims based on estoppel; ….*" (Quoted from Alaska Native Lands: Aboriginal Title, to ANCSA and Beyond, David S. Case, 1.23.90) – This provision has been tested in the Alaska Supreme Court cases Kenai Peninsula Borough v. Cook Inlet Region, Inc., 807 P.2d 487 (1991) and Snook v. Bowers, 12 P.3d 771 (2000). The term "developed" can be difficult to interpret. Under the Kenai case the court ruled that "*In the context of raw land, the common meaning of 'developed' includes subdivided property which is ready for sale." And "...to be within this definition of 'developed' the land must be practically and legally suitable for sale to the ultimate user.*" Given these interpretations of the ANCSA protection against adverse possession, I doubt any of the ANCSA lands along this Nome-Council road project would meet the test of "development" such that a claim of a public prescriptive easement could be claimed across them. ANCSA lands may be acquired under eminent domain and there is no apparent prohibition against a taking by inverse condemnation.

- **Native Allotments:** A public road placed across a valid Native allotment cannot be claimed by the public under adverse possession or by a taking through inverse condemnation. See Haymond v. Scheer, 543 P.2d 541 (Okla. 1975) "*It is well settled that there can be no adverse possession against the federal government which can form the basis of title by estoppel or under the statute of limitations; and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restrictions upon alienation…*" and United States v. Clarke, 445, U.S. 253 (1980) U.S. Supreme Court March 18, 1980. "*…although prescribing that allotted lands 'may be condemned for any public purpose under the*

laws of the State of Territory where located," requires that they nonetheless be "*condemned*."

- **Federal lands**: "*It is well established that a citizen can accrue no rights in federal land against the Government by adverse possession. Mere occupancy of public lands and making improvements thereon give no vested right therein against the United States or any subsequent purchaser therefrom.*", Sparks v. Pierce, 115 U.S. 408, 413 (1885), "*…and an occupant must show that he occupies under some proceeding or law that at least gives him the right of possession.*" Southern Pacific Trans. Co., 23 IBLA 232, 244; 83 I.D. 1, 5 (1976)." (Quoted from IBLA 76-612 Henry E. Reeves July 18, 1977)

- **State Lands:** A.S. 38.95.010 – "*No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state*."

With regard to State owned lands, the prohibition against prescription is not an issue with regard to our project ROW as DOT&PF may apply for a Public Right-of-Way permit from DNR. Normally, it also would not be a problem with the federal lands but for the fact that the federal lands along this project is the USFWL managed Maritime National Wildlife Refuge as opposed to general BLM managed lands. DOT&PF is able to apply for a highway right-of-way across BLM managed public domain lands at no cost and through an often used and well understood processes. A right-of-way over USFWL managed lands would require an ANILCA Title XI process that can be far more difficult, expensive and time consuming. Undeveloped ANCSA lands required for the road footprint outside of the existing ROW would have to be acquired and compensation paid.

"Floating Easements" [Context/Location/!!!]

A floating easement is one where there is no fixed location, route, or width to the right-of-way. As they generally encumber the entire servient estate, they tend to hamper development and limit financing possibilities. S.O. 2665, the Department of Interior order that converted the PLO 601 withdrawals for "Feeder" and "Local" routes into easement interests in 1951 was referred to as a "floating easement" due to its provision that would establish highway easements across federal lands for new construction. It was an easement imposed before the construction and before the alignment and width of the ROW required was known.

The '47 Act would also be considered a "floating easement". While it was stated as an encumbrance to Alaska patents after the Act of July 24, 1947, it did not define the reservation location or width. This would occur when the project was designed and a "Notice of Utilization" was issued. '47 Act reservations ceased to be placed into patents at statehood. The ones that made it into patents after statehood were still available for public

use. The lack of certainty on the part of the land owner was one reason why the Right-of-Way Act of 1966 repealed the future use of these reservations. The Act stated that "*This practice has resulted in financial difficulties and the deprivation of peace of mind regarding the security of one's possessions…*"

The Alaska case Kelley v. Matanuska Elec. Ass'n, Inc. (Sept. 24, 2008) is the only one I found that specifically considers a "floating easement". The property owner asserted that the court should invalidate an existing "blanket easement" for an electric transmission or distribution line "…*because the easement is not limited to a "specific or definite area" and has "no reasonable width, length, or access points,"*. This, he argued constituted "…*an "unreasonable restraint on [his] property rights."* This would violate several prior Alaska cases holding that use of an easement must be reasonable and appropriate to the nature of the land and the purpose of the easement. As Kelley did not present any evidence that MEA's planned use of the easement would harm him, the court refused to limit or invalidate the easement.

All in all, "*floating easements*" are indefinite, uncertain and as a result cause strife and controversy between the dominant and servient estate owners and should be avoided.

So how does this discussion of "floating easements" relate to our Nome-Council road project? The Safety Sound bridge project at MP 22, constructed between 1977 and 1978 represented the only stretch of road within the project limits for which we had existing right-of-way plans. The project was a little less than a mile in length. The first time I had a reason to look at these plans was many years ago and what I found were irreconcilable differences between the centerline geometry as shown on the project as-builts vs. the ROW plans. The as-built plan view graphically delineates both the proposed centerline alignment and the previously existing centerline which differed significantly. The ROW plans, oddly did not show the location of the old alignment and it showed the proposed aligned cross-hatched and labeled as "Existing R/W". Ultimately, while this did not appear to make a lot of sense, it would not be a fatal flaw given the acquisition for the new ROW would be from BLM. But it was a mystery and mysteries need to be solved.

Essentially, the ROW staff preparing the acquisition plans treated the existing 200-foot wide PLO ROW as a "floating easement". That is, they did not apply it to the pre-bridge road alignment, they applied to the post-bridge alignment. Apparently, treating the PLO ROW as a "floating easement" between 1971 and 1976 was not unusual. We found an April 14, 1971 memo in the DOT archives discussing a meeting between then Department of Highways Commissioner, Bruce Campbell and BLM Director McVee. The memo revealed an agreement by which the Dept. of Highways only need show the ROW as related to the new centerline where the ROW traversed only public lands. The rationale for this policy was to reduce the administrative burden on both agencies where the road was to be realigned and there existed no 3rd party interests that required documentation of the realignment. The alternative was a very time consuming and costly process to acquire the new ROW from BLM and then vacate the excess existing ROW. A lot of paper and process for no apparent good reason. Highways continued to apply the "floating

easement" concept for PLO ROW on certain projects, apparently without notification to BLM regarding when and where it was being used. In February of 1976, McVee writes to DOH Commissioner Parker regarding the 1971 agreement. He tells Parker that his agreement with Campbell was "*prior to intensification of environmental considerations and before ANCSA"* (NEPA 1969 - ANCSA 12/18/71), and as a result the concept of considering PLO ROW across public lands as a "*floating easement"* was no longer acceptable. My theory regarding this subject as applied to the Safety Sound plans was that the 1976 letter from BLM never filtered down to the mapping staff and the "*floating easement*" concept was applied there also. But that was just one of the Safety Sound mysteries, which are continued in the next paragraph.

Federal Right of Way Grants [Location/Width/Interest]

Shortly prior to construction of the Safety Sound Bridge, Highways staff recognized that they had a significant problem with the centerline alignment in the curve to the right as centerline exits the northeasterly end of the bridge. But it is not clear that they understood why. Laying out the planned alignment as is reflected on the ROW plans, they would miss the existing road centerline match point east of the bridge by almost 100-feet offset to the north. Design proposed two options, either acquire more ROW from BLM or adjust the centerline within that BLM ROW that had already been acquired. The as-builts suggest they decided to tighten the first curve east of the bridge by more than 5 degrees to force it to align with the existing road.

We had a few theories as to how this problem arose. I thought the offset of 100-feet to be very suspicious given that the PLO ROW width was 100-feet on each side of centerline. Was it possible that in computing the design alignment, instead of using the coordinates for the existing centerline tie in point that they used a point 100-feet to the north on the ROW offset? Karen Tilton had another theory. She noted that the only suggestion of existing control for the bridge project were apparent ties to Corners No. 1 & 2 of the U.S. Survey No. 480 on the westerly approach to the bridge. She also pointed out that a BLM dependent resurvey of U.S. Survey No. 480 in 2007 reflected a bearing on line 1-2 that varied by 8 degrees from the bearing reported in the original 1900 survey. What we don't know is: What did the Dept. of Highways Locations surveyors find and tie as corner's No. 1 & 2 and what did the construction surveyors find and use as control for laying out the project centerline? It would be fun to run that down once and for all but as it turns out, all the ambiguity generated by the survey errors and the "floating easement" issue were cleaned up as a part of ROW acquisition.

At the time new ROW was being acquired for the bridge project, land east of the bridge was all managed by BLM. DOT applied for a ROW between the east end of the bridge and the match point of the existing road that would be between 100 and 300-feet to the north of centerline and run south of centerline all the way to the mean high tide line that was clearly a moving target due to erosion. The grant was for a highway easement under the authority of the Federal Aid Highway Act of August 27, 1958. Effectively the BLM grant was an overlay of the existing PLO ROW, wherever that might have "floated" to, and

a new highway easement where the parcel exceeded the limits of the old PLO. The parcel definition was based on the geometry as shown on the ROW plans and without regard to the realignment that Construction performed within the easement. As the most permanent object on the project was the bridge itself, it was used as the basis of control and bearings to lay out the fixed definition of the BLM grant parcel. The geometry errors were effectively made moot.

"Use & Occupancy" of Native Allotments [Policy/Width/Interest/!!!]

In the PLO paragraphs, I discussed how the PLO highway easement was subject to valid existing rights and how the date of occupancy and use is generally considered to be the critical date by which an allotee's rights are vested. The current Nome-Council road crosses 8 allotments with occupancy dates preceding the PLO that established the 200-foot wide highway easement in 1949. Prior to this project, we might have reached a conclusion that the PLO ROW narrowed where it crossed these allotments as the PLO was subject to the prior valid existing rights. On July 29, 2014, I prepared a paper titled Title review – Use & Occupancy – Highway Rights-of-Way and Alaska Native Allotments. The paper considered the authorities and policies relating to highway ROW over native allotments and provided some recommendations for professionals tasked with preparing ROW mapping for DOT&PF projects and other state agencies. For the Nome-Council road project we adopted a position that we find is consistent with current state policy regarding reconveyances of interests the state may hold in allotment parcels.

The basis for this assertion is founded upon the "Aguilar" reconveyance procedures established between BLM and the State as a result of the 1979 federal case Aguilar vs. United States. It was recognized that occasionally, lands or interests in federal lands subject to a valid native allotment are mistakenly conveyed to the State of Alaska. The U.S. then has the obligation to recover title to the allotment on behalf of the native allotee. In this process, the State has the opportunity to reject the request or impose easements.

In this situation, the U.S. did not mistakenly convey the allotment to the State, but it conveyed the highway ROW for the Nome-Council road in the Omnibus QCD. It might appear that no reconveyance is necessary because the allotment was never subject to the PLO that would have created the ROW in the first place. However, the federal solicitor has directed BLM that to clear title, the Aguilar reconveyance procedures must be followed. DNR, as manager of the State's Aguilar process, has taken the position that they would not voluntarily relinquish title to an airport, highway or public facility through the Aguilar process. While it is possible for the federal government to sue to recover title, the State currently holds that the interest in the QCD-conveyed highway easements should be considered valid *without regard* to the allotee's date of use and occupancy and until the "Aguilar" process shows the contrary.

The PLO 601 withdrawal and SO 2665 easement (200-feet wide, subject to valid existing rights) applies to the location of the Nome-Council road as of statehood. As previously stated, the best evidence of the location of the road at statehood is the alignment

as shown on the 1962 aerial photography. The full 200-foot wide ROW will be claimed across all native allotments subject to "Aguilar" re-conveyance procedures.

Nome-Council Road (Old)

In 1953, the Alaska Road Commission (ARC) constructed a major realignment of Nome-Council Road, leaving a remnant "loop" of the original ARC route. After the realignment, the 2.5 mile loop (now called Old Nome-Council Road) was not identified with a unique route number on ARC maintenance lists and no evidence was found indicating that the road was maintained by ARC or the Bureau of Public Roads (BPR) before statehood. Although Old Nome Council Road is clearly a public ROW due to its long history of public use and expenditure, it was not conveyed to the State of Alaska by the Omnibus Quitclaim Deed (QCD) and is not part of the Alaska Highway System.

As the Old Nome-Council road is separate from our subject Nome-Council road mapping project, we needed to understand the history and nature of the ROW for the loop to ensure we had not missed anything. We had several questions:

1. Was it the original PLO right-of-way and if so was it still a 200-foot wide highway easement?
2. If not, what was the basis of the ROW and how should we show it on the mapping?
3. Did the state own and have management jurisdiction over this right-of-way?
4. What other title and policy issues affected this old loop of the Nome-Council road?

Public Land Orders [Width/Interest]

The initial submittal of the draft ROS for the Nome-Council mapping project reflected the Old Nome-Council loop on 6 sheets and crossing 30 separate parcels. This initial representation was a result of a conclusion that was similar to the application of the PLO authority to the current Nome-Council road. That is, the PLOs impressed a 200-foot wide highway easement across federal lands subject to valid existing rights. Three of the parcels were native allotments determined to have dates of occupation/use prior to the August 10, 1949 date of PLO No. 601. So the 200-foot width could not be applied to them. So it appeared that we had two highway corridors, both named the Nome-Council road and both assigned a ROW width of 200-feet. This wouldn't be the first time that conclusion had been reached in similar situations. But before we applied that logic in this case I wanted to see if there was an alternative that would not impress both roads with the full 200-foot wide PLO right-of-way.

Omnibus Act Quit Claim Deed Issues [Policy/Width/Interest/!!!]

We have examples where a PLO based "Through" road was realigned, the original

section reclassified as a "Local" road and then listed in the Omnibus Quitclaim Deed as a separate secondary route. (i.e. Mentasta Loop Road – formerly a section of the Tok-Cutoff, Old Richardson Highway segments) These actions make clear the intent to retain both alignments under Alaska Road Commission management while relegating the older route to a "local" road status, although we have never found official actions to reclassify them from a higher status to a lower one.

These actions suggest application of a policy in which the wider PLO width would only be asserted on the newly realigned section. However, while limiting the assertion for the Old Nome-Council ROW to a 100-foot wide "local" road PLO seems appropriate based on a view that there should only be a single alignment associated with a named "Through" or "Feeder" route, the decision to do so would be based on an unwritten policy. In addition, the Old Nome-Council loop and its status was the subject of correspondence between DOT&PF and BLM over 15 years ago. At the time I was suggesting that the loop was subject to a 100-foot wide "Local" road PLO and BLM was suggesting that the road ROW be removed altogether. We resisted the elimination of the ROW but this is just another example of revisiting a ROW issue many years later, peeling back another layer of the onion and finding more detail and issues in need of consideration.

In the end, DOT&PF has accepted R&M's research and recommendations on this issue and Old Nome-Council Road is shown on the ROS with a 100-foot wide PLO/SO "Local Road" ROW, subject to valid existing rights.

One question that arises when you make a right-of-way determination based on a project specific agency policy/decision is: What if, when the ROW record of survey is reviewed for a project 20 or 50 years in the future, they reach a decision that we were wrong and that the full 200-foot wide PLO ROW should be applied to the old Nome-Council road? I discussed this in my "Highways" paper as it related to a claim of Quasi Estoppel against DOT for changing our opinion of the ROW width for Davis road. In that case, Davis road had not been previously mapped, but an erroneous width for it had been shown as 66' on ROW plans for another intersecting road. The new plans for Davis concluded that the ROW width was actually 100-feet based on S.O. 2665. The claim under Quasi Estoppel asserted that the State should be prevented from taking a position inconsistent with one previously taken (100 vs. 66 feet) where circumstances render assertion of the second position unconscionable. 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.

Given the detailed representation on the Nome-Council road ROS, the doctrine of quasi estoppel should prevent a future assertion by DOT of a wider ROW for the old Nome-Council road.

ROW Jurisdiction & Management [Policy/Interest/!!!]

Above we decided how to apply the PLO right-of-way and what width to assign, but that didn't end our analysis. We believe it is clear that the bulk of the old loop is subject to a PLO right-of-way. But is the ROW for the old loop owned and managed by DOT&PF? Interestingly, it is not. The above referenced realignments of the Tok-Cutoff and Richardson highways clearly intended to retain the old alignments as a part of the ARC/BPR managed highway system. They were assigned route numbers, discussed in annual reports and listed among the routes to be transferred to the State of Alaska in the 1959 Omnibus Act Quitclaim Deed. That was not the case with the Old Nome-Council road. After the 1953 realignment, there is no further mention of the "abandoned" loop, it was not assigned a route number and it was not named in the Omnibus QCD. The last fact is key. The old loop may clearly have met all of the requirements to be impressed with a PLO highway easement, but the road facility and the easement interest was not conveyed to the State of Alaska. This situation is not unique. The summary of roads conveyed to the State under the QCD was essentially derived from a planning document similar to today's State Highway System inventory. Roads are added, deleted, promoted and demoted by classification over time depending on priorities and the public's need for the road. Another more significant stretch of road that met the same fate was the Rampart road from the Elliott Highway to the community of Rampart. This road has a long Alaska Road Commission history and would have met all of the requirements for a PLO "local" road ROW in 1949 but most of it fell off the system by the time the QCD was issued. A small segment from Rampart to Little Minook Creek is named in the QCD but for the most part but most of the road was seemingly "orphaned".

What does this mean for the Old Nome-Council road loop? There exists a highway easement but the easement is not "owned" by the State of Alaska. Because it was not conveyed to the State under the QCD, we have no basis to override the occupation and use seniority for native allotments under the "Aguilar" reconveyance process. So if the date of occupation & use precedes the 1949 date of PLO 601, we cannot assign the PLO width, even after reducing the width to a "local" road classification. Effectively, these native allotments will not be subject to a PLO right-of-way. This only applies to 3 allotments along the Old Nome-Council road and for those we will need to consider an alternative authority for a road ROW.

What we are saying is that that the Old Nome-Council road is in fact subject to a public right-of-way, just not one currently owned or managed by DOT&PF. Could that change in the future? Yes, but it is unlikely. Due to reductions in funds and increasing costs, DOT looks to stretch its resources by transferring as many local roads as possible to local government. And DOT's current policies for adding new routes to their management is very restrictive. But there are many road easements out there that are not "owned" or "managed" by any specific entity. These might include patent reservations for road ROW, rights-of-way created by subdivision platting in the unorganized borough or in jurisdictions with no road powers such as the Fairbanks North Star Borough. These are public rights-of-way that are available to be incorporated into an agency's management if they elect to do so.

Patent Reservations [Width/Interest/!!!]

One allotment on the Old Nome-Council road presented us with a unique problem. The allotment certificate for Lots 3 & 4 states that "*This allotment is subject to an easement for highway purposes, extending 100 feet each side of the centerline of the Old Nome-Council Road and transferred to the State of Alaska pursuant to the quitclaim deed dated June 30, 1959."*

First, it appears to distinguish between the Old and current Nome-Council roads, then it applies the full 200-foot wide highway easement where we have conceded should be limited to the 100-foot wide "local" road width and finally, it declares that the Old Nome-Council road was conveyed to the State of Alaska.

Our initial concern is that the "Old Nome-Council" road is not cited in the Quitclaim deed. Also, the "Subject to" language is commonly used in a deed to refer to existing easements as opposed to proposed easements. The Law of Easements and Licenses in Land (Bruce & Ely) states that while "*Deed grantors sometimes use 'subject to' language in an effort to create an easement by reservation…, it should not be employed for this purpose because it does not clearly express the intent of the parties*." Bruce & Ely then cites the 1997 Alaska case Methonen v. Stone. The case makes the statement, "*It is well established that the intention to create a servitude must be clear on the face of the instrument; ambiguities are resolved in favor of use of land free of easements*."

Our recommendation was to show the existing ROW as 50-feet from centerline on the basis of Methonen in order to resolve the ambiguity in favor of the allotee. As a result, the public would not over assert the width of the ROW due to an error in the patent language.

RS-2477 Trails & 1917 Territorial Right of Way Act [Width/Interest/!!!]

Now we get back to the 3 allotments that were not subject to the PLO right-of-way. We have already determined that we cannot assert an easement by prescription over a native allotment. But the allotment claims are also subject to valid existing rights. So we need to look at the rights of the public that may have preceded the allotee's date of occupation & use.

What we found in the historic research was that the Nome-Council road has existed for well over 100 years. Subject to valid existing rights, a claim of a highway easement based on RS-2477 would be appropriate. The next question is what width should be asserted?

Over time, assertions of RS-2477 trail rights-of-way have been based on the width of the physical improvement or "ditch to ditch"; 60-feet, based on the 1917 Act; 66-feet based on the 1923 Territorial acceptance of the RS-2477 grant for section line easements or 100-feet based on the A.S. 19.10.015 declaration for all proposed and existing highways. In the

1962 condemnation case State of Alaska v. Fowler, the State argued that the 66-foot width was appropriate in that the 1923 legislative acceptance of the RS-2477 grant indicated the local law and custom for these types of ROW. The court held that the RS-2477 ROW would be limited to that width "*reasonable and necessary for the use of the public.*" As a result, A.S. 19.10.015 was enacted to fix the width at 100-feet.

For an RS-2477 assertion of the Nome-Council road prior to PLO 601, A.S. 19.10.015 is of no use because of its effective date when compared to the allotee's use & occupancy dates. A 1996 communication with the Attorney General's Office regarding application of the 1917 Act to the Elliott Highway suggested that the 1917 Act would likely be interpreted as an acceptance of the RS-2477 grant. Essentially, the 1917 Act constituted an appropriate governmental act reflecting the local law or custom with regard to the standard width of a highway. The 1917 Act stated that "*The lawful width of right-of-way of all roads or trails shall be 60 feet.*"

While this logic seems to track well, I wanted to look a bit further given that the property we were applying the RS-2477 right-of-way to was subject to federal law as opposed to state law as result of the trust obligation. The review included the following:

1/20/39: Letter from the Commissioner of the General Land Office to Ernest Gruening, Director of the Division of Territories and Island Possessions discussing rights-of-way for roads and trails in the Territory of Alaska. "*The width of rights-of-way established under section 2477 is governed by the laws of the States or Territories."*

3/8/89: BLM Manual Section 2801 Rights-of-Way Management (rev. 3/8/89) In this section on RS-2477 rights-of-way. "*For those RS 2477 rights-of-way in the State, county or municipal road system, i.e. the right-of-way is held and maintained by the appropriate government body, the width of the right-of-way is as specified for the type of highway under State law, if any, in force at the latest time the grant could be accepted.. The width may be specified by a general State statute, i.e., secondary roads are 60 feet in width, or may be very specific…Where the right-of-way is not held by a local government, or State law does not apply, the width is determined from the area, including appropriate back slopes, drainage ditches, etc., actually in use for the highway…"*

As the Territorial Road Commission was involved in the construction and funding of activities along the Nome-Council road as far back as 1917 and as the 1917 Act provided the type of general statutory declaration of a road width that the BLM manual appears to envision, it is reasonble to conclude that the assertion of a 60-foot wide RS-2477 width across the native allotment in this situation is appropriate.

1/9/07: As of 2007, the State had successfully settled two Quiet Title cases related to RS-2477 trails in federal District Court against the U.S. In 2000, the settlement

was for the Harrison Creek to Portage Creek (RST 8) and in 2007 the case settled was the Coldfoot to Caro (RST 9) / Coldfoot to Chandalar Lake Trail (RST 262). The State likely asserted a 100-foot width based on A.S. 19.10.015 but in both cases settled for a 60-foot width. The final judgment in the Coldfoot case said "*Except with regard to the question of width, the public highway right-of-way quieted in the State of Alaska by paragraph 1 of this final judgment shall be treated as if it were a right-of-way established pursuant to R.S. 2477…"* It may be that in reaching the settlement, the U.S. was considering the 60-foot width of the 17(b) easement that had been initially proposed rather than the 60-foot width accepted under the1917 Act. But the two settlements do suggest that the a 60-foot width is considered acceptable.

1/23/08: In a 2008 report for the DOT&PF Wood River Road Project, a 60-wide ROW based on the 1917 act for a claim of an RS-2477 crossing several native allotments was applied. The report was forwarded to BIA who then forwarded it to the DOI Deputy Regional Solicitor for Alaska for review. The review commented on the PLO rights-of-way that comprised the bulk of the project ROW but never questioned the 1917 Act as the basis for the RS-2477 60-foot width across the native allotments.

While the assertion of an RS-2477 right-of-way across a native allotment using a 60-foot width based on the 1917 Act has yet to be tested in court, we believe there there exists sufficient support for it to withstand a challenge.

Old Nome-Council Road Summary

We had quite a mix of issues along the old loop to sort out and ultimately concluded that there still existed a public highway easement along its full length. The bulk of this ROW based on a PLO highway easement with a "local" road width of 100-feet, or 50-feet on each side of centerline. The remainder across 3 native allotments with use & occupancy dates preceding PLO 601 was determined to be subject to an RS-2477 highway easement with a 60-foot wide ROW based on the 1917 Act. And with all of that, the old loop is neither owned or managed by DOT&PF.

Closing

The Nome-Council road Record of Survey provided one of those special projects that illustrate a primary reason that I gravitated towards a land surveying career. It's not just about math and physics. It's also about history, law and the stories of what our predecessors went through in developing a transportation system for Alaska. This was one of the interesting ones.